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¹ [2011]FCA 1511.

Defining the Puppy Farm Problem: An Examination of the Regulation of Dog Breeding, Rearing and Sale in Australia

*By Katherine Cooke **

‘Human beings do not treat animals harshly because they are classified as property; animals are classified as property so that human beings can legally treat them harshly.’²

This article examines the regulation of dog breeding, rearing and sale in Australia. It describes existing animal welfare requirements in this industry with reference to the relevant legislation and codes of practice (where they exist). The article argues that the legal problems caused by so-called ‘puppy farms’ do not begin and end at the farm. The article concludes by mentioning some past reform attempts and suggesting reform objectives.

Introduction

On 19 September 2010, more than 1,000 people (accompanied by a large number of dogs) gathered on the steps of Parliament House in Melbourne to demand the abolition of ‘puppy farms’ and to promote other legislative reforms. They were advocating the passage of ‘Oscar’s Law’, a series of proposed measures which include abolishing the factory farming of dogs, banning the sale of pets in pet shops, and the introduction of a ‘proper campaign’ on responsible animal care in Victoria.³ Oscar, the namesake of the campaign, was a dog removed from a Victorian breeding establishment in which his basic needs had been neglected. After undergoing treatment for severe fur matting, gum disease and ear infections, Oscar and other dogs seized from the same establishment were returned by authorities to that establishment.⁴

There is widespread concern about the standard of care provided to dogs and puppies in breeding establishments. Oscar’s Law has the support of

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2 Wendy Adams, ‘Human Subjects and Animal Objects: Animals as ‘Other’ in the Law’ *Journal of Animal Law and Ethics* 3 (2009) 29, 29.

3 See <www.oscarslaw.org>. Oscar’s Law has not yet been prepared as draft legislation.

4 *Ibid.*

about 60 animal welfare organisations.⁵ RSPCA Australia also launched a separate and well-advertised campaign in 2010, promoting awareness of the deplorable conditions that have been found in some dog breeding premises and inviting the public to sign a petition. By April 2011, the petition had more than 60,000 signatures.⁶ Following the demonstration on 19 September, investigative reports appeared on television programs, ‘The 7pm Project’ and ‘60 Minutes’.

The scale on which Australians breed and raise puppies and dogs creates important animal welfare and legal issues. Australia has a high rate of pet ownership: two thirds of households include a pet. There are an estimated 4 million companion dogs and 2.6 million companion cats.⁷ Spending on pets is about \$4.6 billion annually.⁸ However, it is plain that the total number of companion animals in need of a home consistently exceeds the number of households that are willing or able to absorb them. Statistics of the number of dogs and cats euthanased for non-medical reasons in Australia each year vary widely, from about 200,000 to 22,000. This ‘surplus’ of companion animals is particularly concerning in Victoria, the only State or Territory to impose a 28-day limit on holding an animal at a shelter or pound. If the animal has not been adopted during that period, it must be euthanased or ‘removed permanently from the facility, for example, by placement in a foster program.’⁹

RSPCA Australia has commented that a significant frustration is that establishments known as ‘puppy mills’ or ‘puppy farms’ are legally permitted to operate under permits issued by local councils despite serious animal welfare problems, because the existing regulation is not sufficiently stringent or enforceable to ensure the welfare of the animals.¹⁰ This article seeks to assist in the definition of the puppy farm problem in Australia from a legal perspective. What does the law say about dog breeding and rearing establishments? What are the minimum welfare standards for animals living in these establishments? What legal action can be taken if these standards are not met, and by whom? How are the transport and sale of puppies regulated once the puppies have left the breeding establishment? Finally, the article suggests some objectives for

5 Ibid.

6 See <www.closepuppyfactories.org>.

7 See, eg, Centre for Companion Animals in the Community, <www.ccac.net.au>.

8 Harlock Jackson Pty Ltd, Australian Animal Welfare Strategy: Review of Existing Animal Welfare Arrangements for the Companion Animals Working Group (2006).

9 Department of Primary Industries, Code of Practice for the Management of Dogs and Cats in Shelters and Pounds (2002) cl 2.3.7. The Code is under review.

10 RSPCA Australia, Discussion Paper: Puppy Farms (2010) 2.

reform, with reference to the approach taken to these issues in the UK.¹¹

What Is a ‘Puppy Farm’?

One of the major animal welfare risks associated with the commercialisation of companion animals is the growth of what are known as puppy mills, puppy factories or puppy farms (and their equivalents for other types of companion animal). ‘Puppy farm’ is not a term of art. It has no statutory or judge-given definition in Australia. The definition of ‘puppy farm’ recommended by RSPCA Australia is ‘an intensive dog breeding facility that is operated under inadequate conditions that fail to meet the dogs’ psychological, behavioural, social and/or physiological needs’.¹² The financial incentives which encourage the development of puppy farms are in constant tension with the best interests of the animals.

According to the RSPCA, some problems caused by this type of intensive breeding include:

[O]ver-breeding (too many litters per female), in-breeding (mating close relatives), minimal or no veterinary care, poor hygiene, inadequate and crowded housing conditions and high mortality rates. Breeding animals may never be allowed out of their cage to exercise, play, have companionship or to urinate or defecate. Puppies born in puppy farms often have long-term health and/or behavioural problems as a result of the conditions they are bred in, poor maternal nutrition and a lack of adequate socialisation during the crucial first few weeks of life.¹³

It is not possible to state how many puppy farms are in Australia.¹⁴ Not all dog-breeding establishments are puppy farms — there is a large degree of variability in the level of care provided to these animals. However, the animal welfare consequences and the costs to the Australian community of breeding establishments that do fit into the puppy farm category are high. In January 2010, the Queensland branch of the RSPCA alone was caring for more than 500 dogs from three puppy mill

11 Although the focus of this article is on the breeding, rearing and sale of companion puppies, many of these issues apply equally to other animals including cats and rabbits.

12 RSPCA Australia, *Puppy Farms: Problems, Desired Outcomes and Ways Forward* (2010) 1. This definition is discussed further below.

13 See RSPCA Australia, ‘What Is a Puppy Farm?’ <www.kb.rspca.org.au>.

14 The problem is exacerbated by the lack of regulation in several states, and the lack of uniformity in the existing regulation. The RSPCA has very little power to intervene, and only then in cases in which the circumstances are grave. Moreover, there has been limited research into the welfare consequences of puppy farms: see discussion in RSPCA Australia, above n 11, 2.

operations.¹⁵ In one matter involving 104 dogs seized from a puppy farmer, RSPCA Queensland incurred over \$1.8 million in boarding and veterinary expenses. In another matter in which the RSPCA was required to care for more than 300 dogs, costs exceeded \$3,000 per day.¹⁶ Many other rescue and foster organisations invest time and resources in caring for dogs raised in these establishments.

Problems caused by intensive breeding of this kind can also be less direct. The RSPCA believes many puppy farmers fail to comply with other applicable legislation, including that relating to trade and taxation. ‘Large scale puppy farm operations involving more than 100 dogs are usually earning hundreds of thousands of tax-free dollars annually.’¹⁷ Another indirect cost is the increased likelihood that puppies purchased from puppy farms will be unwell or genetically flawed.¹⁸

Regulation in Australia Generally

Given that puppy farms exist in Australia, it is imperative to understand from a legal perspective why this is so, and what may be done. Australia has no federal animal law. The *Australian Constitution* contains no head of power that would allow the federal government to pass national animal welfare laws. (The power to pass federal laws that affect animals is derived from heads of power that are not directed primarily at animals, such as the external affairs power.) Animal welfare is the subject of state and territory legislation.¹⁹ There are two broad types of state and territory legislation relating to companion animals. Animal welfare legislation, including the *Prevention of Cruelty to Animals Acts* and corresponding Regulations in each State and Territory, is directed at preventing certain types of cruelty to animals. These Acts are the principal sources of animal welfare obligations in each jurisdiction, although many other Acts and Regulations can have an impact on animals. This article is principally concerned with animal welfare legislation. The other main type of legislation relates to the management of companion animals. However, commentators have noted that animal management legislation and codes of practice also have important animal welfare implications.²⁰

Although the anti-cruelty legislation prohibits certain types of cruelty to

15 RSPCA Australia, above n 9, 11.

16 Ibid.

17 RSPCA Australia, above n 9, 13.

18 Ibid 13.

19 States and Territories also have power to legislate in respect of the management of cats and dogs in the community: see, eg, Dog and Cat Management Act 1995 (SA).

20 See, eg, Deborah Cao, *Animal Law in Australia and New Zealand* (2010) 176.

animals, it generally offers only limited protection. In Victoria, for example, the definition of ‘cruelty’ for the purposes of the offence of committing an act of cruelty upon an animal includes a number of specific types of behaviour, such as where a person wounds, mutilates, torments or terrifies an animal.²¹ An offence of aggravated cruelty applies where a person commits an act of cruelty on an animal that results in the death or serious disablement of the animal.²² It is a defence to either offence if the person acted reasonably in defending himself or herself (or any other person) against an animal or the threat of attack by an animal.²³

There is no specific prohibition of operating a breeding establishment that would meet or approximate the RSPCA’s definition of puppy farm. It is not a stand-alone offence to own or manage such an establishment in any Australian State or Territory. In order to show that a dog breeder or other person has committed an offence, it is therefore necessary to satisfy the terms of one of the more general state-based animal cruelty offence provisions. However, this is made difficult by the existence of the code system in Australian jurisdictions. For example, the anti-cruelty provisions in Victoria will not apply to an act or practice with respect to the keeping, treatment, handling, transportation, sale, killing, hunting, shooting, catching, trapping, netting, marking, care, use, husbandry or management of any animal or class of animals, which is carried out in accordance with a code of practice.²⁴

At present, there is no national code of practice that applies to the breeding, sale or transport of puppies or other companion animals. The stated approach of the Commonwealth government under the Australian Animal Welfare Strategy is to develop national animal welfare standards with the intention that each state and territory will then adopt those standards.²⁵ Some, but not all, states and territories have developed local codes of practice or guidelines. These codes of practice may be legally enforceable, usually by way of listing in the relevant animal welfare Regulations.²⁶

The codes of practice which are relevant to the breeding of dogs and cats as companion animals are usually directed to either the breeding facilities

21 Prevention of Cruelty to Animals Act 1986 (Vic) s 9(1)(a).

22 Prevention of Cruelty to Animals Act 1986 (Vic) s 10(1). A person who commits an act of aggravated cruelty may be liable to the penalty for that offence, as well as any cruelty offence.

23 Prevention of Cruelty to Animals Act 1986 (Vic) s 11.

24 Prevention of Cruelty to Animals Act 1986 (Vic) s6(b).

25 Department of Agriculture, Fisheries and Forestry, *The Australian Animal Welfare Strategy* (revised ed 2008).

26 See, eg, Prevention of Cruelty to Animals (General) Regulation 2006 (NSW) sch 2.

themselves or the welfare of animals once they reach pet shops. Queensland, the Northern Territory,²⁷ Western Australia and Tasmania have no uniform codes of practice for the breeding, transport or sale of these animals. In those jurisdictions, breeders can only be prosecuted for a breach of the general anti-cruelty legislation.

While there is a reasonable degree of overlap in the content of the existing codes applying to the breeding of companion dogs, there are also significant differences in the approaches taken. (The content of the codes is discussed in more detail below.) This is problematic because many companion animals are not raised in the state or territory that is their ultimate destination, and may have to travel long distances to reach their new home or the point of sale. Many puppies travel overseas, where breeders can access more ‘lucrative’ markets.²⁸ These inconsistencies raise the possibility of breeders choosing to establish themselves in jurisdictions in which the industry is less regulated.

What Is Regulated under the Codes?

South Australia has a ‘Code of Practice for the Care and Management of Animals in the Pet Trade’ (‘SA Code’), which applies to the care and transport of all animals procured and sold for financial gain.²⁹ It is intended to apply to those who operate or work in premises established or designated for the purpose of selling companion animals ‘as a business for profit and reward’.³⁰ It does not, however, specifically regulate the breeding of companion animals. The Objects of the SA Code indicate that it has been developed to cater for the welfare of those animals held in the short term prior to sale. The SA Code recommends that animals not be kept in a confined area for more than 21 days,³¹ although it does not impose any sanctions for failures to observe this recommendation. The Code principally places obligations on Managers to meet its standards.³²

The scope of the SA Code is not limited to cats and dogs: it includes goats, mice, guinea pigs and ‘any other companion animal’.³³ This has

27 The Animal Welfare Act (NT) s24 does make provision for codes of practice to be passed.

28 RSPCA, above n11, 15.

29 Government of South Australia, South Australian Code of Practice for the Care and Management of Animals in the Pet Trade (2nd ed, 2005) cl 1. A Working Group was established to review the Code, and released a Review in July 2010: Department of Environment and Natural Resources, Review of the South Australian Code of Practice for the Care and Management of Animals in the Pet Trade (2010).

30 SA Code cl 2(a).

31 SA Code cl 2(c).

32 See, eg, SA Code cl 3, 15.

33 SA Code cl 2(b).

the advantage of recognising the diversity of companion animals living in that State, but lacks the specificity that may be needed to cater to the different needs of each species. Each requirement of the Code applies universally to all animals that fall within its scope, and is expressed in general language. More specific requirements apply in rare instances, as in respect to the feeding needs of puppies and kittens.³⁴

This demonstrates a clear bias in favour of certain types of animal which are generally the most popular in Australian households. It is not clear why, for example, it has not been considered necessary to specify the feeding needs of baby rabbits. The Code sets the minimum age at which puppies and kittens may be sold as seven weeks. It is not immediately apparent why this figure can be determined in relation to puppies and kittens, and not other animals. Thus the more general requirement applies to all other companion animals, stipulating that no animal may be sold until it is capable of sustaining itself independently and has been weaned.³⁵ This has the advantage of imposing an obligation with regard to a very wide range of animals. However, it also assumes that those responsible for caring for the animals have the knowledge necessary to this task, without imposing any real requirement that this be the case.³⁶

In Victoria, dog breeding and rearing premises are regulated under the *Domestic Animals Act 1994* (Vic) and associated Regulations. The Minister is able to pass a Code of Practice that specifies standards with regard to the conduct of a domestic animal business ('DAB').³⁷ A DAB is a business run for profit that breeds dogs or cats and has more than 10 fertile animals of either or both species.³⁸ If it has fewer than 10 fertile animals, it will still be a DAB unless it is a member of an 'applicable organisation'. These are organisations that have sought approval from the Minister to be declared an applicable organisation. Applicable organisations are typically representative groups for breeders of a specific breed of cat or dog. A business will also be a DAB if it is involved in the rearing, training or boarding of dogs or cats.

It is an offence to conduct a DAB on premises that are not registered for

34 SA Code cl 16(a).

35 SA Code cl23(c).

36 Clause 14 of the SA Code, for example, requires that the Manager ensure that at least one full time member of staff possess sufficient demonstrable knowledge in the care of animals handled or have completed successfully an appropriate course of training. There is no requirement on the Manager to personally complete such training. However, the Manager is required to be familiar with the signs of diseases common in the animals held: SA Code cl20.

37 Domestic Animals Act 1994 (Vic) s59.

38 Note that one of the Labor reform proposals made in November 2010 was the reduction of this number to a minimum of three fertile animals.

that purpose with the relevant municipal council.³⁹ The council has power under s47(2) of the Act to impose terms, conditions or restrictions on the registration of the premises. However, there is no generally available information as to the frequency with which councils do impose such requirements, or the types of restrictions (if any) that are most often imposed. The RSPCA notes that insistence on compliance with the existing Victorian Code varies greatly between councils.⁴⁰

The focus of the Act highlights the ‘property’ status of companion animals. Homes, with an equivalent number of fertile animals, which do not sell their offspring for profit, are not subject to the Code. In doing so it recognises the risks inherent in the commercialisation of animals; Parliament has not deemed it necessary to regulate those who breed animals unless they are doing so for profit.

