



# Law Week seminar:

## What can lawyers do to protect our native wildlife?

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The recent bushfires have put the plight of our native wildlife at the forefront of the national consciousness. Here, the Animal Defenders Office considers the legal status of native wild animals in Australia.

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Recent Law Weeks in the ACT have explored the theme of ‘Lawyers: Protecting Your Rights’.<sup>1</sup> As part of Law Week 2019 the Animal Defenders Office presented a seminar to members of the legal profession and the community at large about the billions of non-human animals who do not have rights, and the global quest by lawyers to obtain basic rights for at least some animals.<sup>2</sup>

In the summer of 2019-20, Australia was ravaged by bushfires. Our collective heart broke as we watched the devastating images of burnt and injured native animals stumble out from the fires. We were then plunged into profound despair as we thought of the suffering of the animal victims we could not see.

Professor Chris Dickman, an ecology expert from the University of Sydney,

estimated that one billion animals died in the fires.<sup>3</sup> In fact-checking this estimate, the ABC concluded it was a conservative figure, and that the number was probably higher.<sup>4</sup>

With the plight of our wildlife at the forefront of our national consciousness, it is timely that we revisit the issue of protecting the rights of animals in Law Week 2020.

How is it possible that native wild animals, an integral part of the local natural environment and landscape, do not have legally enforceable rights that lawyers can protect? How can lawyers protect our native wildlife?

With these questions in mind, this article will consider the legal status of native wild animals in Australia, some of the fundamental problems they face, and ways lawyers can protect them.

To clarify, we are not just talking about threatened or vulnerable species. These species are better protected than most wild animals under our legal system, but have paid the price for this protection by receiving it only once they are close to extinction. This article will look at *all* native wild animals: those whom we have driven almost to extinction, and those who have adapted better to the land’s relatively recent occupation by non-indigenous humans.

### Legal status of wildlife

Animals are regarded as property under the law.<sup>5</sup>

The animals with whom humans interact on a regular basis, such as pets and farm animals, have the traditional hallmarks of property.



"KANGAROO WITH JOEY" BY NICHOLAS JONES IS LICENSED UNDER CC BY 2.0

They can be identified, possessed, and controlled by humans. But what about free-living wild animals? We cannot identify precisely which animals are living where. They are not possessed by anyone, and they are *ipso facto* beyond our control.

This has not stopped governments from asserting that wild animals are the property of the crown.

Late last century this issue went all the way to the High Court of Australia. In the case of *Yanner v Eaton* the High Court dismissed the Queensland Government's assertion in legislation that fauna was the 'property of the state'.<sup>6</sup>

The High Court said that no one can own free-living wildlife because we cannot identify what exactly would be owned by the entity claiming

to be the owner, and because that entity does not possess the free-living wildlife. The High Court therefore concluded that the property status of free-living wildlife is something less than full property ownership. But the High Court also stated that governments have some rights over wildlife, namely the 'power to preserve and regulate the exploitation of an important resource'.<sup>7</sup>

That is why today in Australia human interaction with wildlife is usually regulated by governments through licence regimes. It is also why, despite native wild animals being 'protected' under nature or biodiversity conservation laws, it does not actually amount to much. It simply means that it is an offence to harm the animal *without a licence*.<sup>8</sup>

In the ACT most native animals are 'protected' in that it is an offence to kill them without a licence.<sup>9</sup>

Some, however, are less protected than others. Recently in the ACT the legal status of one of our most iconic native animals, the Eastern Grey Kangaroo, was changed overnight by the stroke of a Minister's pen. With the *Nature Conservation (Controlled Native Species – Eastern Grey Kangaroo) Declaration 2017*, the ACT Minister for the Environment declared the Eastern Grey Kangaroo to be a 'controlled native species'.

The consequences for the kangaroos, and members of the public who wanted to take action to protect them, were immense. The change in legal status not only meant that a licence was no longer required to harm the animals, but it also removed the right

to review government decisions to kill the animals, despite the strong public interest in the welfare and fate of this iconic native wild animal.<sup>10</sup>

Since this change in legal status, the ACT government has approved the killing of thousands of local kangaroos,<sup>11</sup> and these government decisions are beyond the scrutiny usually afforded by administrative review.<sup>12</sup>

## Does our native wildlife need protection?

The devastating impact of the bushfires on Australia's wildlife made headlines around the world.<sup>13</sup>

The terrible toll of the fires compounded ongoing threats to wildlife such as habitat destruction<sup>14</sup> and fragmentation, drought, and climate change.

