REVIEW OF THE *WILDLIFE ACT 1975*

Expert Advisory Panel Report

DECEMBER 2021

VICTORIA
State Government

Cover image: Wedge-tailed eagle. Credit: Patrick Kavanagh

Traditional Owner acknowledgement

The Panel acknowledges and respects Victorian Traditional Owners as the original custodians of Victoria's land and waters, their unique ability to care for Country and deep spiritual connection to it.

The Panel honours Elders past and present whose knowledge and wisdom has ensured the continuation of culture and traditional practices.

The Panel was committed to genuinely partner, and meaningfully engage, with Victoria's Traditional Owners and Aboriginal communities to support the protection of Country, the maintenance of spiritual and cultural practices and their broader aspirations in the 21st century and beyond.

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Hon Lily D'Ambrosio MP
Minister for Energy, Environment and Climate Change
Minister for Solar Homes
Level 16, 8 Nicholson Street
EAST MELBOURNE VIC 3002

20 December 2021

Dear Minister,

It is with pleasure that we present our report of the review of the *Victorian Wildlife Act 1975*.

Victoria's native fauna is wonderfully diverse. It is loved by Victorians for a variety of values and purposes. But our native fauna and biodiversity more broadly are under pressure. We know this from state of the environment reporting and that the decline is likely to continue as pressures from population growth, human activity and climate change persist.

It is not acceptable to assume or accept that this decline is inevitable or that we are powerless to effect change. Awareness, community expectations, scientific knowledge and understanding of Traditional Knowledge about ecological systems have evolved since 1975 when the Wildlife Act was enacted. This presents both an opportunity and moral imperative to act to improve outcomes for Victoria's native fauna.

If we are to improve the outcomes for our native fauna – to truly protect, conserve and reverse biodiversity decline – a new Fauna Act must be framed and operationalised in a different way to its predecessor.

To seize this opportunity, the most significant and important reform is to introduce a new Fauna Act that is underpinned by an explicit ethical framework and embeds new approaches that:

- unequivocally centre on our native animals with their welfare and outcomes at its core
- recognise the sentience, intrinsic value and inherent rights of animals
- adopt a holistic, systems approach that seeks to improve ecosystems integrity
- flip the onus of decision making in favour of native fauna
- formally recognise and value Traditional Ecological Knowledge
- establish the rights and interests of Victoria's First Nations peoples and strengthen genuinely collaborative governance.

Our vision is for a new Fauna Act that focuses on maintaining diverse and healthy native fauna populations and the ecological communities and processes they are an intrinsic part of. Importantly, a new Act must explicitly and exclusively focus on indigenous species – terrestrial, aquatic, vertebrate and invertebrate – and on keeping common species common.

By adopting this new vision, a new Act will borrow from the concepts of Whole of Country management. It is an opportunity to acknowledge the ancient obligations of Victoria's First Nations peoples to care for Country and clarify and activate the rights and interests of all Aboriginal Victorians. A new Act could represent a significant step on the road to self-determination in Victoria.

A new Act must also inform, engage and empower government, stakeholders and the community to act with confidence. They will be guided by a transparent fauna strategy that is underpinned by expert science and Traditional Ecological Knowledge and given effect through actionable fauna plans with outcomes monitored and reported.

As well as a clearly articulated purpose and outcomes, a modernised Fauna Act must provide the governance and mechanisms to support effective decision making and improved outcomes, and to avoid harms. These structures must be backed by contemporary and efficient risk-informed regulatory tools, including enforceable codes of practice and graduated permissions and offence structures and penalties.

We acknowledge human activities and behaviours will continue to bring native fauna, humans and pest species into competition and conflict. Judgements and choices will need to be made to mediate and balance these interests. Our intention is for a new Act to ensure the interests of animals are considered upfront and not as an afterthought. It is far better to avoid harms than to intervene when species are critically threatened and at real risk of being lost.

It has been our deep privilege to undertake this review. But our work would not have been possible without the participation, expertise and generosity of many people. We are grateful to the many individuals and organisations who responded to the call to engage and shared their passion and insight, to the First Nations representatives who entrusted us with their wisdom, and to the expert advisers who challenged our thinking.

The Panel was expertly supported by a Secretariat involving the DELWP team led by Warrick McGrath and the Marsden Jacob Associates team led by Dr Jeremy Cheesman. The review grappled with complex issues and its conduct was disrupted by the pandemic, but the team supported us with their expertise, professionalism and commitment throughout.

We also acknowledge and thank our former Panel members and colleagues, Dr Deborah Peterson who chaired the review for much of its course and Associate Professor Ngaio Beausoleil and Emeritus Professor Arie Frieberg who established the foundations for our enquiries.

Reform is never without challenge and requires sustained leadership and engagement. But to not change is to accept the continued decline and loss of our unique fauna and biodiversity – an outcome unacceptable to most, if not all, Victorians.

We commend this report to you and look forward to a new Fauna Act that will realise better outcomes for Victoria's treasured native animals.

Yours sincerely,

Jane Brockington
Chairperson

Dr John Hellstrom, ONZM
Member

Dr Jack Pascoe
Member

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ACRONYMS

ATCW	Authority to Control Wildlife
CALP Act	*Catchment and Land Protection Act 1994*
CES	Commissioner for Environmental Sustainability
CSIRO	Commonwealth Scientific and Industrial Research Organisation
Cth	Commonwealth
DELWP	Department of Environment, Land, Water and Planning
ENRC	Environment and Natural Resources Committee
EPA	Environment Protection Authority
EPBC Act	*Environment Protection and Biodiversity Conservation Act 1999* (Cth)
FFG Act	*Flora and Fauna Guarantee Act 1988*
GMA	Game Management Authority
IUFRO	International Union of Forest Research Organizations
NRA	Natural Resource Agreement
NSW	New South Wales
OCR	Office of the Conservation Regulator
POCTA Act	*Prevention of Cruelty to Animals Act 1986*
Qld	Queensland
RSA	Recognition and Settlement Agreement
SA	South Australia
TEK	Traditional Ecological Knowledge
TOS Act	*Traditional Owner Settlement Act 2010*
VAGO	Victorian Auditor-General's Office
VCAT	Victorian Civil and Administrative Tribunal
WGR	Wildlife (Game) Regulations 2012
WR	Wildlife Regulations 2013

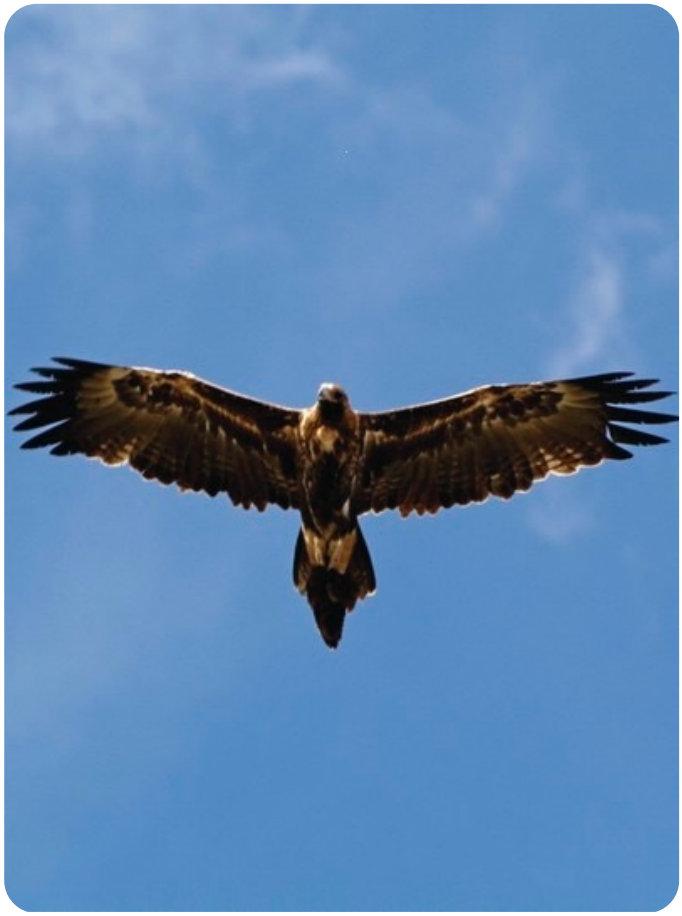
BUNJIL'S FIRST LORE

"Bunjil, our creator, represented by the Wedge-tailed Eagle, directs Wurundjeri Woi-wurrung people's activities and responsibilities on Country through Law (Lore).

We are custodians of the land, and we must take care of the land; this is our cultural responsibility. Our responsibility is to nurture all of Country – the forests, rivers, soil, animals, trees, grasses, ants, worms, insects, and bushes, the creeks, swamps, gullies, mountains, and plains, and crucially, we must nurture and care for people, as we care for all life because healthy Country means healthy people. Bunjil's Law (Lore) is what guides our goals and actions in caring for Country.

Bunjil's first Law (Lore) is to care for Country as you care for your mother, and this law (lore) is the foundation of Country management principles for Wurundjeri Woi-wurrung people."

– Uncle Dave Wandin,
Wurundjeri Elder



Source: Parks Victoria

The abandonment of Bunjil's Law has led to the ecological demise faced on Wurundjeri Woi-wurrung land. Wurundjeri Woi-wurrung people strive to reinstate Bunjil's Law across Country and embrace our inherent and cultural responsibility to care for Country.

EXECUTIVE SUMMARY

The *Wildlife Act 1975* is an important part of Victoria's legal framework for protecting and managing biodiversity. The Act establishes procedures that seek to promote the protection and conservation of wildlife, the prevention of wildlife extinction, and the sustainable use of, and access to, wildlife. It also prohibits and regulates the conduct of people engaged in activities connecting with or relating to wildlife.

The Act developed out of the *Game Act 1958*, in response to increasing concerns among the community about wildlife conservation and preservation and increasing risks to wildlife and their habitat. When the Act was enacted over 45 years ago, Victorians' values and expectations about wildlife were different from those held today. At the time, public awareness of ecosystem destruction, species extinction and loss of biodiversity was just emerging and the shift from focusing on 'natural resource management' to 'biological conservation' was only beginning.

Since then, human settlements and activities have expanded, bringing wildlife into conflict with humans more frequently. There is increasing concern and evidence about the accelerating loss of native wildlife species and associated biodiversity in Victoria and the effects of climate change.

Over the same period, factors such as urbanisation, increased education and income, and a growing focus on individual freedoms have influenced values relating to wildlife. These factors have led to broad changes in attitudes about how animals should be treated, such as increased compassion and care for wild animals and reduced emphasis on using wildlife for human interests.

There is good evidence and a common understanding that the Wildlife Act is no longer consistent with broadly held community values, expectations and aspirations for wildlife in Victoria.

More importantly, the poor and declining state of much of Victoria's wildlife highlights that the Act is inadequate to maintain diverse, healthy wildlife populations and their ecosystems in ways that keep wildlife common in Victoria. The case for change is clear.

About this review

In December 2020, the Minister for Energy, Environment and Climate Change appointed an Expert Advisory Panel to review the Act. The review was prompted by a series of high-profile incidents that sparked community outrage, including the illegal destruction of wedge-tailed eagles in East Gippsland and an incident at Cape Bridgewater that involved many koalas.

The Minister instructed the Panel to examine:

- whether the Act's current objectives and scope are appropriate, comprehensive and clear
- whether the Act establishes a best practice regulatory framework for achieving its objectives
- whether the Act appropriately recognises and protects the rights and interests of Traditional Owners and Aboriginal Victorians around wildlife and their role in decision making
- the best ways to encourage compliance with the Act, including whether offences and penalties under the Act are appropriate to punish and deter wildlife crime.

The Minister requested we focus on these terms of reference. Some issues, although important, were outside the scope of the review, either because they are not central to the operation of the Act or because other reviews are already considering them. These issues included how the Act is administered, regulations under the Act and some matters covered by other Victorian legislation or other legislative reform projects (e.g. animal welfare legislation and land classifications).

A starting point for our review about the state of Victoria's wildlife was the *Victorian state of the environment 2018* report prepared by the Commissioner for Environmental Sustainability. Our review also drew on the insights of Victorian Government agencies, First Nations peoples, scientists, industry and interest groups, academics and the general public. We collected views and inputs to our inquiry over a 9-month timeframe from more than 1,000 individuals and organisations, including meeting with 18 key stakeholder groups, 12 Traditional Owner groups, 9 Victorian Government agencies, 3 sector forums and 3 expert workshops.

We thank everyone who participated in this review; our report and recommendations are better for your contributions.

This review is part of a wider examination of Victoria's legislative framework for protecting and managing biodiversity. The Victorian Government has undertaken several initiatives as it examines this framework, including reviews of the *Flora and Fauna Guarantee Act 1988*, the Authority to Control Wildlife system, the native vegetation clearing regulations and the development of *Biodiversity 2037*, the overarching Biodiversity Plan for Victoria. The Government is also currently considering feedback on a directions paper about modernising the *Prevention of Cruelty to Animals Act 1986*.

Findings and recommendations

Our findings and recommendations are presented in 3 parts:

- Part 1 details the context of the review, the changing challenges facing wildlife and changing community expectations. From this context, we consider what a new Act should achieve for Victoria's wildlife in the future.
- Part 2 makes recommendations about a new Act for managing wildlife in Victoria, and the evidence base and rationale for supporting these recommendations. A key recommendation is to revise the definition of 'wildlife' to focus on native species or 'fauna'. In light of this recommendation, we propose a new Fauna Act.
- Part 3 makes recommendations for mechanisms that we consider should be in place or examined to support a new Act for managing fauna in Victoria. These mechanisms fall outside the provisions of a new Act, but support its implementation, or are longer-term reform opportunities.

Part I: Context and objectives

Trends and challenges impacting Victoria's wildlife

Indicators of Victoria's native wildlife populations show many are in fair to poor condition and are generally trending downwards. Pressures including population growth, land use and habitat fragmentation, and climate change are likely to increase the risk that the downward trend continues.

Victoria's approach to managing wildlife has shifted over time from a species and location-based approach towards a more systems-based approach that focuses on ecosystem resilience, functions and stability. However, the focus remained primarily on managing wildlife as a resource, rather than recognising the intrinsic value and sentience of wildlife and its inherent right to be protected.

Increasingly, First Nations peoples' connections and relationships with wildlife are also being recognised. First Nations peoples have managed and conserved Victoria's cultural landscapes for thousands of years, forming a fundamental connection with wildlife. The concept of Country binds the living and inanimate parts of a landscape, including all people and wildlife. Many animals have spiritual and ceremonial significance and are considered sacred. Protecting wildlife involves managing landscape holistically, ensuring Country and her people are also healthy.

Victorians value wild animals for many reasons, and different groups in the community have diverse attitudes and expectations about protecting, interacting with and using wildlife.

The *Wildlife Act 1975*

The Wildlife Act was introduced in 1975, to establish a framework for managing human interactions with wildlife. Since it passed into law 45 years ago, it has been amended 125 times. Some of these amendments reflected the emergence of new industries such as whale watching and the establishment of new administrative and statutory bodies such as the Game Management Authority. Other amendments were administrative in nature, or changes to the Act because of amendments to other Acts.

Over time, it has become apparent the Act cannot effectively achieve many of its purposes related to wildlife or broader biodiversity goals. Its stated purposes no longer reflect contemporary values related to wildlife. Nor do they progress the rights of Traditional Owners and Aboriginal Victorians to self-determination with respect to wildlife. And the permissions and compliance and enforcement mechanisms under the Act are outdated and need to be modernised.

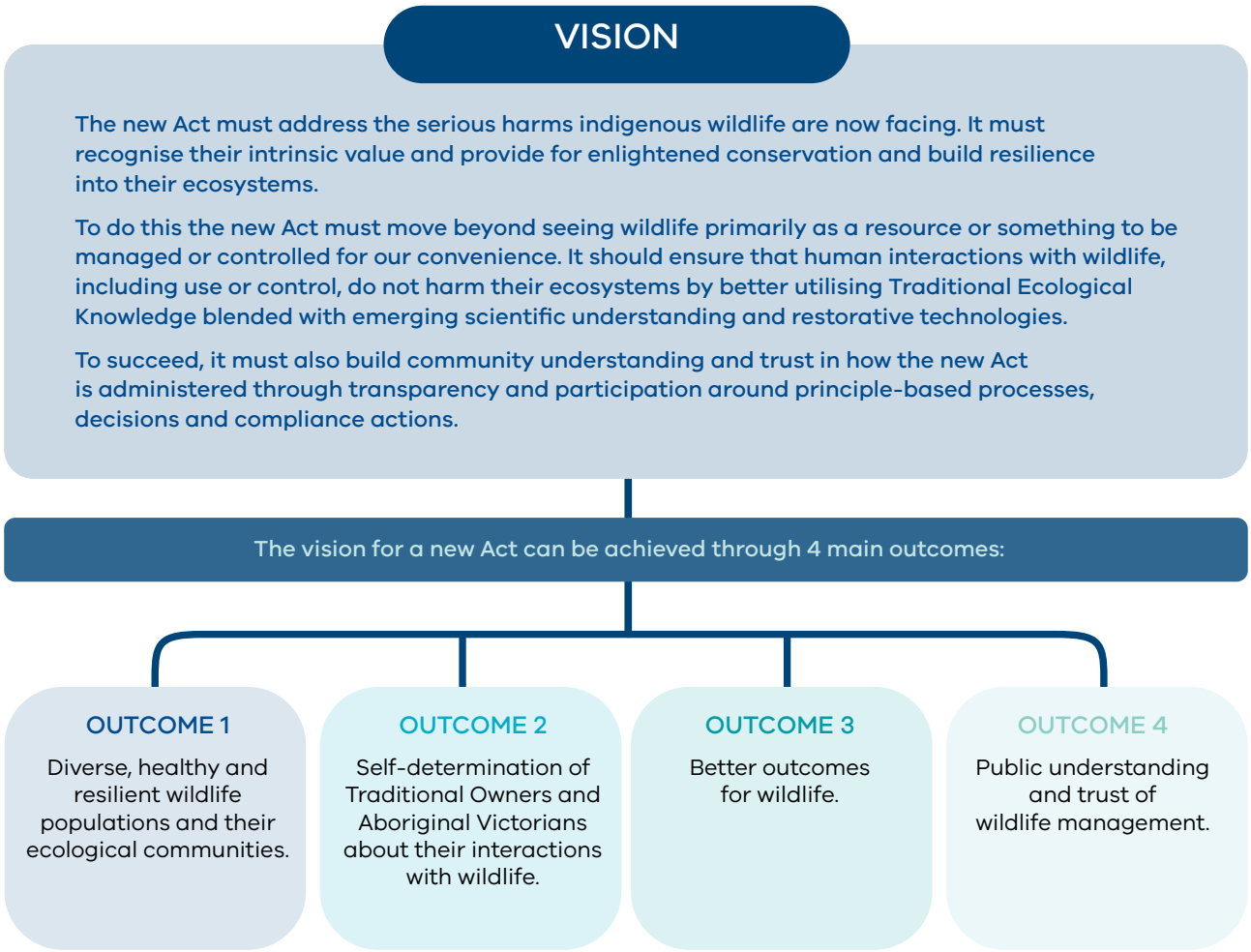
What a new Act should achieve

Currently Victoria's biodiversity ambitions are addressed through a complex matrix of legislation and other interventions that have developed over time. Rather than revise the current Wildlife Act, we propose a new Act that better protects and conserves wildlife. Our vision is to recognise the intrinsic value of wildlife and its ecosystems, and better provide for its protection and conservation.

To achieve this vision, a new Act must be framed differently. We must move beyond seeing fauna primarily as a resource or something to be managed or controlled for our convenience. And it is not sufficient or effective to respond only when species are threatened.

We propose a framework that recognises fauna's intrinsic value and provides for the inherent rights of wildlife to exist without undue interference or impingement on quality of life. Human interactions with fauna, including use or control, should aim to avoid harming their ecosystems. The new legislation must formally recognise the interests, expertise and rights of First Nations peoples in wildlife beyond cultural purposes, and better combine Traditional Ecological Knowledge with emerging scientific understanding and restoration practices. This legislation must also build community understanding and trust by providing for transparency and community participation around principle-based processes, decisions and compliance actions.

We recommend a vision for a new Act that focuses on 4 outcomes.



Part II: Recommendations for a new Act for fauna

Our recommendations for a new Act seek to achieve our vision and outcomes for fauna. This is achieved by: reframing purposes, principles and definitions in the Act; recognising and protecting the rights and interests of Traditional Owners and Aboriginal Victorians in relation to fauna; providing a framework in the Act for achieving the Act's purposes; enacting better practice permissions; and reforming the Act's compliance mechanisms.

Introduce contemporary, appropriate and clear purposes

The purposes of the current Act do not adequately focus on achieving the best outcomes for native fauna in Victoria. They do not recognise the intrinsic value of fauna or its inherent right to protection. They do not recognise the links between fauna and healthy environments, or consider management using a whole-of-ecosystem approach. Nor do they recognise the rights and interests of Aboriginal Victorians relating to fauna, or contribute to the realisation of self-determination in Victoria.

We recommend a revised set of purposes that support our proposed outcomes for native fauna. Specifically, the purposes of the Act are to establish a legal and administrative framework that:

- recognises and promotes the intrinsic importance of fauna and the environment and the value of ecosystem services to human society, individual health and wellbeing
- provides for the conservation, protection and welfare of indigenous animals, including promoting their recovery and restoration
- contributes to protecting, restoring and enhancing ecological communities and processes of which fauna is an intrinsic component
- as far as possible and in accordance with this Act and other laws, accommodates Aboriginal Victorians' rights to self-determination relating to fauna.

We also propose naming this new legislation the Fauna Act, to reflect its focus on Victoria's native fauna. This new Fauna Act should include the following principles that guide decision making:

- Fauna has an inherent right to exist without undue or arbitrary interference.
- Fauna can experience positive and negative sensations and therefore warrants humane treatment.
- Fauna must be managed within the context of its ecosystems.
- Decision making should be based on the best available scientific knowledge and Traditional Ecological Knowledge.
- Decision makers should apply the precautionary principle to avoid harms.
- First Nations peoples and Traditional Owners must be engaged in implementing the Act.
- Managing fauna requires good animal welfare and must ensure ecological sustainability and integrity.
- Information and reporting on decisions made under the Act should be publicly accessible.
- Economic or social impacts of fauna should be managed in compliance with these principles.

These principles should also support decisions, policies, programs and processes that remove barriers to self-determination for Aboriginal Victorians.

A new Act also needs a new definition for fauna. The definition of 'wildlife' in the current Act creates confusion and is not comprehensive. It does not include some indigenous vertebrates (fish) and invertebrates (marine or non-threatened terrestrial species), which means they are not subject to the Act. At the same time, it includes non-indigenous species that should not be defined as fauna (e.g. deer and some game bird species). This protection for non-indigenous animals places the Act at competing purposes. For example, deer proclaimed to be wildlife under the Act can destroy the habitat of indigenous wildlife, undermining the Act's goals to support diverse, healthy and resilient indigenous wildlife species. The recent Parliamentary Inquiry into ecosystem decline in Victoria also found inconsistent definitions about animals in the Wildlife Act, the *Flora and Fauna Guarantee Act 1988* (FFG Act) and the *Catchment and Land Protection Act 1994* impede the effective control of pest animals.

For these reasons we propose a new definition of fauna, one that encompasses any animal-life indigenous to Australia, whether vertebrate or invertebrate and in any stage of biological development, but not including humans.

Recognise and protect the rights and interests of Traditional Owners and Aboriginal Victorians in relation to fauna

The tenet of caring for Country is ubiquitous to all mobs. Understanding a First Nations' worldview requires understanding that Country binds the living and inanimate parts of a landscape through spirit. As noted above, protecting fauna involves ensuring all elements of Country are healthy – the people, the animals and the ecosystems.

A new Act is an opportunity for the State of Victoria to signal what self-determination means in the context of contemporary land management. With an eye to the process of Treaty and the First Principles Review of the *Traditional Owner Settlement Act 2010*, we recommend broadening the rights and acknowledging the responsibilities of Aboriginal Victorians. We consider it is time to recognise that all Victorians should show the ancient lore and system of Country Management of Victoria's First Nations the respect it is warranted, to cede responsibility to groups where possible, and to look to build the capacity of other groups where required.

A new Act should be as inclusive as possible, not solely relying on bodies such as Registered Aboriginal Parties and groups who hold native title, but actively seeking out the right voices for Country. Traditional custodians should also be delegated the authority to extend the rights and responsibilities in relation to fauna to Aboriginal Victorians living on their Country, and by doing so re-establish a cultural practice.

The Act should engage all Victorians in supporting this vision through its ongoing operation. A new Act can contribute significantly to the path of self-determination by recognising and embedding Traditional Owner access to and care of fauna.

Establish a framework for achieving the Act's purposes

Having set a vision and developed the foundational elements of a new Act, the next step is to establish a framework for achieving the Act's purposes. We examined whether the Act's regulatory framework supported the purposes, especially considering recent and anticipated changes to other legal frameworks and policy settings. This review was an opportunity to identify any gaps or inconsistencies in the wildlife management framework within the context of recent changes to the FFG Act, the current review of the *Prevention of Cruelty to Animals Act 1986* (POCTA Act), the current review of Victoria's public land legislation (which will be incorporating the Wildlife Act's provisions on wildlife reserves) and the recently completed Parliamentary Inquiry into ecosystem decline in Victoria.

We propose several mechanisms that clarify responsibilities for fauna and support better planning and management related to fauna.

We recommend establishing a general duty on Ministers and public authorities to consider fauna and biodiversity outcomes when conducting activities. We do not propose extending it to all Victorians.

We also propose a more comprehensive planning framework for fauna. We recommend the production and release of a Victorian fauna strategy and fauna plans. The strategy and plans may be used when the condition and trend of fauna is not being assessed comprehensively, following significant events (e.g. bushfire or flood), where there is risk of local extinctions of a species, or where there is concern about the level of control for a species.

Importantly, strategies and plans must be supported by expert knowledge (scientific knowledge and Traditional Ecological Knowledge) and stronger reporting requirements. We also propose mechanisms for making mandatory codes, standards or guidelines.

Enact better practice permissions

Permissions are a key part of the legislative framework of the current and new Act. Our examination of the current permissions system, and the feedback from participants and experts, suggests the current Act cannot deliver the outcomes we want for Victorian fauna. For example, while the current Act categorises some permissions based on the level of risk, generally low-risk activities are subject to the same regulatory burden (for the regulator and the licence holder) as high-risk activities. This means regulatory resources are disproportionately used to manage lower-risk activities, leaving fewer available to manage higher-risk activities.

We propose modernising permissions by introducing a risk-based approach to human interactions with fauna that is consistent with the risk framework outlined in Chapter 1 (Figure 2). This approach will be more efficient if it targets regulatory effort where it has the most impact in terms of reducing harm to fauna. Under a risk-based approach, higher-risk activities would face some combination of stricter application assessment, more conditions (such as reporting requirements) and more frequent audits and requirements for licence renewal.

While this approach may impose more regulatory burden on those engaging in more risky activities, if regulation is well-directed this extra burden should be justified by the enhanced benefits for fauna and the community. There should be less regulatory burden for lower-risk activities and those producing conservation outcomes. There should also be regulatory burden relief for mature high performing duty holders.

This risk-based approach can be implemented through a broader range of permission types and conditions, and by reallocating the burden of proof from regulators to applicants seeking a permission. Having a broader range of permission types gives the regulator greater flexibility to tailor permissions to the circumstance at hand and increases its capacity to control high-risk activities. Shifting the burden of proof aligns the Act with the general approach in Victoria that places the burden of proof on the applicant.

Importantly, our proposed approach retains mechanisms to appropriately control management of fauna. It considers the positive effects for fauna communities and ecosystems of permitting some activities (e.g. controlling overabundant species) as well as the negative effects (e.g. overusing a species). The permissions system also recognises legitimate and licensed uses of fauna (e.g. via commercial licences and authorisations for Aboriginal Victorians and Traditional Owners).

Reform compliance mechanisms

To complement our proposed changes to permissions, we examined ways to encourage compliance with the Act, including whether offences and penalties are appropriate to punish and deter crimes involving fauna. Criticisms of the current framework include that it focuses too heavily on prosecuting harms once committed, rather than providing mechanisms that deter and avoid harms in the first place.

Our recommendations support several step changes in a new Act to create a modern compliance framework that better delivers our vision for fauna in Victoria. To achieve this, we focus on mechanisms that avoid harms, rather than on prosecuting harms.

We recommend a new Act that modifies fauna offences to:

- address new harms
- include new provisions for attempted offences and aiding and abetting offences
- extend the statute of limitations
- modify the penalties and sanctions to support a more graduated range of administrative, civil and criminal penalties and sanctions
- include sentencing guidelines for the courts and define harm
- reform powers of authorised officers to investigate and intervene in offences.

Part III: Recommendations supporting a new Act for fauna

To this point, our recommendations relate to creating a new Act that achieves better outcomes for fauna and better reflects Victorians' expectations and aspirations for fauna. But a new Act is only one part of Victoria's framework for protecting fauna and biodiversity. As part of this review, we also considered other ways to support better outcomes for Victoria's native fauna and its ecosystems.

Use other mechanisms to promote outcomes

Regulation through administration of an Act is only one way to achieve better outcomes for fauna in Victoria. In many situations, non-regulatory measures may work better, or will complement, regulatory measures in the Act. Considering these complementary mechanisms is important for several reasons:

- First, complementary measures can increase awareness and understanding of Victoria's native fauna and its ecosystems, which is important for improving outcomes. Many Victorians may never be aware of the provisions of the Act unless they breach them, and their breach is detected and enforced.
- Second, even a new Act will have limited influence on the activities of private landholders in Victoria. There is much this group can do to support better outcomes for Victorian wildlife, given private land accounts for two-thirds of Victoria's total land area.

We support current plans by the Victorian Government to raise the awareness of all Victorians about the importance of our natural environment, and to foster positive attitudes towards our environment and the fauna that is integral to it. We propose supporting such activities by implementing a long-term strategy to measure community attitudes and behaviour towards fauna specifically, and Victorian biodiversity more generally. We also recommend promoting communication and awareness campaigns about Victorian biodiversity and fauna to a large number and cross-section of Victorians.

A significant group that can influence outcomes for wildlife and habitat in Victoria are private landholders. Because private land occupies around two-thirds of Victoria's total land area, improving outcomes for fauna must involve supporting landholders to increase the amount of land that is protected for biodiversity purposes. It must also involve changing how productive land is managed for the benefit of fauna.