In NSW, an ‘Animal Welfare Code of Practice’ applying to the ‘Breeding of Dogs and Cats’ (‘NSW Code’)⁴¹ takes a two-tiered approach to regulation, by imposing standards with which compliance is mandatory,⁴² and then suggesting guidelines intended to facilitate that compliance.⁴³ One standard requires trainees to be supervised by trained and experienced staff. The applicable guidelines merely state that staff ‘*should* have formal qualifications in animal care and management’.⁴³ Compliance with a standard does not remove the need to observe the requirements of the *Prevention of Cruelty to Animals Act 1979* (NSW) or the *Companion Animals Act 1998* (NSW) - the latter relates to management of companion animals within the community, and covers matters such as compulsory registration and control of animals outside the home.

The NSW Code defines breeding as ‘the business of breeding litters of animals for sale’.⁴⁴ It applies to ‘facilities’, which include any place, premise or thing used for the accommodation or shelter of animals for the purpose of breeding or rearing dogs or cats, or where puppies or kittens are housed as a result of breeding, and vehicles used for transportation of animals.⁴⁵

39 Councils which conduct animal shelters or pounds in their own right are not covered by these provisions. Rather, councils must register these premises with the Minister under Div 3A of the Domestic Animals Act 1994 (Vic).

40 RSPCA Australia, above n9, 12.

41 NSW Government, Industry and Investment, Animal Welfare Branch, Animal Welfare Code of Practice: Breeding Dogs and Cats (2009).

42 NSW Code cl 2.3.

43 NSW Code cll 4.1.3, 4.2.1 (emphasis added).

44 NSW Code cl 3.2.

45 NSW Code cl 3.2.

The ‘Code of Practice for the Welfare of Dogs in the ACT’ (‘ACT Code’) was approved in 2010.⁴⁶ The Code applies generally to dogs in the ACT, but also contains provisions specific to the breeding and transport of dogs.⁴⁷ Thus the standards for matters such as nutrition, housing and exercise apply equally to companion animals and puppies and dogs being reared commercially.

Conditions of housing

Each of the codes of practice described above tends to contain at least some similar minimum requirements for basic housing conditions. These requirements relate to periodic cleaning and disinfection, airflow, light and protection from the elements.⁴⁸ However, the cage design standards vary significantly between jurisdictions. Imagine you are a dog used for breeding puppies for sale, and you have a shoulder height of 50 cm. The NSW Code entitles you to 2.4 m² of floor space, in a pen that is at least 180 cm high and 90 cm wide.⁴⁹ In Victoria, you would be entitled to 10 m² of floor space, in a pen that is at least 180 cm high and 180 cm wide.⁵⁰ In either jurisdiction you might be housed with no more than one other ‘compatible’ dog. The NSW Code specifically provides that vehicles, caravans, portable crates and the crawl space under any dwelling must not be used as permanent accommodation for dogs and cats.⁵¹ Other codes of practice do not rule out certain types of specific space for use in accommodating animals.

According to the RSPCA, puppy farms are usually very poorly designed and lack any formal structure. Even where puppy farms are designed and built to house and breed a large number of animals for commercial purposes, these establishments can still fail to meet the animals’ behavioural, psychological, social and physiological needs.⁵² Implicit in this comment is the suggestion that large commercial breeding facilities cannot necessarily ever meet the welfare needs of the animals.

The codes of practice typically regulate the general environment in which dogs may be kept at a breeding facility. However, there are discrepancies here too. Under the SA Code, the temperature must be kept between 15 and 30°C, and animals may not be moved from their cages when the

46 The Animal Welfare Authority, Code of Practice for the Welfare of Dogs in the ACT.

47 ACT Code cll 8–9.

48 See, eg, NSW Code cl 6; Vic Code cl 3.7.

49 NSW Code cl 6.1.1.6.

50 Vic Code cl 3.8.

51 NSW Code cl 6.1.1.1.

52 RSPCA Australia, above n 9, 5.

outside air temperature exceeds 33°C.⁵³ In NSW, the Code requires only that animals be protected from ‘extremes’ of temperature.⁵⁴ In Victoria, in cases where dogs (or cats) are kept in totally enclosed buildings in which forced ventilation is the only form of airflow, temperature must be maintained in the range of 18-21°C.⁵⁵ These differences are baffling. They suggest that too little is known with respect to optimal conditions for raising dogs to fix basic minimum standards across Australian jurisdictions which, in some respects, are otherwise very similar from a legal and administrative perspective. If it is the case that too little is known about the temperature in which dogs ought to be housed in order to regulate on that point consistently, why are we raising animals in such conditions in the first place?

Transport

The regulation of transport of dogs and puppies varies considerably (among the jurisdictions in which it is regulated at all). In SA, for example, the Code stipulates that food and drink must be provided for ‘extended journeys’, which are journeys exceeding 12 hours in duration.⁵⁶ The NSW Code simply provides that the method of transport chosen must be appropriate for the age and size of the animal, and prohibits the transport of animals in the boot of a car.⁵⁷ However, it does provide that minimum exercise requirements will still apply on days when animals are being transported. The NSW Code on breeding of companion dogs interacts with the NSW ‘Animal Welfare Code of Practice No 1 - Companion Animal Transport Agencies’. The latter applies to ‘everyone involved in the business of companion animal transportation.’⁵⁸ It applies while animals are the responsibility of a transport agency, from the time of collection, during holding and until delivery at the final destination or point of embarkation.⁵⁹ The Code requires that, for example, the container in which an animal is held is small enough to prevent ‘self-induced’ trauma, but large enough to allow the animal to turn around.⁶⁰

53 SA Code cl 6.

54 NSW Code cl 6.2.1.2.

55 Vic Code cl 3.7.

56 SA Code cl 27.

57 NSW Code cl 7.4.1.1-2.

58 NSW Government, Industry and Investment, Animal Welfare Code of Practice No 1 - Companion Animal Transport Agencies (1996).

59 Where it is necessary for an animal to be held overnight, for longer than 24 hours, the standards of accommodation must meet those set out in NSW Government, Industry and Investment, Animal Welfare Code of Practice No 5 - Dogs and Cats in Animal Boarding Establishments (1996).

60 NSW Government, Industry and Investment, Animal Welfare Code of Practice No 1 - Companion Animal Transport

The ACT Code allows dogs to be transported by motor vehicle, air or rail. Dogs ‘should be transported in the shortest possible time,’ and at all times during transport, dogs should be protected from extremes in temperature.⁶¹

Limits on breeding

In some jurisdictions, the codes of practice set limits on the age at which dogs which may be used for breeding, as well as the total number of litters per bitch, and the appropriate intervals between each litter. For example, in NSW, bitches must not have more than two litters in any two-year period, except with the approval of a veterinarian.⁶² As noted above, the SA Code is not intended to address the conditions in which companion animals are bred or reared, as its scope is limited to the care of animals in the period immediately prior to sale. In Victoria, there is no mention in the Code of Practice of a minimum age at which an animal may be bred, and no limit on the number of litters which an individual may produce in a given period of time. This lack of regulation increases the risk of bitches being bred to exhaustion.

Record keeping

Record keeping may seem to have little impact on the immediate welfare needs of animals, but it is crucial to the broader goals of regulating animal breeding establishments. Accurate record keeping allows for the overall numbers of animals to be monitored, and for the tracking of animals from a particular establishment. There are discrepancies even in the length of time for which records must be kept, with the Victorian Code requiring records to be kept for five years,⁶³ and the NSW Code for three.⁶⁴

Exercise

Exercise is a crucial requirement with respect to dogs living in breeding establishments, particularly where their cages are relatively confined. Even in this important area, there is no consistency of approach. Under the SA Code, it is necessary for dogs and puppies to be exercised in accordance with the needs of their breed and age, but for a minimum of three ten minute intervals per day.⁶⁵ In Victoria, it is only a requirement

Agencies (1996) cl 3.1.1.

61 ACT Code cl 8.1.

62 NSW Code cl 10.1.1.9.

63 Vic Code cl 4.

64 NSW Code cl 5.1.3.

65 SA Code cl 5(e).

for dogs in the minimum recommended enclosure size to be exercised. Dogs kept in enclosures larger than 20 m² ‘do not normally require additional exercise.’⁶⁶ Where dogs do need to be exercised, this can be provided by allowing dogs access to an exercise area for at least 10 minutes twice daily, or walking them on a lead for the same amount of time. Very active or old dogs, the Code stipulates, may require more or less exercise than specified.⁶⁷ One wonders why very old dogs would be required to be kept at such a breeding establishment at all.

Penalties and Enforcement

An obligation to comply with the SA Code is placed on any person who carries on a business which involves selling companion animals for profit. The maximum fine for a failure to comply is \$2,500, although the broader offence of ill treatment of an animal under s13 of the *Animal Welfare Act 1985* (SA) still applies.

In Victoria, non-compliance with the Code is an offence for which the maximum penalty is 10 penalty units.⁶⁸ The same penalty applies for the conduct of an unregistered DAB. In April 2011, the maximum penalty amounted to \$1,194.50. The RSPCA has no power to enforce the Code; responsibility for enforcement rests with authorised officers appointed by the Minister or by a council.⁶⁹ A problem with this system is the lack of any real incentive for councils to allocate resources to the enforcement of the legislation. Under s95 of the *Domestic Animals Act 1994* (Vic), councils retain fines imposed by council officers, whereas fines collected by any other authorised officer are paid into the Consolidated Fund. It is arguable that this not only discourages cooperation between council officers and others who are authorised to enforce the Code, but that the low value of the penalty and the acknowledged difficulties in locating unregistered breeding premises makes it uneconomical for councils to devote any significant resources to investigations.

The RSPCA’s enforcement power is limited to breaches of the *Prevention of Cruelty to Animals Act 1986* (Vic), meaning that it cannot intervene unless there has been a relatively serious incident or allegation of animal cruelty. In its Discussion Paper RSPCA Australia explained that it has frequently investigated puppy breeding establishments (both registered and unregistered) but has not been able to prosecute due to insufficient

66 Vic Code cl 3.5.

67 Ibid.

68 Domestic Animals Act 1994 (Vic) s 63A(1).

69 Domestic Animals Act 1994 (Vic) s 74.

evidence to meet the requirements of the Act.⁷⁰

In NSW, the maximum penalty for non-compliance with the Code is 25 penalty units, which amounted to \$2,750⁷¹ in April 2011. In ‘more serious’ cases, failure to meet one of the standards under the Code can result in prosecution under the *Prevention of Cruelty to Animals Act 1979* (NSW). Under that Act, the Code can be enforced by RSPCA inspectors, Animal Welfare League inspectors and officers of the NSW Police Force.⁷² The RSPCA has commented that police officers have not been known to investigate breeding or puppy farm complaints.⁷³ Local councils do not have an enforcement role under the *Prevention of Cruelty to Animals Act 1979* (NSW), although they do have powers with respect to noise or environmental pollution, and specific matters under the *Companion Animals Act* (NSW), such as microchipping and registration. Lack of any clear division of responsibility between these the RSPCA, the Animal Welfare League and the NSW Police Force is concerning. Also, inspectors may be appointed by the Department of Primary Industries,⁷⁴ seemingly a strange choice of authority to be responsible for the welfare of companion animals in the state.

When there is a conviction under the *Prevention of Cruelty to Animals Act 1979* (NSW), there is provision for the issue of a prohibition order. The court must be satisfied that the person convicted would be likely to commit another such offence, if the person were to be in charge of an animal again.⁷⁵ Failure to comply with such an order is an offence, with a maximum penalty of 25 penalty units. The RSPCA has expressed frustration that in cases where charges are proven but no conviction is recorded, the court cannot impose a prohibition order.⁷⁶

Point of Sale Regulation

The RSPCA has reported that puppy farmers primarily sell puppies over the internet or wholesale to pet shops. ‘They will also often utilise newspaper advertisements and advertise on internet classified pet sites.’⁷⁷

70 RSPCA Australia, above n9, 12.

71 Prevention of Cruelty to Animals (General) Regulation 2006 (NSW) cl20. Failure to comply with the NSW Code can result in the issue of a penalty infringement notice or a prosecution under the Regulation. In April 2011, the value of a penalty unit in NSW was \$110.

72 Prevention of Cruelty to Animals Act 1979 (NSW) s34AA.

73 RSPCA Australia, above n9, 13.

74 Prevention of Cruelty to Animals Act 1979 (NSW) s4(1).

75 Prevention of Cruelty to Animals Act 1979 (NSW) s31.

76 RSPCA Australia, above n 9, 13.

77 RSPCA Australia, above n 9, 11.

It is apparently rare for puppy farmers to accept other than cash payments, which makes tracing the origin of these puppies particularly difficult. Given the poorly documented nature of these arrangements, it is necessary to consider the manner in which sale of puppies and dogs is regulated in Australia. Does point of sale regulation have any effect on the ways in which puppy farms operate?

The SA Code requires that on sale, the vendor must ask the purchaser if they have any personal knowledge of the particular breed of animal being purchased. If not, the vendor must provide the purchaser with printed information, containing a list of specific details such as vaccination requirements, diet and exercise.⁷⁸ This type of requirement presumably does little to encourage purchasers to reflect appropriately on whether they are truly able to care for the animal, particularly if it is only given to them when the transaction is finalised.

In Victoria, pet shops must be registered with the local municipal council. The Vic Pet Shop Code states that people who operate or who work in pet shops are required by the Act to comply with the minimum standards contained in the Code, and are ‘encouraged to establish higher standards.’⁷⁹ (Other than this general comment however, it is not clear how pet shop owners and operators are encouraged to do so.) The Victorian Pet Shop Code requires that animals offered for sale be ‘fully weaned and self-sufficient’, and stipulates minimum ages for different types of animal.⁸⁰ A central feature of the Code is the requirement that pet shops display a guarantee. The guarantee is that if an animal is not acceptable to a purchaser for health or other reasons that are ‘supported by a statement from a veterinarian’, pet shop proprietors must take the animal back and refund all monies or offer a replacement animal with the same guarantee.⁸¹

This serves to protect the financial interest of the purchaser, and may have indirect benefits to animals by providing some level of incentive for pet shop owners to ensure their health. However, it does little to address inherent problems, as it does not in itself trigger any kind of investigation. For example, it could easily result in an unhealthy or diseased animal being returned to an inappropriate environment, or the spread of disease. Animals returned within three days for any other reason entitle the purchaser to a 75% refund. This allows for a cooling off period, in which purchasers who realise that they may be unable to offer an animal the care

78 SA Code cl 29.

79 Victoria, Code of Practice for the Operation of Pet Shops (2004).

80 Vic Pet Shop Code cl 2.4.

81 Vic Pet Shop Code cl 2.4.

it requires may return the pet to the vendor without losing the entirety of their financial investment.

New South Wales also has a code of practice that applies to ‘everyone involved in the keeping or selling of animals in pet shops’.⁸² It sets standards for the care and management of pets kept for the purpose of sale. As with the NSW Code of Practice which applies to breeding dogs, the pet shop code contains both ‘standards’ and ‘guidelines’. The NSW Pet Shop Code, unlike its Victorian equivalent, defines the term ‘animal’ for its purposes, and includes dogs, cats, rabbits, guinea pigs, rats, mice, birds, fish and other vertebrate species.⁸³ Following a number of general standards and guidelines that apply to all these animals, the Code contains special requirements for different groups of animal, such as dogs and cats and rabbits, guinea pigs and mice. Unlike in Victoria, dogs and cats may not be sold to those under 18 years of age.⁸⁴ The NSW Code matches its Victorian equivalent by providing a three-day period in which a purchaser may return an animal (except a fish) and receive a refund of 50 per cent of the price paid.

Queensland has a ‘Code of Practice for Pet Shops’. It was developed by the Queensland government with a view to reducing the number of dogs and cats euthanased in the state each year.⁸⁵ The Code encourages desexing and microchipping animals before they are sold, as well as providing buyers with advice about the care of the animal. The Code is not legally binding in any way, although compliance with the Code does not remove the need to comply with duty of care and other obligations contained in Queensland animal welfare legislation. Rather, compliance demonstrates to the general community that people involved in the pet shop industry are concerned about the welfare of animals in their care.⁸⁶ The SA Code does not apply specifically to dog breeding facilities or to pet shops, but more generally to those involved in the care and management of animals in the pet trade.