Government assistance for fire-affected wildlife has targeted the most 'at risk' species, namely those that were already endangered and vulnerable before the fires.<sup>15</sup>

There is, of course, a dire need for such assistance. It does, however, exclude millions of other individual native animals who may not be classified as at risk, but whose habitat and food sources were equally affected by the fires. These animals face other threats to their survival.

Despite the vast number of native wild animals killed by the fires, governments around Australia continued to allow native animals to be killed for commercial or so-called damage mitigation purposes.

In NSW, for example, licences are still issued to landholders to kill native animals such as wombats, kangaroos, and kookaburras, despite advocates

calling for a suspension of all such permits to kill surviving wildlife.<sup>16</sup>

The commercial kangaroo industry has also been allowed to continue killing many thousands of kangaroos and joeys despite the unquantified impact of the fires on kangaroo populations.<sup>17</sup>

In Victoria, the situation was particularly perilous for wombats.

These native wild animals could be killed in certain areas of the State without even having to obtain a permit. In a small but significant change after the fires, the Victorian government reinstated wombats' 'protected' status, so at least a permit is now required before the animals can be legally killed.<sup>18</sup> However, in the wake of the devastating toll on these animals due to the bushfires, advocates have again called for the killing of these native wild animals to be suspended.<sup>19</sup>

These case studies give some insight into the enormous challenges facing wildlife in Australia.

So how can lawyers help to protect their interests?

## How lawyers can help

As we have seen, the law regards native wildlife as 'resources' regulated by government.

Taking action to protect wildlife therefore often consists of seeking review of government decisions, making submissions about government reform proposals, or lobbying lawmakers.

### Administrative review

Given their 'unowned' status, taking action to protect native animals usually falls to volunteers and community

organisations. An important role for lawyers can be to provide pro bono assistance to these entities by way of legal advice and/or representation.

A recent example of a successful action to protect wildlife occurred in Cairns, Queensland.

On 1 May 2020 the Queensland Civil and Administrative Tribunal handed down its decision in a case brought by the Agile Wallaby Project group, a local wildlife rescue organisation. In 2017 the organisation had applied to the Queensland Department of Environment and Science for a permit to translocate hundreds of agile wallabies from a small urban area where they were taking refuge after the fragmentation of their habitat. The State Department refused the application, but the Tribunal has now overturned that decision in favour of the organisation. The decision allows the organisation to proceed with what will be the country's largest translocation of macropods, and to sites that the organisation describes as 'wallaby heaven'.<sup>20</sup>

In the ACT, grass-roots community organisations have sought administrative review of decisions by government to kill large numbers of local kangaroos.

In 2014 the Animal Defenders Office represented Animal Liberation ACT in one such challenge.<sup>21</sup> On behalf of the animal rights organisation the Animal Defenders Office obtained an injunction to stop the cull that was already underway. While the ultimate decision of the Tribunal went against the applicants, some victories along the way were achieved.



## Animal Defenders Office

The Animal Defenders Office is a nationally accredited not-for-profit community legal centre that specialises in animal law. The Animal Defenders Office is run by volunteer lawyers and law students and other volunteer professionals. It offers information and representation for individuals and groups wishing to take legal action to protect animals. The Animal Defenders Office also produces information to raise community awareness about animal protection issues, and works to advance animal interests through law reform.

The Animal Defenders Office is a member of Community Legal Centres Australia, the peak body representing community legal centres in Australia.

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For the first time, notably, the Tribunal agreed that animal welfare was a relevant consideration in a decision to issue licences to kill the 'protected' native wildlife. Moreover, during cross examination the government's veterinary officer admitted that hundreds of at-foot joeys were 'unintended mortality' of the culls. These young kangaroos are out of the pouch but still wholly dependent on their mothers' milk for food. During the culls they escape when their mothers are shot, but only to die an 'eventual' death from

starvation, dehydration or predation because they no longer have access to their mother's milk. These deaths are not included in cull numbers.

During the trial this aspect of the culls came to be referred to as the 'ghost population' of orphaned cull casualties, which the government still protests against.<sup>22</sup> This outcome was an important victory in terms of raising awareness about the serious animal welfare consequences of the culls.

Another interesting example of administrative review of government

decisions regarding wildlife is the case involving the local wildlife rescue organisation Wildcare, based over the border in Queanbeyan.<sup>23</sup>

In response to the ACT government's policy of not allowing orphaned kangaroo joeys to be rescued and rehabilitated,<sup>24</sup> and to avoid the orphaned joeys simply being killed, the organisation sought a licence to export them from the ACT so they could be cared for in NSW.

The ACT government refused to grant the licence. The organisation sought review of the decision in the ACT Civil and Administrative Tribunal, and while it lost at first instance, it was successful on appeal.<sup>25</sup> As a direct result of this case, many kangaroo joeys have been given a chance at life that they otherwise would not have had.