The existence of fauna and habitat on private land can yield benefits to private landholders – but usually these are not easily valued or are difficult to convert into direct or short-term financial benefits. As a result, ecosystem services are underprovided. To address this issue, we identify a range of ways landholders can be encouraged to invest in conservation on private land. The type of incentives used depend on the mix of private and public benefits created and sustained over time.

Finally, we consider ways to improve the capacity of regulators, including the Office of the Conservation Regulator (OCR) and local councils, to monitor or investigate breaches of the Act, including higher-risk breaches.

Consider longer-term directions

Our recommendations for a new Act and complementary measures are actions that can be implemented in the shorter term. Over the longer term, there are other changes the Victorian Government could explore that we consider will further improve outcomes for fauna and their ecosystems in Victoria.

The first is examining the merits of combining the *Wildlife Act 1975* or the new Fauna Act with the FFG Act. A consolidated Act would have the following advantages:

- A combined Act that applies to common and threatened fauna (wildlife), flora, invertebrates and ecological communities and incorporates provisions to protect habitat would enable a more harmonised and ecosystem-based approach to managing and regulating flora and fauna.
- A consolidated Act with a clearer and harmonised purpose and principles guiding decision making communicates to the community and regulated parties the Victorian Government's priorities relating to biodiversity conservation in a single instrument.
- Amalgamation would avoid the need to amend the FFG Act following reform of the Wildlife Act. This reduces issues of legislative leap-frogging, and potential misalignments due to leads and lags between them.
- Regulatory and administrative functions could be streamlined under a combined Act.
- A consolidated Act may enable a more contemporary and holistic legal framework for Traditional Owners relating to biodiversity and could more effectively provide for self-determination of First Nations peoples about their interactions with Victoria's flora and fauna.
- A consolidated Act also increases consistency with other jurisdictions that have consolidated biodiversity statutes. This may increase scope for cross-jurisdictional collaboration and learning.

However, we recognise combining the Acts would be a significant task that requires assessing the costs and benefits.

The second is considering the merits of establishing the regulator as a standalone agency (separate to the Department of Environment, Land, Water and Planning) with responsibility for the Fauna Act (or Biodiversity Act if created), as well as other conservation regulatory functions as currently occurs.

Review recommendations

Introduce contemporary, appropriate, and clear purposes and principles

Recommendation 4.1

Enact a new Act that focuses on halting further decline in Victoria's wildlife populations and maintaining diverse and healthy wildlife populations and their ecological communities.
It should support 4 outcomes:

- Diverse, healthy and resilient wildlife populations and their ecological communities
- Self-determination of Traditional Owners and Aboriginal Victorians about their interactions with wildlife
- Better outcomes for wildlife
- Public understanding and trust of wildlife management.

Recommendation 5.1

Enact a new Act called the Fauna Act.
The purposes of the new Act are to provide a legal and administrative framework that:

- recognises and promotes the intrinsic importance of fauna and the environment and the value of ecosystem services to human society, individual health and wellbeing
- provides for the conservation, protection and welfare of indigenous animals, including promoting their recovery and restoration
- contributes to protecting, restoring and enhancing ecological communities and processes of which fauna is an intrinsic component
- in accordance with this Act and other laws, accommodates Aboriginal Victorians' rights to self-determination relating to fauna and strengthens the connection between Traditional Owners and Aboriginal Victorians and Country.

Recommendation 5.2

Include principles that provide guidance for decision makers:

- Fauna has an inherent right to exist without undue or arbitrary interference.
- Fauna can experience positive and negative sensations and therefore warrants humane treatment.
- Fauna must be managed within the context of its ecosystems.
- Decision making should be based on the best available scientific knowledge and Traditional Ecological Knowledge.
- Decision makers should apply the precautionary principle to avoid harms.
- First Nations peoples and Traditional Owners must be engaged in implementing the Act.
- Managing fauna requires good animal welfare and must ensure ecological sustainability and integrity.
- Information and reporting on decisions made under the Act should be publicly accessible.
- Economic or social impacts of fauna should be managed in compliance with these principles.

Introduce contemporary, appropriate, and clear definitions in the Act

Recommendation 5.3

Define 'fauna' to mean any animal-life indigenous to Australia, whether vertebrate or invertebrate and in any stage of biological development, but not including humans.

Recommendation 5.4

The Victorian Government should pursue a declaration to list all deer as a pest animal under the *Catchment and Land Protection Act 1994*.

Recommendation 5.5

No longer prescribe duck season to occur automatically.

Duck season can occur each year only if the Minister for Energy, Environment and Climate Change is satisfied duck populations are stable or improving and hunting will not jeopardise their conservation.

The Minister(s) responsible for deciding on duck season arrangements must publish a statement of reasons for their decision each year.

Recommendation 5.6

Include consistent definitions relating to the representation of Traditional Owners and Aboriginal Victorians:

- Aboriginal person – when referring to individual Aboriginal people
- Aboriginal Victorian – when referring to any Aboriginal person in Victoria
- Native title holder – when specifically referring to groups with recognised native title rights under the *Native Title Act 1993* (Cth)
- Specified Aboriginal party – when referring generally to Traditional Owner groups
- Traditional Owner – when referring to Aboriginal people who have traditional connection to an identified geographical area of Country
- Traditional Owner group entity – when specifically referring to groups appointed under the *Traditional Owner Settlement Act 2010*.

Recommendation 5.7

Define the terms habitat, conservation, biodiversity and community in a new Act:

- habitat is the place in which fauna lives, has lived or could live, and includes the physical and living components that provide for its shelter and wellbeing
- conservation means 'to restore, enhance, protect and sustain the diversity and health of native wildlife species in Victoria'
- biodiversity and community are consistent with definitions in the *Flora and Fauna Guarantee Act 1988*.

Recommendation 5.8

Remove the terms for and mechanisms to protect and unprotect taxa or species, including unprotection orders.

Recognise and protect the rights and interests of Traditional Owners and Aboriginal Victorians in relation to fauna

Recommendation 6.1

Include a preamble to the new Act that acknowledges the strong spiritual connection of Traditional Owners and Aboriginal Victorians to Country, including fauna.

Recommendation 6.2

Provide for collaborative governance arrangements between Traditional Owners and Aboriginal Victorians, government and community in the new Act, including processes that allow Traditional Owners and Aboriginal Victorians to participate in decisions about protecting, using and managing fauna.

Recommendation 6.3

Provide for the listing of culturally significant species, the development of management plans, and the making of guidelines that set out how to consider any effects on these species.

Recommendation 6.4

In a new Act:

- create a right for Traditional Owners and Aboriginal Victorians to access any Crown land to collect and use for cultural or other purposes the bodies of deceased fauna
- create a right for Traditional Owners who have entered into a Traditional Owner Settlement Agreement, or who have native title, to take wildlife resources for any purpose on specified lands
- where a Traditional Owner Settlement Agreement does not exist, develop a process for a specified Aboriginal body to negotiate an agreement with the land manager that allows for the take of fauna for any purpose on Crown land
- allocate a specific proportion of a commercial harvest quota to Traditional Owners when commercial rights to harvest fauna on any land tenure are granted.

Recommendation 6.5

Create a permitting system administered by Traditional Owners that allows for Aboriginal persons to undertake certain activities as agreed for example to permit Aboriginal Persons to take fauna on specified land.

Recommendation 6.6

Include a 'savings provision' that ensures no current rights of Aboriginal Victorians are inhibited by a new Act, to remove any doubt about the effect of the revised provisions relating to the rights of Traditional Owners and Aboriginal Victorians.

Establish a framework for achieving the Act's purposes

Recommendation 7.1

Establish a general duty that requires Ministers and public authorities to give proper consideration to the purposes of the new Act when performing functions that may reasonably be expected to affect fauna, and provide for the Minster to make guidelines around how a general duty can be discharged by the duty holder.

Recommendation 7.2

Establish an expert advisory committee that will advise the Minister for Energy, Environment and Climate Change, the Department of Environment, Land, Water and Planning and the Office of the Conservation Regulator on fauna conservation and management matters.

Committee members should have qualifications in animal ethics and welfare, social science, Traditional Ecological Knowledge, and animal health and behaviour and ecology.

Recommendation 7.3

Include provisions to require the production and release of a Victorian fauna strategy and fauna plans.

Recommendation 7.4

The Victorian Government should establish fit-for-purpose fauna data collection procedures. Data should track the long-term status and trends of fauna in Victoria, and the effectiveness of fauna management activities through on-ground outcomes. Data collection must be long term, accurate, consistent, and sufficiently regular to support these objectives.

Recommendation 7.5

Provide for the Minister or the Department of Environment, Land, Water and Planning or the Office of the Conservation Regulator to make codes of practice or standards relating to fauna.

Recommendation 7.6

Allow for fees to recover costs associated with the administration of a new Act.

Recommendation 7.7

Create a statutory role called the Chief Conservation Regulator and confirm and clarify roles, responsibilities and authority including regulatory oversight of the portfolio department (the Department of Environment, Land, Water and Planning).

Enact better practice permissions

Recommendation 8.1

Introduce a risk-based approach to permissions that allows for differences in risk levels, consequences, fauna uses, and animal welfare needs. It should also provide the regulator with sufficient powers of approval, refusal, and removal in accordance with the risk framework.

Recommendation 8.2

Codify a risk-based approach to decisions about permissions that has regard to any fauna plans in place at the time.

Recommendation 8.3

Introduce a broader range of permission types and conditions that reflect the regulatory effort applied to low- and high-risk activities.

Recommendation 8.4

Allow the regulator to prescribe eligibility criteria for a fit and proper person and put the onus on applicants to demonstrate they comply with criteria.

Recommendation 8.5

Allow the regulator to develop and publish mandatory criteria and guidelines that it will apply in making decisions about permissions.

Recommendation 8.6

Provide for an internal review process of permission decisions by the regulator.

Reform compliance mechanisms

Recommendation 9.1

Include new offence provisions relating to:

- attempting fauna offences
- aiding and abetting fauna offences
- destruction of habitat
- feeding animals in the wild
- fauna trafficking.

Recommendation 9.2

The Victorian Government should explore the application of strict liability to appropriate offences in a new Act.

Recommendation 9.3

Extend the statute of limitations to lay charges for offences to 3 years.

Recommendation 9.4

Include a broader, more graduated schedule of administrative, civil and criminal sanctions that:

- includes notices and orders that can be tailored to the circumstances of the offending
- specifies maximum penalties that are consistent with other jurisdictions, differentiated to reflect the status of fauna and the type of offender, and commensurate with culpability of the offender and the harm
- considers other remedies such as restorative and reparative justice.

Recommendation 9.5

Expand legal standing to third parties to seek merits reviews for certain strategic decisions, such as approving a fauna plan.

Recommendation 9.6

Ensure authorised officers have the appropriate powers to undertake their compliance and enforcement duties and the new Act provides for appropriate delegations.

Recommendation 9.7

Develop an indicative sentencing guide or matrix for the regulator and the courts for fauna offences.

Use other mechanisms to promote outcomes for fauna

Recommendation 10.1

The Victorian Government should:

- implement a long-term strategy to measure community attitudes and behaviour towards fauna specifically, and Victorian biodiversity more generally
- develop a sustained dedicated communication and awareness campaign to promote Victorian biodiversity and fauna to Victorians.

Recommendation 10.2

The Victorian Government should review and implement approaches to target monitoring and surveillance efforts where gains from effort are likely to be largest. This review should consider ways to undertake and resource surveillance efforts.

Recommendation 10.3

Allow a new Act to harness incentives, education and technology to improve fauna outcomes on private land.

Consider longer-term directions

Recommendation 11.1

The Victorian Government should consider the merits of combining the *Wildlife Act 1975* or a new Fauna Act with the *Flora and Fauna Guarantee Act 1988*.

Recommendation 11.2

The Victorian Government should consider the merits of establishing an independent and structurally separate regulator, responsible for the Fauna Act, or a new Biodiversity Act and related conservation regulatory functions as relevant.

PART I

Context and objectives

1. ABOUT THIS REVIEW

The *Wildlife Act 1975* is part of Victoria's legal framework for protecting and managing biodiversity. The Act establishes procedures that seek to promote the protection and conservation of wildlife, the prevention of wildlife extinction, and the sustainable use of, and access to, wildlife. It also prohibits and regulates the conduct of people engaged in activities connecting with or relating to wildlife. While it has been amended many times, the Act has not been comprehensively reviewed since its introduction more than 45 years ago.

In May 2020, following a series of high-profile matters that highlighted some apparent shortcomings of the Act, the Minister for Energy, Environment and Climate Change announced a review of the Act to consider whether it should be reformed and if so how. An Expert Advisory Panel was appointed and the review commenced in December 2020.

This review of the Act is part of a wider examination of Victoria's legislative framework for protecting and managing biodiversity. In recent years, this included reviews of the *Flora and Fauna Guarantee Act 1988*, the Authority to Control Wildlife system and the native vegetation clearing regulations, and the development of *Biodiversity 2037,* Victoria's overarching biodiversity plan.

The Prevention of Cruelty to Animals Act 1986 is also currently being reviewed, to modernise animal welfare arrangements, including those for wildlife.

1.1 The scope of the review

The Minister for Energy, Environment and Climate Change endorsed broad terms of reference for the review, asking that the Panel examine:

- whether the Act's current objectives and scope are appropriate, comprehensive and clear
- whether the Act establishes a best practice regulatory framework for achieving its objectives
- whether the Act appropriately recognises and protects the rights and interests of Traditional Owners and Aboriginal Victorians around wildlife and their role in decision making
- the best ways to encourage compliance with the Act, including whether offences and penalties under the Act are appropriate to punish and deter wildlife crime.

As part the review, the Panel was asked to consider:

- contemporary values and expectations regarding wildlife
- the need to protect and conserve wildlife and to prevent wildlife from becoming extinct
- interests in sustainable use of, and access to, wildlife
- the role of wildlife in the cultural practices and beliefs of Traditional Owners and Aboriginal Victorians
- the impact of wildlife on agriculture and other activities
- the impact of ecotourism and other activities on wildlife
- the benefits of activities that foster an appreciation of wildlife
- emerging issues affecting wildlife protection and conservation, sustainable use and access
- any gaps or inconsistencies resulting from changes to other legal frameworks or policy settings
- insights from reviews of similar legislation
- the most appropriate and effective ways to encourage compliance with the Act and punish wildlife crime.

Some issues, although important, fell outside the scope of this review, either because they were not central to the operation of the Act or because they were part of other reviews. We were also not asked to consider whether the current range of activities permitted by the Act should be changed. Accordingly, we generally did not consider:

- how the Department of Environment, Land, Water and Planning (DELWP) and other responsible organisations administer the Act, including their policies, organisational structures and procedures
- the regulations under the Act
- arrangements for declared wildlife emergencies, such as whale entanglements, bushfire and marine pollution that are regulated under the *Emergency Management Act 2013*
- cruelty offences that are part of the current reform of Victoria's animal welfare legislation
- land classifications (state wildlife reserves and other categories, Parts II and V of the Wildlife Act) which are being considered as part of the Victorian Government's proposed reforms for public land legislation.

In some instances, stakeholder or members of the community raised issues in their submissions outside our terms of reference. When appropriate, we directed these issues to DELWP for further consideration.

Expert Advisory Panel

The Panel comprised 3 members with expertise across a range of topics, including regulation and economics, wildlife ethics and welfare, biosecurity, ecological research and an understanding of Traditional Owner and Aboriginal Victorian rights and cultural values:

Ms Jane Brockington – Advising in regulation and governance, Ms Brockington is a non-executive director with expertise in implementing reform and undertaking strategic reviews including of the Environment Protection Authority (Victoria) and Commissioner for Environmental Sustainability. Ms Brockington served as a Panel member from July to December 2021, including as Chair from October to December 2021.

Dr John Hellstrom ONZM – Dr Hellstrom has extensive experience and expertise in animal welfare and was pivotal in developing New Zealand's biosecurity system. He was Chair of the National Animal Welfare Advisory Committee 2009–16. Dr Hellstrom served as a Panel member from July to December 2021.

Dr Jack Pascoe – Dr Pascoe is a Yuin man living in Gadabanut Country and has expertise in ecological research and conservation land management, and an understanding of Victorian Traditional Owner values and cultural obligations. He is Conservation and Research Manager at the Conservation Ecology Centre. Dr Pascoe served as a Panel member from December 2020 to December 2021.

We would also like to thank former Panel members for their valuable contributions to the review. Their insights and input into the issues and consultation papers and engagement processes were instrumental in laying the foundations for this report:

Dr Deborah Peterson – Dr Peterson is an eminent agricultural and natural resource economist and has extensive experience working in both the private and public sector. Dr Peterson was Chair from December 2020 to October 2021.

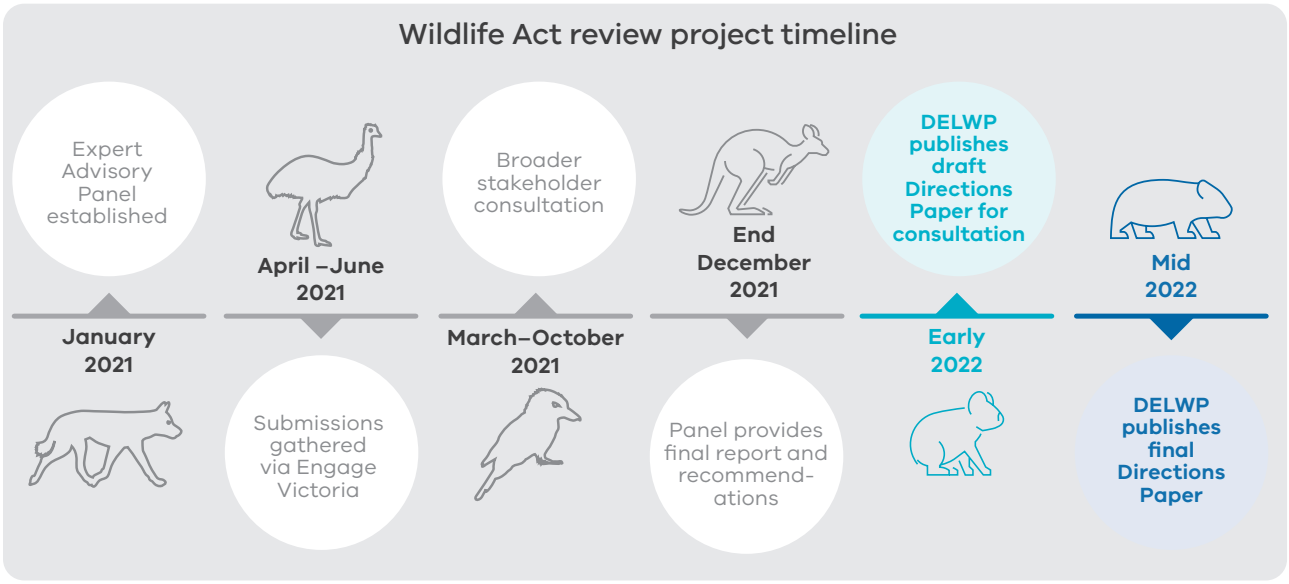
Associate Professor Ngaio Beausoleil – Associate Professor Beausoleil is an expert in wildlife welfare and ethics. She is co-director of the Animal Welfare Science and Bioethics Centre, School of Veterinary Science at Massey University in New Zealand. Associate Professor Beausoleil was a Panel member from December 2020 to May 2021.

Emeritus Professor Arie Freiberg AM – Professor Frieberg has extensive experience in regulatory reform. He is Emeritus Professor in the Faculty of Law at Monash University. Professor Frieberg served as a Panel member from December 2020 to May 2021.

Timeline

The review commenced in January 2021. From March to October 2021, we engaged with a range of stakeholders in a variety of ways (discussed further below). This report presents our recommendations and findings to the Minister for Energy, Environment and Climate Change.

DELWP will develop a Directions Paper that outlines what the Victorian Government proposes to change, based on our recommendations. Stakeholders and the community will have the opportunity to consider and comment on the changes proposed in the Directions Paper in early 2022, before it is finalised in mid-2022.

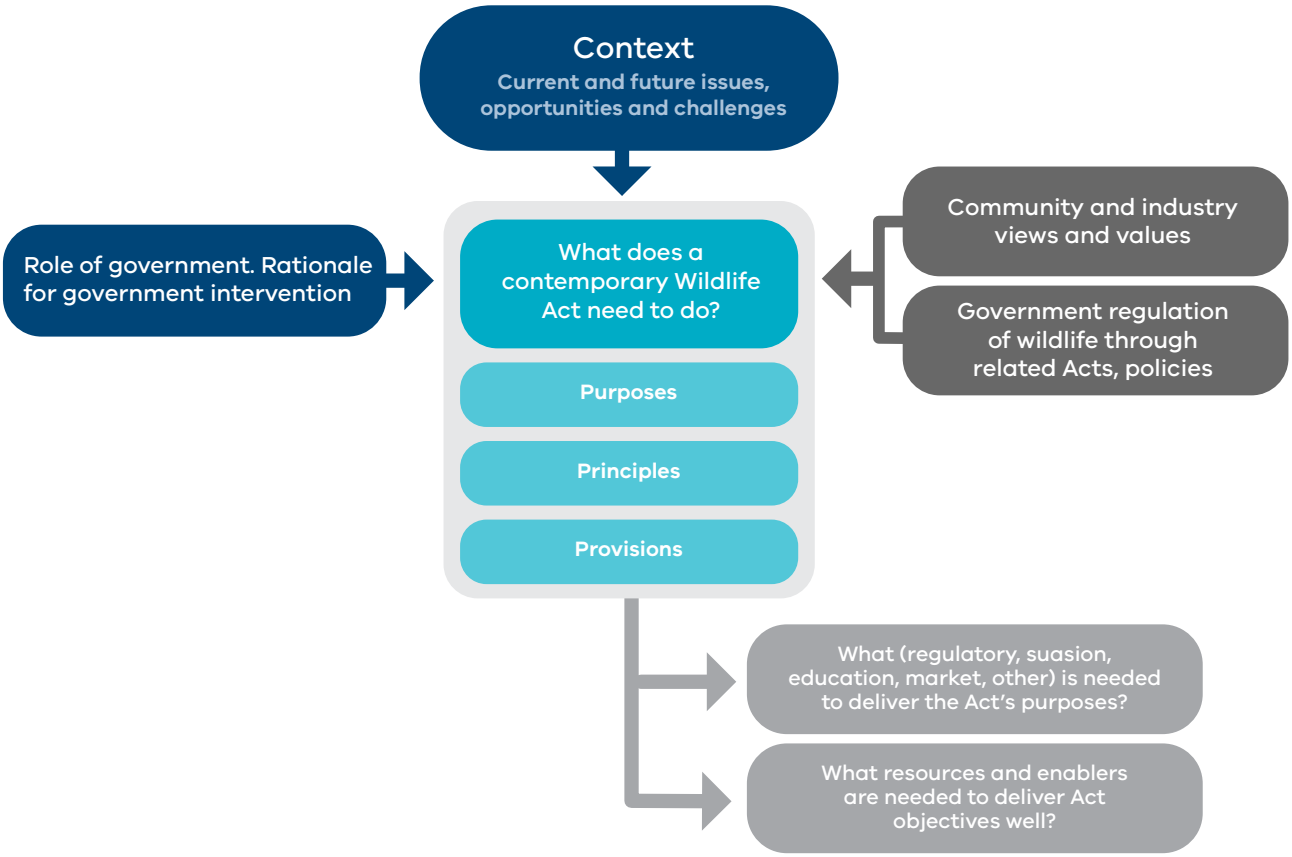


Review frame

The aim of this review is to establish a legislative framework for managing wildlife that supports better outcomes for Victoria's wildlife, including keeping common species common into the future.

Figure 1 shows how the Panel framed the review to organise the key areas of investigation and to focus the scope of work. We conducted the review with reference to some overarching principles (Box 1).

Figure 1: Wildlife Act review frame



Box 1: Principles guiding the Wildlife Act review

The review aimed to envision a legislative framework that supports better outcomes for wildlife, including keeping common species common into the future. The Panel was guided by overarching principles from the Victorian Government's *Biodiversity 2037* plan that relate to the importance of wildlife and its role in supporting the health and wellbeing of Victorians.[1] We used these principles as a starting point for the review, and adapted and added to them in application:

Wildlife is sentient. Animals can feel, perceive and experience what happens to them in a negative or positive way.

Wildlife has intrinsic value and warrants our respect and care. Wildlife has an inherent right to exist without undue or arbitrary interference, and an inherent right to protection from cruelty.

Wildlife is an integral part of ecosystems, and ecological processes. It is subject to threats and management responses. Wildlife management cannot be considered separately from its ecosystems and the health of its associated biodiversity and ecological processes.

Victoria's ecosystems, biodiversity and ecological processes must be managed for long-term sustainability. Ecosystems have a finite capacity to recover from demands and disturbances created by factors such as climate change and population growth. Species numbers and distribution will keep changing, as will the extent and quality of their habitats.

Knowledge comes from many sources. We recognise and respect multiple sources of knowledge, including traditional, community and scientific knowledge. We acknowledge the limitations and uncertainties of available knowledge and recognise the knowledge base must be continually improved.

Victoria's wildlife has, does and will play a significant role in the culture of First Nations peoples and their connection to Country. Country binds the living and inanimate parts of a landscape through spirit. Protecting wildlife involves ensuring all elements of Country are healthy – the people, the animals and the ecosystems.

Engagement must be extensive and inclusive. The people and groups interested in wildlife have different information, different expertise and different interests. All must have the opportunity to contribute to the review and the Panel must listen deeply and openly.

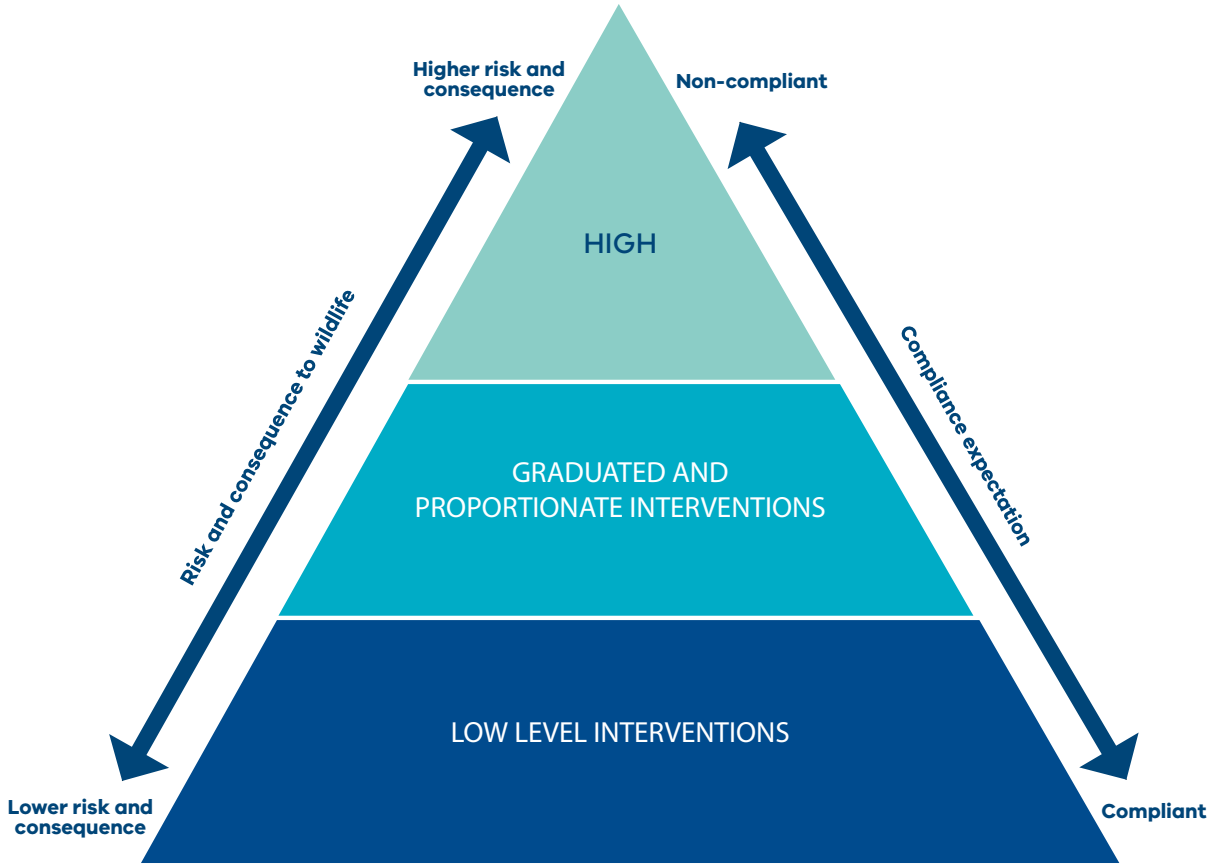
We applied better regulation principles. We considered the attributes of good regulation in the *Victorian Guide to Regulation*[2] and their role in supporting regulation and policy that is effective, proportional, flexible, transparent, cooperative, and subject to accountability and appeal.

1. DELWP, *Protecting Victoria's environment – Biodiversity 2037,* Melbourne, 2017
2. Department of Treasury and Finance, *Victorian Guide to Regulation*, Melbourne, 2014.

As well as the principles guiding the review, we framed our recommendations based on the level of risk and consequence an issue presents to wildlife taxa and communities and, where relevant, the levels of compliance anticipated:

- **For low levels of risk and consequence, we recommend lower-level interventions.** Examples include lower requirements for planning, less involvement of Traditional Ecological Knowledge (TEK) and expert advice, less community consultation, and less monitoring and reporting. Compliance and enforcement activities focus on guidance and support, and permissions are streamlined. As a principle, we aimed to recommend lower-level interventions where possible, and always when they are likely to achieve the desired outcomes.
- **For moderate levels of risk and consequence, we recommend middle-level interventions.** Examples include targeted planning, TEK and expert advice, community consultation, and greater monitoring and reporting. Compliance and enforcement includes greater use of inspections, audits and infringement notices. Permissions are graduated and based on an understanding that the risk of harm may prescribe eligibility criteria for fit and proper persons.
- **For higher levels of risk and opportunity to improve outcomes, we recommend high-level interventions.** Examples include more comprehensive wildlife planning, greater reliance on expert advice, TEK and community consultation, greater monitoring, evaluation and reporting (MER), more stringent permitting requirements, and criminal prosecutions and revoking licences or registrations for intentional or repeated non-compliance.