These codes of practice do not prohibit pet shops from purchasing animals from breeding establishments that would fit the RSPCA’s definition of a puppy farm. They do not impose any requirement on the

82 NSW Department of Primary Industries, *Animal Welfare Code of Practice: Animals in Pet Shops* (2008).

83 NSW Pet Shop Code cl 3.2.1.

84 NSW Pet Shop Code cl 10.1.1. But where no regulatory regime (such as birds traded under authorities issued by the NSW Parks and Wildlife Authority) applies, other animals may be sold to those over 16. There is no apparent reason for such speciesism, and none is offered by the Code. Presumably, a rabbit or a bird is just as capable as a dog or cat of suffering in the case that it is purchased by someone too young to care for it appropriately.

85 Queensland Government, *Queensland Code of Practice for Pet Shops* (2008) 2.

86 *Ibid* 3.

proprietors or managers of pet shops to report suspected puppy farming activities. This is in spite of the fact that those who work in pet shops are in a much better position than most to obtain information about the source of companion animals raised for sale. Although the codes of practice may require records to be kept, they do not specify in any detail what these records must show.⁸⁷ Thus there is no guarantee that those enforcing the codes would be assisted by these records in any attempts to trace sick or injured puppies back to their source.

Australian law does not limit the countries to which puppies or other companion animals may be sent. That is, there is no requirement that a country of destination have any particular level of animal welfare protection. Puppies may legally be sold into countries with no existing animal welfare laws. This position necessarily undermines the effectiveness of the existing regulation of dog breeding.

Objectives of Reform

What is needed is a set of clear objectives for the regulation of the intensive breeding of dogs (as well as cats and other companion animals). Given the infrequency of reform in this area and the generally limited resources made available for the enforcement of animal protection measures in Australian jurisdictions, reforms must be well considered and must take a long-range view rather than addressing only the immediate problems. It is important to acknowledge here that the aim of regulation in this area is not to eliminate all breeding of dogs. The benefits to humans of caring for dogs are too well known and documented⁸⁸ to make it at all thinkable that dogs could vanish from our lives. To put it simply, the broad goal of regulation in this field must be, at its most basic, to ensure the welfare of dogs bred by people.

It is clear that existing regulation and enforcement mechanisms in this area are struggling to contend with a series of direct and indirect consequences of the operation of puppy farms. The direct consequences include those discussed above, such as poor living conditions and deplorable treatment of animals at the farms. The indirect consequences flow through to problems of managing animals within communities. In particular, state and territory governments, and local councils, are understandably finding it difficult to address the over-population of animals in a humane manner. These problems are exacerbated by the

⁸⁷ See, eg, Vic Pet Shop Code, cl 15(b).

⁸⁸ See, eg, the discussion in Lesley-Anne Petrie, 'Companion Animals: Valuation and Treatment in Human Society' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (2009) 57, 68–73.

lack of resources available to enforce existing animal welfare codes of practice and legislation.

It is also clear that animals bred and sold as companion animals complete a journey which begins in a breeding establishment and, if all goes well, ends at the home of the ultimate purchaser, often passing through a pet shop on the way. Options for reform are not (and should not be) limited to the imposition of minimum welfare standards at breeding establishments. A holistic approach to reform is needed, which takes into account the breeding, rearing, transport and eventual sale of these animals. As has been shown, the content of welfare standards and the means chosen to enforce them are equally important.

A key objective of reform must be to determine whether an accepted, standardised definition of ‘puppy farm’ is required. Would the creation of a specific offence of puppy farming be too limited to capture other dog breeding activities, which are also harmful to dog welfare? Is a breeding establishment a puppy farm as soon as it has a certain number of fertile dogs? Is it necessary that the dogs be bred for profit or reward? Is it even necessary that the dogs be bred intentionally? Should animal hoarding constitute a separate offence in its own right? These questions must be addressed in the course of drafting any new provisions.

The position in the United Kingdom

The regulatory position in the UK is briefly described here by way of contrast with the Australian systems. In the UK, the rearing of dogs is regulated under the *Breeding of Dogs Act 1973* (UK) c60. The Act applies throughout the UK, a point that immediately distinguishes the situation from that in Australia. Breeding premises must be licensed, and to be licensed they must be inspected by a veterinarian.⁸⁹ The veterinarian's professional opinion of the premises and the applicant for the licence is then noted in a written report to the local council. Where it is observed, this kind of approach helps to ensure that breeding premises meet the needs of the animals from the outset. Premises must be licensed when there are four or more litters born at the premises in a 12-month period. This can be contrasted with the position in Victoria, where a DAB need not be licensed unless it contains 10 or more fertile bitches. The scope of the UK legislation is quite broad, since bitches kept at another premises are still included in the calculation.⁹⁰ It is therefore likely that the terms of the UK legislation would apply to many more

⁸⁹ Breeding of Dogs Act 1973 (UK) c 60, s 1(2A).

⁹⁰ Breeding of Dogs Act 1973 (UK) c 60, s 4A(4).

premises than those currently captured by the codes of practice operating in Australia.

Enforcement

Licenses must be renewed every 12 months. Local councils are empowered to order the inspection of a licensed premises, and it is an offence to obstruct an inspector.⁹¹ As in Australian jurisdictions, there is no obligation on councils to conduct any inspections. However, those who are guilty of an offence under the Act are liable to imprisonment for a maximum of three months, or a fine.⁹²

Restrictions on breeding

The UK restrictions on breeding are generally less generous than those in Australia. Bitches must be at least one year of age before they are mated and they must not give birth to more than six litters in a lifetime.⁹³ They can only have one litter every 12 months.⁹⁴ Such limitations help to restrict exploitation of exhausted animals, but do little to guarantee the future of the animal.

Past reform attempts in Australia

In 2006, a Bill placed before the SA Parliament proposed amending the *Animal Welfare Act 1985* (SA) to introduce a provision (s15A) directed specifically at regulating the commercial breeding of companion animals. The Bill (which ultimately lapsed in the House of Assembly) would have made it an offence to breed a dog or other prescribed companion animal except in accordance with an authorisation from the Minister. A secondary offence proposed by the Bill was the sale of a companion animal that had been bred in contravention of s15A. If the Bill had been passed, written authorisations would have been required in order to breed companion animals.⁹⁵ Further, authorisations relating to dog breeding would have needed to contain conditions that sought ‘to prevent the practice known as puppy farming’. However, the Bill itself did not define the term ‘puppy farming’. The penalties contained in the Bill were relatively severe. The maximum penalty for a breach of s15A was a fine of \$20,000 or four years imprisonment. As the Honourable Bob Such,

91 Breeding of Dogs Act 1973 (UK) c 60, s 2(2).

92 Breeding of Dogs Act 1973 (UK) c 60, s 3(1).

93 Breeding of Dogs Act 1973 (UK) c 60, s 1(4)(g).

94 Breeding of Dogs Act 1973 (UK) c 60, s 1(4)(h).

95 Prevention of Cruelty to Animals (Commercial Breeding of Companion Animals) Amendment Bill 2006 (SA).

Independent Member for Fisher, said in the House of Assembly at the time of reading the Bill:

I am sure the huge majority of the community would support a measure which does not intrude on legitimate breeders - those who care about dogs and love dogs. They would welcome something that tackles this insidious practice, generally known as puppy farming.⁹⁶

Significant changes to regulation at the point of sale (where it exists) are also possible and warrant serious consideration. In 2008, NSW Greens Senator Clover Moore introduced a private member's Bill that would have prevented the sale and display of certain animals, including dogs and cats, in pet shops and markets.⁹⁷ It would also have prevented the display of other mammals in shop windows. This kind of legislation would presumably deter impulse purchase of pets. The Bill was negated in principle.

Similarly, on 6 April 2011 Caroline Le Couteur MLA presented a Private Member's Bill to amend the *Animal Welfare Act 1992* (ACT), the *Animal Welfare Legislation Amendment Bill 2011* (ACT). The Bill was defeated in the Legislative Assembly on 4 May 2011. The Bill was designed to introduce wide-ranging reform of ACT animal welfare legislation, and was not limited in application to the problem of puppy farming, or to the welfare of dogs in the Territory more generally. As in the case of the NSW Bill described above, it would have made it an offence to display an animal in a shop window. Clause 11 of the Bill would also have introduced a strict liability offence of failing to give information about basic care of an animal to the person to whom the animal is sold.

The Bill was also intended to amend the *Domestic Animals Act 2000* (ACT) by introducing an offence of breeding a dog or cat for sale without a licence to do so.⁹⁸ In deciding whether to grant a breeders licence to an applicant, the Bill proposed that the registrar be satisfied of a range of factors, including that the applicant will only breed from cats or dogs that are healthy and genetically sound, and that no puppies or kittens would be allowed to leave the premises before reaching 8 weeks of age. The Bill would have introduced a strict liability offence of selling a dog of 6 months or older if not de-sexed (subject to some exceptions, such as

96 South Australia, Parliamentary Debates, House of Assembly, 28 June 2006, 690 (Bob Such).

97 Animals (Regulation of Sale) Bill 2008 (NSW).

98 Animal Welfare Legislation Amendment Bill 2011 (ACT) cl 21. The Domestic Animals Act 2000 (ACT) currently only requires those with four or more dogs at a residential premises to be licensed.

where the buyer holds a permit for the dog).⁹⁹ It would also have made it illegal to keep for sale, or sell a dog from a shop, or to advertise a dog for sale if the person were not an 'authorised seller' or 'approved person'.

Key considerations for reform

It is clear that the commercial breeding of dogs in Australia has failed to self-regulate effectively. (This may also be due in part to the lack of information available to those buying companion animals about the conditions in which the animals are raised. Consumers cannot make welfare-based decisions where those conditions are not known to them.) To take the Northern Territory as an example of a jurisdiction with no specific regulation of puppy or cat breeding facilities, prosecutors must rely on very general requirements in the *Animal Welfare Act 1999* (NT). Such minimum conditions include a requirement that animals receive adequate exercise if they are confined, and that a person transporting an animal must not inflict any unreasonable or unnecessary suffering on the animal.¹⁰⁰ These minimum protections are much less detailed than those contained in the welfare codes of practice in other jurisdictions (despite the many weaknesses and inconsistencies of those codes).

As a starting point, nationwide regulation of the breeding, rearing and sale of companion dogs is necessary as a bare minimum, to ensure that welfare conditions are enforceable in every Australian jurisdiction. While consistency across jurisdictions is desirable, it may be preferable in the short term to introduce minimum standards applying specifically to breeding of companion dogs in those jurisdictions in which such regulation is non-existent, such as Tasmania and the Northern Territory. This is particularly the case if no specific offence of puppy farming is to be introduced in Australian jurisdictions. In that scenario, it is absolutely essential that minimum conditions be stringent enough to abolish puppy farming 'by default'.

In its review of the SA Code, the South Australian working group took the position that the review was only an interim measure. When the Primary Industries Ministerial Council has produced a national Model Code with respect to Pet Shops, expected to be ready in 2011, the Code will be made mandatory in SA by enactment as Regulations under the *Animal Welfare Act 1985* (SA).¹⁰¹ The SA review recommended among other things that the application of the SA Code for animals in the pet

99 *Animal Welfare Legislation Amendment Bill 2011* (ACT) cl 74A. Clause 74B of the Bill would have made it an offence to sell a dog under 6 months without a redeemable de-sexing voucher.

100 *Animal Welfare Act 1999* (NT) ss 11, 13.

101 Government of South Australia, above n 2897, 3.

trade be broadened to include those who do not make a financial gain through their dealings with animals.¹⁰² The review identified that many people deal with animals on an ad hoc, informal basis but should nevertheless be required to provide those animals with the same minimum conditions as more formal operations. It also acknowledged estimates that fewer than 10 per cent of animals bought in Australia are bought from pet shops, so targeting business premises alone would leave many animals with very little protection.¹⁰³

Reform of existing point of sale regulation offers an excellent opportunity to address some of the issues caused by puppy farming. While a comprehensive ban on sale of pets from pet shops may be unrealistic in the short term, reforms should require proprietors and managers of pet shops to take greater responsibility for ensuring that they do not sell animals sourced from puppy farms. In recognition of the fact that animal welfare conditions for export of animals are set by the importing country, the RSPCA has recommended the introduction of measures which would allow for all puppies sold by Australian breeders to be traceable to the breeder.¹⁰⁴ The RSPCA also advocates setting minimum conditions for the age of puppies destined for export, as well as exploring strategies for the prevention of export of puppies to overseas puppy farms.¹⁰⁵

Enforcement and available penalties will be crucial to any reform. We have seen that existing codes of practice are not always legally enforceable, or are not enforceable in their entirety, leaving important welfare considerations to the discretion of managers and proprietors. In the weeks before the Victorian state election of November 2010, both major political parties released policy statements describing their approaches to reform of dog breeding regulation. The Liberal Party proposals included the introduction of much heavier penalties for breaches of the Vic Code or failure to register a DAB.¹⁰⁶ The Coalition policy would also give RSPCA inspectors the same powers of entry and inspection as those currently held by local government inspectors.¹⁰⁷ As noted above, the RSPCA's inability to take action to enforce existing codes in many jurisdictions including Victoria is a major source of frustration. Although the policy did not contain a large amount of detail, it proposed working with the federal government to introduce 'tougher regulations on the lucrative sale of unregistered puppies overseas,

102 Ibid 6.

103 Ibid.

104 RSPCA Australia, above n 11, 4.

105 Ibid.

106 See above n 9728.

107 Ibid.

including minimum ages and stricter licensing.¹⁰⁸ As of April 2011, the elected Liberal government was yet to take action to further these proposals.

The unsuccessful Brumby Labor government released a policy with a number of similar recommendations. The Labor policy also recommended regulation of identification and traceability of online pet sales ‘to improve consumer protection and aid welfare investigations.’¹⁰⁹ It echoed the Liberal proposal of giving RSPCA officers more extensive powers. One point of difference was the planned introduction of a minimum age (18) for buying pets. (This is already a requirement in NSW under the Pet Shop Code.¹¹⁰) The Labor policy proposed the extension of the minimum holding period for animals in shelters and pounds to allow more animals to be rehabilitated and rehoused.¹¹¹ It also promised \$4 million to the RSPCA over a four-year period to assist with the funding of inspectorate work. However, there was a significant difference in the nature of the increased penalties proposed. While the Liberal (then Opposition) government suggested an increase in the maximum penalty for breach of the Code of Practice to \$30,000, the Labor government’s proposal was limited to \$2,389 for each breach.¹¹² It is arguable that imposing and enforcing higher maximum penalties throughout Australia (perhaps even periods of imprisonment as in the UK) would not only more effectively deter would-be puppy farmers, but would provide councils and local branches of the RSPCA with a genuine incentive to invest funds in the investigation of potential offences.

Conclusion

In the face of the suffering of the animals we raise for food, the true nature of the source of our supply of companion animals often recedes into the distance. Rarely do we hear of ‘battery pups’, for example. Given the relative visibility of certain kinds of companion animals, this phenomenon has important implications. South Australia is the only Australian state or territory to have a code of practice that applies to the commercial breeding of companion animals other than cats and dogs.

The benefits companion animals bring to the people they live with are well-known. Despite the popularity of dogs and cats and their role within many Australian families, there are significant gaps in the regulatory

108 Ibid.

109 Minister for Agriculture, ‘Brumby Government to Back RSPCA on Animal Welfare’ (Media Release, 27.10.2010).

110 It was also proposed in the Amendment of Animal Welfare Legislation Bill 2011 (ACT) cl 30.

111 Ibid.

112 Ibid.

protection of their living conditions. The existence of puppy farms is an important reminder of these gaps. A strong, considered approach is required. This article has outlined the existing legislation and codes of practice which stipulate (or merely suggest) minimum welfare standards for companion dogs and puppies raised and sold in Australia. It has discussed some of the gaps and inconsistencies in this regulation, and shown that effective resolution of many legal problems created by puppy farms requires close attention not only to breeding establishments but also to transport and point of sale regulation.

THE RIGHTS OF ANIMALS AND THE WELFARIST APPROACH TO PROTECTION: MAY THE TWAIN MEET?