### Submissions about reform proposals

Governments frequently propose amendments to the regulatory framework governing human interaction with native wildlife. Lawyers can play an important role in contributing to public consultation processes about these proposals, not only because of their in-depth knowledge of the legal system, but also due to their reputation for being 'astute and good at working out where in practice to apply ideas for maximum effect'<sup>26</sup>.

Making submissions on the welfare implications of reform proposals affecting wildlife could range from commenting on a new draft national code of practice for the commercial shooting of kangaroos, to assessing moves to abolish the requirement for licences to disturb flying-fox camps or plans to deploy drum lines to capture and kill sharks.<sup>27</sup>

### Lobbying for law reform

Lawyers can also work with community organisations to lobby politicians and law-makers for law reform to better protect wildlife.

Lawyers can be excellent advocates for law reform, given their familiarity with regulatory frameworks and the law-making process.

In writing this article we reached out to ACT Wildlife, the ACT's leading wildlife rescue organisation (and the Law Week 2020 charity), to find out about the challenges the group's volunteer wildlife carers face in protecting wildlife.<sup>28</sup>

We discovered that one of the biggest issues confronting the group is rescuing and caring for native flying foxes caught in poorly designed and badly hung fruit tree netting. Poorly designed tree netting has holes in which animals can become entangled. It is readily available for sale in the ACT. When hung in a loose manner on garden fruit trees it can become a death trap for native animals. Scores of flying foxes get caught in the nets and often remain there for days before being freed by wildlife carers. Half of the animals rescued by carers die from injuries sustained during their ordeal.

So how could lawyers help with this issue? Would law reform even be feasible?

As lawyers, we would research and discover that in December 2019 Victoria amended its animal welfare regulations to regulate the sale and use of fruit netting. The new regulation creates an offence to use or sell fruit netting that does not comply with the stipulated mesh size.<sup>29</sup>

Being able to point to a recent example of law reform in an Australian jurisdiction would make it easier to persuade local parliamentarians that ACT legislation should be similarly amended to help stop flying foxes from getting caught in inappropriate netting, and to reduce the time volunteer carers have to spend on rescuing and either rehabilitating or euthanasing these diminutive native animals.

### The ultimate law reform for wildlife

Perhaps ironically, we shall leave the last word on law reform for wildlife not to a lawyer, but to a philosopher.

In 2005 the internationally renowned Australian philosopher Peter Singer proposed what would be a game-changer in terms of how the law regards wildlife:

We need a Mabo decision for Australia's wild animals, a legal recognition of their special status as original residents of Australia, alongside its original [human] inhabitants. The only ethical approach is one that gives their interests equal consideration alongside similar human interests.<sup>30</sup>

Over a decade later this remains an aspirational goal for wildlife law reform in this country.

### Tara Ward

ANIMAL DEFENDERS OFFICE

Tara Ward is the co-founder of the Animal Defenders Office, and volunteers as Executive Director and Principal Lawyer for the organisation. Tara also teaches animal law at the University of NSW.