Figure 2: Review's risk and consequence-based approach



Review process

For this review, the Panel released an issues paper in April 2021 that provided background information about the Act and sought feedback on a range of issues. It can be downloaded from the Engage Victoria website: https://engage.vic.gov.au/independent-review-victorias-wildlife-act-1975

We engaged widely via virtual and face-to-face meetings, public submissions and comments, and focused roundtable discussions. We thank everyone who contributed to the review, including Victorian Government agencies, First Nations peoples, scientists, industry and interest groups, academics and the general public. A consultation report released in October 2021 that summarises the key issues raised by stakeholders can be downloaded from the Engage Victoria website: https://engage.vic.gov.au/independent-review-victorias-wildlife-act-1975

We also commissioned expert advice on several matters. We thank and acknowledge the following expert advisors for their contributions to the review:

- **Adjunct Professor Gerry Bates,** Sydney Law School (University of Sydney) and Australian Centre for Environmental Law (ACEL) (Australian National University)
- **Professor Lee Godden,** Director, Centre for Resources, Energy and Environmental Law (University of Melbourne)
- **Associate Professor Elizabeth Macpherson,** Faculty of Law (University of Canterbury)
- **Distinguished Professor Rob White,** Criminology, School of Social Sciences (University of Tasmania).

Some of the commissioned advice is publicly available on the Engage Victoria website: https://engage.vic.gov.au/independent-review-victorias-wildlife-act-1975

2. THE TRENDS AND CHALLENGES IMPACTING VICTORIA'S WILDLIFE

KEY POINTS

Indicators of Victoria's native wildlife populations show most are in fair to poor condition and almost all are trending downwards. Pressures including population growth, land use changes, habitat fragmentation and climate change are contributing to that downward trend.

The Victorian approach to managing wildlife has shifted over time from a species and location-based approach towards a more holistic approach that focuses on ecosystem resilience, functions and stability. However, the focus has remained primarily on managing wildlife as a resource or constraint, rather than recognising the intrinsic value and sentience of wildlife and its inherent right to be protected for its own sake.

First Nations peoples have sustainably managed and conserved Victoria's cultural landscapes for thousands of years, forming an inherent connection with fauna. Many of these animals have spiritual and ceremonial significance and are considered sacred.

Wild animals are valued for many reasons, and different groups in the community have diverse attitudes and expectations about protecting, interacting with and using wildlife.

This chapter includes contextual material we considered in framing the review work and developing recommendations.

2.1 The state and trend of Victoria's native wildlife

Victoria's population, development and economic growth has directly contributed to the decline and loss of our native wildlife. Some Victorian species are doing well, but generally, Victoria's biodiversity has declined over the past 200 years. Since European settlement, Victoria has lost 18 species of mammal, 2 bird species, one snake species, 3 freshwater fish species and 6 invertebrate species.[3] *The Victorian state of the environment report 2018* found most biodiversity (including native wildlife) indicators are fair to poor, and generally trending downwards:

- None of the 35 biodiversity or wildlife indicators were rated as good.
- More than 20 are poor, and only 7 are fair.
- 18 indicators are deteriorating.
- 7 are stable and only one (private land conservation) is trending up.[4]

These indicators cover a range of aspects of biodiversity, including plant species, habitat and ecosystems. Generally, the wildlife indicators measured in the report mirror the broader situation that results for most indicators are poor and trends are deteriorating. The report also highlights how Victoria's population and economic growth decisions are impacting Victoria's wildlife:

- Many of the natural systems that support wildlife, and wildlife supports in turn, are in fair to poor condition and are generally deteriorating. Native vegetation condition is deteriorating, land fragmentation is increasing, and gains in private land conservation are not offsetting losses. Victoria still loses around 4,000 ha of native vegetation each year, even though native vegetation regulations introduced in 1989 have slowed the rate of land clearing.[5]
- Exotic plants and animals continue to affect habitats, displace native wildlife and in some instances prey on native wildlife. Populations of invasive wildlife species such as carp, deer and horses are growing and expanding, mostly to the detriment of native species, habitats and ecosystems.
- Waterway environments are threatened by pollution (including nutrient and sediment runoff), high levels of water consumption and altered water flows.
- Marine and coastal environments are threatened by pollution, coastal development and infrastructure.

3. DELWP, *Protecting Victoria's environment – Biodiversity 2037*, Melbourne, 2017; VAGO, *Protecting Victoria's Biodiversity. Independent assurance report to Parliament 2021–22*: 07, Melbourne, 2021.
4. CES, *Victorian state of the environment report 2018 – Indicator report card*, Melbourne, 2018.
5. DELWP, *Protecting Victoria's environment – Biodiversity 2037*, Melbourne, 2017.

A recent Victorian Parliamentary Inquiry also presented evidence of ecosystem decline in Victoria and identified causes such as invasive species, climate change and habitat loss and fragmentation caused by development and land use change.[6]

Pressures on Victoria's natural environment and wildlife populations will continue in the future. Victoria's population is forecast to grow to 11 million by 2056, with cities and towns expanding to accommodate this growth. As well as Melbourne, Geelong, Ballarat and Bendigo are expected to experience strong growth, as well as surrounding peri-urban areas such as the Surf Coast, Baw Baw and Moorabool local government areas.[7]

At the same time, climate change is expected to cause significant and widespread changes to biodiversity and natural ecosystems. Existing and new threats associated with climate change include:

- increased frequency and severity of extreme weather events
- increased frequency and intensity of bushfires and drought
- rising sea levels
- changes in ocean temperatures, currents and ocean acidification
- changes to waterway flows, levels and regimes
- changes in the range, distribution, abundance and seasonality of species
- changes in the range, distribution and impacts of introduced plants and animals, including the introduction of new pests taking advantage of a changed climate.

2.2 How wildlife and biodiversity are protected

Victoria's planning and investment in protecting biodiversity (including wildlife) historically tended to focus on protecting a particular species or location. The focus was also often on protecting wildlife as a resource, rather than recognising the intrinsic value and sentience of wildlife and its inherent right to be protected for its own sake.

The Victorian approach to managing biodiversity has shifted over time from a species and location-based approach towards a more systems-based approach that focuses on ecosystem resilience, functions, and stability.

A recent report by the Victorian Auditor-General's Office (VAGO) reinforced the importance of a system-wide approach by highlighting the uncertainty and limits of managing species.[8] The report also emphasised the importance of governments using all available levers (including legislative resources) to achieve objectives, monitoring and reporting, institutional capacity and resourcing in delivering statewide environmental outcomes.

Post 2019/2020 fires Credit: Doug Gimesy

6 Legislative Council Environment and Planning Committee, *Inquiry into ecosystem decline in Victoria*, Parliament of Victoria, Melbourne, 2021.
7. DELWP, *Victoria in future 2019 – population projections 2016 to 2056*, Melbourne, 2019.
8. VAGO, *Protecting Victoria's Biodiversity. Independent assurance report to Parliament 2021–22*: 07, Melbourne, 2021.

2.3 Victoria's wildlife is valuable

Wildlife plays an important role in the environmental, economic and social/cultural landscape of Victoria.[9]

Wildlife has intrinsic value

Beyond (or regardless of) their contribution to the environment and benefits to humans, there is growing recognition that native animals (and plants) have intrinsic value – that is, value in its own right, independent of human uses – and an inherent right to exist and flourish.[10] For example, a survey of NSW residents found 98% of respondents agreed Australian wildlife is worth conserving because of the role it plays in ecosystems, and because it 'had a right to exist'. It is likely Victorians feel the same.[11]

However, while there is broad support for the intrinsic value of wildlife,[12] how this translates into beliefs about how to treat animals, or what we should be allowed to do to and with them, varies.[13] Unsurprisingly, people who identify as conservationists, environmentalists and animal rights activists are more likely to believe humans have a moral obligation towards animals.[14]

Wildlife helps maintain healthy ecosystems

Wildlife plays a vital role in maintaining healthy ecosystem function, influencing a range of factors that contribute to overall ecosystem health.[15] Healthy ecosystems produce some of humans' most basic needs – such as clean air and water, productive soils, natural pest control, pollination (including of agricultural crops), flood mitigation and carbon sequestration. Ecosystems also provide food, raw materials for production (such as timber, pastures and fertilisers), genetic resources and pharmaceuticals, while contributing to waste decomposition and detoxification.[16]

Victorian wildlife species perform essential roles that contribute to their ecosystems. Pollinators, such as the grey-headed flying fox, rainbow lorikeet and some lizard species,[17] fertilise many plants that not only provide food for other animals (and humans) but support plant populations. Seed dispersers (such as flying foxes and birds) can transport seeds large distances and connect fragmented habitats.[18] Seed dispersal also influences the structure of plant communities and seedling survival.[19]

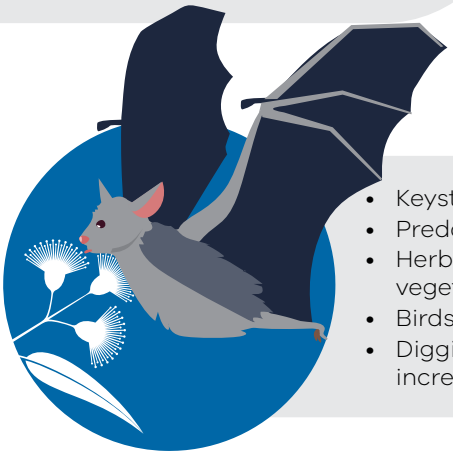
Some wildlife is a food resource for other species; predators, such as owls, carnivorous mammals (e.g. quolls) and reptiles (e.g. snakes and monitors) help control the populations of animals they prey on. Magpies, honeyeaters, bandicoots, echidnas and bats do the same for insect populations. Herbivores and grazers improve the productivity and diversity of plant communities[20] and also affect soil microbes and the rate of nutrient cycling.[21] Some species also act as 'ecosystem engineers', such as echidnas, whose digging can help improve soil health and promote seed germination in areas that might otherwise have low productivity.[22] Even in death wildlife contribute to ecosystem functioning, supporting scavengers, fungi and microbes.

9. DELWP, *Protecting Victoria's environment – Biodiversity 2037,* Melbourne, 2017.
10. Ibid.
11. MC Fabian, AS Cook and JM Old, 'Attitudes towards wildlife conservation', Australian Zoologist, 2020, 40, pp 585–604.
12. J Bruskotter, J Vucetich, A Dietsch, K Slagle, J Brooks and M Nelson 'Conservationists' moral obligations toward wildlife: Values and identity promote conservation conflict', *Biological Conservation,* 2019, 240, 108296; P Berry, V Fabok, M Blicharska, Y Bredin, M Garcıa Llorente, E Kovacs, N Geamana, A Stanciu, M Termansen, T Jaaskelainen, J Haslett and P Harrison, 'Why conserve biodiversity? A multi-national exploration of stakeholders' views on the arguments for biodiversity conservation', *Biodiversity Conservation,* 2018, 27, pp 1741–1762.
13. J Bruskotter, J Vucetich, A Dietsch, K Slagle, J Brooks and M Nelson 'Conservationists' moral obligations toward wildlife: Values and identity promote conservation conflict', *Biological Conservation,* 2019, 240; M Boulet, K Borg, N Faulkner and L Smith, 'Evenly split: Exploring the highly polarized public response to the use of lethal methods to manage overabundant native wildlife in Australia', *Journal for Nature Conservation*, 2021, 61, 125995.
14. J Bruskotter, J Vucetich, A Dietsch, K Slagle, J Brooks and M Nelson 'Conservationists' moral obligations toward wildlife: Values and identity promote conservation conflict', *Biological Conservation,* 2019, 240.
15. DELWP, *Living with Wildlife Action Plan,* Melbourne, 2018.
16. DELWP, *Protecting Victoria's environment – Biodiversity 2037,* Melbourne, 2017.
17. CSIRO Publishing, *Australian Pollinator Week: celebrating more than just the bees and birds*, Canberra, 2019.
18. R deTorre, MD Jimenez, A Ramirez, I Mola, MA Casado and L Balaguer, 'Use of restoration plantings to enhance bird seed dispersal at the roadside: failures and prospects', *Journal of Environmental Engineering and Landscape Management,* 2015, 23, pp 302–311.
19. Australian Museum, *Seed dispersal,* Canberra, 2018.
20. SE Koerner, MD Smith et al, 'Change in dominance determines herbivore effects on plant biodiversity', *Nature Ecology and Evolution,* 2018, 2, pp 1925–1932.
21. DE Burkepile and RV Thurber, 'The long arm of species loss: how will defaunation disrupt ecosystems down to the microbial scale?', *BioScience*, 2019, 69, pp 443–454.
22. DJ Eldridge, 'An echidna moves 8 trailer-loads of soil a year, and scientists say they're helping to tackle climate change', *Australian Geographic*, 2021.

Victoria's wildlife is valuable

- Wildlife has intrinsic value and inherent rights to exist and flourish
- Wildlife are sentient beings and can feel and experience sensations such as joy, pain and fear

Value to ecosystems



- Keystone species
- Predation controls numbers of other wildlife
- Herbivores disperse seeds and prevent vegetation overgrowth
- Birds, bats and bees pollinate plants
- Digging by reptiles and small mammals increases the fertility of the soil

Cultural or spiritual value

- Wildlife is an indivisible part of Country for Traditional Owners
- Fundamental to cultural practice, expression and spiritual wellbeing
- Many species are totems for Aboriginal people
- Many people feel a spiritual connection with wildlife

Value to people
(non-consumptive)

- Interactions provide education, inspiration and aesthetics
- Emotional benefits provided through wildlife volunteering
- Recreational activities, such as bird and whale watching
- Health and wellbeing benefits of keeping wildlife as pets
- People value simply knowing that wildlife exists and is there for future generations to enjoy

economy

- Pet shops trading in captive-bred wildlife
- Harvesting, farming and processing of animal products, such as meat, pet food and leather
- Recreational hunting and fishing
- Commercial fishing
- Birds, bats and insects pollinate crops and orchards
- Natural pest control for the agriculture sector
- Tourism through nature-based tours and wildlife parks and zoos

Wildlife has social and cultural value

Wildlife is embedded in the cultural heritage of Victoria's First Nations peoples, who have cultural, spiritual and economic connection to the land and its natural resources, including native wildlife.[23] First Nations peoples actively care for their Country through a cultural landscape lens that acknowledges the dynamic interconnections between people and Country. Care of Country is undertaken in a manner consistent with the lore of Fire Nations which is passed down orally from generation to generation. Country encompasses the natural environment (which incorporates animals, plants, soil, minerals, water and air), the spiritual (Dreamings, Songlines, Spirits) and traditional knowledge of that environment, and the cultural practices and activities that are performed on Country.[24]

Wildlife also has social and cultural value for society more broadly. In many cases the existence of particular species in an area can be a source of pride or happiness for locals, in addition to the economic benefits it might provide through tourism. Many Victorians value living in areas rich with wildlife[25] and even the knowledge that wildlife exists nearby, value that was heightened during our prolonged COVID lockdowns in Melbourne. Living or visiting areas with a thriving environment, including wildlife, can have physical and mental health benefits.[26]

The social and cultural value of wildlife is highlighted in many ways, including that many people are wildlife volunteers, through wildlife donations, and by decisions to provide wildlife habitat on private land. While exact figures are not available, we know there are around 100,000 environmental volunteers and citizen scientists in Victoria. We also know that wildlife organisations are among the largest recipients of donations following disasters such as the Black Saturday bushfires in 2009.

Wildlife contributes to our economy

Wildlife provides and supports Victoria's 'natural capital', which are the resources provided by nature – minerals, soil, water, ecosystem services, and all living things from which we derive material or financial value. Victoria's agriculture, forestry and fisheries sectors, which directly rely on natural capital, contribute around $8 billion (or 2.8%) to annual gross state product.[27]

Wildlife contributes significantly to many regional and local economies. It is a tourism drawcard with flow-on benefits to local towns and businesses. We consider some ways that wildlife impact on the Victorian economy in more detail below.

Wildlife-based tourism

Wildlife watching is a key attraction in Victoria's nature-based tourism industry. Benefits of nature-based tourism include economic benefits to businesses and local and state communities, wellness/welfare benefits for participants, and environmental benefits through increasing participants' knowledge about and appreciation of nature. Victoria's natural assets attract millions of visitors from overseas, elsewhere in Australia and locally from Victoria every year.[28]

Victoria's wildlife tourism activities include birdwatching, marine mammal tours, spotlighting, diving/snorkelling, and vehicle-based wildlife spotting, and occur statewide. Key wildlife attractions include little penguins (Phillip Island), endemic Burrunan dolphins (Port Phillip Bay), southern right whales (near Warrnambool), kangaroos (e.g. around Halls Gap), and koalas (e.g. in the Otways).

Conservatively, marine mammal tourism in Victoria generates over $2 million in annual direct operator revenue. Whale-watching season attracts several thousand tourists: dolphin swim businesses ran around 700 tours in 2017–18, carrying over 11,000 passengers.[29]

23. DELWP, *Living with Wildlife Action Plan*, Melbourne, 2018.
24. Federation of Victorian Traditional Owner Corporations, *The Victorian Traditional Owner Cultural Landscapes Strategy*, DELWP, Melbourne, 2021.
25. DELWP, *Living with Wildlife Action Plan*, Melbourne, 2018.
26. The Wildlife Trusts, *Nature for Wellbeing*, United Kingdom, n.d.
27. DELWP, *Protecting Victoria's environment – Biodiversity 2037*, Melbourne, 2017
28. Ibid.
29. T Helm, *Analysis of regulatory costs and benefits for proposed Wildlife (Marine Mammals) Regulations 2019 Final Report*, Tim Helm Economic Consulting, Melbourne, 2019.

Industries that use wildlife directly

Wildlife can be used (in limited ways) to provide economic benefit. Wildlife, including parts of wildlife and eggs, can be used commercially.[30] Some species can be bred commercially and sold at pet shops or to commercial wildlife licence holders, such as wildlife demonstrators or displayers.

Wildlife is also farmed commercially. For example, emus are farmed for meat, oil, skins, feathers and eggs; some deer species are farmed for meat, skins, antlers and other by-products; and game bird species are bred commercially for hunting. Kangaroos and deer can be harvested commercially from the wild for meat, skins and other by-products.

One of the most high-profile uses of wildlife is the commercial kangaroo industry, which supplies meat for human and pet food. In 2020, 87 licensed harvesters from across the state harvested 46,064 eastern and western grey kangaroos under the Kangaroo Harvesting Program.[31] The statewide commercial harvest quota for 2021 is 95,680. While up-to-date figures on processing rates and revenue per carcass are not available, the Kangaroo Pet Food Trial (the predecessor of the Kangaroo Harvesting Program) provided an estimated $1 million in benefits to kangaroo processors over 4 years.[32]

Other direct uses of wildlife include the captive wildlife trade and other licensed activities. At May 2021, there were approximately 420 commercial licence holders in Victoria,[33] including wildlife controllers, wildlife dealers, wildlife demonstrators, displayers, taxidermists, processors and farmers. Commercial wildlife businesses range in size from sole traders (e.g. people offering taxidermy or snake catching services) to larger organisations such as wildlife processors that have many staff. There are approximately 920 commercial wildlife licence employees registered with DELWP,[34] although data limitations mean the number of employees registered for each business cannot be reported.

Seal tourism Credit: Sea All Dolphin Swims

30. ENRC, *Utilisation of Victorian native flora and fauna, Inquiry Report*, Parliament of Victoria, Melbourne, 2000.
31. DELWP, *Kangaroo Harvesting Program 2020 Report*, State of Victoria, Melbourne, 2021.
32. DELWP, *Kangaroo Pet Food Trial Evaluation Report,* State of Victoria, Melbourne, 2018.
33. DELWP, Wildlife Licensing System, accessed 28 May 2021.
34. Ibid.

Costs associated with human–wildlife interactions

Population and economic growth, land use changes and changes in human behaviour are bringing people and wildlife into contact more often and can mean humans and wildlife compete for resources. These increased human–wildlife interactions are brought about by human activities, and they impose costs on animals. Often, these costs to wildlife are not accounted for because they are diverse, difficult to identify and difficult to value.

These interactions can also impose costs on Victorians and the Victorian economy. For example, on farms, wildlife can damage property, crops and pasture, affecting people's livelihoods. Kangaroos and wallabies can cause significant damage as they feed on or flatten crops or pasture, or foul high value crops. Wombats can damage fences, create hazardous holes by burrowing in pastures, and undermine dams and building supports by burrowing. Non-indigenous wildlife such as deer add to grazing pressure in livestock pastures. Wildlife can also carry diseases that affect livestock such as cattle and horses.

Often, the interventions and actions to remedy these impacts of wildlife are also very costly. In many instances, this may be because our approaches to managing wildlife are outdated and/or were not rigorously assessed in terms of their costs and benefits. It is likely there are more efficient and effective approaches to managing human–wildlife interactions, that not only support better outcomes for wildlife, but also reduce costs for people.

Mob of kangaroos and housing development Credit: Graeme Coulson

3. THE *WILDLIFE ACT 1975*

KEY POINTS

The Wildlife Act establishes procedures to promote the protection and conservation of wildlife, the prevention of wildlife extinction, and the sustainable use of, and access to, wildlife. It also prohibits and regulates the conduct of people engaged in activities related to wildlife.

It is one part of Victoria's biodiversity protection framework. Several other Acts also regulate activities or require actions from government for wildlife and habitats. Wildlife is also protected through national legislation including the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

The Act has been amended 125 times since it passed into law in 1975. Despite these changes, the Act is not effectively achieving many of its purposes related to wildlife or broader biodiversity goals. Moreover, the stated purposes of the Act no longer reflect contemporary outcomes for wildlife.

This chapter provides an overview of the Wildlife Act's current purpose and functions. It also summarises how the Wildlife Act operates within Victoria's biodiversity protection framework, including recent and anticipated reforms that could affect the Act. The Panel considered this broader framework when making recommendations about reforming the Act.

3.1 What the Act currently does

The Act establishes procedures to promote the protection and conservation of wildlife, the prevention of wildlife extinction, and the sustainable use of, and access to, wildlife. It also prohibits and regulates the conduct of people engaged in activities connecting with or relating to wildlife.

Box 2 summarises the key functions of the Act, while Figure 3 summarises the proportions of activities authorised under the Act.

Box 2: Key functions of the *Wildlife Act 1975*

Keeping and trading wildlife

Under the Act, it is an offence to kill, take, control or harm wildlife without a permit or licence. Licences permitting private and commercial activities involving wildlife are granted under the Wildlife Regulations 2013.

Managing wildlife

Using the Authority to Control Wildlife (ATCW) system, the Act enables the management and control of wildlife, including lethal control where justified. In some situations, wildlife can be 'unprotected' under the Act, meaning they can be controlled without an ATCW, including for lethal control.

Hunting game

Game licences are necessary to hunt game species, including species of deer and ducks that are defined as wildlife under the Act. The Act also imposes on the Game Management Authority monitoring and reporting obligations relating to hunting.

Caring for and rehabilitating wildlife

Authorisations may be granted to allow for the treatment or rehabilitation of sick, injured or orphaned wildlife.

Creating, managing and enforcing protected areas

The Act allows the creation, management and enforcement of state wildlife reserves, nature reserves, wildlife management cooperative areas, prohibited areas and sanctuaries.

Granting permits to conduct wildlife research, tourism and commercial filming

Permits must be obtained to conduct research using Victoria's wildlife, use wildlife in commercial films, and conduct tours in areas protected under the Act. Permits are not required for non-commercial films.

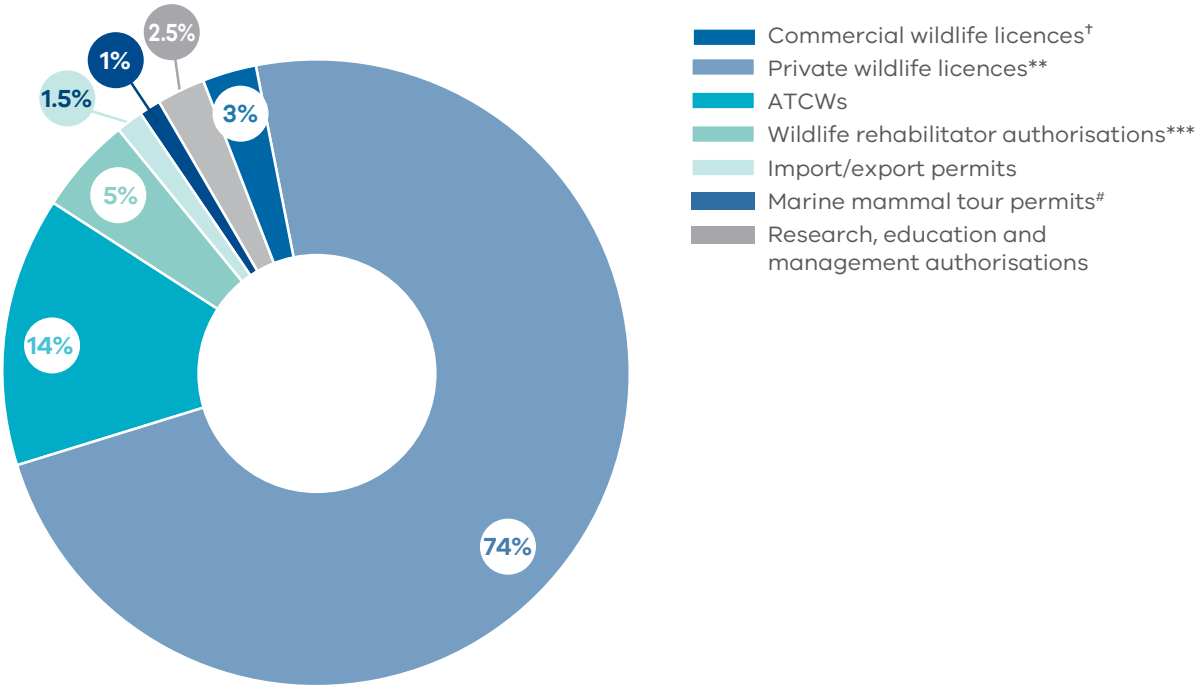
Protecting Victoria's whales, dolphins and seals

Whales (including dolphins) and seals are regulated under specific provisions in the Act. Operators of whale watching, whale (dolphin) swim tours and seal tours must have permits to operate. Permits may also be granted to keep whales for rehabilitation and scientific and educational purposes.

Sets out powers for authorised officers

The Act establishes powers for authorised officers to carry out their duties in enforcing the Act. These powers include issuing banning notices and exclusion orders, search and seize powers and the ability to conduct controlled operations.

Figure 3: Activities authorised under the *Wildlife Act 1975*



† Commercial wildlife licences include controllers, dealers, demonstrators, displayers, taxidermists, emu farmers and processor licences.

** Private wildlife licences include basic, advanced, specimen and dingo licences.

*** Wildlife rehabilitators include shelter and foster carer authorisations.

Marine mammal tour permits include whale watching permits from a vessel and aircraft, dolphin swim tour permits and seal watching permits.

Data source: Wildlife Licensing System, at 9 December 2021

Kangaroo meat. Credit: Macro Group Australia

3.2 It is part of Victoria's legislative landscape for wildlife and biodiversity

Figure 4 outlines the Ministers and Victorian Government agencies involved in administering the wildlife protection statutory framework and their functions. It shows the Wildlife Act is one part of Victoria's biodiversity protection framework. The most relevant Victorian Acts are:

- the *Flora and Fauna Guarantee Act 1988* (FFG Act), the primary legislation for managing potentially threatening processes in Victoria. Importantly, the FFG Act does not contain any offences relating to threatened terrestrial fauna – the offences relate only to flora and fish. Rather the Wildlife Act protects both threatened and common wildlife, with offences for disturbing or harming wildlife. The Wildlife Act creates separate offences for FFG-listed threatened wildlife including larger penalties
- the *Prevention of Cruelty to Animals Act 1986* (POCTA Act), which regulates the welfare and treatment of animals generally including wildlife protected under the Wildlife Act. Several codes of practice established under the POCTA Act have been adopted under the Wildlife Act or its subordinate legislation
- the *Planning and Environment Act 1987*, which establishes the Victoria Planning Provisions, which requires a permit to remove native vegetation and provide native vegetation offsets when removal cannot be avoided
- the *Traditional Owner Settlement Act 2010* (TOS Act), which enables contractual recognition of Traditional Owner rights to Country, including access to wildlife and other natural resources
- the *Fisheries Act 1995*, which protects and manages indigenous fish and some aquatic invertebrates
- the *Catchment and Land Protection Act 1994* (CALP Act), which establishes requirements for landholders to manage invasive plants and animals in Victoria.

Key national legislation that affects Victoria's wildlife protection framework includes the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). That Act assesses the impact of proposed activities on nationally threatened wildlife species and migratory species as 'matters of national environmental significance'.

Several other national and international agreements may also influence Victoria's approach to protecting biodiversity and wildlife, such as the *Australian Government's Strategy for Nature 2019–2030*, the United Nations' Sustainable Development Goals and the United Nations Declaration on the Rights of Indigenous Peoples.

3.3 The current Act cannot meet the needs of wildlife or Victorians

Our consultations revealed diverse views about Victoria's wildlife. However, 2 things were clear. First, Victorians value wildlife. Second, the current Act does not meet the needs of wildlife or the Victorian community.

Specifically, the Act does not support healthy and diverse wildlife populations or ecosystems, as evidenced by the poor and declining state of much of Victoria's wildlife. It does not reflect the broadening of contemporary views about wildlife, including the growing acceptance that wildlife has intrinsic value, is sentient and has an inherent right to protection for its own sake. Nor does it recognise the interests, expertise and rights of First Nations peoples in managing wildlife and the ecosystems of which it is a part. Finally, the current permissions and compliance and enforcement mechanisms are outdated and need to be modernised.