*By Stephen Keim SC and Tracy-Lynne Geysen **

Introduction

Supporters of the RSPCA and the idea that animals are entitled to be treated with kindness and respect, despite their spectacular achievements over a lengthy period of activism, wonder why it is difficult to make progress. These feelings are enhanced when the same supporters think about the logic that supports their cause and the natural empathy that many people have for animals, especially, when the animals are younger.

Animal protection legislation has generally been treated as a regulatory task. That is, legislation has imposed restrictions on human conduct (on pain of punishment) on the basis that it is wrong to engage in certain conduct towards animals. The role of animals in the process is passive at all times: in being treated cruelly and in the legal processes that may or may not follow. This article explores the concept of the extent to which animals can and should be treated as the recipients and holders of rights and the extent to which such an approach might assist in achieving more effective protection for animals.

We conclude by making some suggestions how, with a rights- based approach in mind, animal welfare legislation may be strengthened in its ability to protect animals from cruel and inhumane treatment.¹

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¹ We have used the *Animal Care and Protection Act 2001* (Queensland) as the focus of our suggestions.

The Rights Based Approach in the Environmental Sphere

This rights based legal approach has been considered in the context of enhancing respect for the environment and the natural systems on which human life and welfare depend. These considerations are likely, also, to have application to the task of promoting the rights of domestic animals and animals raised by humans for food and for other forms of sustenance.

Part of the difficulty encountered in advancing the cause of animals derives from the central ideas that underpin our legal systems. The idea that animals should have any protection is alien to a human-centred legal system that focuses strongly on the property rights of people. In *Wild Law*,² South African lawyer and environmental activist, Cormac Cullinan, introduces the concept that is the title of the book in the following terms:

“Wild law expresses Earth jurisprudence. It recognises and embodies the qualities of the Earth system within which it exists. As an approach it seeks both to foster passionate and intimate connections between people and nature and to deepen our connection with the wild aspect of our own natures. It tends to focus more on relationships and the processes by which they can be strengthened, than on end-points and ‘things’ like property. It protects wilderness and the freedom of communities to self-regulate. It aims to encourage creative diversity rather than to impose uniformity. Wild law opens spaces within which different and unconventional approaches can spring up, perhaps to flourish, perhaps to run their own course and die.

Wild laws are laws that regulate humans in a manner that creates the freedom for all the members of the earth community to play a role in the continuing co-evolution of the planet. Where wild laws prevail, cultural and biological diversity, creativity and the freedom to play a creative role in the co-evolution of the planet will be found.

With a little practice you can start to recognise flashes of it even in our current legal and political systems. Wildness can be glimpsed in laws that reserve a certain amount of water to the river in order that it may flow healthily, and in international declarations that assert the inherent value of all living organisms and of biological diversity itself. It crops up in the recent amendment to the German

2 Cormac Cullinan, *Wild Law*, 2002, Siber Ink, Claremont, South Africa.

constitution (paragraph 20(a)), which recognises that the state has a responsibility to protect animals as well as humans.”³

Cullinan contrasts his wild law concept with the paradigm that prevails in the world’s legal systems:

“The dominant legal systems are all based on the assumption that we human beings exist only within our own skins (i.e. that which is outside our skins is not us) and that we are the only beings or subjects in the universe ... everything else is defined as an object.”⁴

The force of the assumption that only humans matter derives from the role of legal systems in society. Legal systems not only regulate what people can and can not do. They also contain the ideas, values and systems which go to make up the society’s view of itself and the world in which it operates. Cullinan points out that, while the regulatory role of law is easy to perceive, “we often overlook the fact that law plays an equally important role in constituting and forming society itself”.⁵

The effect of the hidden role of law in reflecting the world view of society is that ideas which fall outside or contradict that world view are, generally, not taken seriously by the legal system and experience difficulty in obtaining serious consideration. Cullinan gives as an example the privileged position that corporations, disembodied and artificial legal entities, have obtained within the legal system.⁶ As a further and more relevant example for present purposes, Cullinan speaks of the difficulty faced by the argument that animals should have rights in making progress:

“The idea that animals should have legal rights has enjoyed little success before the courts of the United States despite the dogged efforts of many campaigners and some dedicated lawyers. One of the reasons for this ... is not that the American judiciary is particularly insensitive to animals, but rather that when the society that is the United States was constituted and the picture that is the legal and political system was painted, animals were outside the frame. Consequently, recognising that animals should be treated in a similar

3 Cullinan, note 1, page 10-11.

4 Cullinan, note 1, page 29.

5 Cullinan, note 1, page 42.

6 Cullinan, note 1, pages 57.

way to humans goes against the grain of the whole legal system. In fact, for many people, it is unthinkable ...”⁷

One attempt to widen the vision of the prevailing legal system was the now famous 1972 article of Christopher D Stone, Professor of Law at the University of Southern California, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*.⁸

Stone accepted that his argument would sound unthinkable in the context in which he was writing but argued that the idea was a natural progression from the development of previously “unthinkable” concepts. Stone pointed out the idea that children might have rights (and were not the property of the male head of the family) was also once unthinkable.⁹ Stone also pointed out the law’s ability to give legal existence and consequential rights to fictional beings such as trusts, corporations, joint ventures, municipalities, nation-states and even ships, which have a status in the law separate to their owners.¹⁰ Stone revisited the uglier times of the law in noting the invisibility in the law of different races including Jews, Afro-Americans, and even Chinese. It was not just slaves who had been treated as objects able to be owned and dealt with according to the whims of their owners. As late as nineteenth century California, Chinese were included among those human groups who lacked even the procedural right to testify against white people in court proceedings.¹¹

The idea of leveraging rights off other more generally-accepted concepts has played a role in the development of human rights generally. The *Declaration of the Rights of Man and Citizen* approved by the National Assembly of France on 26 August 1789, in the period before the French Revolution spiralled out of control into violence, gave rise to an extension of rights to Jewish people; Protestants; and free Blacks as debates in the Assembly drew attention to the contradiction involved between those restrictions and the statements of philosophy in the Declaration. Eventually, the abolition of slavery gained the attention of the Assembly.¹²

7 Cullinan, note 1, page 45-46.

8 45 S. Cal. L. Rev. 450 (1972).

9 Stone, note 8, pages 450-451.

10 Stone, note 8 pages 453-454.

11 *People v Hall* 4 Cal. 399, 405 (1854) cited in Stone, note 7, page 454.

12 This progression of ideas in the minds of the representatives in the Assembly is charted by Lynn Hunt in her book, *Inventing Human Rights*, WW Norton, 2007.

In the same way, the existence of slavery in the United States, although it took over 80 years and a civil war, was always likely to be perceived as contradictory to the opening words of Declaration of Independence adopted in 1776. The *Universal Declaration of Human Rights* adopted by the General Assembly of the United Nations in 1948 is intended to be used for the purpose of providing an argument against discriminatory treatment wherever it occurs in the world.

AC Grayling shows¹³ this process of leveraging occurring in Yorkshire in 1830 when Richard Oastler drew attention to the plight of workers in the mills of the town of Bradford. In letters published in the *Leeds Mercury*, Oastler took to task the local member, William Wilberforce, for campaigning against the slave trade and slavery in other countries while ignoring the “slavery” under his very nose.

Stone remakes Cullinan’s point in the following pithy passage:

“There is something of a seamless web involved: there will be resistance to giving the thing “rights” until it can be seen and valued for itself: yet it is hard to see and value it for itself until we can bring ourselves to give it “rights” – which is almost inevitably going to sound inconceivable to a large group of people.”¹⁴

Stone proposed a system analogous to litigation on behalf of persons with reduced capacity, namely, that a person could apply to be appointed a guardian for a natural area where that area was being endangered or being detrimentally impacted upon. He then pointed out that procedural legal rules could be made to allow the natural qualities of natural areas to be given weight in themselves without giving natural areas “rights”. But he makes the important point that the idea of rights has an influence far beyond its narrow procedural effect. He says:

“If my sense of these influences is correct, then a society in which it is stated, however vaguely, that ‘rivers have legal rights’ would evolve a different legal system than one which did not employ that expression, even if the two of them had, at the start, the very same ‘legal rules’ in other respects.”¹⁵

Stone devotes 22 pages of his article to what he calls *The Psychic and Socio-Psychic Aspects*. After citing an extract from Carson McCullers’ *A Tree, A Rock, A Cloud* in which an old derelict explains to a 12-year-

13 AC Grayling, *Towards the Light*, Bloomsbury, 2007, London at page 174.

14 Stone, note 8, page 456. Joseph Heller, the author of *Catch 22*, would be proud of such a formulation.

15 Stone, note 8, page 489.

old boy his “science” of learning to love anything, a group of people in a street or the objects that form the title of the story, Stone says:

“To be able to get away from the view that Nature is a collection of useless objects is, as McCullers’ ‘madman’ suggests, deeply involved in the development of our abilities to love - or, if that is putting it too strongly, to be able to reach a heightened awareness of our own, and others’ capacities in their mutual interplay. To do so, we have to give up some psychic involvement in our sense of separateness and specialness in the universe. And this, in turn, is hard ... Yet, in doing so, we - as persons - gradually free ourselves of needs for supportive illusions. Is not this one of the triumphs for ‘us’ of giving legal rights to (or acknowledging the legal rights of) the blacks and women?”¹⁶

We would put it slightly differently. Since humans have evolved for life in small hunter and gatherer communities, empathy acts as a controlling device for much of our behaviour. To those for whom we hold empathy we are capable of showing great kindness even at our own expense in material and intangible benefits. For those whom we identify as “other”, we possess a capacity, often but not always latent, to treat with great unkindness, even cruelty. Since our legal systems are influential in projecting and developing the values that we hold as societies and citizens, if we recognise animals or natural systems as having rights, our ability to hold empathy for those “objects” will be enhanced. Psychically, as well as legally, the granting of rights makes a dramatic change to a society’s ability to protect the new holder of those rights.¹⁷

Animals as personal property

When one shifts from a consideration of the environment and natural objects to the position of animals, especially domestic and production

16 Stone, note 8, page 495.

17 In an article published over 30 years later (<http://www.princetonindependent.com/issue01.03/item10bd.html>). Lesley McElhattan considers the lasting influence of Stone’s article. He suggests that the fame of the article was, in large measure, due to the fact that Justice William O. Douglas cited the article in a famous dissent in *Sierra Club v Morton*, 405 US 727 (1972). (*Sierra Club v Morton* was, itself discussed in the influential Australian case of *ACF v The Commonwealth* (1980) CLR 146 at paragraph 20.) McElhattan is more optimistic than Cormac Cullinan about the US legal system. He suggests that the passage of the National Environment Protection Act’s procedural requirements in the 1980s to conduct environmental impact assessments with public participation had resulted in a markedly different attitude to the environment. He considers that the passage of the legislation is at least partially because of Stone’s article. The success or otherwise of EIA in the US and legislation elsewhere in achieving real change in decision making and attitudes is, itself, controversial.

animals, the dominant paradigm of the human-centred legal system, which operates in almost all jurisdictions, regards such animals, predominantly, as chattels.¹⁸ During the 17th century, ownership of animals carried the right to treat the animal with unlimited cruelty. Such treatment carried no necessity to be justified by economic benefits for humanity and could be for amusement or for no reason at all.¹⁹

Animals remain in law the chattels of their owners. Despite this, legislation has existed for nearly one hundred years in Queensland (and longer in other States) to prevent cruelty to animals.²⁰ The restrictions in such legislation apply equally to owners of the animals in question and to strangers. It applies to animals which have no owner. That is not to say that the content and application of such legislation are not influenced by the concept of animals as property. Importantly, such legislation does not bestow rights upon the protected animals. Rather, cruelty to animals is seen as a departure from behaviour standards set down by the legislation. The approach is ethically based (bad behaviour) rather than rights based (infringing against the entitlements of the animals, themselves). The philosophy underpinning such legislation may be described as welfarism.²¹ The legislation has also done little to break down the conception of animals deriving their principal importance from the fact that they are chattels belonging to humans.

The Francione Analysis

The significance of the legal classification of animals as chattels of another is discussed at some length by Gary Francione.²² He highlights the fact that individual animal interests have no place within the property paradigm as “animals are, as a matter of law, solely means to human ends. As such, their value is measured in terms of their usefulness to humans, and not in terms of their own interests”.²³

18 Lesley-Anne Petrie, *Companion Animals: Valuation and Treatment in Human Society* in White, S and Sankoff, P, *Animal Law in Australasia*, The Federation Press, Sydney, 2009, p57.

19 Sankoff, P, *The Welfare Paradigm: Making the World a Better Place for Animals?*, in White, S and Sankoff, P, *op. cit.* (note 17), p10. Sankoff cites both Blackstone and 18th writer, John Lawrence.

20 *Animal Care and Protection Act 2001 (Qld)* s3. the 2001 Act replaced an Act first passed in 1920. Similar legislation existed in Western Australia from 1920. New Zealand had legislation from 1880. See Sankoff, P, note 19, page 7.

21 Sankoff, P, note 19. Sankoff refers to the legislation restricting the unlimited rights of humans by reference to a concern for “animal welfare” at page 17. His chapter is, accordingly, called *The Welfare Paradigm* ...

22 Francione, GL (1995) *Animals, Property and the Law*, Temple University Press, Philadelphia. Professor Francione is Distinguished Professor of Law and Nicholas deB. Katzenbach Scholar of Law and Philosophy at Rutgers University School of Law-Newark. He has written extensively on the relationship of animals and the law over the last several decades.

23 Francione’s arguments are discussed in Sankoff, P, note 19 at page 23.

Professor Francione's philosophical position is that it is impermissible to exploit animals in any way for the benefit of human beings. He could be described as the philosopher of veganism. He does not accept as appropriate any exploitation of animals for human ends. From that standpoint, he has an uncomplicated embrace of an animal rights approach to the protection of animals from human cruelty and human exploitation. Professor Francione sees little difference between the two as a matter of principle.

Many people reject veganism and the refusal to allow any form of human exploitation of animals either as impractical or as politically impossible. Others reject it on philosophical grounds on the basis that human exploitation of animals is consistent with a wider biosphere where some animals are vegetarian; some animals are carnivorous; and some animals are omnivores. Even the earth jurisprudence of Cullinan discussed earlier in this article recognises that humans are not alone in the biosphere in drawing useful things, on which life depends, from others in the biosphere.

The Welfare Paradigm in Practice

We do not seek to engage in the debate as to whether any form of exploitation of animals by humans is immoral. The issue that interests us is the extent to which the welfare approach to protecting animals from cruelty can be strengthened in its effect by utilising an animal rights approach and other methods of drafting and enforcement. Can humans benefit from animals for food, shelter and clothing purposes and still, effectively, prevent overt cruelty to the animals from whose resources we benefit?

One problem with the welfare approach is that it has existed only in the space allowed by human needs. Whenever a conflict occurs between economic imperatives and the rights of animals to be treated properly, the conflict tends to be resolved in favour of economics. Thus, if woollen coats are likely to be at all more expensive were mulesing of sheep to be abolished, the prevailing paradigm will find a way to justify mulesing. Free range egg production is unlikely to become the norm while other crueller ways of producing eggs are less costly. Chickens will be slaughtered in ways that leave them open to be boiled alive in the same circumstances for the same reasons.