## Endnotes

1. Law Week theme in 2019 and 2020.
2. See a write-up of our presentation by Mike Rosalky, Animal Defenders Office volunteer lawyer and director: 'Deserving of rights. Legal personhood and animal law,' *Ethos. Law Society of the ACT Journal*, Issue 253, Spring 2019.
3. 'More than one billion animals killed in Australian bushfires', News, University of Sydney, 8 January 2020, <https://www.sydney.edu.au/news-opinion/news/2020/01/08/australian-bushfires-more-than-one-billion-animals-impacted.html>.
4. 'Have more than a billion animals perished nationwide this bushfire season? Here are the facts', RMIT ABC Fact Check, updated 4 Feb 2020, <https://www.abc.net.au/news/2020-01-31/fact-check-have-bushfires-killed-more-than-a-billion-animals/11912538>.
5. See for example the definition of 'goods' in the *Competition and Consumer Act 2010* (Cth): 'goods includes... (b) animals, including fish' (s4).
6. *Yanner v Eaton* (1999) 201 CLR 351.
7. *Yanner v Eaton* at 369.
8. See for example *Biodiversity Conservation Act 2016* (NSW), ss2.1 and 2.10.
9. *Nature Conservation Act 2014* (ACT), ss130 and 153.
10. Between 2009 and 2014 various animal protection groups from around Australia had sought administrative review of the ACT government's decisions to grant licences to kill thousands of kangaroos each year in Canberra nature parks: see *Animal Liberation v Conservator of Flora and Fauna* (Administrative Review) [2009] ACAT 17; AT 13/41 Australian Society for Kangaroos Inc v Conservator of Flora and Fauna [2013] (unreported); and *Animal Liberation ACT v Conservator of Flora and Fauna* (Administrative Review) [2014] ACAT 35.
11. F O'Mallon, 'More than 4000 kangaroos shot in Canberra cull', *Canberra Times*, 26 Jul 2019, <https://www.canberratimes.com.au/story/6295016/more-than-4000-roos-shot-in-canberra-cull/>.
12. Animal Defenders Office Media Release, 'Animal Defenders Office condemns anti-democratic changes to legal status of kangaroos', 14 Feb 2017, <https://tinyurl.com/yaomy6bm>.
13. For example J Yeung, 'Millions of animals are dying from the Australian fires', CNN, 9 Jan 2020, <https://edition.cnn.com/2020/01/07/australia/australia-fire-wildlife-deaths-intl-hnk-scli/index.html>.
14. See for example the bulldozing of the bluegum plantation at Cape Bridgewater, Victoria, that resulted in a 'massacre' of koalas. K O'Sullivan and S Woolley, 'Koalas allegedly killed in 'massacre' on private logging plantation in Victoria', 7 News, 3 Feb 2020, <https://7news.com.au/news/animals/hundreds-of-koalas-allegedly-killed-in-massacre-on-private-logging-plantation-in-victoria-west-c-677103>.
15. Premier of Victoria Media Release, 'Immediate Support For Victoria's Wildlife And Biodiversity', 23 Jan 2020, <https://www.premier.vic.gov.au/immediate-support-for-victoria-wildlife-and-biodiversity/>. Department of Agriculture, Water and the Environment (Cth), 'Wildlife and threatened species bushfire recovery research and resources', <https://www.environment.gov.au/biodiversity/bushfire-recovery/research-and-resources>.
16. Animal Justice Party NSW, 'Ban NSW Native Animal Slaughter Permits', <https://animal-justice-party.good.do/NSWnativeanimalslaughter/ACTION/>.
17. For example in NSW, the state worst hit by fires, 'commercial harvester licences' are available and can be applied for online <https://www.environment.nsw.gov.au/topics/animals-and-plants/wildlife-management/kangaroo-management/commercial-harvester-licence>. In South Australia, the commercial kangaroo harvest area was set to cover practically the entire state on 1 Jan 2020, and has not been amended since the fires: [https://www.environment.sa.gov.au/topics/plants-and-animals/Abundant\\_species/kangaroo-conservation-and-management](https://www.environment.sa.gov.au/topics/plants-and-animals/Abundant_species/kangaroo-conservation-and-management).
18. See the awkwardly titled 'Revocation of the Order in Council that unprotects the Common Wombat' (4 Feb 2020), which makes it illegal to disturb or destroy wombats without an Authority to Control Wildlife.
19. The Greens Victoria, 'Wombat protection a critical step, but thousands still at risk of being killed', 6 Feb 2020, <https://greens.org.au/vic/news/wombat-protection-critical-step-thousands-still-risk-being-killed>.
20. At the time of writing this article the Tribunal decision had not yet been published. For the story, see <https://www.facebook.com/9NewsFarNorthQueensland/videos/585372589003934/?t=1> and <https://www.facebook.com/7NEWSCairns/videos/887671905081438/?t=0>.
21. *Animal Liberation ACT v Conservator of Flora and Fauna* (Administrative Review) [2014] ACAT 35.
22. ACT Government, *Nature Conservation (Eastern Grey Kangaroo) Controlled Native Species Management Plan 2017*, 11 May 2017, p34, <https://www.legislation.act.gov.au/di/2017-37/default.asp>.
23. Wildcare Queanbeyan Inc, <http://www.wildcare.com.au/>.
24. ACT Government 2017, op. cit (note 22), p31.
25. *Wildcare Queanbeyan NSW Inc and Conservator of Flora and Fauna* [2011] ACAT 68.
26. Author JM Coetzee, quoted in *The Animal Law Toolkit* by Voiceless. The Animal Protection Institute, First Edition, December 2009, p35.
27. Submissions by the Animal Defenders Office on government proposals such as these can be found on our website at <https://www.ado.org.au/submissions>.
28. ACT Wildlife, <http://actwildlife.net/index.html>.
29. *Prevention of Cruelty to Animals Regulations 2019* (Vic), regulation 13. Regulation 13 will come into operation on 1 September 2021 (reg 3(3)).
30. Peter Singer, 'Preface' to *Kangaroos: Myths and Realities*, ed. M Wilson and DB Croft, Australian Wildlife Protection Council, 2005.