Figure 4: The statutory framework and functions for wildlife protection in Victoria

***Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth)**

- Nationally listed threatened species and migratory species
- Approvals process for matters of national environmental significance
- Regulates international wildlife trade

Department of Environment, Land, Water and Planning
Minister for Energy, Environment and Climate Change

Department of Environment, Land, Water and Planning

- Wildlife policy and administration of the *Wildlife Act 1975*
- Community education and advice for managing wildlife issues and impacts
- Wildlife population management and research

Office of the Conservation Regulator

- Compliance and enforcement
- Licensing and permits

Wildlife Act 1975

- Protection, conservation and sustainable access and use of wildlife
- Licences, authorisations and authorisation orders
- Offences and Authorised Officers powers
- Protections for whales, dolphins and seals
- Regulates tour operators in State Wildlife Reserves

Flora and Fauna Guarantee Act 1988

- Biodiversity conservation objectives
- Listing of threatened species
- Critical habitat and habitat conservation orders
- Biodiversity strategy

Parks Victoria

- Regulates protection, use and management of Victoria's national parks and other state parks
- Regulates tour operators

Wildlife Regulations 2013

- Regulate the trade, possession and use of wildlife
- Prescribe licences and their conditions
- Prescribe fees, offences, royalties and exemptions
- Habitat protection

Wildlife (Marine Mammal) Regulations 2019

- Regulate activities relating to marine mammals, including tourism

***Native Title Act 1993* (Commonwealth)**

- Traditional Owner Corporations can apply for a Federal court determination to recognise native title rights

Department of Jobs, Precincts and Regions
Minister for Agriculture

Department of Jobs, Precincts and Regions

- Policy relating to recreational game hunting, animal welfare, agriculture and biosecurity

Prevention of Cruelty to Animals Act 1986

- Animal cruelty offences that apply to wildlife
- Research permits in relation to wildlife
- Exemption from offences for anything done in accordance with the Wildlife Act

Game Management Authority Act 2014

- Establishment of the Game Management Authority

Game Management Authority

- Regulation of game hunting, including deer, native duck, quail
- Administration of game licences
- Regulation and enforcement of kangaroo harvesting program

Wildlife (Game) Regulations 2012

- Regulate game hunting
- Prescribe game licences, conditions and restrictions
- Prescribe fees and offences relating to game

Wildlife (State Game Reserves) Regulations 2014

- Prescribe particulars relating to the management of state game reserves

Department of Justice and Community Safety
Attorney-General

Traditional Owner Settlement Act 2010

- Traditional Owner Corporations can enter into a Recognition Settlement Agreement with the State to recognise their right to access and use wildlife
- Exempt from offences under the Wildlife Act

Victorian Fisheries Authority
Minister for Fishing and Boating

Fisheries Act 1995

- Regulation of commercial and recreational fishing
- Administration of fishery management plans
- Protection and regulation of protected aquatic biota

Local Government
Minister for Planning

Planning and Environment Act 1987

- Section 52.17 of Victoria's Planning Provisions sets out the requirements for a planning permit to remove native vegetation and offset specific impacts on threatened species

Other legislation with intersections with the Wildlife Act:

- ***Catchment and Land Protection Act 1994***
- ***Conservation Forests and Lands Act 1987***
- ***Forests Act 1958***

4. WHAT A NEW ACT SHOULD ACHIEVE

KEY POINTS

This review proposes a new paradigm and framework for a new Act for wildlife. We recognise the need for new legislation that protects and conserves wildlife and contributes to reversing wildlife decline in nature. If we are to change the outcomes for wildlife, and for biodiversity more broadly, the new Act must be framed in a different way to the past.

The Panel considers legislation and regulations about wildlife should focus on 4 outcomes:

- diverse, healthy and resilient wildlife populations and their ecological communities
- self-determination of Traditional Owners and Aboriginal Victorians about their interactions with wildlife
- better outcomes for wildlife
- public understanding trust of wildlife management.

This chapter sets out what the Panel considers a new Act should achieve and identifies the areas of reform, which are then developed in later chapters.

4.1 Our vision of a new Act

The Panel proposes a new Act for wildlife that focuses on halting further decline and maintaining diverse and healthy wildlife populations and their ecological communities.

Victoria had some of the world's most ancient and stable ecosystems. These ecosystems were actively managed and stable for many thousands of years, until the past 2 centuries. Survival of wildlife within these ecosystems, during major geological and climatic change, was maintained by human–wildlife interactions within a biocultural landscape.

Our vision is to recognise the intrinsic value of wildlife and its ecosystems, and better provide for its protection and conservation. We propose a framework that recognises wildlife's intrinsic value and provides for its protection and conservation by better using Traditional Ecological Knowledge blended with emerging scientific understanding and restorative practices.

Many Victorians identify with and value indigenous wildlife more strongly than ever, including endangered and threatened wildlife. However, it is not sufficient or effective to respond only when species are threatened. We need new legislation that better protects and conserves wildlife.

A new Act must be framed differently to reverse wildlife decline in nature and change the outcomes for Victoria's wildlife and biodiversity more broadly. We must move beyond seeing wildlife primarily as a resource or something to be managed or controlled for our convenience. Human interactions with wildlife, including use or control, should aim to avoid harming their ecosystems.

The new legislation should provide for the inherent rights of wildlife to exist without undue interference and impingement on quality of life. It should also ensure Victorians can experience free-living wildlife without causing harm to ecosystems or the welfare of wildlife. As part of this paradigm shift, the new Act must formally recognise the interests, expertise and rights of First Nations peoples in wildlife beyond cultural purposes. It must value Traditional Ecological Knowledge and embed collaborative governance mechanisms.

This legislation must also build community understanding and trust in how the new Act is administered by providing for transparency and community participation around principle-based processes, decisions and compliance actions.

Currently Victoria's biodiversity ambitions are addressed through a complex matrix of legislation and other interventions that have developed over time. Harmonising legislation in ways that maintain resilient ecosystems would better support all indigenous biodiversity.

4.2 Outcomes of a new Act

Our vision for a new Act supports 4 main outcomes.

Outcome 1: Diverse, healthy and resilient wildlife populations and their ecological communities

A new Act should support the outcome of diverse, healthy and resilient wildlife populations in Victoria now and in the future. It must consider current and continuing risks and threats such as pest species, land development, population growth and climate change. A new Act should also contribute to the outcome of protecting, restoring and enhancing ecological communities and processes of which wildlife is an intrinsic component.

To achieve this outcome, the Act should recognise some species are more resilient and have greater adaptive capacity than others. This means activities or interactions with some species may need more regulatory oversight than others (e.g. to protect vulnerable species or to manage overabundant species). The Act will provide mechanisms that support wildlife planning at appropriate scales, and within the broader context of biodiversity and ecosystems. The Act will provide scope and flexibility to adapt to new challenges and uncertainty.

Outcome 2: Self-determination of Traditional Owners and Aboriginal Victorians about their interactions with wildlife

The Panel acknowledges the rights of First Nations peoples are inherent and have never been ceded by legal doctrine or agreement and that a new Act should advance the rights and interests of Aboriginal Victorians in relation to wildlife. This approach is consistent with the process of Treaty in Victoria and the Victorian Government's commitment to advancing self-determination. It is also consistent with the national Strategy for Nature objectives, and United Nations Declaration of the Rights of Indigenous Peoples.

To advance self-determination, a new Act will include Aboriginal Victorians in wildlife governance mechanisms and processes as they seek to fulfil their obligations to care for Country, including restoring culturally significant species. It will enable Aboriginal Victorians who are not Traditional Owners, or Traditional Owners with limited access to traditional land and waters, to practise Traditional Ecological Knowledge and pass down their cultural knowledge.

A male common blue banded bee. Credit: Jenny Thynne. Licensed under Creative Commons

Outcome 3: Better outcomes for wildlife

The Act should recognise the sentience, intrinsic value and inherent rights of wildlife to guide human interactions with and uses of wildlife so that they do not lead to unintended harm, loss or the destruction of ecosystems of which wildlife is a part.

The regulatory framework for wildlife must centre on better outcomes for wildlife – individual animals, wildlife populations and communities, and ecosystems – and aim to prevent harm to wildlife rather than mitigate harms.

The framework should also reflect better practice regulation and governance by ensuring:

- responsibilities are clear, do not overlap and are allocated where decisions can be made most effectively, efficiently and in a timely manner. Clear responsibilities allow parties administering the Act to establish priorities and boundaries for their work and hold them accountable by measuring outcomes for wildlife
- permissions (licences, permits and authorisations) support outcomes for wildlife. The process for determining permissions is efficient, risk-based, easily understood, proportionate, fair and consistent
- compliance and offence provisions are proportional to the seriousness of harm caused to wildlife and the culpability of the offender. They have a real deterrent effect and allow for appropriate enforcement. Regulators have flexibility in how they respond to specific circumstances and events.

Outcome 4: Public understanding and trust of wildlife management

A new Act should build community understanding and trust through effective participation of stakeholders and interested parties, and transparency and accountability of key actors.

Inclusive participatory approaches should lead to better outcomes. These outcomes include greater representation of diverse values and expectations, and more innovative solutions. They may also lead to an improved sense of duty and compliance. Community and private sector actors can play significant roles in leadership and governance, including designing and implementing wildlife strategies.

A new Act should ensure public, private and voluntary sector actors are answerable for their actions and that there is redress when duties and commitments are not met. Transparency fosters internal and external confidence in the leading organisation and encourages 'buy in' from stakeholders. In the public sector, accountability and transparency ensure those administering and regulating the Act achieve their public interest goals, and also improve organisational performance.

Recommendation 4.1

Enact a new Act that focuses on halting further decline in Victoria's wildlife populations and maintaining diverse and healthy wildlife populations and their ecological communities. It should support 4 outcomes:

- **Diverse, healthy and resilient wildlife populations and their ecological communities**
- **Self-determination of Traditional Owners and Aboriginal Victorians about their interactions with wildlife**
- **Better outcomes for wildlife**
- **Public understanding and trust of wildlife management.**

4.3 Reform recommendations

The following chapters outline and explain our recommendations for a new Act that achieves our vision and outcomes for wildlife. These recommendations relate to:

- purposes, principles and definitions (Chapter 5)
- the rights and interests of Traditional Owners and Aboriginal Victorians relating to wildlife (Chapter 6)
- a new framework for achieving the Act's purposes (Chapter 7)
- better practice permissions (Chapter 8)
- better practice compliance mechanisms (Chapter 9)
- mechanisms outside a new Act that support its implementation (Chapter 10)
- longer-term reforms (Chapter 11).

Figure 5 maps the provisions in the current Act with our recommendations for a new Act.

Little Penguin, St Kilda Credit: Doug Gimesy

Figure 5: Recommendations for a new Act to achieve better outcomes for Victoria's wildlife

Wildlife Act 1975

PURPOSES

(a) To establish procedures in order to promote:
  (i) the protection and conservation of wildlife;
  (ii) the prevention of taxa of wildlife from becoming extinct;
  (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.

APPLICATION

- Wildlife includes: all indigenous terrestrial vertebrates; threatened terrestrial invertebrates; non-indigenous vertebrates declared as game; aquatic animals, birds, reptiles and amphibians
- Wildlife does not include: terrestrial invertebrates that are not threatened; declared pest animals; fish and aquatic invertebrates
- Wildlife are further classified as protected (but may be unprotected in certain circumstances) or threatened

EXEMPTIONS

- Other than specified provisions, does not apply to a member of a Traditional Owner group acting in accordance with an agreement made under the *Traditional Owner Settlement Act 2010*
- Additional exemptions from offences in the Act are prescribed in the Wildlife Regulations 2013

REGULATORY TOOLS

- Powers to make Orders in Council to:
  - Declare species as wildlife (s 3(5)) or game (s 3)
  - Declare wildlife as unprotected (s 7A)
  - Declare areas to be a wildlife co-operative or prohibited areas, or sanctuaries (ss 32–34)
  - Prohibit possession of wildlife (s 49)
- Power to make Regulations (s 87)

Proposals for reform

PURPOSES & PRINCIPLES

- Enact a new Act that focuses on halting further decline in Victoria's wildlife populations and maintaining diverse and healthy wildlife populations and their ecological communities (4.1)
- Enact a new Act called the Fauna Act. The purposes of the new Act are to provide a legal and administrative framework that:
  - Recognises and promotes the intrinsic importance of fauna and the environment and the value of ecosystem services to human society, individual health and wellbeing
  - Provides for the conservation, protection and welfare of indigenous animals, including promoting their recovery and restoration
  - Contributes to protecting, restoring and enhancing ecological communities and processes of which fauna is an intrinsic component
  - In accordance with this Act and other laws, accommodates Aboriginal Victorians' rights to self-determination relating to fauna (5.1)
- Include principles that provide guidance to decision makers (5.2)

APPLICATION

- Define fauna to mean any animal-life indigenous to Australia, including fish and invertebrates (unless sufficiently protected under other legislation) (5.3) and clarify other definitions including representation of Traditional Owners and Aboriginal Victorians (5.6), habitat, conservation, biodiversity and community (5.7)
- Victorian Government should pursue a declaration to list all deer as a pest animal under the *Catchment and Land Protection Act 1994* (5.4)
- Remove the terms 'protect' and 'unprotect' and the ability to unprotect fauna (5.8)
- No longer prescribe duck season to occur automatically each year and require the Minister(s) responsible for deciding on duck season arrangements to publish a statement of reasons for their decision each year (5.5)

RIGHTS OF TRADITIONAL OWNERS AND FIRST NATIONS PEOPLE

- More explicitly recognise Traditional Owner rights and connection to Country, including fauna, in a preamble to the Act (6.1)
- Support self-determination through collaborative governance arrangements and by clarifying and extending take and use right to fauna (6.2)
- Provide for the listing of culturally significant species (6.3)
- Advance interests of Aboriginal Victorians related to fauna by broadening and clarifying the take and use rights of Traditional Owners and Aboriginal Victorians (6.4 and 6.5)
- Include a savings provision to ensure no other rights of Aboriginal Victorians are inhibited (6.6)

MORE REGULATORY TOOLS FOR THE FRAMEWORK

- Establish a general duty on Ministers and public authorities (7.1)
- Formalise a role for independent expert advice (7.2)
- Provide for fauna strategies and fauna plans (7.3)
- Establish fit-for-purpose data collection and reporting requirements (7.4)
- Provide for the making of mandatory codes, standards and guidelines (7.5)
- Allow for fees to recover all costs associated with the administration of a new Act (7.6)
- Create a statutory role called the Chief Conservation Regulator (7.7)

Wildlife Act 1975

PERMISSIONS

- Licences, authorisations and permits to undertake activities that would otherwise be offences
  - Authority to take etc.wildlife (s 28A)
  - Authority to disturb wildlife (s 28A(1A))
  - Possession and trade licences (s 22)
  - Import and export permits (s 50)
  - Whale and seal tour permits (s 83A & s 85C)
  - Tour operator licences (s 21B)
  - Research permits (s 28A & s 78(1))
  - Game licences (s 22A)
- Powers to make Orders in Council to:
  - Authorise a class of persons to take etc wildlife (s 28G)
  - Authorise a class of persons to disturb wildlife (s 28H)

OFFENCES

- Hunting, taking, destroying , molesting, disturbing etc.protected and threatened wildlife and game
- Possessing, buying, selling etc.protected and threatened wildlife
- Dog or cat attacking wildlife
- Importing or exporting of wildlife
- Marking wildlife
- Releasing captive wildlife
- Killing wildlife by poison
- Use of certain prohibited equipment to take wildlife, or possession of it in certain areas
- Keeping false records, providing false information
- Hindering hunting, approaching a hunter or being in hunting areas without permission
- Approaching whales closer than the prescribed limit
- Conducting whale or seal tour without a permit
- Offences relating to State Wildlife Reserves

COMPLIANCE AND ENFORCEMENT

Authorised officers are appointed under the *Conservation, Forests and Lands Act 1987*

- Enforcement powers include:
  - Entry
  - Issuing retention notices
  - Search, inspection and recording
  - Issuing banning notices*
  - Seizure of wildlife and other property
  - Taking samples
  - Giving directions with respect to whales
- Available sanctions include:
  - Fines
  - Exclusion orders*
  - Imprisonment
  - Cancellation of licence
- Statute of limitations is 2 years under the Act and 1 year under the regulations

* For use during duck season only.

Proposals for reform

PERMISSIONS

- Introduce a risk-based permissions framework with a broader range of permissions types, that:
  - Allows for differences in risk levels, consequences, wildlife uses, animal welfare needs and
  - Has sufficient powers for approval, refusal and removal for the regulator (8.1)
- Codify a risk-based approach to decisions about permissions (8.2)
- Introduce a broader range of permission types and conditions that reflect the regulatory effort applied to low- and high-risk activities (8.3)
- Allow regulator to prescribe eligibility criteria for a fit and proper person and put the onus on the applicant to demonstrate they comply (8.4)
- Allow regulator to develop and publish mandatory criteria and guidelines that must apply in making decisions about permissions (8.5)
- Introduce process for internal review (8.6)

OFFENCES AND PENALTIES

- Create new offences including: attempting fauna offences, aiding and abetting fauna offences, destruction of habitat, feeding animals in the wild and fauna trafficking (9.1)
- Explore the application of strict liability to appropriate offences in a new Act (9.2)

COMPLIANCE AND ENFORCEMENT

In addition to what is existing:

- Ensure authorised officers have appropriate powers and the new Act provides for appropriate delegations (9.6)
- Develop an indicative sentencing guide or matrix for the regulator and the courts for wildlife offences (9.7)
- Extend the statute of limitations from 2 to 3 years (9.3)
- Include a broader, more graduated range of administrative, civil and criminal sanctions (9.4)
- Expand legal standing to third parties to seek merits reviews for certain decisions (9.5)

MECHANISMS TO SUPPORT IMPLEMENTATION AND LONGER TERM REFORMS

- Promote education and awareness of wildlife, including measuring community attitudes and behaviours towards wildlife and ensure its appropriately funded (10.1)
- Review and implement approaches to enhance risk-based monitoring and surveillance (10.2)
- Enable the harnessing of incentives, education and technology to improve wildlife outcomes on private land (10.3)
- Consider the merits of combining the *Wildlife Act 1975* and/or a new Fauna Act with the *Flora and Fauna Guarantee Act 1988* (11.1)
- Consider the merits of establishing an independent regulator (11.2)

PART II

Recommendations for a new Act for fauna

5. INTRODUCE CONTEMPORARY, APPROPRIATE AND CLEAR PURPOSES, PRINCIPLES AND DEFINITIONS

KEY POINTS

The Minister asked the Panel to examine whether the Act's current objectives (purpose) and scope are appropriate, comprehensive, and clear.

We recommend creating a new Fauna Act that:

- redefines fauna in Victoria
- includes contemporary purposes that recognise the intrinsic value of fauna and its inherent rights
- introduces principles that guide clear interpretation.

This chapter considers the foundational elements of a new Act: purpose, scope and name, principles and definitions. It proposes introducing new purposes and scope, changing the name of the Act and introducing principles that guide decision making. It proposes revising the definitions, most importantly to focus on 'fauna', not 'wildlife'. It also discusses some of the potential implications of these proposals.

5.1 Clarify the intent of the Act through its purposes and name

Good legislation contains clear and consistent purposes that provide guidance about the desired outcomes and a firm foundation for operational provisions.

We consider the current purposes do not adequately focus on achieving the best outcomes for native fauna in Victoria. The current purposes do not adequately recognise the intrinsic value of fauna or its inherent right to protection. Nor do they recognise the links between fauna and healthy environments, or adequately consider fauna management using a whole-of-ecosystem approach. The current purposes also do not recognise the rights and interests of Traditional Owners and Aboriginal Victorians relating to fauna or recognise the importance of this for self-determination.

We recommend a revised set of purposes that support the outcomes outlined in Chapter 4. Our proposal is a guide to our intent for the Act's purposes. We also propose naming this new legislation the Fauna Act, to reflect its focus on Victoria's native fauna and to better align its functions with that of the *Flora and Fauna Guarantee Act 1988* (FFG Act).

Achieving these purposes is supported through principles (discussed in the next section), mechanisms within the Act (discussed in Chapters 7, 8 and 9) and enabling mechanisms that lie outside the Act (discussed in Chapters 10 and 11).

Recommendation 5.1

Enact a new Act called the Fauna Act. The purposes of the new Act are to provide a legal and administrative framework that:

- **recognises and promotes the intrinsic importance of fauna and the environment and the value of ecosystem services to human society, individual health and wellbeing**
- **provides for the conservation, protection and welfare of indigenous animals, including promoting their recovery and restoration**
- **contributes to protecting, restoring and enhancing ecological communities and processes of which fauna is an intrinsic component**
- **in accordance with this Act and other laws, accommodates Aboriginal Victorians' rights to self-determination relating to fauna and strengthens the connection between Traditional Owners and Aboriginal Victorians and Country.**

5.2 Clarify the intent of the Act through its principles

A legislated purpose clarifies an Act's role, while legislated principles can provide direction to decision makers on how to perform their functions. Principles should align with an Act's purpose and provide a practical and rigorous framework for decision making. Such principles recognise decision makers often face trade-offs to balance different values and outcomes.

The current Act does not contain principles that provide clear direction for managing Victoria's fauna. As a result, decision makers lack clear guidance about how to reconcile trade-offs (e.g. between short-term and long-term impacts), balance different outcomes (e.g. between social, environmental and economic outcomes), or consider risk.

We recommend a new Act include the following principles that guide how to perform functions under the Act:

- Fauna has an inherent right to exist without undue or arbitrary interference.
- Fauna can experience positive and negative sensations, including pleasure, pain and fear and so must be treated humanely accounting for scientific and cultural knowledge of their needs and natural behaviours.
- Fauna must be managed within an ecosystem context that recognises the interdependencies between fauna and the broader ecological communities and processes they are part of.
- The use of the best available science must be mandated in decision making. Such a mandate must include Traditional Ecological Knowledge.
- Decision makers should apply the precautionary principle when there are threats of serious or irreversible harm to fauna, so that lack of full scientific certainty is not used as a reason for delaying prevention of that harm.
- The State should take an inclusive approach to engaging with any First Nations peoples or Traditional Owners whose interests may be affected by the implementation of the Act. This includes requiring participation in decision making, planning and the development of policies, programs and processes relating to fauna taxa and communities.
- Disturbance, take or use of native fauna occurs only in accordance with clearly described animal welfare standards and principles and with the principles of ecologically sustainable use and ecological integrity.
- Public access to information and reporting on decisions made under the Act is presumed.
- Managing any adverse economic or social impacts associated with native fauna is done so in the context of the purposes of the Act and its principles.

Recommendation 5.2

Include principles that provide guidance for decision makers:

- **Fauna has an inherent right to exist without undue or arbitrary interference.**
- **Fauna can experience positive and negative sensations and therefore warrants humane treatment.**
- **Fauna must be managed within the context of its ecosystems.**
- **Decision making should be based on the best available scientific knowledge and Traditional Ecological Knowledge.**
- **Decision makers should apply the precautionary principle to avoid harms.**
- **First Nations peoples and Traditional Owners must be engaged in implementing the Act.**
- **Managing fauna requires good animal welfare and must ensure ecological sustainability and integrity.**
- **Information and reporting on decisions made under the Act should be publicly accessible.**
- **Economic or social impacts of fauna should be managed in compliance with these principles.**

5.3 Clarify definitions in the Act

The Act's definitions of 'wildlife' and 'protected wildlife' are complex and may not reflect what most people would consider to be fauna in Victoria. The definition of 'wildlife' also creates confusion about what is or is not covered. Other key terms are not defined. The Act also includes terms that can be removed in a new Act.

Definition of wildlife

Wildlife as currently defined has 2 main issues.

First, it excludes indigenous species.

The Act defines 'wildlife' to include vertebrate animals indigenous to Australia or its territories or terrestrial waters, as well as terrestrial invertebrates listed as threatened under the FFG Act. It does not include some indigenous vertebrates (fish) and invertebrates (marine or non-threatened terrestrial species), which means they are not subject to the Act. Figure 6 shows the animals that are covered and not covered under the current Act.

Second, it includes non-indigenous species that should not be defined as wildlife.

The current Act provides for any animal to be proclaimed as wildlife, including non-indigenous animals such as deer and some non-native game bird species (s 3(1)(b)).

We consider the ability to protect non-indigenous animals places the Act at potentially competing purposes. For example, deer proclaimed to be wildlife under the Act and therefore protected can destroy the habitat of indigenous fauna, undermining the Act's goals to support diverse, healthy and resilient indigenous wildlife species. The Parliamentary Inquiry into ecosystem decline in Victoria also found inconsistent definitions about animals in the *Catchment and Land Protection Act 1994* (CALP Act), the FFG Act and the Wildlife Act are impeding the effective control of pest animals. That inquiry called for definitions under these Acts to be reviewed and harmonised to ensure ecosystems are managed and protected efficiently.[35]

To address these issues, we recommend a new definition for 'fauna' in a new Act.

Recommendation 5.3

Define 'fauna' to mean any animal-life indigenous to Australia, whether vertebrate or invertebrate and in any stage of biological development, but not including humans.

In practice, our recommended definition:

- includes fish and invertebrates
- excludes introduced deer, ducks, pheasants, partridges and quail.

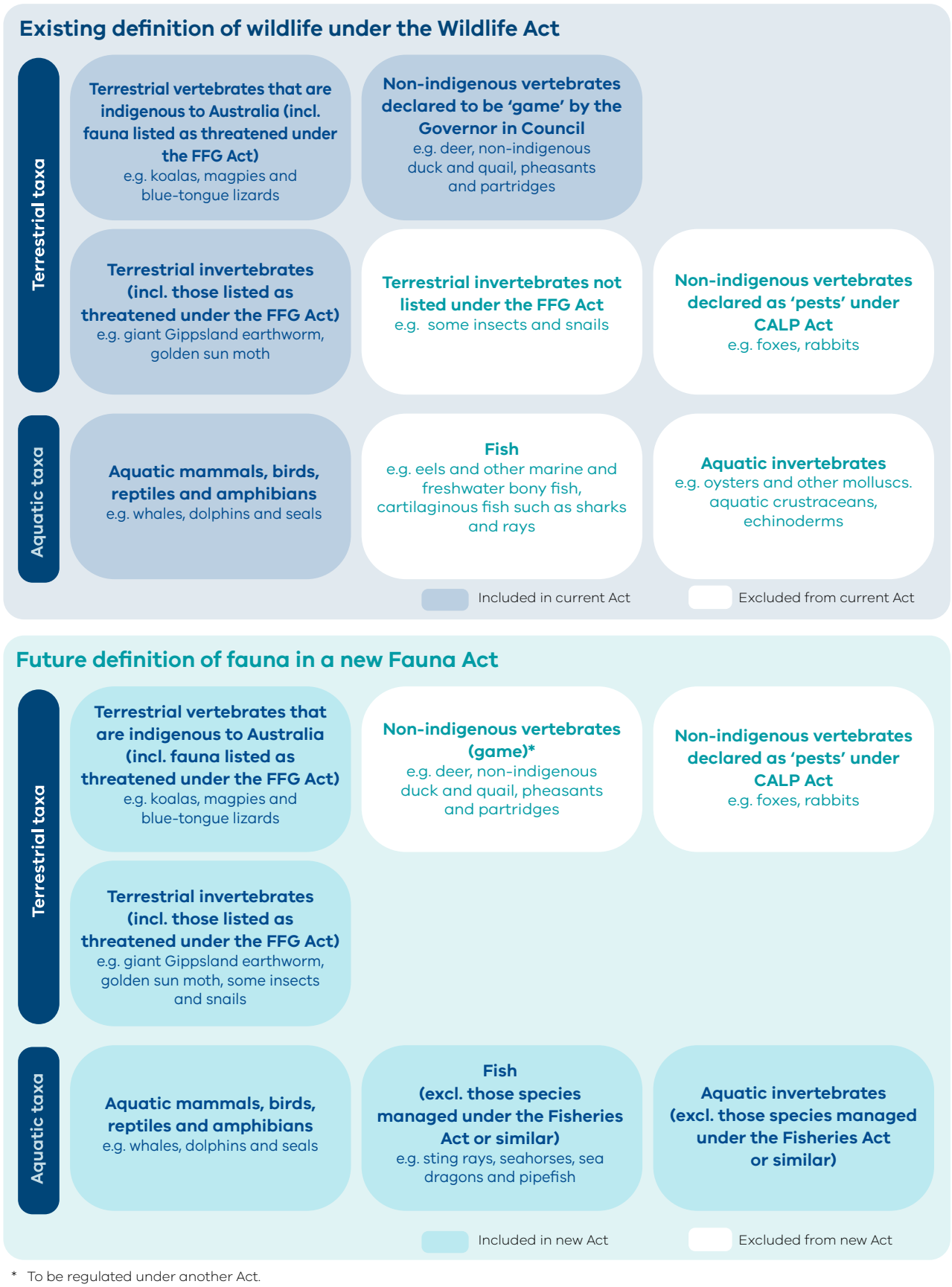
We consider this definition clarifies the purposes of the new Act to protect native fauna populations in Victoria. It applies to fauna that occurred in Australia before European settlement (1788) in any form including naturally occurring hybrids and fauna bred or kept in captivity or confinement.

It allows for flexibility by retaining the option of excluding species in clearly prescribed circumstances. For example, fish species may be excluded to the extent they are afforded sufficient management and protection under other legislation (e.g. recreational and commercial fishing covered by the *Fisheries Act 1995* and the export of species such as eels under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)). Similarly, invertebrates may be excluded for ad hoc or incidental interactions or when controlled legally under other legislation (e.g. control of insects using pesticides that are regulated under the *Drugs, Poisons and Controlled Substances Act 1981*). The Victorian Government will need to consider these circumstances in more detail to fully understand the practical implications.

The recommended definition adopts similar wording as the definition of fauna in the FFG Act (s 3). This approach supports harmonisation across the Acts and provides greater opportunity to ensure fauna and its ecosystems are managed and protected effectively and efficiently.

35. Legislative Council Environment and Planning Committee, *Inquiry into ecosystem decline in Victoria*, Parliament of Victoria, Melbourne, 2021, p 84.

Figure 6: Comparison of the current definition of wildlife under the Wildlife Act and the proposed definition of fauna under a new Fauna Act



* To be regulated under another Act.

CALP Act - *Catchment and Land Protection Act 1994*
FFG Act - *Flora and Fauna Guarantee Act 1988*

We recognise not all fauna included under this definition are sentient. So far, most scientific evidence suggests all vertebrates and some invertebrates such as decapods (e.g. crayfish) and cephalopods (e.g. squid and octopus) are sentient.[36,37] But the sentience boundary is shifting as we learn more. We consider sentient fauna deserves our consideration of its ability to experience pleasure and distress, while non-sentient fauna deserves our consideration of its intrinsic value within ecosystems.

Implications of our definition for 'fauna'

We recognise defining 'fauna' to include fish and invertebrates, and to exclude deer and introduced quail, pheasants and partridges will have implications for managing some species. We discuss our intentions for the new Act and implications of our proposed definition for fauna below.

Fish

Fish (including sharks, rays, lampreys, oysters, molluscs, crustaceans and echinoderms)[38] are currently managed under the *Fisheries Act 1995* and the Fisheries Regulations 2019. Threatened fish are also classified as listed fish under the FFG Act. The Victorian Fisheries Authority administers the Fisheries Act, with a focus on commercial and recreational fishing.

By including fish in the definition of fauna, we do not intend that DELWP or the Office of the Conservation Regulator (OCR) become responsible for administering or regulating recreational or commercial fishing in Victoria. These activities should remain with the Victorian Fisheries Authority.