Their classification as personal property means that animals can be controlled and disposed of as the owner sees fit. Animal welfare legislation seeks to place a layer of restriction upon the owner's otherwise unlimited powers without changing the underlying property

paradigm. When first passed by the Parliament, the *Animals Protection Act* 1925 (Queensland) proscribed the ill-treatment of animals.²⁴ The key to the compromise between the rights of ownership and the concern to prevent cruelty lies in two definitions. First, “animal” was defined, relatively narrowly to mean “any domestic or captive or impounded animal”. Second, “ill-treat” was defined to include: “ill-treat, wound, mutilate, overdrive, overwork, torment, torture and cause any animal **unnecessary pain or suffering**; also overload or drive when overloaded, and overcrowd, and unreasonably beat or kick”.²⁵

Sankoff, in his chapter on the *Welfare Paradigm*²⁶ analyses the way in which the concept of unnecessary pain has been applied. He notes both the lack of case law and the limited nature of the prosecutions which have occurred across all Australian and New Zealand jurisdictions. The cases which result in prosecutions mainly involve companion animals and the pointless or sadistic application of pain. Also open to prosecution is the infliction of pain because of laziness or losing the plot. This can be seen in the much-televised raids by which large numbers of ill-fed and unlooked after animals are seized by RSPCA officers. Society has no difficulty with the practical outlawing of this kind of cruelty because it arises in the absence of a legitimate reason.²⁷

On the other hand, institutionalised cruelty carried out on an industrial scale in the course of food production or the satisfaction of other human needs is almost never prosecuted or rendered illegal. This is because the satisfaction of human needs, especially, if economic advantages are involved, represents a legitimate reason and the suffering caused, almost by definition, is not unnecessary.

Professor Francione’s 1995 monograph *Animals, Property and the Law* documents in graphic and horrifying detail the systemic way in which industrial cruelty has almost universally escaped regulation in United States jurisdictions despite apparently strong political commitments by legislators and the passing of impressive sounding legislation. The analysis includes examples taken from the development of the common law in England and other United Kingdom jurisdictions. The contributing factors to the failure of such legislation include deliberate gaps in the coverage of the legislation; the passing of ineffective

24 Section 4.

25 Both definitions are in s.3. Emphasis is added.

26 Above, note 19.

27 Sankoff analyses the reasons in a Canadian case of *R v Menard* (1978) 43 CCC (2d) 458 where the leading judgment was that of Lamer J, later to become Chief Justice of Canada.

regulations; lack of resources dedicated to enforcement; poor evidence gathering; and restrictive attitudes taken by courts to the standing of persons seeking to enforce the legislation.

The areas of economic activity that escaped prosecution for what appeared on the surface to be gross cruelty included farming,²⁸ hunting (which was excluded from the coverage of most legislation), and pest removal.²⁹ The most scathing of Professor Francione's criticism is reserved for the failure of legislators and administrators to control and regulate rampant cruelty to animals in the course of animal experimentation for the purpose of research. These failures, the analysis of which fills several chapters of *Animals, Property and the Law*, occurred despite the passing of the federal *Animal Welfare Act* in 1966 and the revisiting of that legislation by Congress four times (in 1970, 1975, 1985 and 1990) before the publication of the text.

Despite the power of Professor Francione's analysis, the conclusions he draws in *Animals, Property and the Law* offer little hope for reform of legal practices short of ending all commercial exploitation of animals. While the history of welfarist legislation may encourage such a view, there is a need to consider ways in which legislation may be rewritten and alternative ways of structuring the enforcement structures to see whether legislation to protect animals from cruel practices can be freed at least to a limited extent from its domination by the property paradigm in which it has evolved.

Modern Animal Welfare Legislation

The *Animal and Care Protection Act 2001* Queensland ("ACPA") purports to be cutting edge animal welfare legislation. The long title of the Act is as follows: "An Act to promote the responsible care and use of animals and to protect animals from cruelty, and for other purposes".

Section 3 ACPA articulates the underpinning values of animal welfare legislation with great clarity. The formulation is not dissimilar to the distillation arrived at by Sankoff's analysis discussed above.

Section 3 provides:

"The purposes of this Act are to do the following—
(a) promote the responsible care and use of animals;

²⁸ *Bowyer v Morgan* 95LTR 27 (branding of lambs on the nose); *State v Crichton* 4 Ohio Dec. 481 (dehorning cattle).

²⁹ *Fund for Animals Inc. v Mud Lake Farmers Rabbit Committee* 673 P.2d 408.

- (b) provide standards for the care and use of animals that—
 - (i) achieve a reasonable balance between the welfare of animals and the interests of persons whose livelihood is dependent on animals; and
 - (ii) allow for the effect of advancements in scientific knowledge about animal biology and changes in community expectations about practices involving animals;
- (c) protect animals from unjustifiable, unnecessary or unreasonable pain;
- (d) ensure the use of animals for scientific purposes is accountable, open and responsible.”

Despite the high-minded tone, the purposes reflect disapproval of mindless cruelty but acknowledge the compromise between human and animal needs (which will usually be resolved in favour of humans).

Section 18 ACPA, in creating the offence of cruelty to animals, makes repeated use of the concept of animals suffering pain being wrong only if it is unnecessary (from a human perspective).

Section 18 provides:

“18 Animal cruelty prohibited

- (1) A person must not be cruel to an animal.
Maximum penalty—1000 penalty units or 2 years imprisonment.
- (2) Without limiting subsection (1), a person is taken to be cruel to an animal if the person does any of the following to the animal—
 - (a) causes it pain that, in the circumstances, is unjustifiable, unnecessary or unreasonable;
 - (b) beats it so as to cause the animal pain;
 - (c) abuses, terrifies, torments or worries it;
 - (d) overdrives, overrides or overworks it;
 - (e) uses on the animal an electrical device prescribed under a regulation;
 - (f) confines or transports it—
 - (i) without appropriate preparation, including, for example, appropriate food, rest, shelter or water; or
 - (ii) when it is unfit for the confinement or transport; or
 - (iii) in a way that is inappropriate for the animal’s welfare; or*Examples for subparagraph (iii)—*
 - placing the animal, during the confinement or transport, with too few or too many other animals or with a species of animal with which it is incompatible
 - not providing the animal with appropriate spells
 - (iv) in an unsuitable container or vehicle;
 - (g) kills it in a way that—
 - (i) is inhumane; or

- (ii) causes it not to die quickly; or
- (iii) causes it to die in unreasonable pain;
- (h) unjustifiably, unnecessarily or unreasonably—
- (i) injures or wounds it; or
- (ii) overcrowds or overloads it.”

The prohibition of “cruelty” in subs.18(1), on its face, is not restricted by the inclusive definition constituted by subs.18(2). The prohibition of inhumane slaughter also appears unrestricted by the “unreasonable” qualifiers in other part of subs.(2). One suspects, however, that the application of the section as a whole will be strongly influenced by the repeated references to “unjustifiable, unnecessary or unreasonable” in paragraph 18(2)(a), reflecting the values of the 1925 Act.³⁰ One suspects that the section, despite appearing to rely on objective values such as “inhumane” killing, will continue to be interpreted in ways that reflect the history of welfarist legislation as a means of restricting behaviour that involves cruelty unsupported by any legitimate economic justification. As such, animal welfare legislation places limitations on what is ordinarily a largely unfettered right to deal with one’s property as one sees fit to protect the interests of the animal.³¹

A further set of offences is created by s17 ACPA which provides :

17 Breach of duty of care prohibited

- (1) A person in charge of an animal owes a duty of care to it.
- (2) The person must not breach the duty of care.
Maximum penalty—300 penalty units or 1 year’s imprisonment.
- (3) For subsection (2), a person breaches the duty only if the person does not take reasonable steps to—
 - (a) provide the animal’s needs for the following in a way that is appropriate—
 - (i) food and water;
 - (ii) accommodation or living conditions for the animal;
 - (iii) to display normal patterns of behaviour;
 - (iv) the treatment of disease or injury; or
 - (b) ensure any handling of the animal by the person, or caused by the person, is appropriate.
- (4) In deciding what is appropriate, regard must be had to—
 - (a) the species, environment and circumstances of the animal; and
 - (b) the steps a reasonable person in the circumstances of the person would reasonably be expected to have taken.

30 Section 45 provides an “offence exemption” for slaughtering pursuant to a particular religious faith, no matter how cruel the slaughter process may be.

31 The offence provisions must also be considered in the light of the blanket exemption for conduct conducted in accordance with the various industry codes provided for in s.13 ACPA. These codes are discussed further below.

Examples of things that may be a circumstance for subsection (4)(b)—

- a bushfire or another natural disaster
- a flood or another climatic condition

Part 3 of chapter 3 of the ACPA canvasses ‘prohibited events’, defined to include bullfights, cockfights, dogfights, and other events in which animals are released from captivity to be hunted, killed or injured by another animal.³² Not surprisingly, events in which animals are released from captivity to be hunted or shot at by a person are allowed, provided there is an appropriate “acclimatisation period” between when the animal is released and hunted, as this apparently reduces stress to the animal. Organising or participating in a ‘prohibited event’ carries a maximum fine of 300 penalty units or 12 months’ imprisonment. Further prohibited activities are contained in part 5 of chapter 3 of the ACPA. These include causing a captive animal to be killed or injured by a dog³³, releasing an animal for injury or killing by a dog³⁴ and keeping or using kill or lure for blooding or coursing³⁵. The ACPA now places an obligation on persons in charge of closely confined dogs to exercise them for 2 hours after 24 continual hours of confinement³⁶.

Parts 3 and 5 of chapter 3 reflect a philosophy that certain conduct involving animals is illegitimate. This does indicate a strengthening of the extent to which the rights of the owner of animals will be restricted in the interests of the animal’s welfare. Commendable as such prohibitions are, they do not challenge the way in which animals are treated which are more central to serious economic activity. The distinction between releasing animals to hunt immediately and releasing animals to hunt after they are acclimatised reflects the value placed on hunting as an important (albeit cruel) way of enjoying real estate whether public or privately held.³⁷

Part 4 of chapter 3 of the ACPA deals with regulated surgical procedures including cropping dogs’ ears,³⁸ docking dogs’ tails,³⁹

32 The prohibited events are listed in s.20 ACPA.

33 Section 30 ACPA.

34 Section 31 ACPA.

35 Section 32 ACPA.

36 Section 33 ACPA.

37 For a detailed discussion of animal cruelty law as it applies to animals used in commercial economic activity, see Caulfield, Malcolm, *Handbook of Australian Animal Cruelty Law*, Animals Australia, 2008.

38 Section 23 ACPA.

39 Section 24 ACPA.

debarking operations⁴⁰ and removing cats' claws.⁴¹ All procedures must now only be performed by veterinarians and only in circumstances where the surgeon considers the procedure to be in the interests of the animals' welfare. This part of the legislation still raises the question as to whether the opinion of veterinarians as to the welfare of an animal will be influenced by the economic benefit of the operation to the owner. It is noticeable, also, that most of the operations are those which are likely to be performed on companion animals, not animals raised for commercial exploitation.

Section 27 ACPA places the same restrictions upon the docking of the tail of a horse or a cow. The economic impact of finding such operations in the interests of the welfare of the animal concerned is likely to be greater and the pressure on veterinarians to so conclude may well be greater than in the case of companion animals.

Write Your Own Exemption

Part 6 of chapter 3 of the ACPA deals with exemptions, and of particular interest is division 2, which deals with codes of practice. Basically, this division allows acts or omissions that would otherwise constitute an offence under the ACPA to be exempt from the legislation provided the offender has acted in accordance with a code of practice or the scientific use code⁴². The making of codes of practice is dealt with by chapter 2 ACPA. The making of a code of practice is by regulation.⁴³ The type of conduct dealt with by a code includes for the use of animals for "commercial, entertainment, recreational, scientific or other purposes".

The code of practice exemption takes most of the setting of standards for treatment of animals outside the purview of sections such as the offence creation sections 17 and 18 ACPA. It is wholly in accord with the long history of welfare legislation that the industries that use animals and obtain great economic benefit from them will be influential in deciding the contents of the codes which affect those industries. The code-setting process is one which is very likely to reflect the economic importance of animals as private property, the status of animals as chattels. While the passing of legislation such as the ACPA draws much public attention for the apparent stringency of its offence-creating

40 Section 25 ACPA.

41 Section 26 ACPA.

42 Section 40 ACPA.

43 Section 14 ACPA.

sections, the ongoing process of making industry codes is likely to attract much less interest and attention. However, the industry codes are much more influential in determining the way in which animals are treated and exploited and whether the concerns of the welfare of those animals outweigh the economic importance of exploiting those same animals as cheaply as possible, albeit in a way that causes pain and unhappiness to the animals.

Improving the State of Welfare

The ACPA may be seen as advanced and progressive legislation to protect animals. Even so, it retains the imprint of its animals as chattels history and philosophical underpinnings. For the foreseeable future, attempts at improving legislation of this kind must be made against the same background. We believe, however, that consciousness of that contextual background can lead to thoughtful attempts at overcoming the worst of its influence. In this section, we attempt to provide some tentative guidance as to how that may be achieved.

We have some suggestions to make legislation like the ACPA more effective in its objective of improving the welfare of animals. The method we suggest involves trying to graft a degree of animal rights on to a system that remains, unavoidably, part of a legal system where animals remain the property of people.

Our first suggestion is that the legislation declare that the prohibitions contained in the ACPA and the regulations made under the Act amount to rights held by the animals, themselves. This is a plain attempt to adopt the approach urged by Professor Stone in his famous paper.

The animals in whom such rights adhere cannot, of course, bring their own actions. There needs to be a system by which persons with an interest in the area can bring actions on the part of affected animals if they have evidence that such rights are being breached. This takes some of the responsibility for ensuring that the Act's provisions are complied with from the bureaucracies that would otherwise administer it.

Some guidance may be obtained from the Commonwealth's environmental legislation, the *Environment Protection and Biodiversity Conservation Act 1999* ("the EPBC Act"). The EPBC Act defines a particular form of standing or qualification to bring litigation to enforce the provisions of the EPBC Act either by injunctive relief or by administrative law actions pursuant to the *Administrative Decisions (Judicial Review) Act 1974* ("the ADJR Act"). For an individual, the EPBC Act will allow access to enforcement actions if the individual has either

engaged in activities for the protection of the environment or has engaged in research activities into the environment during the two years immediately prior to the occurrence of the unlawful activity said to be the subject matter of the litigation.⁴⁴ An organisation (which may be either corporate or unincorporated) will qualify as an interested person if, during the two years prior to the relevant events occurring, both its objects related to protection or conservation of or research into the environment and it engaged in activity directed to similar purposes.⁴⁵

We suggest an analogous set of provisions allowing groups and individuals with an established track record for pursuing or researching the protection of animals from cruel treatment to be allowed to bring actions to enforce the provisions of the ACPA. This should include criminal prosecutions and civil actions including for injunctive relief to prevent the commencement or continuation of practices that breach the legislation. It is particularly important that the available actions include actions to challenge the approval of codes of practice which approval (by regulation) is currently provided for by s13 ACPA.

This leads to our third suggestion. At present, the Governor-in-Council (and the industry groups who will write the codes) is given a *carte blanche* in respect of the content of the codes. The ACPA should contain a number of basic criteria which ensure that, at the very least, the codes of practice in their content conform with the objects and substantive content of the legislation, itself. The minister may only be allowed to commence the regulation process if he or she is satisfied on reasonable grounds that those criteria have been met.

We would make the following preliminary suggestions for such criteria:

- Any processes intended to cause the death of an animal must involve all reasonably available steps to minimise the suffering of the animal;
- Any processes causing pain to an animal as part of its husbandry or other industrial processes may only be justified by benefits to that animal;
- Any animal raised for industrial purposes must be provided with humane living conditions at all times of its existence;
- Any arrangements for transport of animals must provide for humane conditions at all times of the transport process.

⁴⁴ Subsection 475 (6) EPBC Act.

⁴⁵ Subsection 475 (7) EPBC Act.

We do not suggest that those four criteria cover everything that needs to be specified as basic requirements for the s13 codes. However, hopefully, they provide examples of the positive legal requirements that must be met. It is also important that codes be conceived of not as a means of exemption from the offence making provisions of the legislation. Rather, they should constitute a means of obtaining certainty of practice by deemed compliance with the offence-creating sections in the Act.

Other aspects of the ACPA require legislative strengthening. Slaughtering pursuant to a religious faith is completely exempted from the offence provisions.⁴⁶ While religious tolerance may justify departure from an industry-developed slaughtering code, it should be subject to substantive requirements to minimise infliction of pain arising from the slaughtering process. It should not act as a charter of rights to torture animals in their final moments in the pursuit of religious freedom.

Fishing and hunting have been a traditional regulation-free area of human activity. The ACPA provides for control of live bait fishing by regulation.⁴⁷ Any such regulation should be subject to similar criteria as we have suggested for the s13 codes of practice.

We suggest fishing and hunting be subject to further positive legislative requirements. These should include obligations:

- To use methods which minimise the infliction of pain;
- To euthanase wounded animals at the earliest reasonable opportunity; and
- To terminate pain to the animal as soon as it is within human control.

The use of animals for research purposes is dealt with by chapter 4 ACPA. We do not intend to canvass an area that is extremely important, wide-ranging and a subject of controversy in itself. We merely note that the ACPA deals with the subject by adopting the code of conduct published by the National Health and Medical Research Council.⁴⁸ We would add that, whether it be pursuant to State or Commonwealth legislation, any code for research purposes should be subject to basic animal welfare criteria and its compliance with such

⁴⁶ Section 45 ACPA.

⁴⁷ Section 44 ACPA.

⁴⁸ Section 49 ACPA.

criteria should be able to be tested by litigation brought by persons with experience in the area pursuant to the type of liberalised standing provisions we have discussed above.

Conclusion

While the ACPA could be considered an improvement on its ancient predecessor, it continues to reflect the harsh implications for animals of their status as personal property.

As we have noted, the lengths legislators have gone to in defining ‘cruelty’ and prescribing penalties are somewhat at odds with the fact that both pieces of legislation contain an exhaustive list of exemptions allowing acts of cruelty to go unpunished.

As discussed, the case law also clearly demonstrates the implications of the classification of animals as personal property. A monumental shift in judicial attitudes is needed to bring judgements in line with society’s views and expectations. Such a shift is likely to take some time.

However, the plight of animals at the hands of humans is now, more than ever, in the public arena. The means of bringing litigation to enforce the rights of animals (rights created by the Act) that we have suggested may make the enforcement of those rights more effective. Along the way, changes in judicial attitudes will, hopefully, be encouraged.

16 May 2011

SHOOTING OUR WILDLIFE: AN ANALYSIS OF THE LAW AND ITS ANIMAL WELFARE OUTCOMES FOR KANGAROOS & WALLABIES

*By Keely Boom and Dror Ben-Ami**

Introduction

Over the last decade in Australia, the Federal and State governments have approved an annual commercial kill of four to six million kangaroos and wallabies each year.¹ On average three million macropods are actually ‘harvested’/killed.² Around 300,000 young at foot and 800,000 pouch young are either killed or left to die each year as collateral of the commercial industry.³ In addition, up to 200,000 kangaroos and wallabies are killed for non-commercial reasons each year.⁴ A further unknown number are killed without

* Keely Boom and Dr Dror Ben-Ami are Research Fellows at THINKK, the think tank for kangaroos, at the University of Technology Sydney. The authors wish to thank the Institute for Sustainable Futures and Voiceless the animal protection institute for their generous support of THINKK and this research. Thanks to John Revington for research support, as well as Dr Malcolm Caulfield, Elizabeth Ellis and Katrina Sharman for helpful comments on a draft of this article. Any errors in the article are the responsibility of the authors.

1 The annual approvals are available here: <<http://www.environment.gov.au/biodiversity/trade-use/wild-harvest/kangaroo/quota/2010.html>> accessed 1 November 2010.

2 The total number of kangaroos commercially killed is available here: <<http://www.environment.gov.au/biodiversity/trade-use/wild-harvest/kangaroo/quota/2009.html>> accessed 1 November 2010.

3 Email from David Croft to Keely Boom, 2 September 2010. Based on R Hacker, S R McLeod, J P Druhan, B Tenhumberg, U Pradhan (2004) ‘Kangaroo Management Options in the Murray-Darling Basin.’ (Murray-Darling Basin Commission: Canberra) with a 60% male harvest (or 40% female) the number of young at foot killed annually in the last decade is around 300,000 and the number of pouch young around 840,000.

4 In 2000, 95,686 kangaroos were shot non-commercially in NSW, Queensland and South Australia. RSPCA Australia (2002) Kangaroo Shooting Code Compliance: A survey of the extent of compliance with the requirements of the Code of Practice for the Humane Shooting of Kangaroos. Prepared for Environment Australia <<http://www.environment.gov.au/biodiversity/trade-use/publications/kangaroo-report/examination.html>> accessed 20 October 2010 (‘Report 2002’), (5 Other animal welfare issues relevant to the Code of Practice).

government authorisation. This is the largest land-based slaughter of wildlife in the world.⁵

The literature on the welfare of wild animals is sparse and certainly far less developed than the literature on the welfare of agricultural or other domesticated animals. Professor Stuart Harrop has observed that this area of law often ‘derives unobtrusively, incidentally or even accidentally from measures designed to conserve species.’⁶ This is particularly true with regard to macropods. The legislation related to macropods is primarily concerned with the conservation and exploitation of the different species, rather than regulating the welfare of the animals.

This article will commence by defining terms and then will examine the legal and policy framework for macropod management. Firstly, the animal protection legislation at the State and Territory level will be assessed particularly in terms of what application this legislation may have upon the killing of macropods. Secondly, the State and Territory nature conservation legislation will be assessed in terms of their regulatory provisions, welfare provisions and a current gap in the law with regard to licences to kill joeys. The article will then consider the historical development of the Commonwealth’s increasing involvement. It will provide an analysis of the Commonwealth legislation and the *National Codes of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial and Non-Commercial Purposes*⁷ (‘National Codes’ and ‘Commercial Code’ or ‘Non-Commercial Code’) which provide the key welfare standards in Australia. After highlighting some of the problems around the welfare standards contained in the National Codes, the article will consider a case where the Commercial Code was challenged. Finally, the article will highlight the Australian Animal Welfare Strategy (AAWS) and examine some possible areas for legal reform.

5 In comparison, the Canadian government approved the kill of around 220,000 to 365,000 harp seals annually in the period 2001 to 2011. See Fisheries and Oceans Canada, Overview of the Atlantic Seal Hunt 2006 -2010, <<http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/mgtplan-plangest0610/mgtplan-plangest0610-eng.htm>> accessed 14 February 2011.

6 Stuart R Harrop, ‘The dynamics of wild animal welfare law’ (1997) 9 *Journal of Environmental Law* 287, 287.

7 Department of the Environment, Water, Heritage and the Arts, National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Non-Commercial Purposes (2008) <<http://www.environment.gov.au/biodiversity/trade-use/wild-harvest/kangaroo/pubs/code-of-conduct-non-commercial.pdf>> accessed 8 October 2010 (‘Non-Commercial Code’); Department of the Environment, Water, Heritage and the Arts, National Code of Practice for the Humane Shooting of Wallabies for Commercial Purposes (2008) <<http://www.environment.gov.au/biodiversity/trade-use/wild-harvest/kangaroo/pubs/code-of-conduct-commercial.pdf>> accessed 8 October 2010 (‘Commercial Code’). (Or together: ‘National Codes’).

Definitions

The terms surrounding the killing of macropods may be seen as highly subjective. Proponents of the industry may describe the killing as '*taking*' macropods⁸, while animal protection activists often describe the killing as '*slaughter*'.⁹ The commercial killing of macropods was for some time referred to as '*trapping*',¹⁰ and more recently has been called '*harvesting*'.¹¹ Government agencies use the term harvesting to refer to 'the removal of animals that are living in a wild population, ... for direct use.'¹² The non-commercial slaughter of macropods is generally referred to as '*culling*'.¹³

The most widespread terms, 'harvesting' and 'culling,' may be criticised for advancing a positive image of the activities. In particular, harvesting, a term traditionally associated with non-sentient crops, may be used to avoid alerting the uninformed reader that these animals are being killed. Culling is perhaps an even more subjective term as it implies that there are too many macropods and that macropod populations need to be reduced.

In this paper, the term '*killing*' has been adopted to refer to both forms of killing on the basis that this term is neutral and objective. The phrases '*commercial killing*' and '*non-commercial killing*' are used to directly replace 'harvesting' and 'culling' for the same reason.

The term '*kangaroo*' is sometimes used generically to refer to a number of different species including kangaroos and wallabies. The scientifically correct term is '*macropod*' which refers to Macropodoidea (the whole superfamily). The term kangaroo technically refers to

8 See e.g. Kangaroo Industry Association of Australia, How the kangaroo industry works <<http://www.kangaroo-industry.asn.au/industry.html>> accessed 17 February 2011.

9 See e.g. Animal Liberation, Kangaroo Campaign <<http://animal-lib.org.au/campaigns/120-kangaroo-campaign.html>> accessed 14 February 2011; Animals Australia, Kangaroo Shooting <http://www.animalsaustralia.org/issues/kangaroo_shooting.php> accessed 14 February 2011; Voiceless, Kangaroos <http://www.voiceless.org.au/The_Issues/Fact_Sheets/kangaroos.html> accessed 14 February 2011.

10 RSPCA Australia, Report 2002, above n 5.

11 Department of Sustainability, Environment, Water, Population and Communities, Kangaroos and wallabies, <<http://www.environment.gov.au/biodiversity/trade-use/wild-harvest/kangaroo/index.html>> accessed 17 February 2011.

12 ENRC Victoria: 2000, 'Inquiry into the Utilisation of Victorian Native Flora and Fauna,' Report June 2000, No. 30 Session 1999/2000, Environment and Natural Resources Committee, Victorian Government Printer, Melbourne, 92.

13 See e.g. ACT Department of Territory and Municipal Services, Kangaroo Culling on Defence Lands – Fact Sheet <http://www.tams.act.gov.au/_data/assets/pdf_file/0006/56823/Kangaroo_Culling_on_Defence_Lands.pdf> accessed 17 February 2011.

macropods that have an average foot length of greater than 250 mm and wallabies are macropods that have a smaller average foot length.¹⁴ This paper uses the term macropod for scientific accuracy.

THE LEGAL AND POLICY FRAMEWORK FOR MACROPOD MANAGEMENT

Introduction

The legal and policy framework for macropod management crosses jurisdictions and areas of law. State and territory legislation provides the primary source of regulation for the killing of macropods. However, Commonwealth legislation provides further regulation in relation to exports. The Commonwealth has also developed two National Codes to regulate the welfare aspects of commercial and non-commercial killing. Provisions related to the welfare of these animals are found in both animal protection legislation and nature conservation legislation. The first area examined here is the animal protection legislation of Australian States and Territories.

STATE AND TERRITORY LEGISLATION

Animal protection legislation

Application of animal protection legislation to the commercial and non-commercial killing of macropods

Animal cruelty is prohibited throughout the States and Territories.¹⁵ Animal protection legislation does not draw any particular distinction between domesticated animals and wild animals. Thus it is arguable that any acts of cruelty committed in the killing of macropods (whether for commercial or non-commercial purposes) would fall within the provisions of the animal protection legislation. Some animal cruelty offences only apply to persons who are the ‘owner’ or ‘in charge’ of the animal.¹⁶ These offences may not apply to the killing of wild animals

¹⁴ Terence J. Dawson, *Kangaroos Biology of the Largest Marsupials* (1995). Some people are confused about wallaroos (think they are between wallabies and kangaroos) but they fall under the definition of an average foot length >250mm which are the kangaroos. The Antilopine is as big as reds and greys.

¹⁵ Animal Care and Protection Act 2001 (Qld) s 18; Prevention of Cruelty to Animals Act 1985 (SA) s 13(1); Prevention of Cruelty to Animals Act 1986 (Vic) s 9; Prevention of Cruelty to Animals Act 1979 (NSW) s 5(1); Animal Welfare Act 1999 (NT) s 6(1); Animal Welfare Act 2002 (WA) s 19; Animal Welfare Act 1992 (ACT) s 7; Animal Welfare Act 1993 (Tas) s 8(1).

¹⁶ This is particularly relevant for the duty of care offences. See, for e.g., Prevention of Cruelty to Animals Act 1979

where the offender is not exercising any form of ownership over the animals, however most cruelty offences are likely to apply to persons mistreating wild animals at large.¹⁷

There is no single definition of cruelty across Australia but all of the definitions include two key elements: (1) that an act has caused pain or suffering to an animal¹⁸ and (2) that the act was unnecessary, unjustified and/or unreasonable.¹⁹ In relation to the first element, it is important to note that the killing of animals per se is not cruel at law.²⁰ If an animal has been killed without causing pain or suffering, then there will generally be no breach of the animal cruelty legislation. In the case of macropods, it is clear that many adult and young animals experience pain and suffering as a result of the commercial and non-commercial killing of macropods. The extent of this pain and suffering is discussed at length later in this article in the context of the National Codes.

Although ambiguous, the second element (whether the act was unnecessary, unjustified and/or unreasonable) has received little judicial interpretation²¹ with almost no consideration of wildlife.²² The leading

(NSW) s 8; Animal Care and Protection Act 2001 (Qld) s 17; Animal Welfare Act 1985 (SA) s 13(3)(b); Animal Welfare Act 1993 (Tas) s 6; Prevention of Cruelty to Animals Act 1986 (Vic) s 9(1)(f); Animal Welfare Act 2002 (WA) s 19(3); Animal Welfare Act 1992 (ACT) s 8; Animal Welfare Act 1999 (NT) s 8. It may be possible to argue that governments should be liable under the duty of care offences, however some jurisdictions 'make clear that animal welfare legislation does not apply to the State where it might otherwise be claiming property to wild animals in their natural environment. So, for example, in Queensland, s 6 of the Animal Care and Protection Act 2001 has the effect that 'the State will not be deemed to be in charge of a wild or protected animal that is at large merely because the animal is deemed to be the property of the State.' Steven White, 'Animals in the wild' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (2009), 239 citing Explanatory Note, Animal Care and Protection Bill 2001 (Qld), 19.

17 Steven White, 'Animals in the wild' in Peter Sankoff and Steven White, above n 17, 239. See e.g. Prevention of Cruelty to Animals Act 1979 (NSW) s 5(1); Animal Care and Protection Act 2001 (Qld) s 18; Animal Welfare Act 1985 (SA) s 13(1); Animal Welfare Act 1993 (Tas) s 8; Prevention of Cruelty to Animals Act 1986 (Vic) s 9(1); Animal Welfare Act 2002 (WA) s 19(1); Animal Welfare Act 1992 (ACT) s 7; Animal Welfare Act 1999 (NT) s 6(1).

18 *McNamara v Noble* (1937) 54 WN (NSW) 148. The level of pain is determined by species *RSPCA v Harrison* (Unreported, SA Supreme Court, No SCGRG-99-669 Judgment No S363, Martin J, 7 September 1999); *RSPCA v Evitts* Judgment No S3810 (Unreported, SA Supreme Court, No SCGRG 92/2774, Cox J, 17 February 1993).

19 Animal Care and Protection Act 2001 (Qld) s 18(2)(a); Prevention of Cruelty to Animals Act 1985 (SA) s 13(2); Prevention of Cruelty to Animals Act 1986 (Vic) s 9; Prevention of Cruelty to Animals Act 1979 (NSW) s 4(2); Animal Welfare Act 1999 (NT) s 6(3); Animal Welfare Act 2002 (WA) s 19; Animal Welfare Act 1992 (ACT) s 7; Animal Welfare Act 1993 (Tas) s 8(1).

20 However, note that in New South Wales there is a provision which effectively extends the definition of cruelty to include killing: Prevention of Cruelty to Animals Act 1979 (NSW) s 4(2).

21 S Wright, *Nonhuman Animal Rights – Legislation, Ethics and Reform* (Honours Thesis, University of Western Australia, 2001), 37 in Dominique Thiriet, 'Out of the "too hard basket" – Traditional Hunting and Animal Welfare' (2007) 24 *Environmental and Planning Law Journal* 59, 66.

case on whether an act or omission was necessary is *Ford v Wiley*.²³ According to this case, the first matter is to determine whether the relevant act carried out on the animal is to affect an ‘adequate and reasonable object’. There are a number of objects that are frequently cited in relation the killing of macropods. These are: that macropods are pests that need to be controlled; that eating macropods may enable a reduction in reliance on sheep and cattle meat (and thus is of environmental benefit); and that macropods are a resource to be exploited. Each of these potential objects is briefly, yet critically, examined here.