Rather, our aim is to protect fish and other aquatic species that are not fished commercially or recreationally and are not regulated under other legislation under a new Fauna Act. They are part of Victoria's natural ecosystems and should be regulated under the same legislation as other native fauna.

We acknowledge further consideration and consultation is needed between DELWP, the OCR and the Victorian Fisheries Authority to understand and resolve any practical implications of including fish in our definition of fauna.

Invertebrates

Threatened invertebrates are currently protected under the FFG Act. But common species and other invertebrate species (about whose conservation status we know little) are not protected by any Victorian legislation. Defining all invertebrates as fauna recognises their important role in natural ecosystems.

It is not practical to always protect all invertebrates. Many activities can impact invertebrates (e.g. incidental trampling) and invertebrates need to be controlled in some situations (e.g. to protect crops or human health risks). It is not our intention to create unnecessary regulatory burden where these activities are appropriate or unavoidable. Exemptions will be needed to account for these situations.

Weedy seadragon Credit: Parks Victoria

36. H Proctor, Animal Sentience: Where Are We and Where Are We Heading?. *Animals (Basel)*. 2012;2(4):628–639. Published 2012 Nov 14. doi:10.3390/ani2040628
37. I Mikhalevich and R Powell, 'Minds without spines: Evolutionarily inclusive animal ethics', *Animal Sentience*, 2020, 29(1).
38. See the *Fisheries Act 1995* for a comprehensive definition of fish.

Instead, our aim is to ensure the regulatory framework can be applied to invertebrates as appropriate, such as when an activity needs to be regulated (e.g. overexploitation for a commercial interest) in recognition of their important role in ecosystems. One approach may be to provide landholders incentives to use land management practices that protect invertebrates. Using incentives to encourage landholders to protect fauna is discussed in Chapter 10.

Deer

Under the new definition, deer would not be protected by the new Act. Victoria has 4 species of deer that are established in the wild (fallow, hog, red and sambar deer). Exact numbers of wild deer in Victoria are not available, but estimates of combined numbers range from several hundred thousand up to 1 million animals or more.[39]

Deer pose a significant risk to biodiversity, native fauna and threatened species. They reduce and destroy native vegetation and compete with native fauna for food. They can significantly reduce the natural health of ecosystems, by creating shrub and ground layer disturbance, habitat destruction through grazing, tree rubbing and wallowing behaviour, soil compaction and erosion, degradation of waterways and the spread of weeds into new areas. They impose substantial costs on Victorian agriculture. Sambar deer are also listed as a potentially threatening process to native vegetation under the FFG Act.

There are increasing calls from the community for all species of deer to be recognised as invasive and declared as pest animals under the CALP Act. This view was evident in feedback we received during public consultation. The Victorian Deer Control Strategy proposes to review the classification of deer species that are not currently established in the wild (e.g. chita, rusa, wapiti, sika and any hybrids), but it does not propose to review established deer species.

We consider the impacts of deer on native and threatened fauna and their habitat is too significant to ignore. As well as recommending excluding deer from the definition of fauna, we also recommend listing deer as a pest animal under the CALP Act.

Recommendation 5.4

The Victorian Government should pursue a declaration to list all deer as a pest animal under the *Catchment and Land Protection Act 1994*.

Declaring deer as a pest under the CALP Act has the advantage of clarifying objectives for managing deer in Victoria and encouraging all stakeholders with an interest in deer to work collectively towards the same goals.

Significantly, being declared a pest does not prevent deer hunting; it can still be hunted, just as other pest species (e.g. foxes and rabbits) can be hunted. Nor is the declaration likely to significantly affect the commercial deer harvest sector. However, the Victorian Government will have to consider whether to regulate deer hunting in the same way it regulates hunting of other pest animals, or whether deer hunting should be regulated differently.

The pest declaration will also place a legal requirement on all landowners to take reasonable steps to prevent the spread of, and as far as possible, eradicate deer from their properties. Costs to landowners associated with this requirement can be reduced by engaging commercial harvesters or recreational hunters to undertake the activity.

Appendix B outlines other implications of our recommendations relating to deer that the Victorian Government will have to consider.

Ducks, pheasants, partridges and quail

Currently, 8 species of native ducks are declared as game species under the Wildlife Act and recreationally hunted in Victoria: grey teal, Pacific black duck, Australian wood duck, Australian shelduck, pink-eared duck, chestnut teal, hardhead and Australasian shoveler. As native species, they will remain protected under a new Act.

It is not our intention to ban these species from being hunted in Victoria. However, the regulations prescribing Victoria's duck hunting seasons must ensure the health and sustainability of our native duck populations.

Currently, duck hunting season is prescribed in the Wildlife (Game) Regulations 2012 to occur every year between March and June, with a bag limit of 10 ducks per person per day. The Victorian Government can modify these seasonal arrangements, or cancel the season, under s 86 of the Wildlife Act. Modifications usually reflect concerns about the distribution, abundance and breeding activity of duck populations, which can be affected by climatic conditions and availability of habitat.

Poor climatic conditions (e.g. drought) can lower wetland availability, which in turn reduces waterbird breeding. Hunting during these times puts further pressure on the health of duck populations by removing breeding adults, leading to declining population numbers. The Eastern Australian Aerial Waterbird Survey shows waterbird distribution and abundance has been consistently below the long-term average for several years now and wetland availability has been lacking due to continued dry conditions across eastern Australia.[40]

39. DELWP, *Victorian Deer Control Strategy*, Melbourne, 2020.
40. JL Porter, RT Kingsford, R Francis and K Brandis, *Aerial survey of wetland birds in Eastern Australia – October 2020 annual summary report*, University of NSW, 2020.

Our consultations revealed concerns about decisions on seasons to protect native duck populations. Currently, the process relies on the Game Management Authority (GMA) board advising the Minister for Agriculture on duck season arrangements. The *Game Management Authority Act 2014* requires the board to have regard to a triple bottom line assessment. The GMA board considers best available data (e.g. the Eastern Australian Aerial Waterbird Survey of waterbird abundance and distribution and wetland habitat availability), as well as social and economic factors.

In contrast, we propose an objective, evidence-based approach to setting duck season arrangements based solely on scientific data and evidence of a sustainable level of harvest. We also propose a new process for deciding on whether a season is appropriate, to focus on protecting the health and sustainability of our native duck populations. A duck hunting season should not be prescribed in regulations to automatically occur every year. Instead, a season should be allowed only when the Minister for Energy, Environment and Climate Change is satisfied native duck populations are stable, healthy and able to withstand hunting pressure, based on scientific evidence. Further, the responsible Minister(s) must publish the reasons for any duck season arrangement decisions to ensure transparency and build trust in the decision making process.

Brace of ducks from Victorian duck season Credit: Doug Gimesy

Under our proposal, recreational hunting of native ducks can still occur, but only when evidence demonstrates it is sustainable.

Recommendation 5.5

No longer prescribe duck season to occur automatically.

Duck season can occur each year only if the Minister for Energy, Environment and Climate Change is satisfied duck populations are stable or improving and hunting will not jeopardise their conservation.

The Minister(s) responsible for deciding on duck season arrangements must publish a statement of reasons for their decision each year.

Currently, introduced pheasants, partridges and 3 species of quail are defined as wildlife because of their value as game species. One quail species, the stubble quail is native and will continue to be protected under the new Fauna Act, but the other introduced species of pheasants, partridges and quail will not. Hunting of these species should be regulated under other legislation, as appropriate.

Marine mammals

The current definition of wildlife includes marine mammals, and we propose to include them in the definition of fauna in a new Act. Separate parts of the current Act (Part X and XA) prescribe offences relating to activities that are harmful to whales, dolphins and seals (e.g. killing and taking) and sets out a permissions system for marine mammal swim and sightseeing tours. We do not propose to change the rules around how these species are regulated, but we do not consider it necessary to have separate sections in a new Act. The definition of native fauna will include marine mammals, so all provisions will apply to marine mammals (e.g. permissions and offences). This does not preclude prescribing specific regulations or enforceable codes tailored for marine mammals if necessary.

Further, some existing mechanisms (e.g. approach distances for whales, dolphins and seals) could be beneficial to apply to the protection of other species (e.g. hooded plovers that nest on beaches and are vulnerable to disturbance). Government should consider broadening their application.

Representation of Aboriginal peoples in Victoria

The current Act excludes terminology relevant to Aboriginal Victorians.

We make several recommendations about recognising and protecting the rights and interests of Traditional Owners and Aboriginal Victorians relating to fauna (Chapter 6). Given that, we consider it appropriate that a new Act define terms relating to the representation of Aboriginal Victorians, so it is clear who the recommended provisions relate to. Further, these terms should align with existing Victorian legislation (subject to the outcome of the Treaty Process).

Recommendation 5.6

Include consistent definitions relating to the representation of Traditional Owners and Aboriginal Victorians:

- **Aboriginal person – when referring to individual Aboriginal people**
- **Aboriginal Victorian – when referring to any Aboriginal person in Victoria**
- **Native title holder – when specifically referring to groups with recognised native title rights under the *Native Title Act 1993* (Cth)**
- **Specified Aboriginal party – when referring generally to Traditional Owner groups**
- **Traditional Owner – when referring to Aboriginal people who have traditional connection to an identified geographical area of Country**
- **Traditional Owner group entity – when specifically referring to groups appointed under the *Traditional Owner Settlement Act 2010*.**

Definitions of other terms

Terms such as 'conservation', 'habitat', 'biodiversity' and 'community' are not defined in the current Act, which creates confusion. For example, regulations can be made to preserve and maintain wildlife habitat under s 87(1) of the Act. Section 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.

These terms can be highly nuanced and interpreted differently, which can make it difficult for regulated parties to understand their obligations and for administrators of the Act. We propose the following definitions be included in the new Act.

Recommendation 5.7

Define the terms habitat, conservation, biodiversity and community in a new Act:

- **habitat is the place in which fauna lives, has lived or could live, and includes the physical and living components that provide for its shelter and wellbeing**
- **conservation means 'to restore, enhance, protect and sustain the diversity and health of native wildlife species in Victoria'**
- **biodiversity and community are consistent with definitions in the *Flora and Fauna Guarantee Act 1988*.**

The recommended definition for habitat recognises it comprises living and non-living elements, can be occupied continuously or intermittently, and can be reinhabited. These aspects of the definition are important when considering ways to reintroduce wildlife into certain areas. Our recommended definition of habitat is also consistent with the definition in the *Biodiversity Conservation Act 2016* (NSW) (s 1.6) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) (s 528).

The recommended conservation definition is adapted from the definition of conservation activities more broadly as the 'management or control of biotic and abiotic resources to *restore, enhance, protect and sustain* the quality and quantity of a desired mix of species, and ecosystem conditions and processes for present and future generations'.[41]

41. J Dunster and K Dunster, *Dictionary of natural resource management*, CAB International, Canada, 1996, cited in IUFRO, *Glossary of Wildlife Management Terms and Conditions*, Vienna, 2015.

Importantly, this definition does not preclude the use, take or control of native wildlife to the extent that it does not impair the ability of wildlife communities to persist and improve in the wild and retain capacity to adapt or change, particularly when welfare outcomes for fauna are improved (e.g. overabundance).

Defining biodiversity and community using FFG Act definitions supports harmonisation of a new Fauna Act with the FFG Act if this is deemed desirable. The FFG Act includes the following definitions (s 3):

- biodiversity – the variability among living organisms from all sources (including terrestrial, marine and other aquatic ecosystems) and includes:
  (a) diversity within species and between species, and
  (b) diversity of ecosystems
- community – a type of assemblage which is or which is wholly or substantially made up of taxa of flora or fauna existing together in the wild.

Consideration of other terms

The terms 'protected' and 'unprotected' create confusion. Under the current Act, protected wildlife means all wildlife other than those kinds or taxon that are classified as pest animals under the CALP Act or are subject to an unprotection order.

Unprotection orders are currently in place for brushtail possums, long-billed corellas, sulphur-crested cockatoos, galahs, and dingoes (on private land only) and most species of deer. Most of these orders do not apply across Victoria uniformly; they apply to specific areas, under specific circumstances and are subject to conditions which are not widely known. While offering flexibility, unprotection orders can cause uncertainty in the community and affect compliance. They can also present perverse outcomes, such as creating the perception that the species value is less than other species and lack of oversight of control and whether welfare standards are being met.

We consider the terms 'protected' and 'unprotected' would be inconsistent with the intent of a new Act. Unprotection orders are a crude tool to achieve outcomes better obtained by other means. Individual and localised animal issues can be addressed through issuing Authorities to Control Wildlife. Larger-scale wildlife population issues, including overabundance, can be addressed through regional fauna plans (discussed in Chapter 7).

Recommendation 5.8

Remove the terms for and mechanisms to protect and unprotect taxa or species, including unprotection orders.

Removing the terms 'protected' and 'unprotected' from the new Act means all species of fauna would be afforded protection and there would be no ability to apply a 'blanket' unprotection to a species. However, other mechanisms are available to control fauna when it is warranted, e.g. Authorities to Control Wildlife, licensed wildlife controllers or fauna plans.

We consider removing unprotection mechanisms is particularly appropriate for species such as the dingo. This species is listed as threatened under the FFG Act yet it is currently unprotected on private land and on public land within a 3 km buffer of private land in some areas of Victoria to protect livestock. Dingoes should not be unprotected in any circumstances, given their threatened status.

Dingoes are an apex predator and play an important role in regulating ecosystems as highlighted in the recent Parliamentary Inquiry into ecosystem decline in Victoria.[42] Therefore, any decision on the control of wild dogs and dingoes must give proper consideration to the cascading ecosystem effects of proposed management actions. We consider fauna plans could be used instead of the current unprotection order to better address the conflicts between dingo conservation and agricultural interests. For example, these plans could incentivise private landholders to adopt better practice stock management and encourage co-existence with native predators.

Recent genetic research supports our position.[43] This research revealed hybridisation between feral dogs and dingoes is negligible, which means wild dog control is targeting dingoes. Unprotecting dingoes also has the perverse outcome of breaking up dingo pack structures, which can increase stock predation.

As well as removing unprotection mechanisms, we encourage the FFG Act Scientific Advisory Committee (which advises the Minister for Energy, Environment and Climate Change on the listing of threatened species) to consider removing hybridisation as a threat to dingoes in the Dingo Action Statement.[44]

42. Legislative Council Environment and Planning Committee, *Inquiry into ecosystem decline in Victoria*, p 106.
43. KM Cairns, MS Crowther, B Nesbitt and M Letnic. 'The myth of wild dogs in Australia: are there any out there?', *Australian Mammalogy*, 26 March 2021.
44. DEPI, *Action Statement No. 248 Dingo Canis lupus subsp. dingo*, Melbourne, 2013.

6. RECOGNISE AND PROTECT THE RIGHTS AND INTERESTS OF TRADITIONAL OWNERS AND ABORIGINAL VICTORIANS IN RELATION TO FAUNA

KEY POINTS

The Minister asked the Panel to examine whether the Act appropriately recognises and protects the rights and interests of Traditional Owners and Aboriginal Victorians around wildlife and their role in decision making.

We recommend a new Act that recognises and expands on the legal rights of First Nations that have been established by Victorian and Commonwealth governments and the courts in relation to fauna.

Central to the path towards self-determination is that once certain legal rights are restored (such as under a *Traditional Owner Settlement Act 2010* settlement agreement), these rights are not bounded in a way that is contrary to the principle itself.

The Panel recognises the tenet of caring for Country is ubiquitous to all mobs. To understand a First People's worldview, one must understand the concept of Country. It is all encompassing, binding the living and inanimate parts of a Landscape through spirit, all enlivened through story.

Unlike Western concepts of nature and wilderness, Country is inclusive of people, indigenous and non-indigenous, and for Victoria's First Nations the bond with Country is as close as that between a child and their physical mother. This creates a bond of kinship between people and their Country and ensures people will always play the role of custodians of Mother, not the role of owner.

The responsibility to care for Country was never ceded. We acknowledge this is not an aspiration, but an obligation, which First Nations peoples have been largely unable to meet due to the process imposed by settlement and through ongoing legal and governance systems.

To review the Wildlife Act we must use some established concepts to enhance and protect the rights of Aboriginal Victorians in relation to fauna in a new Act, even though they maybe be contrary to the worldview of First Nations. We also acknowledge fauna is only a part of Country, and that to protect fauna we must ensure Country, and her people, are also healthy.

Landscapes must be cared for holistically, considering all landscape elements while also ensuring First Nations peoples have access to fauna and have a strong role in managing fauna. This inclusion will ensure connection with Country is strong and that the knowledge of the 'old people' survives and evolves as a living culture. This Traditional Ecological Knowledge was responsible for the diverse and healthy land that settlers took for themselves upon settlement and is key to enhancing Victoria's biodiversity into the future.

We consider a more holistic strategy for managing Landscapes is consistent with our view that a whole-of-ecosystem approach is necessary to protect and conserve Wildlife. To achieve this, not only should we change the focus of the Wildlife Act but we also recommend bringing pieces of relevant legislation together to create a more consistent and integrated regulatory framework for conserving fauna and Country.

The review of the Wildlife Act is an opportunity for the State of Victoria to signal what self-determination means in the context of contemporary land management. With an eye to the process of Treaty and the First Principles Review of the *Traditional Owner Settlement Act 2010* (TOS Act), we recommend broadening the rights and acknowledging the responsibilities of Aboriginal Victorians. Victoria's leaders (including the Victorian Government) must show the ancient lore and system of Country Management of Victoria's First Nations the respect it warrants and cede responsibility to groups where possible and look to build the capacity of other groups where required.

A new Act should be as inclusive as possible, not solely relying on bodies such as Registered Aboriginal Parties and groups who hold native title, but actively seeking out the right voices for Country. Traditional custodians should also be delegated the authority to extend the rights and responsibilities related to fauna to Aboriginal Victorians living on their Country, to re-establish cultural practice. It should engage all Victorians in supporting this vision through its implementation and ongoing operation. A new Act can make a significant contribution to the path of self-determination by recognising and embedding Aboriginal Victorians access to and care of fauna.

We make several recommendations to address the deficiencies of the current Act. We also recognise First Nations peoples have expressed different preferences about some proposed reforms. Where we are aware of these differences, we recommend First Nations peoples have opportunities to opt out of pursuing those reforms.

We also acknowledge further consultation is required and that DELWP has committed to ongoing discussions with First Nations peoples as partners in the reform process, including settling the Victorian Government response to our report. We have communicated to DELWP that additional resources should be made available to First Nations peoples so that they can fully realise the benefits of the reform process.

Our recommendations in Chapter 5 address the purposes and principles of a new Act and specifically incorporate Traditional Owners and Victorian Aboriginals. When forming the recommendations for this chapter, the following factors guided our thinking:

- recognising and considering existing Traditional Owner and Aboriginal Victorian rights, interests and Traditional Ecological Knowledge (TEK) relating to fauna
- recognising the responsibilities of Traditional Owners and Aboriginal Victorians to care for fauna on Country
- acknowledging Aboriginal ways of knowing Country and fauna and the role and value of TEK in managing Country
- requiring decision makers to draw on that knowledge in making relevant decisions in genuine partnership
- ensuring the State takes an inclusive approach to engaging with any Aboriginal people or bodies whose interests may be affected by implementing the new Act.

6.1 The current Act's recognition of Traditional Owner and Aboriginal Victorian interests and rights

The Wildlife Act exempts any member of a Traditional Owner group from a range of offences if the activity is in accordance with an agreement under the TOS Act. The Wildlife Act also contains provisions for the Secretary to enter into agreements with Traditional Owner Land Management Boards to manage land in certain reserve types. To our knowledge, no agreements have been entered into using these provisions and we assume the function has since been subsumed by agreements under the TOS Act.

The TOS Act provides a framework for negotiating out-of-court native title settlements in Victoria. It is an alternative framework for settling native title claims in Victoria to the one available under the *Native Title Act 1993* (Cth). The TOS Act recognises Traditional Owners and certain rights over Crown land within an agreed area. A TOS Act settlement typically includes Natural Resource Agreements (NRAs), which recognise Traditional Owners' rights to take and use specific natural resources and to provide input into the management of land and natural resources.

Walert 'possum' belts Credit: Djirri-Djirri

The current Wildlife Act offers very limited recognition of the interests, rights and expertise of Traditional Owners and Aboriginal Victorians. We propose several recommendations that seek to address these deficiencies. Importantly, while we consider a new Act can and should make a significant contribution towards restoring rights for First Nations peoples, existing Victorian and Commonwealth government legislation plays a more fundamental role realising self-determination for First Nations peoples.

6.2 Acknowledge First Nations and Aboriginal Victorians in a preamble

We consider a preamble to a new Fauna Act should acknowledge the strong spiritual connection between Country, including fauna, and Victoria's First Nations and all Aboriginal Victorians. The *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* provides an example of how this might be achieved when drafting legislation in partnership with Traditional Owners and Aboriginal Victorians.

A preamble to a new Act should also recognise the rights, obligations, interests and expertise of Traditional Owners and Aboriginal Victorians relating to fauna and be adaptive to the ongoing evolution of the relationship between the State of Victoria and Aboriginal peoples in Victoria. These measures should work together with provisions ensuring Aboriginal rights and obligations are appropriately protected and reflected in collaborative governance models proposed under this review.

Recommendation 6.1

Include a preamble to the new Act that acknowledges the strong spiritual connection of Traditional Owners and Aboriginal Victorians to Country, including fauna.

6.3 Provide for collaborative governance arrangements with Traditional Owners and Aboriginal Victorians

A new Act should require collaborative governance arrangements between Traditional Owners and Aboriginal Victorians, the Victorian Government and community, including processes that require participation in decisions about protecting, using and managing wildlife. To do this, the Act should provide for:

- a state-level framework for including Traditional Owners and Aboriginal Victorians in providing guidance on fauna management decisions, fauna plans and cultural use of fauna
- a formal role for Traditional Owners and Aboriginal Victorians in developing fauna strategies and fauna plans
- any representative body providing advice must include Traditional Owners and/or Aboriginal Victorians
- a requirement for planning and decision making about fauna at key decision points to consider applicable Country Plans that may be developed
- existing collaborative management arrangements being extended to allow for joint planning, management, and protection of wildlife between the Victorian Government and Traditional Owners on specified lands (i.e. either established Aboriginal title land or other Crown land that becomes Aboriginal title as a result of a TOS Act agreement or Treaty).

Recommendation 6.2

Provide for collaborative governance arrangements between Traditional Owners and Aboriginal Victorians, government and community in the new Act, including processes that allow Traditional Owners and Aboriginal Victorians to participate in decisions about protecting, using and managing fauna.

6.4 Recognise culturally significant species and heritage value

For Victoria's First Nations peoples, fauna has significance beyond being utilitarian and is incorporated into culture, ceremony and customs. Nations and individuals have totemic species of significance, as do landscapes. As a result, some species will be of heightened significance to Traditional Owners and warrant special cultural consideration.

To reflect this, a new Act should:

- provide for the listing of culturally significant species and the development of culturally significant species management plans by Traditional Owners. These plans could form an addendum to Whole of Country Plans
- provide for the development of a system for referring applications for licences, permits and authorities (e.g. an Authority to Control Wildlife) that will affect a listed culturally significant species to Traditional Owners for consultation and advice. The new Act should include a power for the Minister to make guidelines for such assessments, developed in collaboration with Traditional Owners. At a minimum, guidelines should include consideration of applicable Country Plans and sub plans
- require decision makers to give proper consideration to the cultural heritage values of Traditional Owners related to fauna when making decisions.

Recommendation 6.3

Provide for the listing of culturally significant species, the development of management plans, and the making of guidelines that set out how to consider any effects on these species.

6.5 Recognise rights to access fauna

The current legislative framework provides some rights for Traditional Owners to access wildlife. However, these rights are often constrained to use for cultural purposes or are further bounded by species lists and locations. Such constraints act as a barrier to self-determination.

We recommend advancing the rights and interests of Traditional Owners and Aboriginal Victorians by broadening and clarifying their rights. To do this, a new Act should:

- create a right for Traditional Owners and Aboriginal Victorians to access any Crown land to collect and use for cultural or other purposes the bodies of deceased fauna
- create a right for Traditional Owners who have entered into a Traditional Owner Settlement Agreement, or who have native title, to take wildlife resources for any purpose on specified lands
- where a Traditional Owner Settlement Agreement does not exist, develop a process for a specified Aboriginal body to negotiate an agreement with the land manager that allows for the take of fauna for any purpose on Crown land
- allocate a specific proportion of a commercial harvest quota to Traditional Owners when commercial rights to harvest fauna on any land tenure are granted.

Recommendation 6.4

In a new Act:

- **create a right for Traditional Owners and Aboriginal Victorians to access any Crown land to collect and use for cultural or other purposes the bodies of deceased fauna**
- **create a right for Traditional Owners who have entered into a Traditional Owner Settlement Agreement, or who have native title, to take wildlife resources for any purpose on specified lands**
- **where a Traditional Owner Settlement Agreement does not exist, develop a process for a specified Aboriginal body to negotiate an agreement with the land manager that allows for the take of fauna for any purpose on Crown land**
- **allocate a specific proportion of a commercial harvest quota to Traditional Owners when commercial rights to harvest fauna on any land tenure are granted.**

We recognise some Aboriginal people may not be a member of a specified Aboriginal body, often as a result of the disruption and continuing legacy of colonialism. Traditional Owners may wish to extend their rights to address this legacy.

6.6 Protect existing rights

We recognise the current Act and a new Act operate within a larger legislative landscape, so our recommendations must not inadvertently undermine any rights of First Nations peoples in other Acts. We recommend a savings provision for this reason.

Recommendation 6.5

Create a permitting system administered by Traditional Owners that allows for Aboriginal persons to undertake certain activities as agreed for example to permit Aboriginal Persons to take fauna on specified land.

Recommendation 6.6

Include a 'savings provision' that ensures no current rights of Aboriginal Victorians are inhibited by a new Act, to remove any doubt about the effect of the revised provisions relating to the rights of Traditional Owners and Aboriginal Victorians.

Possum skin cloak created by Mandy Nicholson Credit Peter Casamento

7. ESTABLISH A FRAMEWORK FOR ACHIEVING THE ACT'S PURPOSES

KEY POINTS

The Minister asked the Panel to examine whether the Act establishes a better practice regulatory framework for achieving its objectives, particularly considering gaps or inconsistencies resulting from changes to other legal frameworks and policy settings.

We recommend a new Act:

- establishes a general duty on Ministers and public authorities relating to fauna
- requires expert advice
- strengthens provisions related to management plans
- strengthens data collection and reporting requirements
- enacts mechanisms for making mandatory codes, standards or guidelines
- allows fees to fully recover costs.

The Panel examined whether the Act's regulatory framework supported the purposes, especially considering recent and anticipated changes to other legal frameworks and policy settings. This review is an opportunity to identify any gaps or inconsistencies in the fauna management framework within the context of recent changes to the *Flora and Fauna Guarantee Act 1988* (FFG Act), the current review of the *Prevention of Cruelty to Animals Act 1986* (POCTA Act), the current review of Victoria's public land legislation (which will be incorporating the Wildlife Act's provisions on wildlife reserves) and the recently completed Parliamentary Inquiry into ecosystem decline in Victoria.

This chapter explores the allocation of government roles and functions relating to fauna management and ways to improve decision making and accountability. It also clarifies the responsibilities of government and the community relating to fauna and discusses the importance of better planning.

It identifies how the proposed recommendations support the outcomes outlined in Chapter 4, particularly those relating to fostering diverse, healthy and resilient fauna populations, providing better practice regulation and governance, and building trust and understanding. It also discusses the implications of these proposals.

Importantly, the recommendations are not an assessment of how the Act is administered. How responsible organisations administer the Act, including their policies, organisation structures and procedures, and resourcing and funding, falls outside our terms of reference.

7.1 Establish a general duty on Ministers and public authorities relating to fauna

A general duty is an obligation to avoid or undertake actions that could reasonably be foreseen to cause or avoid injury or harm. Such duties can fill gaps in existing legislation where no specific duties are imposed, and in the context of environmental management, can articulate standards and positive measures. When backed by appropriate guidelines, they can also guide individuals on their roles and responsibilities and what practices are acceptable.

We propose introducing a general duty applicable to Ministers and public authorities because it draws attention to the impacts on fauna across all government portfolios and entities. It creates a positive onus for Ministers and public authorities to consider and on balance advance outcomes for fauna where possible. It can do this by:

- imposing a general duty on duty holders to ensure they consider fauna, and that their activities related to fauna integrate with activities by other regulators
- requiring public authorities to consider the Act and fauna/biodiversity outcomes when conducting activities such as fire preparation, mitigation and suppression
- providing for a head of power for the Minster to make guidelines around how a general duty can be discharged by the duty holder.

We recognise it may be difficult to enforce the general duty, but we consider the benefits for fauna through changing expectations and mindsets make it worthwhile.

Recommendation 7.1

Establish a general duty that requires Ministers and public authorities to give proper consideration to the purposes of the new Act when performing functions that may reasonably be expected to affect fauna, and provide for the Minster to make guidelines around how a general duty can be discharged by the duty holder.

A general duty would harmonise the new Act with the duty on Ministers and public authorities to give proper consideration of the objectives of the FFG Act in performing any of their functions that may reasonably be expected to affect Victoria's biodiversity (s 4B(1)), including proper consideration of any instrument made under that Act (s 4B(2)).

We do not propose extending a general duty to all Victorians, because it is unlikely to be a practical mechanism for encouraging the Victorian community to focus more on fauna. Instead, incentives could be provided through rewarding good regulatory compliance through reduced regulatory burden. Additionally, we consider suasive and other incentive mechanisms that could sit both inside and outside the Act would better encourage positive behaviours by Victorians towards wildlife (see Chapter 10).

Box 3: What does a general duty mean in practice?

Clearing red-tailed black cockatoo habitat

The south-eastern population of the red-tailed black cockatoo is listed as endangered under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and as threatened under the Victorian *Flora and Fauna Guarantee Act 1988*, with more than half of its habitat permanently cleared since European settlement. The majority of its remaining fragmented habitat is in south-western Victoria.

Red-tailed black cockatoos have a specialised diet, feeding almost entirely on buloke and 2 species of stringybark. They prefer to feed in areas that have not been burnt (or crown scorched) for at least 10 years because unburnt forest is more productive (has higher seed yields) than recently burnt forests. They also require trees that are at least 220 years old for nesting, and that must be within 5 km of feeding habitat. Their ecology and current limited extent of habitat makes them especially vulnerable to clearing of feeding and nesting trees, and to fires including prescribed burning.