Firstly, a comprehensive review of the scientific literature, prepared for the NSW Kangaroo Management Advisory Board in 2006, found that the killing of macropods cannot be justified on the basis of pest control or damage mitigation purposes.²⁴ As a result, the management programs in NSW and other States have abandoned the previously promoted object of damage mitigation.²⁵ In light of these findings, the RSPCA has questioned whether the killing of macropods for commercial and non-commercial purposes is necessary and has called for this to be reviewed by the Commonwealth and State/Territory governments.²⁶ Even where there is a need to manage macropod

22 Dominique Thiriet, ‘Out of the “too hard basket” – Traditional Hunting and Animal Welfare’, above n 22, 66.

23 (1889) 23 QBD 203; Malcolm Caulfield, *Handbook of Australian Animal Cruelty Law* (2008), 23.

24 Olsen and Braysher found that ‘Although studies are few, kangaroos do not appear to impact greatly on wool production and compelling evidence of competition between kangaroos and sheep is lacking.’ At 84. The authors also stated that ‘Simplistic removal of kangaroos will not necessarily allow replacement with the equivalent in stock or improvement in productivity (e.g. wool production).’ At 77. P Olsen and M Braysher, ‘Situation Analysis Report: Update on Current State of Scientific Knowledge on Kangaroos in the Environment, Including Ecological and Economic Impact and Effect of Culling’ (March 2006) (Prepared for the Kangaroo Management Advisory Panel) <<http://www.environment.nsw.gov.au/resources/nature/SituationAnalysisFinal.pdf>> accessed 22 February 2011.

The authors reached similar conclusions in 2000: P Olsen and M Braysher, ‘Situation Analysis Report: Current State of Scientific Knowledge on Kangaroos in the Environment, including Ecological and Economic Impact and Effect of Culling’ (2000) <<http://www.environment.nsw.gov.au/resources/nature/SituationAnalysisFinal.pdf>> at 4 August 2010. However, note that in the 2000 report, Olsen and Braysher state that ‘high numbers of kangaroos ... need to be culled to protect environmental or grazing interests’ at 11.

25 In the NSW Kangaroo Management Program effective 1 January 1998 to 31 December 2001, one of the goals was ‘to minimise the adverse effects that certain densities of [kangaroos] may have on rangelands, on pastoral and agricultural production and other land uses.’: New South Wales Kangaroo Management Program, effective 1 January 1998 to 31 December 2001. Licences were only granted if the killing could be justified on the basis of damage mitigation: Circular: Explanatory Notes to support the Public Exhibition of NSW Kangaroo Management Program – A management program for the utilisation of four kangaroo species in New South Wales, Paragraph 1.8. However, the ‘overarching goal’ of the NSW Commercial Kangaroo Harvest Management Plan 2007-2011 is ‘to maintain viable populations of kangaroos throughout their natural ranges in accordance with the principles of ecologically sustainable development.’

26 RSPCA Australia, ‘Is there a need to kill kangaroos or wallabies?’ <<http://kb.rspca.org.au/entry/77/>> accessed 10

populations, non-lethal methods may be a viable alternative to killing the animals.²⁷

Secondly, it has been argued that eating macropods may enable a reduction in reliance on sheep and cattle for meat. Both cause substantial environmental damage.²⁸ However, the concept of sheep replacement has been around for over 20 years and no sheep replacement has occurred to date.²⁹ Furthermore, it appears that there are fundamental problems with this theory so that its practical application may be negligible.³⁰

Lastly, there is a notion that macropods are a resource to be exploited. In light of the problems with the concepts of pest control and sheep replacement, it would appear that the justification for killing macropods is predominantly profit maximisation. The exploitation of resources for profit may be viewed as an 'adequate and reasonable object' and thus would meet the first element in *Ford v Wiley*. This finding raises the need to look at the second element in this case.

The second element provided in *Ford v Wiley* is whether there is a proportion between the means and the object, and 'the beneficial or useful ends sought to be attained must be reasonably proportionate to the extent of suffering caused, and in no case can substantial suffering be inflicted unless necessity for its infliction can reasonably be said to exist.'³¹ This is a particularly relevant question for the killing of

November 2010.

27 See e.g. Graeme Coulson and Mark Elderidge, *Macropods: The Biology of Kangaroos, Wallabies and Rat-Kangaroos* (2010), 315.

28 See e.g. Gordon Grigg, 'Kangaroos – A Better Economic Base for Our Marginal Grazing Lands' (1987) 24 *Australian Zoologist* 73.

29 M Chapman, 'Kangaroos and Feral Goats as Economic Resources for Graziers: Some Views from a Southwest Queensland' (2003) 2003 *Rangeland Journal* 20; P Ampt and A Baumber, 'Building Connections Between Kangaroos, Commerce and Conservation in the Rangelands' (2006) 33 *Australian Zoologist* 398; D A Thomsen and J Davies, 'Rules, Norms and Strategies of Kangaroo Harvest' (2007) 14 *Australasian Journal of Environmental Management* 123; R Cooney, A Baumber, P Ampt and G Wilson, 'Sharing Skippy: How can Landholders be involved in Kangaroo Production in Australia?' (2009) 31 *The Rangeland Journal* 283.

30 See Dror Ben-Ami, David Croft, Daniel Ramp and Keely Boom, *Advocating Kangaroo Meat: Towards Ecological Benefit or Plunder?* (Report by THINKK, the think tank for kangaroos, University of Technology Sydney, 2010) <http://s3.amazonaws.com/thinkk_production/resources/14/2596_UTS_ecological_report_Final.pdf> accessed 15 December 2010.

31 (1889) 23 QBD 203.

macropods where the ultimate issue becomes whether or not the potential commercial gains outweigh the scale of pain and suffering.³²

The *Western Australian live export* case considered the question of whether the animals were likely to suffer unnecessary harm.³³ In referring to *Ford v Wiley*, Crawford M said the commercial gain of the exporters needed to be balanced with the likelihood of pain, injury and death for the sheep. Crawford M concluded that any harm likely to be suffered by these sheep was unnecessary.³⁴ In the case of macropods, a similar argument can be made that the likelihood and scale of pain, injury and death outweighs the potential commercial gain.³⁵

In relation to non-commercial killing, a case study illuminates some of these issues. In June 2010, the Australian Society for Kangaroos (ASK) sent a letter to NSW Police Commissioner Scipione calling for an investigation and legal action. This complaint argued that the killing of 228 adult macropods and joeys at Mount Panorama Bathurst (NSW) in September 2009, in order to clear the car racing track was an offence under s4 of the *Prevention of Cruelty to Animals Act 1979* (NSW).³⁶ ASK alleged that the killing of these animals was unnecessary and therefore illegal.³⁷ The letter noted that there had been a successful herding of macropods in 2008. No macropods had entered the race track of the Bathurst 1000 event that year. ASK therefore argued that the 2009 killing was unnecessary as there were viable non-lethal

32 The Kangaroo Industry Association of Australia has claimed that the industry is worth \$270 million and directly employs 4,000 people: Kangaroo Industry Association of Australia, *The Kangaroo Industry – FACTS < http://www.kangaroo-industry.asn.au/media/ki_med_kit_gen.html>* accessed 31 January 2011. However, the industry is heavily impacted by environmental factors. For example, as a result of the flooding over Summer 2010-2011, Macro Meats reported that it was distributing 70 per cent less meat than normal: Hospitality, *What the papers said: 28 February 2011 < <http://www.hospitalitymagazine.com.au/article/What-the-papers-said/528093.aspx>>* accessed 28 February 2011.

33 *State Solicitors Office v Daws & Ors* 2007 Magistrates Court of Western Australia FR9975-7/05; FR10225-7/05.

34 Caulfield, *Handbook of Australian Animal Cruelty Law*, above n 24, 23.

35 Magistrates are often influenced by community perceptions of cruelty. Philip Jamieson, “Duty and the Beast: The Movement in Reform of Animal Welfare Law” (1991) 16(2) UQLJ 238, 245. Also see Michael Radford, “‘Unnecessary Suffering’: The Cornerstone of Animal Protection Legislation Considered” (1999) *Criminal Law Review* 702, 705.

36 Australian Society for Kangaroos, *Complaint to Commissioner Andrew P Scipione APM* (on file with authors). The complaint also alleged that the killing was an offence under s 98 of the *National Parks and Wildlife Act 1974* (NSW).

37 Section 4(2) of POCTAA provides that ‘[f]or the purposes of this Act, a reference to an act of cruelty committed upon an animal includes a reference to any act or omission as a consequence of which the animal is unreasonable, unnecessarily or unjustifiably ... (a) beaten, kicked, killed, wounded, pinioned, mutilated, maimed, abused, tormented, tortured, terrified or infuriated.’ (Emphasis added). Section 5(1) provides that ‘[a] person shall not commit an act of cruelty upon an animal.’

alternatives. This complaint suggests that evolving science and policy with regard to macropods may increasingly support the notion that the killing of macropods is unnecessary. ASK's complaint is further analysed below within the context of the nature conservation legislation.

Barriers that may prevent the application of animal protection legislation to the killing of macropods

Firstly, animal protection legislation may provide that adherence to a code of conduct provides a defence or exemption to prosecution under the cruelty offences. However, these defence provisions relate only to codes which have been adopted under the relevant legislation. The only jurisdiction which has adopted a relevant code is the ACT (this is the ACT code), so it is arguable that the National Codes on the shooting of macropods are of no legal effect in relation to the animal protection law in the remaining States.³⁸

Secondly, animal protection legislation may provide exemptions for the hunting of wildlife. In NSW, this exemption applies where the hunting has occurred in a manner that inflicted no 'unnecessary pain upon the animal.'³⁹ A similar provision is found in Tasmania.⁴⁰ The recreational hunting of macropods results in a high level of animal cruelty yet is virtually uncontrolled by governments.⁴¹ Additional exemptions are provided for killing pests and for killing animals for food.⁴²

Finally, animal protection legislation may 'operate subject to the application of nature conservation legislation.'⁴³ In Queensland and Victoria the relevant animal protection legislation provides that the cruelty and other offences do not apply to acts or omissions made in accordance with the nature conservation legislation.⁴⁴ Thus, where macropods are killed in Queensland and Victoria in accordance with the

38 Caulfield, *Handbook of Australian Animal Cruelty Law*, above n 24, 150. Note that there may be further relevant provisions in the separate legislation. For example, section 34(3) of the *Prevention of Cruelty to Animals Act 1979* (NSW) provides that a person shall not be convicted under the Act or regulations where they have already been convicted under another act or regulation for that act or omission.

39 *Prevention of Cruelty to Animals Act 1979* (NSW), s 24(1)(b)(i).

40 *Animal Welfare Act 1993* (Tas), s 4(1).

41 See discussion in Dominique Thiriet, 'Recreational Hunting – Regulation and Animal Welfare Concerns' in Sankoff and White, above n17.

42 Katrina Sharman, 'Farm Animals and Welfare Law: An Unhappy Union' in Sankoff and White, above n17.

43 Deborah Cao, *Animal Law in Australia and New Zealand* (2010), 231.

44 *Animal Care and Protection Act 2001* (Qld) s7 grants an immunity for acts or omissions done in accordance with the *Nature Conservation Act 1992* (Qld); *Prevention of Cruelty to Animals Act 1986* (Vic) s 6(1B) provides that cruelty and other offences do not apply to anything done in accordance with the *Wildlife Act 1975* (Vic).

relevant licences, there is no scope for the animal protection legislation to operate with regard to these animals. The following section focuses upon the State and Territory nature conservation legislation and to what extent this legislation provides for the welfare of these animals.

Nature conservation legislation

Regulation of the commercial and non-commercial killing of macropods through State and Territory nature conservation legislation

State and Territory legislation provides that macropods and other wildlife are ‘protected fauna’ and it is an offence to kill or harm them. For this reason, where a management plan provides for the commercial or non-commercial killing of macropods, it is necessary for landholders and shooters to obtain licences to do so. Each participant in the killing of macropods and the processing and sale of macropod products is required to be licensed. Harvesters, landholders, meat processors, skin dealers and meat retailers are all required to obtain licences from the appropriate government agencies.

For example, in NSW, occupiers must obtain a licence under s121 of the *National Parks and Wildlife Act 1974* (NSW). Licences can be non-commercial or commercial. Applicants need to include the species and number of tags requested. For non-commercial occupier licences, the application form requires the occupier to specify the damage caused by the native fauna by ticking one or more of the following options: damage to crops, damage to fences and competition for pastures and/or water.⁴⁵ Tags are issued with each licence and must be attached to the carcasses of both commercial and non-commercially shot macropods. The licence will have an expiry date and a set of conditions attached. Commercial shooters are required to obtain a commercial fauna harvester’s licence. A person may only obtain such a licence after completing the accreditation and meat handling course. Macropods must be shot in accordance with the National Codes (commercial or non-commercial depending upon the licence). At the end of each month harvesters provide activity reports.⁴⁶ The harvester’s vehicle, meat processors, skin dealers and meat retailers must all also be licensed.⁴⁷

45 Application to Harm Protected Fauna in New South Wales – Section 121 Occupier’s Licence – Non-commercial <
<http://www.environment.nsw.gov.au/resources/nature/KMPApplicationS121Non-commercialHarm.pdf>> accessed 1
November 2010.

46 There is limited information about rates of compliance with these reporting requirements. However, there are indications that there are problems with compliance. For example, the NSW Kangaroo Management Plan Annual Report for 2009 revealed that 86 penalty infringement notices were issued to harvesters who failed to submit returns:

It should be noted that the commercial killing of macropods for export only occurs in Queensland, New South Wales, South Australia, Western Australia and (most recently) Tasmania. The Victorian government claims there is no commercial killing of macropods in that State.⁴⁸ The following table provides a summary of the relevant State and Territory legislation.

Table 1: State and Territory Nature Conservation Legislation

State/Territory	Legislation	Relevant sections
New South Wales	<i>National Parks and Wildlife Act 1974</i> (NSW)	It is an offence to harm protected fauna without a licence. 'Harm' is defined to include hunting, shooting, poisoning, pursuing, capturing, injuring or killing: ss 5, 98. Section 72 allows the preparation of management plans. Ss 120 and 123 allow for licences to be granted.
	<i>National Parks and Wildlife Regulation 2009</i> (NSW)	Part 6 Div. 1 regulates the issuing of licences.
Queensland	<i>Nature Conservation Act 1992</i> (Qld)	It is an offence for an unauthorised person to 'take' a protected animal: s88. 'Taking' includes killing, injuring or harming an animal: s88(2), Dictionary.
	<i>Nature Conservation (Wildlife Management) Regulation 2006</i> (Qld)	Under Div. 2 of Part 4, 'damage mitigation permits' may be granted for the killing of a protected animal which is

Department of Environment, Climate Change and Water, 2009 Annual Report: New South Wales Commercial Kangaroo Harvest Management Plan 2007-2011, <

<http://www.environment.nsw.gov.au/resources/nature/KMPAnnualReport2009.pdf>> accessed 21 February 2011, 18.

47 Department of Environment and Climate Change NSW, Handbook for Kangaroo Harvesters

<<http://www.environment.nsw.gov.au/resources/nature/08413hbkangharvesters.pdf>> accessed 2 November 2010.

48 The Department of Sustainability and Environment has stated that 'Commercial harvesting of wild kangaroos is not permitted in Victoria and it is government policy not to develop a commercial kangaroo industry.' Department of Sustainability and Environment, Fact Sheet: Management of large kangaroos in Victoria: Harvesting of wild kangaroos for commercial purposes, <

[http://www.dpi.vic.gov.au/CA256F310024B628/0/1FF00B883E79CE72CA2574C0000BAAE3/\\$File/Fact+sheet+-+commercial+industry.pdf](http://www.dpi.vic.gov.au/CA256F310024B628/0/1FF00B883E79CE72CA2574C0000BAAE3/$File/Fact+sheet+-+commercial+industry.pdf)> accessed 21 February 2011.