Under a general duty, any statutory authority carrying out an activity that would affect red-tailed black cockatoo habitat would need to give proper consideration to the new Act when performing the activity. For example, an agency conducting prescribed burning would need to consider how the burning would affect red-tailed black cockatoo habitat, particularly on feeding and nesting trees, and adjust their operations to ensure that they are consistent with the new Act.

7.2 Require expert advice

High quality, consistent expert advice is critical to guide decisions about the conservation and welfare of fauna populations. Knowledge, products, practices and technology for managing fauna evolve constantly. Expert consideration and advice on these developments is necessary to support up-to-date and evidence-based decision making. At the same time, Traditional Ecological Knowledge recognises the understanding and connection Aboriginal Victorians have with Country. However, the current Act lacks provisions to establish expert advisory bodies to advise on fauna management.

Several other Victorian Acts allow for expert advice through advisory bodies:

- The Fisheries Advisory Council (established in Part 6 of the *Fisheries Act 1995*) advises on matters relating to managing fisheries at the request of the Minister.
- A Scientific Advisory Committee (established under s 8 of the FFG Act) advises the Minister on listing threatened taxa, identifying potentially threatening processes and any other matters relating to flora or fauna conservation.
- The *Environmental Protection Amendment Act 2018* (s 235) empowers the Environment Protection Authority to establish advisory panels to advise the Authority on any matter arising from administering the Act or regulations.

The Office of the Conservation Regulator has also established 2 advisory groups to support its regulatory functions. The Independent Regulation Advisory Panel advises on better practice approaches to regulation, while the Stakeholder Reference Group advises on a range of issues including establishing priorities, developing communication and engagement strategies, and providing feedback on areas for improvement.

Currently, DELWP seeks the advice of independent experts for matters relating to complex fauna population issues or to assist in assessing large scale or complex applications to control fauna. In some cases, a formal advisory committee is appointed. But often, the advice is obtained via informal and ad hoc committees or advisory panels, with varying degrees of efficiency and quality of advice.

We recommend a new Act establish an expert advisory committee whose members have qualifications in animal ethics and welfare, social science, Traditional Ecological Knowledge, and animal health and behaviour and ecology. Members of the expert advisory committee should be appointed based on their expertise, not because of affiliation.

Eel monitoring project at Tae Rak (Lake Condah), Gunditjmara Country Credit: GHCMA

Recommendation 7.2

Establish an expert advisory committee that will advise the Minister for Energy, Environment and Climate Change, the Department of Environment, Land, Water and Planning and the Office of the Conservation Regulator on fauna conservation and management matters.

Committee members should have qualifications in animal ethics and welfare, social science, Traditional Ecological Knowledge, and animal health and behaviour and ecology.

The expert advisory committee should support operationalisation of the Act. This means the committee should advise on issues such as fauna population issues, large scale control applications, and any other matters deemed appropriate.

For example, some early areas of focus could include advice on:

- the design of the fauna strategy and management plan frameworks and implementation (discussed below)
- strategies and plans once developed
- implementation of the general duty and associated guidance
- support to coordinate and develop culturally significant species lists by Traditional Owners and Aboriginal Victorians
- design of the performance and outcome assessment framework for the new Act and the associated data strategy, in consultation with the Commissioner for Environmental Sustainability
- codes of conduct, standards and guidelines.

Importantly, the committee should not make or review regulatory or similar decisions. Nor should its function and scope overlap with the FFG Act advisory committee, although some cross-membership should not be precluded.

We suggest committee members be compensated (e.g. paid a stipend or a per diem fee) to recognise the significance of the task, time, expertise and expectations, to encourage participation and inclusion.

We also suggest the Minister establish the committee via administrative appointment arrangements as an early reform priority. By doing so, the committee can support and advise on developing the new Act which will formalise the committee in legislation.

7.3 Strengthen provisions relating to management plans

The provisions in the Act relating to management plans (s 28A) are limited; they enable the issuing of Authorities to Control Wildlife (ATCWs) that support such a plan. The Secretary (DELWP) can authorise a person to undertake activities such as hunting, taking, destroying, disturbing, marking, buying, selling, breeding and displaying wildlife if satisfied the authorisation is necessary to support a recognised wildlife management plan. In practice, management plans are used rarely; most instances relate to managing damage caused by eastern grey kangaroos. For example, the Secretary (DELWP) approved the Kangaroo Harvest Management Plan (KHMP) to enable the Kangaroo Harvesting Program. Harvesters authorised under the program must comply with the KHMP.

Our review highlighted shortcomings in the current Act that discourage the development and use of proactive management plans:

- The Act does not specify what should be in the plans nor how such plans are recognised or approved.
- Management plans are location and issue specific, rather than a tool for strategically managing fauna populations over the longer term across Victoria.
- There is little information available to support management plans, such as:
  - the current condition and trend for fauna populations (including the level of genetic diversity)
  - the impacts of authorisations on species
  - fauna habitats and ecosystems
  - the key risks and threats, including natural disasters such as floods, droughts and bushfires.

This review is an opportunity to develop a more comprehensive framework for fauna planning that addresses some of the Act's shortcomings and supports the outcomes sought by a new Act (Chapter 4).

Recommendation 7.3

Include provisions to require the production and release of a Victorian fauna strategy and fauna plans.

Figure 7 illustrates how the fauna strategy and fauna plans could work.

A Victorian fauna strategy will set out how the Victorian Government will deliver on the purposes of the Act. Fauna plans can be developed at any scale as necessary (e.g. for a single property, local area, region or statewide) and for individual species populations or ecosystems to operationalise the fauna strategy.

Plans for managing fauna on a single property will be developed by the landowner and may support an application for an ATCW, while a plan for a region or the state may be developed by the Victorian Government in consultation with the community, local government and First Nations peoples.

Figure 7: Fauna strategy and fauna plans

Victorian fauna strategy

A fauna strategy must be made in relation to the objectives of the Act, and include:

- proposals for achieving the purposes of the Act
- outcome-based targets to measure the achievement of the purposes of the Act
- a framework to monitor and evaluate implementation
- how the strategy will support Aboriginal cultural values and Traditional Ecological Knowledge of managing fauna and self-determination.

A strategy should include a framework for how the Victorian Government will:

- assess fauna taxon/community resources across the state and how they are used
- assess the nature, causes, extent and severity of fauna taxon/community degradation and identify areas for priority attention
- identify the objectives for fauna taxon/community in the region and how the objectives of the Act will be implemented or promoted to benefit that taxon/community or manage that process
- apply a framework for managing trade-offs and competing objectives
- engage with the community.

In preparing a fauna strategy, the Minister must consider:

- the objectives and principles of the Act
- the need to achieve the objectives and principles of this Act efficiently, effectively and with minimum adverse social and economic impacts
- any other prescribed matter.

Fauna plans

A plan must state:

- the region to which it applies
- the taxon/community to which it applies.

A plan may provide for any of the following:

- assess fauna taxon/community resources within the region, and how they are used
- assess the nature, causes, extent and severity of fauna taxon/community degradation in the region and identify areas for priority attention
- identify the objectives for fauna taxon/community in the region and how the objectives of the Act will be implemented or promoted to benefit that taxon/community or manage that process
- identify how impacts to a taxon/community will be mitigated or avoided, including by managing potentially threatening processes, particular areas or resources, and/or by conserving, managing or restoring habitat
- identify and implement mitigation measures to ensure any take or control of fauna in any given area and/or across the state is sustainable.

A plan may provide for all or any of the following:

- research and/or monitoring
- educational programs
- land use planning, including with respect to areas, or prohibited areas determined to be important/significant habitat for fauna
- land management advisory services
- incentives for better land management.

Examples which may trigger development of a fauna plan includes a natural disaster or where there is a new commercial interest or concerns about the level of control authorisations for a species.

The following examples demonstrate when a fauna plan may be used:

- **Where the condition and trend of a fauna taxa or community is not being assessed comprehensively in Victoria.** In these circumstances, a plan will first seek to close information gaps or address knowledge deficiencies about fauna and its trajectory. This evidence will then be the basis for long-term planning for the fauna community. It will also establish a requirement to monitor fauna.
- **Following significant events** such as drought, fire, or flood, and other events with potential impacts for long-term fauna communities and their condition. In these circumstances, a plan will first seek to understand the impact of the event on affected fauna, the likelihood of recovery and the future trajectory of the populations. This evidence will then be the basis for long-term planning for the fauna community post-event.
- **Where there is risk of local extinctions of fauna community or taxa** even when a species is common statewide. In these circumstances, plans will focus on how to practically manage the local fauna community so that it remains diverse, healthy and resilient. This planning will support continued local diversity within the species as well as local social and cultural impacts.
- **Where there is a concern for the level of control for a species or there is a legal market for fauna or fauna products** including both consumptive (kangaroo harvesting) and non-consumptive (fauna-based tourism) uses. Plans will establish baseline indicators, monitoring and allocation to ensure the control or activity is sustainable, detect negative changes and collect fees and royalties.

Under our proposal, DELWP would be responsible for leading and coordinating development and implementation of strategies and plans, with advice and oversight from the expert advisory committee. The committee could advise on the term of strategies and plans, but in the first instance, we suggest at least a 10-year period for strategies and a 3-year period for plans with provisions to review and extend as appropriate. Importantly, strategies and plans should specify monitoring and end point evaluation. They should also link with the Commissioner for Environmental Sustainability's state of the environment reporting cycle.

Our proposed tiered approach aligns with the scope and functions of the FFG Biodiversity Strategy (FFG Act, Part IV, Div 1) and flora and fauna management plans (FFG Act, Div 3). This alignment provides opportunities to harmonise Acts, and to potentially integrate a new Fauna Act and the FFG Act in the future (see Chapter 11).

These new planning arrangements will need appropriate resources and capabilities, and are likely to require coordination across agencies. Our recommended approach is consistent with the Victorian Auditor-General Office's recent findings about protecting Victoria's biodiversity. That report underscored the importance of using legislative levers to achieve objectives, establishing fit-for-purpose monitoring and reporting, and maintaining institutional capacity and resourcing to deliver statewide environmental outcomes.

Koala in defoliated tree, Credit DELWP

7.4 Strengthen data collection and reporting requirements

The Act does not meet contemporary standards for public reporting. It lacks provisions to require reporting on decisions taken (e.g. the number and type of permissions issued) as well as the more complex task of reporting progress against purposes and outcomes.

A foundational step in strengthening reporting requirements is ensuring data on fauna is collected. This data is important to assess performance against the outcomes we identified for a new Act, as well as to assess efficiency and administration of the Act. This includes but is not limited to the data required to inform and satisfy reporting requirement recommendations in this section (discussed below), relating to permissions outcomes, fauna planning and strategy, and strategic reporting against the outcomes of the new Act.

Recommendation 7.4

The Victorian Government should establish fit-for-purpose fauna data collection procedures. Data should track the long-term status and trends of fauna in Victoria, and the effectiveness of fauna management activities through on-ground outcomes. Data collection must be long term, accurate, consistent, and sufficiently regular to support these objectives.

Data collection must be long term, accurate, consistent and regular.

In making this recommendation, we recognise the recent reports from the Victorian Auditor-General's Office's review of *Biodiversity 2037*[45] and the Parliamentary Inquiry into ecosystem decline in Victoria.[46] Both identified inadequate data collection, gaps in knowledge inputs, and lack of coordination between agencies as foundational problems preventing the adequate tracking of the long-term status and trends in biodiversity in Victoria, and the effectiveness of biodiversity management interventions. We agree with these findings; the lack of data was a consistent message from stakeholders and experts throughout our review.

We also support the Commissioner for Environmental Sustainability's recommendation to streamline and coordinate data collection on biodiversity.[47] One option is a central point or agency that coordinates and collates fauna data and tracks the long-term effectiveness of fauna management activities through on-ground outcomes.

Fieldwork Credit: DELWP

45. VAGO, *Protecting Victoria's Biodiversity. Independent assurance report to Parliament 2021–22*: 07, Melbourne, 2021.
46. Legislative Council Environment and Planning Committee, *Inquiry into ecosystem decline in Victoria*, Parliament of Victoria, Melbourne, 2021.
47. CES, *Victorian state of the environment report 2018 – Summary report*, Melbourne, 2018

Reporting against permissions outcomes

In 2020–21, over 12,480 permissions were granted or renewed across a range of licence and authorisation types under the Act.[48] We understand that reporting on these outcomes has historically been on an ad hoc basis (with the exception of high level ATCW summaries since 2009) or released following Freedom of Information requests.[49]

Past reporting has been inadequate and can create the perception that the outcomes of permissions are being withheld deliberately to avoid scrutiny. Regular reporting can remedy this perception. We consider the following information may be reported:

- criteria for approving or refusing applications for licences, permits and authorities
- criteria for appeals of decisions about licences, permits and authorities
- the number of applications for licences, permits and authorities, the number of declined and approved applications and the general reasons for decisions
- the number and type of animals taken, killed, destroyed, disturbed, marked or controlled, the methods actually applied and the possible impacts on fauna populations
- the number and type of animals 'taken' from the wild for rehabilitation and the number and type of rehabilitated animals released, and post-release outcomes for those animals.

Full reporting requirements should be the subject of consultation, noting there will be some limitations for privacy or other legal reasons.

Reporting against the stated outcomes of fauna plans

To be effective, fauna plans (particularly those with detailed input from local communities) must contain provisions for regular reporting against stated outcomes and allow for continuous improvement. The need for reporting and analysis will increase as plans become more complex. Reporting arrangements should include a minimum set of indicators but also allow for bespoke approaches where necessary. This reporting is critical to build confidence about the use of plans and realise their potential in addressing complex fauna management needs.

Strategic reporting against the objectives and outcomes of a new Act

Most contemporary laws contain provisions for regular reporting or review against an Act's stated objectives and outcomes (e.g. every 5 years). This type of reporting demonstrates progress or identifies instances where the Act has fallen short, either through design or implementation.

Importantly, it is also an opportunity for government to refocus efforts on areas that require additional investment or change methodologies transparently. This approach allows for public scrutiny and a chance to identify gaps between the purposes and outcomes. Typically, an independent body would conduct an open review and seek the views of stakeholders, as well as collect and present data from the regulator.

Such reporting would be consistent with and could inform the Commissioner for Environmental Sustainability's regular assessments of the state of Victoria's environment.

7.5 Enact mechanisms for making mandatory codes, standards or guidelines

It is the Victorian Government's role to set clear standards for the community of what is appropriate when it comes to activities relating to fauna. Codes, standards and guidelines provide the minimum acceptable requirements and standards of training and practice needed to meet animal welfare and conservation outcomes.

However, the current Act does not contain heads of power to develop and issue mandatory codes, standards or guidelines that stipulate how to lawfully conduct activities relating to fauna. Currently, mandatory standards are set by DELWP or the Office of the Conservation Regulator (OCR) by applying conditions to licences, authorisations and permits, while non-mandatory guidance is provided through guidelines or other supporting policy-based documents.

48. OCR, *Year in review 2020–21*, DELWP, Melbourne, 2021.
49. DELWP, personal communication.

This approach creates several problems:

- There is no consistent approach to setting standards across the various permission types.
- Current codes or standards are often outdated, not fit for purpose, and inconsistent, making them difficult to enforce.
- Guidelines to support the fauna rehabilitation sector are inadequate, given the highly technical and complex nature of their work. More comprehensive and detailed standards can help the sector better protect the welfare of fauna being rehabilitated and improve the chances that fauna will be successfully released back into their habitat.

The criteria by which decisions are made by the regulator are not transparent. This affects both the credibility and predictability of the system.

We recommend a new Act include a head of power to develop clear and appropriate standards and review them regularly so they remain fit for purpose. As well as supporting outcomes for fauna populations, this proposal supports better practice regulation and governance, and builds trust and understanding. It clarifies requirements for licensed parties, provides flexibility for regulators, and allows for offences for non-compliance with the code or standard. This head of power could be a regulation making power that specifies what a code or standard can be made for and how often it must be reviewed or remade.

Recommendation 7.5

Provide for the Minister or the Department of Environment, Land, Water and Planning or the Office of the Conservation Regulator to make codes of practice or standards relating to fauna.

An example could be a code developed for the fauna care and rehabilitation sector. Codes should specify requirements such as training and education, and data and record keeping. In implementing this proposal, it will be important to recognise and account for any codes or standards created under the new animal welfare legislation. We suggest the relevant departments, regulators and advisory bodies establish a group to review proposals for codes and standards, to ensure sensible alignment and outcomes.

7.6 Allow for fees to recover costs

Various provisions in the current Act provide for charging a fee. Licence and permit fees are typically based on the costs associated with administering and managing the licensing system and the costs of compliance and enforcement. However, the Act does not explicitly state that fees are charged to recover costs; nor does it limit fees to this purpose. Monies collected do not have to be reinvested in administering the Act or funding fauna-related activities; they are most likely directed to central revenue.

We recommend fees imposed by the Act recover costs transparently.

Recommendation 7.6

Allow for fees to recover costs associated with the administration of a new Act.

This recommendation is consistent with the Victorian Government's Cost Recovery Guidelines, such that cost recovery fees should recover costs, except if there are positive spill over effects (often called externalities) associated with the service. Most licences and permits do not yield significant positive externalities, so cost recovery should work on a full cost basis.

7.7 Separate regulatory functions from policy and program functions

The current Act does not contain provisions that clearly separate the regulatory and compliance functions from program and policy functions. This is not unique to the current Act or the relationship between DELWP and the OCR and indeed is not uncommon. However, it can lead to both perceived and real conflicts of interest when all functions sit in the same department. Key issues arising from this issue include:

- perceptions of a lack of regulatory independence when the regulator (the OCR) is subject to departmental management arrangements (DELWP)
- lack of clarity around responsibilities of the land manager, the Game Management Authority and the OCR
- continuity issues and a lack of stakeholder confidence because the Victorian Government or the Secretary can create or abolish governance arrangements for compliance and enforcement without any reference to the Act
- legal 'conflict' or ambiguity because the regulator (the OCR) is expected to regulate the activities of its home department (DELWP), but in practice is legally constrained in doing so
- conflict between DELWP's/the Secretary's land management activities and regulatory obligations.

We consider a new Act would benefit from clearly assigning, in law, regulatory powers to an officer or entity separate from other functions within DELWP. In particular, a new Act should clearly define the role of the regulator as distinct from the role of DELWP as a land manager and subject to the provisions of the Act itself.

We propose a new Act that underpins and clarifies the role of the Chief Conservation Regulator. This role could be created in statute in several ways and a number of factors should be accounted for when considering the most appropriate or cost-effective model. At a minimum, we support a model that creates a statutory position appointed by the Governor in Council and reporting to the Minister. It is logical however that the Chief Conservation Regulator be located within and draw resources from DELWP made available by the Secretary. The model for establishing and operating the Commissioner for Environmental Sustainability is a useful reference.

Recommendation 7.7

Create a statutory role called the Chief Conservation Regulator and confirm and clarify roles, responsibilities and authority including regulatory oversight of the portfolio department (the Department of Environment, Land, Water and Planning).

8. ENACT BETTER PRACTICE PERMISSIONS

KEY POINTS

The Minister asked the Panel to examine whether the Act establishes a better practice regulatory framework for achieving its objectives. Permissions are a key part of the Act's regulatory framework and this review is an opportunity to modernise the types of permissions, as well as the processes for assessing and issuing permissions.

We recommend a new Act:

- introduce a risk-based approach to assessing and issuing permissions (licences, permits and authorities)
- increase the range of permissions instruments to allow accreditation or registration in low-risk environments
- attach more conditions in high-risk situations (such as information reporting).

These changes focus regulatory effort where it can have the greatest impact in improving the outcomes for Victorian fauna.

Permissions are a key part of the Act's legislative framework, and this chapter explores options to improve the permissions system. Our examination of the current framework, and the feedback from participants and experts, suggests it is inadequate to deliver the outcomes we want for Victorian fauna. This review is an opportunity to create a permissions framework that supports the vision outlined in Chapter 4.

In particular, the chapter outlines the step changes that can modernise permissions. It examines options to better manage risks through permissions in ways that are consistent with the risk framework outlined in Chapter 1 (Figure 2). It identifies how the proposed recommendations support the outcomes outlined in Chapter 4, particularly those relating to fostering diverse, healthy and resilient fauna populations, providing better practice regulation and governance, and building trust and understanding. It also discusses the implications of these proposals.

8.1 Enact risk-based permissions

A number of provisions in the Act grant licences, permits and authorisations.[50] Licences, authorisations and permits are issued in most part by the Office of the Conservation Regulator (OCR) who is primarily responsible for regulation under the Act. It is an offence under the Act to breach the conditions of a licence, permit or authorisation or to fail to have permission to undertake the regulated activities.

The Act's powers provide for some categorisation of permissions according to the level of risk. For example, categories of wildlife licences (s 22) are prescribed for different activities or levels of risk. Commercial licences are tailored for specific industries and are subject to more stringent requirements than licences for recreational activities, such as keeping captive-bred fauna. The regulations also allow for licence exemptions for activities that the regulator considers are low risk (e.g. keeping common fauna as pets, such as budgies).

But generally, low-risk activities are subject to the same regulatory burden (for the regulator and the licence holder) as high-risk activities. This means regulatory resources are overused in managing low-risk activities, and underused in managing high-risk activities. Examples of low-risk activities include possessing taxidermied fauna. Higher-risk activities include possessing dangerous fauna under licence. The result of this misallocation of effort and resources is a framework that cannot maximise the outcomes for fauna.

In part, this issue arises because the permissions approach does not reflect current fauna use, trade, and access or community expectations on what activities should be permitted. Some of the problems include the following:

- The legislation does not accurately distinguish between commercial and private interests in fauna. As a result, emerging uses including private in-home display and private breeding and sale of large (commercial) quantities of fauna are carried out under a private wildlife licence instead of a commercial dealer's licence and therefore are not adequately regulated.
- Individuals are permitted to possess dangerous fauna including crocodiles and venomous snakes with a private wildlife licence.
- Individuals are permitted to possess fauna that have specific husbandry needs and are ill-suited to captivity (e.g. quolls, kangaroos and wombats) under a basic private wildlife licence.

To address these issues, we recommend introducing a risk-based approach to regulating human interactions with fauna. This approach will be more efficient if it targets regulatory effort where it has the most impact in terms of reducing harm to fauna.

50. The principal permissions include: commercial wildlife licences (s 22); private wildlife licences (s 22); game hunting licences (s 22A); authorisations to control wildlife that damages crops or property (s 28A); authorisations relating to research, health and safety and Aboriginal cultural purposes (s 28A); authorisations relating to the care, treatment or rehabilitation of sick, injured or orphaned wildlife (s 28A); for marine mammal tours (Part X and XA) and tours in state wildlife reserves (Part IIA).

Box 4: What will risk-based permissions mean in practice?

Commercial trade of fauna under a private licence

In 2016, several people were detected secretly housing, breeding, and dealing in more than 600 protected and exotic animals for commercial profit. The animals were legally sourced using a private wildlife licence held by one of the offenders. The animals were seized by the Office of the Conservation Regulator (OCR) and the accused were charged with offences related to the possession and trade of wildlife and other animals under the *Wildlife Act 1975* and the *Catchment and Land Protection Act 1994*. The penalties for the offenders ranged from fines without conviction, to custodial sentences. The court also ordered the destruction of $60,000 worth of equipment used in the offending.

DELWP was required to hold the seized fauna for an extended period at significant cost while the investigation and prosecution occurred. The Wildlife Act does not allow for the disposal of fauna that is seized while being legally held or possessed under a valid licence, until the matter is decided in court.

Associates of the offenders later applied for various wildlife licences to allow the offenders to legally access commercial quantities of fauna for breeding and sale.

Adopting a risk-based permissions framework would allow the OCR to focus enforcement effort on cases of serious offending such as this one:

- Defining commercial activities and applying higher penalties allows for punishments that are commensurate with the seriousness of the crime. These penalties should include indictable offences for a person and a company based on animal numbers and/or trafficking allegations. (These penalties are discussed in Chapter 9.)
- Improving and updating fit and proper person tests for licences and authorisations enables decision making that supports wildlife welfare and community expectations (discussed below).

Other elements of a risk-based approach that could apply in this situation relate to sanctions and the powers of authorised officers:

- Incorporating offences for aiding and abetting offences allows the OCR to hold associates who assisted in the criminal activity to account.
- Improving the powers of authorised officers relating to search and arrest, evidence gathering and disposal of seized fauna that was lawfully possessed support wildlife welfare and community expectations (discussed below).
- Adopting a broader range of civil sanctions gives the OCR flexibility to tailor punishments to suit the circumstances. These sanctions could include a banning order to prevent offenders from continuing to operate, a reparation notice to recover costs associated with caring for seized fauna and notices to recover proceeds from the illegal sale of commercial quantities of fauna.

These elements are discussed in more detail in Chapter 9.

Recommendation 8.1

Introduce a risk-based approach to permissions that allows for differences in risk levels, consequences, fauna uses, and animal welfare needs. It should also provide the regulator with sufficient powers of approval, refusal, and removal in accordance with the risk framework.

Under a risk-based approach, higher-risk activities would face some combination of stricter application assessment, more conditions (such as reporting requirements) and more frequent audits and requirements for licence renewal. While this approach may impose more regulatory burden on those engaging in more risky activities, if regulation is well-directed this extra burden should be justified by the enhanced benefits for fauna and the community. There should be less regulatory burden for lower-risk activities and those producing conservation outcomes. There should also be regulatory burden relief for mature high performing duty holders.

This approach reflects the move towards risk-based regulation being adopted by most regulators in Victoria, including the OCR. Creating a new Act would help support the OCR's evolution as a mature regulator that appropriately applies this approach to its regulatory craft.

The following sections summarise the factors to consider when establishing a risk-based framework for managing permissions relating to fauna.

Moonlit Sanctuary Wildlife Park Credit: Moonlit Sanctuary

Consider the risks created for and by fauna communities and their ecosystems

A range of activities that require permission decisions create risks – some of them significant – for fauna populations and the welfare of individual animals. Some examples are provided below.

The OCR accounts for some of these risks in practice when considering permission for such activities, but the current Act does not mandate this risk-based approach. As a result, risks can be ignored, or treated on an ad hoc or inconsistent basis.

Requiring a risk-based approach for permission decisions promotes explicit consideration of the key risks to fauna from various activities. Fauna management plans can also play a role in preventing some risks from eventuating.

Recommendation 8.2

Codify a risk-based approach to decisions about permissions that has regard to any fauna plans in place at the time.

The following examples identify the risks that could be considered for different types of permissions.

Decisions about the lethal control of fauna consider the likelihood and consequences of:

- the cumulative impact of lethal control on a species over time and the risk that if not managed and monitored adequately, control could lead to overall decline
- the proportional impact on the species, particularly for rare or threatened species where even a small control allowance may have a disproportionate impact
- the risk of unintended negative effects on ecosystem function and flow-on effects (e.g. removing top order predators affects their role in keeping populations of prey species in balance)
- the risk of not controlling a locally abundant species, which could lead to irreversible ecological impacts or create welfare issues by increasing the competition for resources between animals
- the risk that control of a species at different times of the year or at different life stages or cycles can intensify welfare or conservation impacts (e.g. disturbing or moving flying fox colonies when females are pregnant or nursing)
- the capability of applicants to carry out control activities humanely.

Decisions about the keeping of fauna consider:

- risks that keeping or trading of a species increases the likelihood that individuals are taken from the wild
- risks associated with keeping individuals in captivity, including whether their welfare is adequately protected
- risks of individuals escaping from captivity into the wild, particularly in areas where they do not naturally occur.

Decisions about the rescue and care of fauna consider:

- minimum standards of care, including that fauna do not suffer unnecessarily in care, receive veterinary care when needed and are euthanised when appropriate
- rescued and rehabilitated fauna are released at an appropriate time and place (where they were taken from), and only when they can successfully survive in the wild (e.g. animals with amputated limbs or domesticated animals should not be released).

Decisions about the display of fauna consider:

- the risks being displayed or used in demonstrations will create undue stress to the fauna (e.g. exposure to crowds of people)
- the appropriateness of conditions where fauna will be kept and displayed
- the appropriateness of activities that use fauna.

Enact a broader range of permission types and conditions

One option for implementing a risk-based approach is through a broader range of permission types and conditions. A broader range of permission types gives the regulator greater flexibility to tailor permissions to the circumstance at hand and increases their capacity to control high-risk activities.

We recommend a new Act include a broader range of permission types and conditions that better reflect the regulatory effort applied to low- and high-risk activities.

Recommendation 8.3

Introduce a broader range of permission types and conditions that reflect the regulatory effort applied to low- and high-risk activities.

Registration or accreditation could be used to regulate lower-risk activities. Regulators such as Consumer Affairs Victoria and WorkSafe use registration to identify and assess businesses that may need regulating and to communicate with them to support compliance.[51] Registering low-risk activities is an effective alternative to a current licence exemption, which provides no line of sight to the parties undertaking the activity. For example, accreditation could be used for possessing a fauna specimen or taxidermied animal or to access fauna where risk is low and there is little to no impact on fauna and ecosystems.

Some cases may require more stringent conditions, such as increased self-reporting requirements and audits of high-risk activities, so the regulator can target effort where it is likely to improve fauna outcomes. Examples include rehabilitation of sick, injured and orphaned fauna and dealing with dangerous fauna.

Other options include attaching conditions to permissions. For example, the regulator could include a mandatory condition requiring a licence holder to monitor and report on the impacts of their activities. The regulator can review activities and respond as necessary. This approach – known as 'adaptive management' – can be used when not all effects of a decision are known at the time.[52] The regulator could set reporting periods (e.g. 6 months) and the Act could include penalties for misinformation and failing to report.

Permissions should also include mandatory minimum standards relating to the humane treatment of animals, including minimum standards relating to the accommodation, care, rescue, rehabilitation, release or killing of animals.

51. P Armytage, J Brockington and J van Reyk, *Independent Inquiry into the Environment Protection Authority*, Melbourne, 2016.
52. See for example *Tuna Boat Owners Association of SA Inc v Development Assessment Commission* [2000] SASC 238; *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited* [2010] NSWLEC 48.

Require the applicant to demonstrate they are suitable

Currently, the Act requires the Secretary to prove an applicant for a permission is not a fit and proper person when refusing an application. This approach contrasts the approach that places the burden of proof on the applicant. For example, someone applying for an aquaculture licence in Victoria must demonstrate they are a fit and proper person to hold the licence.

Currently persons applying for permissions are required to state if they have been found guilty of an offence under the Wildlife Act or the *Prevention of Cruelty to Animals Act 1986*. However, there are no other requirements for them to demonstrate they are an appropriate person or corporation to carry out that activity. The ability for the regulator to prescribe minimum requirements that a person or corporation must meet to be eligible to apply for a permission would appropriately place the burden of proof on the applicant and not the regulator.

Similarly, applicants should be required to demonstrate they can meet the requirements of a permission. For example, Authority to Control Wildlife (ATCW) holders should be required to demonstrate damage is occurring and they can meet certain minimum standards to ensure they are able to humanely dispatch fauna in line with set standards.

Under the current Wildlife Act, licences can be issued to persons over the age of 10, which presents enforcement difficulties if minors are implicated in non-compliance. There is no onus on the parents or guardians to take responsibility for the licence and the conduct of the minor, which may leave licence non-compliance unaddressed.

Recommendation 8.4

Allow the regulator to prescribe eligibility criteria for a fit and proper person and put the onus on applicants to demonstrate they comply with criteria.

8.2 Use permissions clearly, appropriately and consistently

Permissions can be refused, cancelled, suspended or amended, but neither the Act nor the regulations set out criteria guiding the regulator in making these decisions. Provisions that outline grounds for refusing permissions (s 23) apply to only commercial and private wildlife licences and game licences issued under s 22 of the Act. However, the Act doesn't specify grounds for refusal of authorisations issued under s 28A, which includes wildlife shelters and ATCWs.

Currently, licences are issued and renewed as a matter of course, and removed only where non-compliance is detected and significant, or other offences in the Act or similar legislation are triggered. As a result, some licences are perceived as a public right to possess, rather than a privilege (e.g. private wildlife licence, under which fauna is kept as pets). Further, the ease of obtaining a licence and the unlikelihood of losing it for minor non-compliance (e.g. breach of record keeping requirements) is relatively well known within the sector.

When a permission is cancelled, the Secretary or Game Management Authority must notify the holder and allow them to make a written or oral submission that the regulator must consider (ss 28F, 25DA, 25D). Section 86C allows the Victorian Civil and Administrative Tribunal (VCAT) to review permission decisions. Only the applicant or permission holder can ask VCAT to review a decision to refuse, grant, suspend or cancel permissions. VCAT considers whether the decision maker followed the legal requirements and whether it was a good decision that reflects community interests. An applicant or permission holder can appeal a VCAT decision in the Victorian Supreme Court. At the appeal stage, the court will consider whether the VCAT decision was made according to the correct law, and accounts for procedural justice.

We propose several recommendations to address the current deficiencies.

Introduce mandatory criteria for permissions

Because the current Act lacks criteria relating to permissions, the OCR developed a risk-based framework for considering and refusing applications under s 28A. However, the decision making provisions of the Act are subjective and lack a clear and transparent process for appeals.

We recommend including criteria to guide decisions about approving, refusing, suspending and cancelling permissions in a new Act. This approach improves clarity for both the regulator and the community. Further, decisions about how criteria are applied should be transparent. We addressed this aspect in Chapter 7 as part of our recommendation to strengthen reporting requirements.

Recommendation 8.5

Allow the regulator to develop and publish mandatory criteria and guidelines that it will apply in making decisions about permissions.

This approach is common, with environmental and natural resource statutes in other jurisdictions now including criteria that guide decision making (e.g. the *Nature Conservation Act 1992* (Qld).

Criteria may include:

- consistency with the purpose and principles of the Act
- consistency with any applicable fauna strategy and/or management plan in place
- consideration of whether the activity is ecologically sustainable and accounts for the status of the species (e.g. lethal control should not generally be permitted for threatened species)
- consideration of whether the activity meets animal welfare standards
- whether and how conservation outcomes might be enabled and encouraged
- potential impacts on third parties, including Aboriginal Victorians.

Introduce an internal review process for permission decisions

Section 86C of the current Act allows VCAT to review decisions the Secretary or regulator can make about licences, authorisations and permits including refusing to grant, refusing to renew or suspending or cancelling a licence, authorisation or permit. In doing so, VCAT can make a range of orders that can affirm the original decision, vary or set aside (and remake) the decision or set aside the decision and send the matter back to the decision maker with recommendations.

However, the current Act does not contain provisions for an internal review at the request of the applicant or permission holder. An internal review process provides for a more accessible, quicker and cost-effective way to challenge a decision than external processes such as appeals to VCAT or judicial review. Internal review processes can also help improve the quality of the initial decision making.

We propose allowing for an internal review process in a new Act, including specifying the types of decisions that can be reviewed, the process and timelines, among other things.

Recommendation 8.6

Provide for an internal review process of permission decisions by the regulator.

9. REFORM COMPLIANCE MECHANISMS

KEY POINTS

The Minister asked the Panel to examine ways to encourage compliance with the Act, including whether offences and penalties under the Act are appropriate to punish and deter fauna crime.

We recommend encouraging compliance through a new Act that focuses on mechanisms that avoid harms, rather than on prosecuting harms once they have occurred.

We recommend a new Act:

- modifies fauna offences to:
  - address new harms
  - include new provisions for attempted fauna offences, aiding and abetting fauna offences, habitat destruction, feeding of fauna and fauna trafficking
  - extend the statute of limitations
- modifies the penalties and sanctions to support a more graduated range of administrative, civil and criminal penalties and sanctions
- includes sentencing guidelines for courts and define harm
- reforms powers of authorised officers to investigate and intervene in fauna offences.

The Minister asked the Panel to examine ways to encourage compliance with the Act, including whether offences and penalties under the Act are appropriate to punish and deter fauna crime. Criticisms of the current framework include that it focuses too heavily on prosecuting harms once committed, rather than providing mechanisms that deter and avoid harms in the first place. This chapter outlines the step changes that can create a modern compliance framework that better delivers our vision for fauna in Victoria. Our recommendations support this shift and aim to encourage better compliance with the Act. The chapter also outlines the implications of our recommendations.

Other mechanisms outside the Act can also affect compliance; we discuss these options in Chapter 10.

9.1 Reform offences

Part VII of the current Act contains most offences relating to:

- hunting, taking or destroying wildlife
- buying, selling, acquiring, receiving, disposing of, keeping, possessing, controlling, breeding, processing, displaying, taking samples from or experimenting on wildlife
- marking wildlife
- disturbing wildlife or causing wildlife to be disturbed.

These offences are separated according to the status of the wildlife – protected wildlife, threatened wildlife or game – with different penalties for the same offence depending on the status of the wildlife. Offences relating to marine mammals are contained in Parts X and XA of the Act.

Authorised officer with seized wildlife Credit: Doug Gimesy

Part VII also includes offences for:

- dogs or cats attacking or chasing wildlife on public land
- using prohibited equipment, punt guns or substances such as bird lime to restrain, take or hunt wildlife
- killing wildlife by poison without authorisation
- interfering with scientific equipment or notices
- providing false information in a licence application or keeping false records in relation to a licence or authorisation
- hindering or obstructing hunting during duck hunting season.

Part VIII includes offences relating to interactions with authorised officers and police officers, such as refusing to give a name or address, obstructing or physically or verbally assaulting officers or impersonating an officer. Part IX relates to controlled operations and includes offences around disclosing information about a controlled operation without authorisation. There are also offences for contravening the conditions of a licence, permit or authorisation.

The Act does not include offences relating to animal cruelty. These are dealt with under the *Prevention of Cruelty to Animals Act 1986* (POCTA Act). Activities undertaken in accordance with a licence or authorisation issued under the Wildlife Act are exempt from the cruelty offences under the POCTA Act. This means the Office of the Conservation Regulator (OCR) must ensure licences or authorisations include conditions that prevent cruelty and protect animal welfare. The POCTA Act is being reviewed, but the new legislation is expected to retain this exemption.

Over the past 10 years, the most common offences were:

- illegal possession/trade/use of wildlife (including take of protected and threatened wildlife from the wild, possession of wildlife without a licence and possession in contravention of a permission)
- destruction or harm to wildlife (i.e. killing or injuring wildlife in the wild)
- failure to maintain records and non-compliance with permission conditions, including where this causes harm to legally possessed wildlife (e.g. inadequate husbandry, cruelty and welfare offences against captive wildlife) (Figure 8).

Less common offences included the unlawful movement of wildlife over state borders (failure to obtain or comply with import or export permits), damage of wildlife habitat, attracting or luring wildlife with the intent to trap and obstructing hunting.

Figure 8: Common offences over the past 10 years under the *Wildlife Act 1975,* Wildlife Regulations 2013 and Wildlife (Game) Regulations 2012

Data sourced from the Offence Management System, Department of Jobs, Precincts and Regions, October 2021

Include new offences

The current Act has gaps in its offences for harms that have emerged since it was drafted, including:

- attempted fauna offences. An attempted offender cannot be sanctioned if their offence is prevented (e.g. by the OCR or the community). As a result, the Act does not deter future attempts of an offence, given a person may not be detected if they try again
- aiding and abetting fauna offences. No offence provisions enable punishment of a person who assists another person to commit a fauna crime. A person who does not actually take part in the crime but assists (e.g. supplies a poison or trap) or directs a person to commit the crime needs to be held accountable for their role in breaching the law
- habitat destruction. Protection of fauna habitat on private land relies heavily on the appropriate administration of other legislation such as the *Planning and Environment Act 1987*, which is directly administered by local governments. To manage and address impacts where local governments fail to intervene, or decide not to intervene, an offence regarding destruction of habitat is needed. This offence currently sits in the regulations, which limits the penalty that can apply. As a result, penalties are often insufficient, particularly when dealing with large scale habitat destruction and clearing of important habitat for threatened species. Implementing this offence provision will not replace the need for appropriate application of the Planning and Environment Act, but rather provides additional tools for safeguarding habitat
- feeding animals in the wild and fauna trafficking. The absence of these offences limits the OCR's capacity to recognise and appropriately investigate and enforce harms to fauna in these areas.

We propose including new offences in a new Act, to support diverse, healthy and resilient fauna populations, and better practice regulation and governance.

Recommendation 9.1

Include new offence provisions relating to:

- **attempting fauna offences**
- **aiding and abetting fauna offences**
- **destruction of habitat**
- **feeding animals in the wild**
- **fauna trafficking.**

Clarify strict liability

Generally, offences that carry penalties or punishment towards the higher end of the spectrum require that the prosecution prove the person both committed the offence and also **intended** to commit the offence. This is known as having both a guilty act and a guilty mind.

The current Act is silent on the standard that applies under its offences. That is, it does not suggest under which offences only one of the elements (guilty act) must be proven for the accused to be found guilty.

In practice, the requirement to prove both the act and intent or the act alone will be determined by the punishment being sought. For example, a prosecution strategy that seeks a custodial (prison) sentence will almost always require that both components are met.

More contemporary legislation, in certain areas of law, stipulate that the requirement to prove intent is removed and so the prosecution need only prove the person did the unlawful act. This is known as strict liability. To strengthen the deterrent effect of a new Act and increase its effectiveness in preventing wildlife crime, we propose the Victorian Government consider applying strict liability for appropriate offences.

We recognise it is likely offences carrying lower penalties or punishment are where strict liability can be applied, and where applying strict liability is likely to have the greatest impact.

Recommendation 9.2

The Victorian Government should explore the application of strict liability to appropriate offences in a new Act.

Extend the statute of limitations to lay charges

The current statute of limitations for offences under the Act is 2 years (i.e. charges must be laid no later than 2 years after the date on which the offence is alleged to have been committed). Offences under the Wildlife Regulations have a statutory limitation period of 1 year.

We consider these timeframes are not sufficient to properly investigate offences before laying charges. Generally, fauna crime investigations are complex, because they can occur in geographically dispersed and remote areas of the state, there are challenges with evidence gathering (e.g. decomposition of illegally destroyed fauna), and there is a reliance on community reporting for detection and intelligence.

We propose extending the statute of limitations to lay charges to 3 years. This longer period is appropriate and necessary to improve the chances for a successful enforcement outcome, given fauna crime investigations are complex and may not be detected until well after a crime is committed. A 3-year statute of limitations is also consistent with the recent amendments to the *Sustainable Forests (Timber) Act 2004* which extended its statute of limitations to 3 years.

Recommendation 9.3

Extend the statute of limitations to lay charges for offences to 3 years.

9.2 Reform sanctions

The Act and its regulations allow for the administrative, civil and criminal sanctions illustrated in Figure 9. The Act contains over 40 offences with maximum penalties ranging from fines of 20 penalty units ($3,300) to 1,000 penalty units ($165,220) or 2 years' imprisonment (Appendix A).

The Act relies heavily on administrative sanctions and criminal penalties with very little option to use civil penalties. Authorised officers can apply only low- or high-range interventions to encourage a regulated party to comply. Moderate interventions such as a broader range of infringements, notices and orders (e.g. enforceable undertakings, banning orders and injunctions) are largely absent.

Many of the offences in the Act are not infringeable because they do not meet the requirements of the *Infringements Act 2006*. Possessing captive-bred wildlife under a lapsed licence is an offence under s 47 but is not infringeable because it is an indictable offence. The lack of infringeable offences limits the OCR's options to take action. Options such as issuing an official warning do little to deter future offending in some circumstances, while suspending and cancelling a licence or authorisation and prosecution are often onerous and disproportionate with the harm posed.

We examined issues with the current Act's compliance framework against better practice principles of contemporary compliance frameworks and the risk framework (Figure 2, Chapter 1).

Figure 9: Sanctions under the *Wildlife Act 1975*

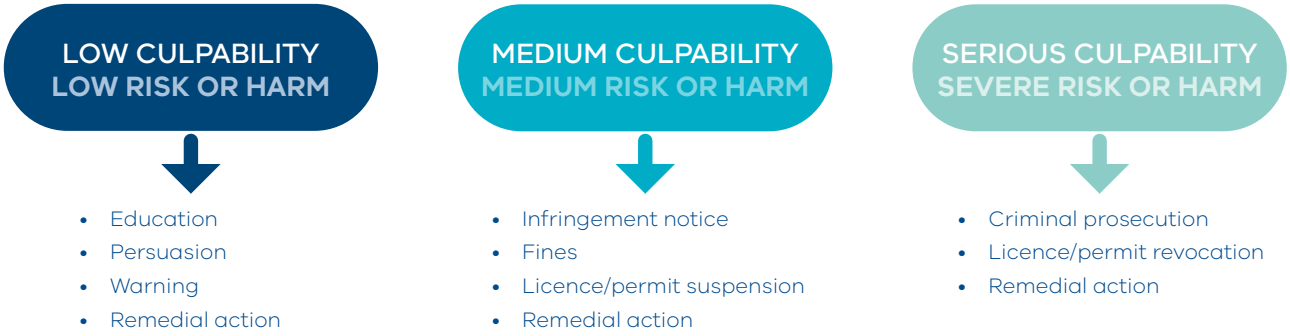
- Formal verbal caution or warning letters
- Infringements (for offences under the regulations only)
- Insertion or amendment of conditions in licences, permits and authorisations
- Suspension, revocation or cancellation of permissions or authorisations
- Notices to comply
- Banning notices[a]

- Exclusion orders[a]

- Penalties (monetary)
- Imprisonment

[a] This sanction applies only to people interfering with duck season.

Figure 10: Assessment of culpability and risk of harm



Adapted from White & Heckenberg, 2014 and Krpan, 2011

Contemporary compliance frameworks allow the regulator to react to situational factors and be proactive to potential risks and threats. Measures broadly involve 3 levels of intervention, reflecting differing levels of seriousness of harm to fauna and the culpability of the offender (Figure 10). Typically, measures in a compliance framework include:

- **Administrative measures** for less serious offences, including penalty infringement notices, warnings, directions and remedial action
- **Civil measures** for moderate seriousness for 'balance of probabilities' offences, including measures such as injunctions, enforceable undertakings, payments and remedial action
- **Criminal measures** for serious, for 'beyond reasonable doubt' offences including measures such as strict and absolute liability, fines and imprisonment and remedial actions.

When choosing the appropriate intervention, the regulator considers assessments of culpability and harm. For example, an individual who deliberately breaks the law may receive a different sanction than one who breaks the same law but is ignorant or negligent. This decision also depends on the scale of harm.

In practice, reactive compliance mechanisms such as fines and imprisonment are not effective mechanisms for fauna harm deterrence or protection, if environmental crime prosecutions are any guide[53] and accounting for deliberate offending.[54] Many Victorians may be aware of Victoria's wildlife offences and sanctions only if they contravene them and are detected. This means the Act's compliance framework needs measures beyond reactive offences and sanctions.

Good regulatory practice involves:

- using communication, education, incentives and other methods to change community attitudes and behaviours towards fauna and help people to comply
- including sanctions and penalties that allow for graduated, appropriate and enforceable action that deters people from breaking fauna laws and effectively punishes them when they do
- engaging in collaborations that permit legitimate human use and interaction with fauna, and disrupt fauna crime (e.g. multi-agency networks, community groups).

We make recommendations about engagement, communication and education in Part III, Chapter 10 as these mechanisms sit outside the Act.

We recommend a new Act includes a more comprehensive toolbox of sanctions. This approach gives the OCR flexibility to impose low-, medium-, or high-level sanctions that reflect the seriousness of harm (individuals, population scale, ecosystems) and the characteristics of the offender (individual or commercial enterprise, and previous compliance and standards performance).

We have not prescribed which measures to include. Rather, the following sections outline some of the options and issues to consider when selecting measures.

53. See S Chin, W Veening, and C Gerstetter, *Policy Brief 1: Limitations and challenges of the criminal justice system in addressing environmental crime*, European Union Action to Fight Environmental Crime, 2014.
54. Sentencing Advisory Council of Victoria, *Animal cruelty offences in Victoria*, Melbourne, 2019, p xvi.

Recommendation 9.4

Include a broader, more graduated schedule of administrative, civil and criminal sanctions that:

- **includes notices and orders that can be tailored to the circumstances of the offending**
- **specifies maximum penalties that are consistent with other jurisdictions, differentiated to reflect the status of fauna and the type of offender, and commensurate with culpability of the offender and the harm**
- **considers other remedies such as restorative and reparative justice.**

Administrative and civil sanctions

Other Australian jurisdictions use administrative and civil sanctions to encourage compliance. For example, the *Protection of the Environment Operations Act 1997* (NSW) includes a broad range of orders, giving the regulator flexibility in responding to compliance and enforcement issues. These orders include: for restoration and prevention; for payment of costs, expenses and compensation; to pay investigation costs; monetary benefit orders; environmental service orders; for payment into an environmental trust; order to attend a training course; and order to provide financial assistance.

Banning orders is another option included in some legislation, but they cannot be used as a sanction under the current Act (except to ban interfering with hunting). There is currently no provision other than refusing a licence that prevents further possession of wildlife under the Act. This is inadequate for several reasons:

- Some protected wildlife (listed under Schedule 4 of the Wildlife Regulations 2013) do not require a licence to possess or trade, therefore there is no mechanism to prevent someone from doing so.
- Convicted offenders can become assistants under a commercial wildlife licence and continue trading despite their own licence being refused or cancelled.
- Convicted offenders can operate under the licence of a family member or friend, because these licences cannot reasonably be refused under the current framework.

The POCTA Act contains provisions to prohibit animal possession for people convicted under that Act, to prevent a person from owning or working with animals for up to 10 years on a first offence. A provision to ban a person from access to or possession of fauna on application to the civil court would help penalise and manage commercial and trafficking offences, repeat possession offences, and circumstances when cruelty is not a factor in offending.

Other regulatory regimes emphasise administrative measures such as verbal cautions, warning letters and infringements, rather than taking fauna offences to court (Box 5).

Box 5: Administrative and civil sanctions

Civil penalties

Civil penalties are sanctions that are imposed by courts in non-criminal proceedings following action taken by a government agency. Breaches do not involve a prison sentence or a criminal conviction. Further, they involve a lesser quantum of proof for conviction than a criminal offence (which is proof beyond reasonable doubt). Civil penalties are primarily a deterrent, rather than a punitive measure.

Currently, the Act does not contain any civil penalty provisions. In contrast, the *Environment Protection (Amendment) Act 2018* (Part 11.5) contains numerous civil offences for breaching permits or licences; maximum penalties can amount to 1,000 penalty units for an individual or 5,000 penalty units for a corporation.

Verbal warnings and written warning letters

These sanctions may encourage compliance when offending results in low harms, and culpability is low and/or extenuating circumstances discourage the use of fines. An example is minor record keeping offences that do not affect animal welfare. In this case, education about the importance of good record keeping may be more appropriate than financial or criminal sanctions.

Infringement notices

Infringement notices or 'on-the-spot' fines involve paying a monetary penalty instead of being prosecuted for an alleged summary offence. They deal with minor offences efficiently, while saving the offender, the regulator and the court time. Infringement notices can vary depending on the seriousness of the offence, though the maximum penalties are significantly lower than court-imposed fines.

Enforceable undertakings

An enforceable undertaking is an agreement between a person (or an organisation) and a regulatory body, where the person agrees to carry out activities relating to an alleged breach. The undertaking is enforceable in a court and is an alternative to formal court proceedings. An undertaking may, for example, require a person to comply with the terms of the undertaking, pay compensation for any harm or damage caused, publish an apology, cease the offending conduct, establish compliance programs, or perform community services.[55] The person cannot be prosecuted while the undertaking is operating, but failure to comply can result in prosecution.

Compensation orders, financial assurances and payment of prosecution costs

A compensation order requires a person found guilty of an offence to compensate an affected person or regulatory authority for: the injury, loss or damage any costs they incurred to prevent, minimise or remedy any injury, loss or damage suffered.[56] Currently, the Act does not allow for compensation orders. Nor does it provide for mandated bonds or financial assurances, which a regulator may use to cover the costs of keeping and maintaining seized fauna before finalising a prosecution (which may take considerable time).[57] The costs of prosecution may be considerable and, in some cases, exceed the amounts received via financial sanctions. In some jurisdictions, orders for paying investigation and prosecution costs may be made against an offender.

Removal of monetary benefits

In some circumstances (such as illegal trade in fauna), an offender may profit from the offence. Some legislation permits a court to order the offender to pay an amount estimated to be the gross benefit they gained by committing the offence. This provision acts as a deterrent by removing any financial benefit gained from committing the offence (e.g. s 13.24 of the *Biodiversity Conservation Act 2016* (NSW)). The payment amount is not subject to any maximum penalty stated in the Act.

Forfeiture of seized items and property used in committing an offence

Under s 70A, a court that has found a person guilty of an offence can order the destruction or disposal of anything seized relating to the offence. An additional potential sanction is forfeiture of property that is used to commit an offence, such as vehicles or weapons (e.g. s 12C of the Singapore Wild Animals and Birds (Amendment) Bill 2020). The *Confiscation Act 1997* contains general provisions for confiscating property and the proceeds of crime, but a specific provision in the Act could give it added force in cases where property used to commit an offence is forfeited, no matter what its value.

55. *Environment Protection (Amendment) Act 2018*, Part 11.2; *Flora and Fauna Guarantee Act 1988*, Part 6, Div 3A, s 62AI; *Regulatory Powers (Standard Provisions) Act 2014* (Cth), ss 109–115.
56. *Environment Protection (Amendment) Act 2018*, s 313; *Flora and Fauna Guarantee Act 1988*, s 62.
57. *Environment Protection (Amendment) Act 2018,* Part 8.4.

Other remedies

The Act lacks other sanctions or remedies that might help achieve its objectives. A new Act could include sanctions and remedies that are proportionate to the harm done and the culpability of the offender (Box 6). Such sanctions and remedies may deter the offender and others from committing the same or similar offences, ensure offenders do not profit from their crimes and change the offender's behaviour.

Criminal sanctions

Currently, the only criminal sanctions in the Act are penalties that include monetary fines or imprisonment. The Act contains over 40 offences (Appendix A). In most cases, the criminal penalties differ depending on the status of the wildlife involved, with offences involving threatened wildlife having higher penalties than those involving non-threatened wildlife. For example:

- the penalty for hunting, taking or destroying threatened wildlife without authorisation is 240 penalty units ($43,617.60) or 24 months imprisonment or both, and an additional 20 penalty units ($3,634.80) per head of wildlife impacted
- the penalty for hunting, taking or destroying non-threatened wildlife or game is 50 penalty units ($9,087) or 6 months imprisonment or both, and an additional 5 penalty units ($908.70) per head of wildlife impacted.

Maximum penalties in the Act place an upper limit on the court's power to punish an offender, to indicate how serious the offence is and to establish the outer limits of the punishment that is proportionate to the offence. They also provide for sentencing the worst example of the offence by the worst offender.

Box 6: Innovative justice measures

Restorative justice

'Restorative justice' involves repairing the harm caused by offenders. In this context, justice refers to both an activity (voluntarily carried out by the offender to benefit those affected by the crime) and a process (involving victims, offenders and community members).[58] The emphasis is on participation and dialogue, putting things in context, learning lessons, and 'making things right'. Examples include victim–offender mediation, juvenile conferencing, circle sentencing, and reparative probation.

Reparative justice

'Reparative justice' is a process used when the perpetrator may not be a human entity (e.g. a corporation) and/or when the offender is a powerful individual or company for whom 'redemption' may be less relevant than repairing the harm.[59] It can require repairing harm without involving consensual agreement or negotiation with the community, etc. This may be appropriate because company personnel change and company practices require regulatory and enforcement systems that penalise and sanction in ways that are tailored to the size and activities of the corporation.

Empathy training

Empathy training aims to increase offender appreciation of the perspective of the victim and, in particular, to understand and feel emotions appropriate to the situation. Empathy training tries to shift the way that offenders experience and perceive the world around them through therapeutic programs. For example, those who deliberately kill animals are frequently de-sensitised to the suffering they cause and as a result, lack empathy. Examples of prison-based animal programs include therapeutic visitation programs where companion animals are brought to the facility, fauna rehabilitation programs where prisoners care for and release injured fauna, and pet adoption programs where prisoners adopt and care for animals.

58. See C Cunneen, R White and K Richards, *Juvenile justice: youth and crime in Australia,* Oxford University Press, Melbourne, 2015.
59. R White, 'Reparative justice, environmental crime and penalties for the powerful', *Crime, Law and Social Change,* 2017, 67, pp 117–132.

The highest maximum penalty in the Act is 1,000 penalty units or $181,740, which is for various offences relating to whales. The monetary penalties have a very limited range, with the second highest maximum penalty being 240 penalty units ($43,617.60), which applies for various offences including taking, hunting or destroying threatened wildlife without authorisation.

The maximum imprisonment time under the Act is 10 years, for disclosing information about a controlled operation with the intention of endangering the health or safety of a person, or to prejudice the effective conduct of the operation. However, most penalties involving prison sentences are between 6 and 24 months.

When compared with other Victorian legislation, the penalties under the current Act are lacking. As a result, the regulator or prosecutor often pursues charges under other legislation, such as the POCTA Act, to achieve better enforcement outcomes.

The Victorian community has expressed concern about the sanctions imposed for wildlife offences (Box 7). First, while Victoria has separate offences for threatened wildlife or protected wildlife for the offence of hunting, taking or destroying wildlife, other states provide unique penalties for more categories of wildlife. For example, Western Australia has a different maximum penalty if the offence was conducted upon a cetacean, a critically endangered species, an endangered species, a vulnerable species, or a common species. New South Wales also provides for threatened species, vulnerable species and common species. These graduated penalties apply to all offences relating to wildlife, such as contravention of licence, unlawful dealing, and habitat destruction.

Second, although the Act contains some additional penalties, a general additional penalty provision does not cover all offences. For example, taking, hunting or destroying wildlife incurs an additional penalty per head of wildlife impacted, but injuring wildlife does not. In contrast, the *National Parks and Wildlife Act 1972* (SA), for example, imposes additional penalties on top of the general sentence for each animal killed, harmed or affected. Further, such penalties can be graduated to reflect the status of the animal: $1,000 per animal if it is an endangered species, $750 for a vulnerable species, $500 for a rare species and $250 for other animals.

Third, the Act does not specify maximum penalties for interfering with or destroying wildlife habitat that indirectly affects wildlife. Although it is an offence under the Wildlife Regulations (r 42) to disturb, damage or destroy wildlife habitat, the maximum penalty is only 50 penalty units ($8,261).

This penalty significantly diminishes the potential seriousness of this offence. In contrast, the *Biodiversity Conservation Act 2016* (NSW) (s 2.4) makes it an offence to damage the habitat of threatened species or ecological communities and carries a maximum penalty of 2 years' imprisonment or $1,650,000 for a corporation or $330,000 for an individual.

Fourth, the Act does not address continuing offences. The only offences that specify increased penalties for repeat offenders relate to interfering with duck hunting. A continuing offence is a single ongoing failure to perform a duty imposed by law, with a penalty that can be imposed for each day the offence continues after a conviction or notice of contravention. It is usually specifically provided for in legislation. Section 13.11 of the Biodiversity Conservation Act (NSW) is an example (although it is likely to apply to offences against the environment rather than wildlife).

Fifth, the penalties generally do not differentiate between natural persons and companies. Only 2 of 65 offences in the Act differentiate between commercial and private persons.

Further, while prison terms for wildlife offences in Victoria are in line with other Australian jurisdictions, maximum fines in Victoria are among the lowest in the country. Specifically, penalties in Victoria are substantially lower than those in New South Wales, Queensland and Western Australia. Those jurisdictions also have a greater variety of graduated penalties that reflects the class of wildlife that has been harmed or traded.

New South Wales has the highest maximum penalties for offences relating to flora and fauna under the Biodiversity Conservation Act (NSW) (s 13.1). That Act creates 5 tiers of maximum monetary penalties. Tier 1 penalties for a corporation are $1,650,000 with an additional daily penalty of $66,000 and an additional penalty of $66,000 for each plant or animal. For an individual, the maximum penalties are $330,000 with an additional daily penalty of $33,000 and a penalty of $33,000 for each animal or plant. The maximum imprisonment term is 2 years. A tier 5 offence carries a maximum penalty of $22,000 for either an individual or corporation. Similarly, the EPBC Act contains maximum penalties of up to $1,050,000 and 7 years' imprisonment for an individual or up to $10,050,000 for a corporation.

Possible options for a new Act include the following:

- Reset maximum penalties in line with those in Queensland, New South Wales and Western Australia
- Introduce graduated penalties that reflect the status of fauna affected, e.g. critically endangered species, endangered species, vulnerable species or common species
- Allow for additional penalties on top of the general sentence, e.g. for each animal killed, harmed or affected
- Make penalties consistent between offences, such as having consistent approaches to penalties for additional fauna impacted under difference offence categories
- Introduce differentiated penalties for natural persons and companies.

9.3 Consider expanding legal standing for merits review

The current Act does not provide for a third party to seek a review of a decision made under the Act on its merits. A third party is restricted to appeal a decision on administrative grounds only. This means that a court can only intervene in a decision if a third party can prove the procedures required in making the decision were not observed, the decision was not authorised or the decision involved an error of law. A third party can seek a review of a decision on its merits only if the Act under which the decision was made extends jurisdiction to hear such a review to a tribunal or court.

The right of a person or body to ask a court or tribunal to hear an appeal is commonly referred to as 'standing'. The approach to standing has changed significantly in recent years, particularly relating to environmental matters. For example, legislation often seeks to 'involve the public in decision making and enforcement, both as a means of information gathering prior to making decisions, and as an aid to enforcement after they are made'.[60]

We recognise standing is a complex issue and the risks of vexatious third party appeals must be balanced against the rights of those affected by the decision.

Examples of where standing has been granted in existing laws

Standing can be virtually open ended, as with the *Environmental Planning and Assessment Act 1979* (NSW) (s 123), which extends standing to everyone by providing that 'any person' may enforce the law or participate in the statutory scheme. Other regulatory regimes may use various tests including that a third party must be 'materially affected' by the decision which has seen both narrow and broad interpretations of the test by the courts.

The concept of 'open standing' does not require the application of a statutory or common law test. It works on the basis that any person, without restriction, can appeal a decision (and in some jurisdictions have costs awarded against them). While some critics argue open standing would increase the number of unfounded or frivolous appeals, analysis of open standing in New South Wales after more than 30 years of operation found open standing has supported legislative objectives, not undermined them. Forecasts that open standing would swamp the court with unworthy litigation did not happen, with most litigation by environmental activists found to be discerning, and contributed significantly to the jurisprudence of the court.[61]

Slightly more restrictive forms of standing establish a person or body as appropriate due to factors such as a demonstrated commitment to environmental protection. Various factors can be combined to indicate capacity to properly represent the public interest.

The key issues in determining standing in a new Act are to whom and what extent standing will be provided, and how this will be articulated in legislation. For example, the new Part 11.4 of the *Environment Protection Act 2017* allows an 'eligible person' (s 308) to take action to enforce the Act or a permission granted under the Act. 'Eligible person' is defined as:

- a person whose interests are affected by the contravention or non-compliance that is the subject of the application, or
- a person who has the leave of the court to bring an application. Leave will only be granted if the court is satisfied that:
  - the application would be in the public interest, and
  - the person had requested in writing that the Environment Protection Authority (EPA) take enforcement or compliance action, but the EPA failed to take enforcement or compliance action within a reasonable time.

We do not recommend open standing for any decision made under a new Act in the first instance. However, we see merit in providing open standing for review of a narrower set of more strategic decisions. These could include decisions about when a fauna plan is required to address a particular issue or set of circumstances.

Recommendation 9.5

Expand legal standing to third parties to seek merits reviews for certain strategic decisions, such as approving a fauna plan.

60. G Bates, *Environmental law in Australia,* LexisNexis Butterworths, Sydney, 2013, pp 740–741.
61. G Bates, *Environmental law in Australia,* LexisNexis Butterworths, Sydney, 2013, p 762.

9.4 Modernise powers of authorised officers

The Act gives authorised officers comprehensive entry and search powers. Officers can also issue retention orders to maintain evidence integrity and availability, and to direct persons in certain circumstances (including licenced persons, in the vicinity of marine mammals, and during a wildlife emergency). Under warrant, authorised officers may exercise their entry and search powers at a dwelling. Authorised officers are also authorised under the POCTA Act, however the powers of entry, information gathering and investigation differ under the Wildlife Act and the POCTA Act.

In some instances, authorised officers have limited ability to investigate fauna non-compliance and gather evidence in a timely manner. For example, financial and telecommunications records can be obtained only by serving a warrant at a premises or by searching premises. However, some businesses are based online (e.g. some financial institutions) and do not have a premises.

When the Act has been breached, authorised officers can seize fauna in the offender's possession. However, the OCR must maintain any fauna until a court makes an order for their disposal. In practice, this leads to erring against seizure, given the significant administrative and husbandry burden it can involve. This in turn, undermines outcomes for fauna.

Recommendation 9.6

Ensure authorised officers have the appropriate powers to undertake their compliance and enforcement duties and the new Act provides for appropriate delegations.

We recommend reviewing and expanding authorised officers' powers relating to seizure and forfeiture of fauna, to ensure they support efficient and flexible enforcement processes and achieve the best outcomes for fauna.

In particular, we propose modernising enforcement and investigatory powers in line with equivalent investigatory powers elsewhere in Victoria (notably with the POCTA Act) and federally. For example, authorised officers should be granted broader powers to request records and documents as evidence, similar to powers under the *Environmental Protection Amendment Act 2018* (s 255) and the EPBC Act (s 486F).

The processes for seizing fauna should be improved to match those used in other Acts. For example, under the POCTA Act, the regulator can apply to the magistrate's court for an order to dispose of the animal if proceedings have commenced (i.e. the regulator does not need to wait for an outcome of proceedings, which can take years). The court may also order the owner to pay a bond or security to the regulator to care for the animal and cover any associated costs.

Investigation into mass poisoning of Wedge-tailed eagles
Credit: Doug Gimesy.

Box 7: What do the proposed changes to sanctions mean in practice?

Illegal destruction of wedge-tailed eagles

In 2018, 134 wedge-tailed eagles were found dead on private property in East Gippsland. Many were killed between October 2016 and April 2018 using bait impregnated with poison. Following a major investigation, charges were laid under the *Wildlife Act 1975* against one person, who was found guilty for illegally destroying a large number of eagles. They were fined $2,500 and jailed for 14 days, the first custodial sentence for destruction of wildlife in Victoria. However, many in the community viewed the prosecution outcomes as inadequate and disproportionate given the large number of deaths of an iconic protected species.

Reforms to improve future enforcement outcomes:

- Extending the statute of limitations to a more appropriate term and improving authorised officers' evidence gathering powers will greatly increase the regulator's chances of a successful prosecution.
- Increasing penalties and prison terms, commensurate with benchmarks in other jurisdictions, along with guidelines for sentencing for courts, will enable courts to issue a punishment that better fits the seriousness of the crime.
- Creating new offences for aiding and abetting wildlife offences will also ensure anyone soliciting or counselling illegal activity can be held accountable for their actions.

Illegal habitat destruction

In 2018, the Department of Environment, Land, Water and Planning (DELWP) received reports from the community of alleged illegal clearing of native vegetation on private property near Nurcoung. DELWP investigated the clearing using satellite imagery and noted approximately 70 ha of native vegetation had been removed without a planning permit, creating a newly ploughed area.

The site is adjacent to the Little Desert National Park and contiguous with that vegetation. The area cleared contained modelled habitat for 66 rare and threatened flora and fauna species, including Mallee fowl, which is listed as threatened under the *Flora and Fauna Guarantee Act 1988* and as vulnerable under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). At least 10 recorded breeding mounds are within 3 km of the area cleared.

DELWP and the Office of the Conservation Regulator worked together with the local council to pursue enforcement options under both the *Planning and Environment Act 1987* (for clearing native vegetation without a planning permit) and the Wildlife Regulations 2013 for illegal destruction of habitat. The offender was issued an infringement notice for approximately $800 for the illegal destruction of wildlife habitat. Prosecution was not pursued.

Reforms to improve future enforcement outcomes:

- Elevating the offence for the destruction of habitat from the regulations to a new Act will allow for increased penalties, so the punishment is proportionate with the extent or significance of the illegal destruction. By adopting a broader range of civil sanctions, such as restorative justice mechanisms that require the offender to repair the harm, the regulator can achieve better enforcement outcomes.

9.5 Provide sufficient guidance for courts in sentencing

Sentencing aims usually include punishment, deterrence, rehabilitation, denunciation and community protection. In determining the appropriate combination of penalties and sanctions, the sentencing judge considers the details of the offending conduct (the circumstances and the harm caused) and the subjective characteristics of the offender. In most cases, the sentence handed down is less than the maximum penalty.

Relatively few fauna-related cases go to criminal trial, which limits magistrates' operational knowledge of dealing with fauna offences and their understanding about how to measure seriousness of harm as well as gravity of the offence.

Several options could address this issue:

- a guidebook for magistrates that explains the quantum and types of harm to wildlife, linked to specific offences
- a specialist court or Division of the existing court. Specialist environmental courts established elsewhere in Australia and overseas have jurisdiction to hear merit appeals, civil enforcement proceedings, civil penalty proceedings, criminal prosecution and, in some instances also judicial review applications. The NSW Land and Environment Court is an example
- a fauna crime sentencing database that provides detailed sentencing information including sentencing statistics on offences, penalty types, characteristics that relate to the objective seriousness or gravity of the offence, and subjective characteristics that relate to the particular offender (similar to the NSW environmental crime sentencing database)
- formal sentencing guidelines for offenders convicted under the Act. For example, the Biodiversity Conservation Act (NSW) (s 13.12) requires the court 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. Such guidelines would put fauna offences in the context of community standards, as well as specific and general ecological conditions confronting fauna. This approach would help the courts understand the connection of the offence with the seriousness of the crime and promote understanding of community expectations concerning protecting and conserving fauna.

Other ways to include non-legal expertise include community impact statements, expert opinion and specialist court appointments.

Recommendation 9.7

Develop an indicative sentencing guide or matrix for the regulator and the courts for fauna offences.

PART III

Recommendations supporting a new Act for fauna

10. USE OTHER MECHANISMS TO PROMOTE OUTCOMES FOR FAUNA

KEY POINTS

The Minister asked the Panel to examine the best ways to encourage compliance with the Act. As well as reviewing the Act, we considered other mechanisms outside the Act that can encourage compliance and deliver better outcomes for Victoria's fauna.

We recommend:

- greater investment in fauna education and behavioural research
- greater risk-based investment in monitoring and surveillance
- greater encouragement and investment in conservation on private land.

In earlier chapters, the Panel recommends ways a new Act can improve outcomes for Victoria's native fauna by protecting, conserving and contributing to reversing the decline of fauna and their ecosystems. We also recommend ways a new Act can address barriers to Traditional Owners' and Aboriginal Victorians' self-determination relating to fauna. And we recommend ways the Act can support better outcomes for fauna by building public understanding and trust of fauna management through greater public participation and transparency.

But a new Act is only one part of Victoria's framework for protecting wildlife and biodiversity. In this chapter, we consider other mechanisms outside a new Act that can support better outcomes for Victoria's native fauna and its ecosystems. Considering these complementary mechanisms is important for several reasons:

- First, complementary measures (such as education programs) can increase awareness and understanding of Victoria's native fauna and its ecosystems. This increased awareness is important for improving outcomes for fauna, and may also encourage compliance with regulations relating to fauna. Currently, many Victorians may not consider the effects of their actions on fauna, or be aware of the provisions of the Act unless they breach them, and their breach is detected and enforced.
- Second, even a new Act will have limited influence on the activities of private landholders in Victoria. There is much this group can do to support better outcomes for Victorian fauna, given private land accounts for more than two-thirds of all land area in Victoria. Further, the *Victorian state of the environment 2018* report found conservation on private land was the only indicator of Victoria's biodiversity that was improving.[62]

This review is an opportunity to reinforce the positive steps private landholders are taking to improve Victoria's biodiversity.

10.1 Promote positive outcomes for fauna via education and awareness raising

Many Victorians already have positive attitudes towards Victoria's native fauna (Chapter 2). They value native fauna for a range of reasons, and the attitudes and expectations of different groups towards protecting, interacting with, and making use of fauna are also diverse. Yet whatever these attitudes and expectations, they are often strongly held; various stakeholders have important 'self-identifying' interests in (both positive and negative), and connections to, fauna species, geographical areas or both.[63]

But some Victorians are uninterested in wildlife, and place lower priority on fauna than other issues. Exact numbers are not available, but disengaged groups could comprise up to a third of the Victorian population.[64] Further, what people say about fauna and how they behave towards it can differ (known as the 'value–action gap'). For example, people who profess to love fauna may be happy to let their dogs off leash on beaches in sensitive bird breeding areas. And people living near nature may be happy owning cats and letting them outdoors, placing fauna at risk.

The Victorian Government's *Biodiversity 2037* and *Living with Wildlife Action Plan* both include actions to raise the awareness of all Victorians about the importance of our natural environment, and to foster positive attitudes towards the environment and the fauna that are integral to it.[65]

62. CES, *Victorian state of the environment report 2018 – Indicator report card,* Melbourne, 2018.
63. M Boulet, K Borg, N Faulkner and L. Smith, 'Evenly split: Exploring the highly polarized public response to the use of lethal methods to manage overabundant native wildlife in Australia', *Journal for Nature Conservation,* 2021, 61, p 125995; J Meis-Harris, A Saeri, M Boulet, K Borg, N Faulkner and B Jorgensen, *Victorians value nature – survey results*, BehaviourWorks Australia, Monash University, Melbourne, 2019; KK Miller and TK McGee, 'Sex differences in values and knowledge of wildlife in Victoria, Australia', *Human Dimensions of Wildlife,* 2000, 5(2), pp 54–68.
64. J Meis-Harris, A Saeri, M Boulet, K Borg, N Faulkner and B Jorgensen, *Victorians value nature – survey results*, BehaviourWorks Australia, Monash University, Melbourne, 2019.
65. DELWP, *Protecting Victoria's environment – Biodiversity 2037,* Melbourne, 2017; DELWP, *Living with Wildlife Action Plan*, Melbourne, 2018.

Both documents recognise building public awareness and understanding can shift peoples' positive attitudes and behaviours towards fauna specifically, and Victoria's biodiversity more broadly.

We support the broad actions in *Biodiversity 2037* and the *Living with Wildlife Action Plan* to raise public awareness, but we consider more should be done to raise community awareness. The status of Victoria's fauna and biodiversity means there is an urgent need to do so.

Recommendation 10.1

The Victorian Government should:

- **implement a long-term strategy to measure community attitudes and behaviour towards fauna specifically, and Victorian biodiversity more generally**
- **develop a sustained dedicated communication and awareness campaign to promote Victorian biodiversity and fauna to Victorians.**

Importantly, promotion campaigns and programs should aim to increase awareness throughout the Victorian population, as well as target specific campaigns for key target groups. Activities to monitor attitudes could include repeat surveying using the Victorians value nature foundation survey from 2018. We consider investing in establishing, maintaining and reporting on positive attitudes and behaviours towards fauna should be a priority. Funding and resourcing should be commensurate with this being a priority action and the scale of the objective.

10.2 Target monitoring and surveillance

Detecting fauna offences is difficult, since fauna is often on private land, highly mobile and/or in remote locations. Detection is necessary to ensure and enforce compliance with the Act. Beyond compliance, there is also a need to improve monitoring and surveillance to support data collection and reporting, including against fauna plans (see Chapter 7).

The scale of the potential monitoring and surveillance task means regulators and other agencies tasked with data collection will need to use risk-based approaches when deciding how they develop and allocate monitoring and surveillance capability. We agree with the recent Parliamentary Inquiry recommendation that monitoring and surveillance capacity needs to be enhanced to support better outcomes in a new Act. Part of this enhancement will involve targeting effort to where gains from effort are largest.

Recommendation 10.2

The Victorian Government should review and implement approaches to target monitoring and surveillance efforts where gains from effort are likely to be largest. This review should consider ways to undertake and resource surveillance efforts.

Wombat killed by motor vehicle. Credit: Doug Gimesy

This activity may involve providing additional resourcing so regulators and other agencies tasked with data collection have suitable technologies and qualified staff to undertake monitoring and surveillance. New technologies, including remote sensing, are being developed and refined, which can provide better information about the state of fauna, as well as unusual and unexplained activities relating to fauna and its habitat. Regulators should also explore building relationships with community and groups such as fauna tourism operators that support them to play a role in offence detection and data collection.

Monitoring and surveillance data should be linked to data about permissions and licence holders and to fauna plans (see Chapters 7 and 8). This data should also be used to develop fauna policies. To ensure fauna outcomes are delivered as effectively and efficiently as possible, fauna policies could include mechanisms such as positive incentive programs. These incentives are discussed in the next section.

10.3 Encourage and invest in conservation of fauna on private land

Private land occupies around two-thirds of Victoria's total land area, making landholders a key group that can help improve fauna outcomes and biodiversity more broadly. In particular, improving outcomes for fauna must involve supporting landholders to increase the amount of land protected for biodiversity purposes. It must also involve changing how productive land is managed to benefit fauna.

We recognise many landholders already contribute significantly to nature conservation in Victoria by participating in private land networks via Catchment Management Authorities, voluntarily engaging in conservation through land management cooperative agreements under the *Conservation, Forests and Lands Act 1987,* participating in groups such as Landcare, and entering voluntary conservation covenants through initiatives such as the Trust for Nature.[66] However, landowners are not subject to any mandatory or minimum obligations towards fauna conservation. In contrast, the *Catchment and Land Protection Act 1994* imposes general duties on landowners, such as taking reasonable steps to avoid land degradation, conserve soil, protect water resources and manage vertebrate pests.

The existence of fauna and habitat on private land can yield a range of benefits to private landholders – but often these benefits are not easily valued, or it is difficult for landholders to convert them into direct or short-term financial benefits. As a result, these ecosystem services are under provided and are less than what is ecologically desirable and in the overall public interest. A new Act should signal ways to address this problem other than simply by regulating private land management activities.

We consider landholders can be encouraged to invest in conservation on private land in a range of ways. The incentives used depends on the mix of private and public benefits created and sustained over time.[67]

When to use positive incentives

Use positive incentives when the benefits of land management for fauna are high, but the land management comes at a cost to the landholder. Here the incentive focuses on rewarding and compensating the landholder for the disincentives they face in undertaking fauna conservation on private land. This incentive could be ongoing financial support to undertake land management activities, public recognition that the landholder is providing for fauna outcomes, other things, or all the above. This approach recognises people are often not so much driven by private benefit as they are wary of private cost.

Successful positive incentive programs should demonstrate:

- they are cost effective in delivering outcomes so must be measurable and reported consistently
- they deliver public benefits cost effectively (a high level of outcomes for the public dollars spent).

A well-supported and communicated system of positive incentives for fauna outcomes on private land, such as programs that involve payments for ecosystem services through subsidies or tenders, can turn fauna conservation into an opportunity for landowners. Legislative approaches that try to compel landowners to take costly or prohibitive actions to produce positive fauna outcomes on their land (such as not clearing habitat) can make fauna seem a liability for some landowners and create perverse incentives for landowners to remove or deter fauna on their land. Positive incentives could also be used in place of certain Authorities to Control Wildlife, e.g. where being paid to support fauna populations produces significant public value in terms of fauna outcomes.

66. DELWP, *Protecting Victoria's environment – Biodiversity 2037,* Melbourne, 2017.
67. D Pannell, *Pannell Discussions: 80–Public benefits, private benefits: the final framework,* Perth, 2006.

When to use technology investment

When private incentives are weak but the public benefits to fauna are large, governments can encourage development of new technologies and processes that improve the private benefits of service provision and leverage the beneficial public outcomes more cheaply. Examples include:

- improving farm systems management and design to increase fauna and habitat outcomes without diminishing farm profits such as: understanding benefits of farm system microclimate; improving cell grazing technology to improve landscape function; or incorporating native pasture species in grazing systems
- improving farm productivity to reduce farm management pressures on marginal land (e.g. fencing technologies to better manage fauna exclusion and inclusion, soil microbiomes and fertilisers that improve invertebrate outcomes, pasture species that also improve habitat outcomes, or irrigation and delivery system management to reduce green algal blooms).

When to use education and practice change

Improving land management for fauna that also improves outcomes for the landowner benefits everyone. Education and practice change can be important in these situations. Examples where this can happen can include:

- better managing soils and ground cover
- using pesticides, fungicide and fertilisers appropriately
- improving fencing
- using strategic shelter belts as habitat
- using farm management practices that can minimise wild dog incidents.

Dingo. Credit: Shutterstock

11. CONSIDER LONGER-TERM DIRECTIONS

KEY POINTS

The Panel considers several longer-term directions could deliver better outcomes for Victoria's wildlife.

In particular, we recommend the Victorian Government:

- review the advantages and disadvantages of combining the *Wildlife Act 1975* and/or the new Fauna Act with the *Flora and Fauna Guarantee Act 1988* (FFG Act)
- consider the merits of establishing an independent and structurally separate regulator, responsible for the Fauna Act, or the Biodiversity Act if the FFG and Fauna Act are combined, as well as regulatory functions under other conservation-related Acts, as currently occurs.

This chapter outlines longer-term policy directions the Victorian Government may consider to promote better outcomes for fauna populations and the ecosystems of which they are a part.

11.1 A new Biodiversity Act for Victoria

The *Flora and Fauna Guarantee Act 1998* (FFG Act) (Box 8) and the Wildlife Act are the primary laws that protect, conserve and manage the state's biodiversity. The FFG Act focuses on threatened species and ecological communities, while a new Fauna Act will apply to all native wildlife, including threatened wildlife and invertebrates listed under the FFG Act.

Examining Victoria's complex legal framework that deals with fauna – both threatened and non-threatened – has led us to consider the merits of combining these 2 statutes into one, consolidated Act.

Box 8: The *Flora and Fauna Guarantee Act 1988*

The *Flora and Fauna Guarantee Act 1988* (FFG Act) sets the overarching objectives and principles for protecting (and managing impacts to) Victoria's biodiversity. It contains the framework for listing species as threatened and establishes the Scientific Advisory Committee, which has a key role in overseeing the framework. It sets out the requirements for a Biodiversity Strategy, and for producing action statements and management plans for threatened species. It provides the tools for determining and protecting 'critical habitats'.

While the FFG Act contains the permit and offences regime for the unauthorised take of threatened flora and threatened fish, the *Wildlife Act 1975* contains the equivalent regime for the unauthorised take of threatened wildlife.

Combining the FFG and a new Fauna Act (or the current Wildlife Act) would have several advantages:

- The purposes of the Acts are aligned, with both relating to 'conservation' and aiming to prevent taxa from becoming extinct. A combined Act that applies to common and threatened fauna, flora, invertebrates and ecological communities and incorporates provisions to protect habitat would enable a more harmonised and ecosystem-based approach to managing and regulating flora and fauna. A consolidated Act would aim to prevent common species from declining to the point of becoming threatened, and prioritise threatened species and community protection and recovery within a single instrument.
- A consolidated Act with a clearer and harmonised purpose and principles guiding decision making communicates to the community and regulated parties the Victorian Government's priorities relating to biodiversity conservation in a single instrument.
- Amalgamation avoids the need to amend the FFG Act following reform of the Wildlife Act, reducing issues of legislative leap-frogging.
- Regulatory and administrative functions could be streamlined under a combined Act. For example, fauna strategies and plans could be integrated with the FFG Biodiversity Strategy (FFG Act, Part IV, Div 1) and flora and fauna management plans (FFG Act, Div 3).
- A consolidated Act may enable a more contemporary and holistic legal framework for Traditional Owners relating to biodiversity and could more effectively provide for self-determination of First Nations peoples about their interactions with Victoria's flora and fauna.
- A consolidated Act also increases consistency with other jurisdictions that have consolidated biodiversity Acts. This may increase scope for cross-jurisdictional collaboration and learning.

We recognise combining the Acts would be a significant task. Amalgamation may take considerably longer than creating a new Fauna Act on its own, delaying benefits from a new Act in the process. A detailed assessment is needed to determine whether the change is likely to produce net benefits and is feasible.

Recommendation 11.1

The Victorian Government should consider the merits of combining the *Wildlife Act 1975* or a new Fauna Act with the *Flora and Fauna Guarantee Act 1988*.

11.2 An independent regulator

We recommend a new Act contains provisions that clearly separate the regulatory and compliance functions from program and policy functions and ensures the independence of these functions (see Chapter 7). We also recommend establishing independent statutory oversight in the form of a Chief Conservation Regulator.

Over the longer term, there may be merit in establishing an independent and structurally separate regulator, responsible for the Fauna Act (or the Biodiversity Act if the FFG and Fauna Act are combined) as well as other relevant conservation regulation functions. The agency would be established under the *Public Administration Act 2004,* headed by the Chief Conservation Regulator with its own staff and funding allocation.

The advantages of establishing a standalone regulator include that it would:

- signal the Victorian Government's commitment to fauna conservation
- avoid potential/perceived/actual conflicts of interest related to oversight of its portfolio department
- avoid the risk that funding might be shifted to other parts of its portfolio where outputs (and apparent successes) are easier to measure
- have an incentive to build up specialist skills.

For clarity, it is not our intention to allocate some of the current responsibilities of the Office of the Conservation Regulator (OCR) (e.g. state forests, recreational use of public land, timber harvesting and fire prevention) to a different regulator. Rather, our aim is to establish the OCR as an independent agency in legislation.

Recommendation 11.2

The Victorian Government should consider the merits of establishing an independent and structurally separate regulator, responsible for the Fauna Act, or a new Biodiversity Act and related conservation regulatory functions as relevant.

APPENDIX A: CURRENT OFFENCES UNDER THE *WILDLIFE ACT 1975*

OFFENCES		
S 20	Offence to take wildlife from State Wildlife Reserve	25 penalty units
S 21	Removing sand etc.from State Wildlife Reserve or a Nature Reserve	25 penalty units
S 21AAA	Offence to construct, remove, alter, or carry out maintenance on, a levee within a State Wildlife Reserve or Nature Reserve	12 months' imprisonment or 120 penalty units
S 21AA(1)	Offence to cut or take away 2 cubic metres or less of fallen or felled trees in a State Wildlife Reserve or Nature Reserve	20 penalty units 12 months' imprisonment or 50 penalty units
S 21AA(2)	Offence to cut or take away more than 2 cubic metres of fallen or felled trees in a State Wildlife Reserve or Nature Reserve	
S 21A	Offence to conduct organised tour or recreational activity on State Wildlife Reserve if unlicensed	Natural person: 20 penalty units Body corporate: 100 penalty units
S 21F	Contravention of (tour operator licence) condition an offence	Natural person: 20 penalty units Body corporate: 100 penalty units
S 28B	Offence of failing to comply with conditions of authorisation	50 penalty units
S 35	Offences in relation to wildlife sanctuaries	25 penalty units
S 41	Hunting, taking or destroying threatened wildlife	240 penalty units or 24 months' imprisonment plus 20 penalty units for every head of wildlife
S 43	Hunting, taking or destroying protected wildlife	50 penalty units or 6 months' imprisonment plus 5 penalty units for every head of wildlife
S 44	Hunting, taking or destroying game	50 penalty units or 6 months' imprisonment plus 5 penalty units for every head of wildlife (3) During open season: 10 penalty units
S 45	Acquiring etc. threatened wildlife	240 penalty units or 24 months' imprisonment plus 20 penalty units for every head of wildlife
S 47	Acquiring etc. protected wildlife	50 penalty units or 6 months' imprisonment plus 5 penalty units for every head of wildlife
S 47D	Wildlife unlawfully taken	240 penalty units or 24 months' imprisonment
S 48	Offence for dogs or cats to attack wildlife	25 penalty units
S 50	Import and export permits	100 penalty units
S 51	Marking protected wildlife	100 penalty units
S 52	Release of birds and animals from captivity or confinement	50 penalty units

OFFENCES		
S 53	Use of prohibited equipment	25 penalty units
S 54	Killing wildlife by poison	100 penalty units or 6 months' imprisonment
S 55	Using bird lime	20 penalty units
S 56	Punt guns	50 penalty units
S 57	Interference with signs etc	50 penalty units
S 58	Molesting and disturbing etc.protected wildlife	20 penalty units
S 58A	Keeping false records	120 penalty units
S 58B	Providing false information	120 penalty units
S 58C	Offence for certain person to enter on or remain in specified hunting area	60 penalty units
S 58D	Offence to approach a person who is hunting	60 penalty units
S 58E	Hindering or obstructing hunting	60 penalty units
S 58J	Offence to contravene a banning notice	First offence 20 penalty units Second or subsequent offence 60 penalty unit
S 58L	Offence to refuse or fail to comply with direction to leave area to which banning notice applies	First offence 20 penalty units Second or subsequent offence 60 penalty unit
S 76	Killing, taking whales etc.an offence	1000 penalty units
S 76(3)	Taking live whales without a permit	100 penalty units
S 77	Action to be taken with respect to killing or taking of whale	50 penalty units
S 77A	Offence to approach whales	20 penalty units
S 81	Power of authorised officers to give directions	100 penalty units or 6 months' imprisonment
S 83	Offence to conduct whale watching tour	50 penalty units
S 83C	Offence to conduct whale swim tour	100 penalty units or 6 months' imprisonment
S 83I	Breach of condition an offence	100 penalty units or 6 months' imprisonment
S 83J	Power of authorised officer to give directions	100 penalty units or 6 months' imprisonment
S 85	Offence to conduct seal tour	50 penalty units
S 85I	Breach of condition an offence	100 penalty units

APPENDIX B: OTHER IMPLICATIONS OF EXCLUDING DEER IN A NEW ACT

The Panel's recommended definition of fauna in a new Act excludes non-native game and goes further to recommend that deer be listed as a pest species under the *Catchment and Land Protection Act 1994* (CALP Act) (Chapter 5). As discussed in Chapter 5, our intention is not that hunting of these species should cease.

This Appendix considers some other implications of excluding deer in a new Act that are not covered in Chapter 5, assuming no other responses are implemented:

- Public safety could be compromised. It would no longer be illegal to hunt deer at night using spotlights on public land (except where hunting is expressly not permitted). Hunting around some townships where deer hunting is currently illegal for public safety reasons would be legal.
- Animal welfare standards could be compromised.
- Hunting of deer in state game reserves would not be permitted.
- The role of the Game Management Authority (GMA) would significantly reduce because it would be responsible for regulating duck and stubble quail hunting only.
- Management responsibilities would shift from the GMA to the Department of Jobs, Precincts and Regions (Biosecurity) and Victoria Police:
  - Biosecurity will need to resource and enforce laws relating to pest deer.
  - No authority would be responsible for hunting pest animals, so Victoria Police would be responsible for illegal deer hunting behaviour/spotlighting. The GMA's enforcement operations would cease.

Many of these issues could be addressed by amending other legislation:

- Public safety issues could be addressed by amending the *Firearms Act 1996* and associated regulations and/or by changing the land classification of high-risk areas to ban hunting at night and spotlighting. Spotlighting on private property will still require the landholder's permission despite a pest declaration.
- Animal welfare standards could be upheld through the new animal welfare Act and regulations, when developed (including farmed game birds).
- Changes to the *National Parks Act 1975* and the Wildlife (State Game Reserves) Regulations 2014 could allow deer hunting to continue in areas where it can currently occur.

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