		<p>causing (or may cause) damage to property or represents ‘a threat to human health or wellbeing.’</p> <p>Under this regulation, the red kangaroo, the eastern grey kangaroo and the common wallaroo are ‘species of least concern’ wildlife and may be subject to a declared harvest period.</p>
	<i>Nature Conservation (Administration) Regulation 2006</i>	Regulation 11 provides that commercial wildlife harvesting licences may be granted for animals other than in a protected area.
	<i>Nature Conservation (Macropod Harvest Period 2010) Notice 2009</i>	The notice sets the harvest period, minimum area for skin of a harvested kangaroo (skin only), and the minimum weights for carcasses taken for its meat only or for its meat and skin.
	<i>Nature Conservation (Macropod) Conservation Plan 2005</i>	Regulation 9 provides that the holder of a macropod harvesting licence is authorised to take macropods, under the licence, only during a harvest period for macropods.
South Australia	<i>National Parks and Wildlife Act 1972 (SA)</i>	<p>It is an offence to interfere with, harass or molest a protected animal without legislative authority or a permit: s 68(1)(a). It is also an offence to ‘undertake or continue or act or activity that is, or is likely to be, detrimental to the welfare of a protected animal after being directed by a warden not to undertake, or to stop, that act or activity.’ (s68(1)(b)).</p> <p>Section 53 provides that the Minister may grant a permit allowing the killing of a protected animal.</p>

		<p>Reasons include for the destruction or removal of animals that are causing (or likely to cause) damage to the environment, stock and crops.</p> <p>The Minister may grant a permit for the harvest of a protected species and the sale or use of the carcasses: s60J.</p>
	<i>National Parks and Wildlife (Kangaroo Harvesting) Regulations 2003 (SA)</i>	Part 3 regulates and provides conditions for permits granted under s 60J.
Western Australia	<i>Wildlife Conservation Act 1950 (WA)</i>	Section 16 provides that it is an offence to kill protected fauna without an appropriate licence.
	<i>Wildlife Conservation Regulations 1970 (WA)</i>	Regulation 5 provides for the issue of licences for killing protected fauna where the animals are causing damage to property. Regulation 6 allows for the issue of licences permitting the commercial killing of kangaroos.
Tasmania	<i>Nature Conservation Act 2002 (Tas)</i>	Part 4 provides for the conservation of flora and fauna. Section 30 provides that the Minister may determine open seasons for partly protected wildlife.
	<i>Wildlife Regulations 1999 (Tas)</i>	<p>Under regulations 15 to 17 it is an offence to kill specially protected, protected, or partly protected wildlife without an appropriate permit.</p> <p>Regulation 6 allows for the issuing of licences for the killing of wallabies. Regulation 13 provides for the issue of a permit to kill wildlife in order to prevent destruction of or injury to plants or stock.</p>

Victoria	<i>Wildlife Act 1975</i> (Vic)	Under sections 41 to 43, it is an offence to kill 'endangered', 'notable' or 'protected wildlife'.
	<i>Wildlife (Game) Regulations 2004</i> (Vic) <i>Wildlife Regulations 2001</i> (Vic)	Licence and control recreational and commercial hunting.
Northern Territory	<i>Territory Parks and Wildlife Conservation Act 1977</i> (NT) Also see: <i>Territory Parks and Conservation Regulations</i> and <i>Territory Parks and Conservation By-laws</i> (NT)	It is an offence to kill protected wildlife without a permit: s66. Section 55 provides that permits may be granted for the killing of protected wildlife, including for commercial purposes.
Australian Capital Territory	<i>Nature Conservation Act 1980</i> (ACT)	Sections 44 and 45 prohibit the killing and taking of wildlife.

Welfare provisions in State & Territory nature conservation legislation

There are provisions pertaining to welfare in some of the State and Territory nature conservation legislation. For instance, the *Nature Conservation (Macropods) Conservation Plan 2005* (Qld) provides that if a macropod is to be killed, the holder of an authority or the relevant person must kill the animal in a quick and humane way.⁴⁹ This regulation also provides that compliance with the relevant code will be taken to show compliance with the regulation.⁵⁰ Similarly, regulation 115 of the *Nature Conservation (Wildlife Management) Regulation 2006* (Qld) provides that if an animal is to be taken under a commercial wildlife harvesting licence the killing must be done in a quick and humane way.⁵¹ Finally, it is a condition of the licences that the macropods are shot in accordance with the National Codes (commercial or non-commercial depending upon the licence).⁵²

Lack of licences to kill joeys under the nature conservation legislation

However, there is a key deficiency in the existing licensing system in that the killing of joeys is not licensed in NSW. This issue has been highlighted by the NSW Young Lawyers Animal Law Committee with relation to commercial killing. Section 123 of the *National Parks and*

49 Regulation 14(3).

50 Regulation 14(4).

51 Similarly, section 75 of the Nature Conservation Act 1992 provides that one the management principles of prohibited wildlife is to 'encourage the humane taking and use of wildlife.'

52 Note that this only applies to licences issues in Queensland, New South Wales, South Australia and Western Australia.

Wildlife Act 1974 (NSW) states that a commercial fauna harvester's licence may only be granted to 'authoris[e] a person to harm fauna of a species named therein for the purposes of sale.' Regulation 11 of the *Nature Conservation (Wildlife Management) Regulation 2006* (Qld) states that a commercial wildlife harvesting licence 'is to allow a person to harvest protected animals for a commercial purpose.' The NSW Young Lawyers Animal Law Committee argues that shooters holding either of these licences are not permitted to harm or kill joeys unless they are harmed or killed *for the purpose of commercial sale*.⁵³ Joeys cannot be used commercially therefore the licences cannot be used to kill these young macropods. These two states account for more than 75% of all commercial killings.⁵⁴

However, in Queensland, regulation 8 of the *Nature Conservation (Macropod) Conservation Plan 2005* provides that the holder of a licence may kill a pouch young or a dependent young if that animal is found with a female kangaroo that has been killed under the authority. The regulation specifies that the joey may only be killed if this is done in accordance with the relevant Code and the shooter must leave the joey at the place it has been killed (i.e. must not take it). It appears that regulation 8 provides a licence to kill pouch young and dependent young when the mother of that animal has been killed under a licence held in Queensland.

However, in NSW there is no such authorisation provided in the nature conservation legislation. It may be argued that there may be some sort of implied authority to kill joeys as this is required under the National Codes for both commercial and non-commercial shooting (see discussion of the National Codes below). However, an implied authority to kill joeys would seem excessive given the high number of joeys involved (about 1.1 million each year).

This raises the question of whether an actual licence is required to kill these young animals. The complaint lodged by ASK in June 2010 also highlighted this issue (discussed earlier in the context of animal protection legislation). In the complaint, ASK argued that the killing of 228 adult macropods and joeys at Mount Panorama Bathurst (NSW) in September 2009, in order to clear the car racing track was an offence under s98 of the *National Parks and Wildlife Act 1974* (NSW). This

53 NSW Young Lawyers Animal Law Committee, 'A Submission to the NRMCC Working Group on the Draft National Code of Practice for the Humane Shooting of Kangaroos and Wallabies' (prepared by Amber Hall, John Mancy, Eve McWilliams and Angela Radich), March 2008, 5.

54 Ibid.

was in addition to the claim that the killing breached s4 of the *Prevention of Cruelty to Animals Act 1979* (NSW). The nominated shooter had been provided a licence from the NSW Department of Environment and Climate Change to kill only 140 eastern grey kangaroos at Mt Panorama in 2009 under s121 (Occupier's licence) of the *National Parks and Wildlife Act*. However, the documents obtained under the Freedom of Information request revealed that the shooter had killed 228 macropods, 97 females, 43 males and 88 joeys. ASK alleged that the killing of the 88 joeys constituted an offence under ss98 and 133 (conditions of the licence).

Section 5 of the *National Parks and Wildlife Act 1974* (NSW) provides that the young of macropods are protected fauna.⁵⁵ Section 98 clearly provides that it is an offence to harm protected fauna without a general licence (s120), an occupier's licence (s21) or a commercial fauna harvester's licence (s123). So, it's strongly arguable that any killing of joeys without a licence is illegal.

ASK's complaint highlights key loopholes within the current law and policy that have significant ramifications for the welfare of adult and young macropods. If the NSW Police or RSPCA pursue the matter, the case may provide an important precedent and impetus for legal reform. However, the end result may simply be that licences are provided to kill joeys as well as adult macropods. Although this would have little impact on the welfare outcome, such legal reform would reinforce that joeys are protected animals and cannot be killed without a licence.

The historical development of the Commonwealth's increasing involvement

Tension between Commonwealth and State governments over wildlife arises from the fact that the Commonwealth does not have a clear legislative power to deal with environmental issues or animals.⁵⁶ Powers given to the Commonwealth Parliament are found in sections 51 and 52 of the Constitution. The Commonwealth Parliament generally

⁵⁵ Section 5 of the *National Parks and Wildlife Act 1974* (NSW) provides that "... "fauna" means any mammal ...;

"protected fauna" means fauna of a species not named in Schedule 11; "mammal" means any mammal, whether native ... and includes ... the young of a mammal." (Emphasis added). Macropods are not listed in Schedule 11.

⁵⁶ See discussion in PH Lane, 'The Federal Government's external affairs power: The Tasmanian Dam Case' (1983) 57 *Australian Law Journal* 554; Michael Coper, *The Franklin Dams Case* (1983); Philip Toyne, *The Reluctant Nation* (1994); Don Rothwell and Ben Boer, 'From the Franklin to Berlin' (1995) 17 *Sydney Law Review* 242. Fish are an exception. Section 51(x) of the Constitution provides that the Commonwealth Parliament has power with regard to 'Fisheries in Australian waters beyond territorial limits'.

relies upon the external affairs power (s51(xxix)), the trade and commerce power (s51(i)) and the quarantine power (s51(ix)) to create laws relating to the environment or animals. The trade and commerce power (s51(i)) provides the Commonwealth Parliament with the power to legislate with regard to the import and export of wildlife specimens.⁵⁷ A significant proportion of macropod meat and skins are exported to overseas markets, which means that the Commonwealth has an important role to play.

Historically, the State governments were hostile to attempts by the Commonwealth Government to take power with regard to the exploitation of wildlife and in particular macropods. For example, in April 1924, the Commonwealth requested State governments to refer applications for the export of marsupial skins to a State Advisory Committee.⁵⁸ This request was rejected by all State governments. The responses of the NSW and Queensland State Premiers were:

- Queensland: ‘... this Government... cannot agree to the request.’⁵⁹
- New South Wales: acknowledged that export matters are ‘wholly for the Commonwealth Government to determine’ but that ‘legitimate trade should not be restricted in this State if an identical policy be not followed in the other States.’⁶⁰

In 1933, a State-centred export process was introduced with export applications to be approved by State authorities, subject to final acceptance by the Commonwealth Minister.⁶¹ However, in 1959 the Commonwealth again attempted to gain more power over the issue, calling for a common approach on the basis that the differences between State jurisdictions were causing problems. In particular, ‘whilst kangaroos were considered a menace in some States they were protected in Victoria’.⁶²

⁵⁷ The external affairs power (s51(xxix)) also provides the Commonwealth Parliament with power over wildlife if the relevant species has been listed under CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora, opened for signature 30 April 1973, 993 UNTS 243 (entered into force 1 July 1975)).

⁵⁸ Linda Tucker, *Australia’s Regulation of Commercial Use of Wildlife: An Absence of Eco-Logic* (PhD Thesis, University of Wollongong, 2008), 194. The original letter from the Commonwealth is unavailable. The State Government responses are at National Archives of Australia: Prime Minister’s Department, Series no. A364/2.

⁵⁹ WN Gillies, Acting Premier of Queensland, 17th April 1924 in Tucker, above n 46, 194.

⁶⁰ (unnamed official), Acting for George Warburton, Premier of NSW, 5th May 1924 in Tucker, above n 46, 195.

⁶¹ Roger Beale, Department of Environment Sport and Territories, Submission to the Senate References Committee Rural and Regional Affairs On the Inquiry Into Commercialisation of Australian Native Wildlife (1997), 52.

⁶² *Ibid*, 53.

In 1975, the Australian National Parks and Wildlife Service (ANPWS) was made responsible for wildlife export regulation. The ANPWS was created by the *National Parks and Wildlife Conservation Act 1975* (Cth) which recognised the need for Commonwealth and State Government cooperation in wildlife protection.⁶³ This Act was repealed by the *Environmental Reform (Consequential Provisions) Act 1999* (Cth). In 1993, the ANPWS became the Australian Nature Conservation Agency (ANCA). In 1996, the ANCA ceased to exist as an administrative entity and was replaced by Parks Australia as part of Environment Australia within the Department of the Environment and Heritage. Currently, the Department of Sustainability, Environment, Water, Population and Communities is responsible for the approval of exports.

Although each State government remains responsible for the management of macropods within its jurisdiction, any export of macropod products requires Commonwealth approval. The Commonwealth has exercised its external affairs power to legislate with regard to the welfare of macropods which are subject to international export.⁶⁴

The welfare of macropods is just one aspect of what the Commonwealth regulates with the main purpose of regulation being to control and promote exports. As a result, the welfare of macropods is subject to a national approach through the National Codes. However, the States and Territories animal protection laws still apply to wildlife, including macropods (subject to the exemptions described above).

COMMONWEALTH LEGISLATION

Regulation of the commercial and non-commercial killing of macropods through Commonwealth legislation

The *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') and the *Export Control Act 1982* (Cth) are the most significant Commonwealth statutes relating to macropod management. The EPBC Act aims to provide an overall framework for environmental protection. The *Export Control Act* and its relevant subsidiary

⁶³ Section 19(1)(b) provides: 'The Director may co-operate with a State or the Northern Territory or with an authority of a State or of the Northern Territory in formulating and implementing programs for the purposes of the protection, conservation, management and control of wildlife.'

⁶⁴ Environment Protection and Biodiversity Conservation Regulations 2000 (Cth), s 9A.05.

legislation provide further requirements for the export of macropod products.⁶⁵

The key environmental statute related to the killing of macropods at the Commonwealth level is the EPBC Act. Part 13A of the EPBC Act regulates the international movement of wildlife specimens. Section 303DD provides that it is an offence to export without a permit, and that such a permit can be issued where the export is in accordance with an approved plan. Section 303BA(a) provides the objects of Part 13A. Section 303DD(3) provides for the accreditation of wildlife trade management plans. State management plans are accredited with the Commonwealth through this section which allows macropod products to be exported. Conditions for approval are set out in s303FP. Further conditions for wildlife trade management plans are set out in s303FO.

Wildlife trade management plans must be consistent with the objects of Part 13A and must not cause detriment to the species covered in the specific plan. NSW, Queensland, South Australia and Western Australia have approved wildlife trade plans.⁶⁶ If States do not seek to export macropod products there is no requirement for their plans to be approved by the Commonwealth. The commercial harvest and export of Bennett's wallaby (*Macropus rufogriseus*) skins from Tasmania is an approved wildlife trade operation (subject to conditions).⁶⁷

Welfare provisions in the Commonwealth legislation

The objects of Part 13A of the EPBC Act include the promotion of the humane treatment of wildlife.⁶⁸ The final report of the independent review of the EPBC Act in 2009 emphasised the importance of this object and stated it 'was specifically included in the Act due to concerns that it was not adequately addressed in previous legislation.'⁶⁹

65 For example, the Export Control Act 1982 and the Australian Standard for Construction of Premises Processing Meat for Human Consumption provide requirements for the construction of game processing establishments.

66 Department of the Environment, Water, Heritage and the Arts (DEWHA), Approved wildlife management plans <<http://www.environment.gov.au/biodiversity/trade-use/sources/management-plans/index.html>> accessed 1.9.2010.

67 Permit issued to Lenah Game Meats for the period 1 November 2009 until 31 October 2012: <<http://www.environment.gov.au/biodiversity/trade-use/sources/operations/index.html>> accessed 10.11.2010. Further details may be found here: <<http://www.environment.gov.au/biodiversity/trade-use/sources/operations/lenah-game-meats.html>> accessed 10 November 2010.

68 Environment Protection and Biodiversity Conservation Act 1999 (Cth) ('EPBC Act') s 303BA (1).

69 A Hawke, Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Final Report (Commonwealth of Australia, Canberra, December 2009)

<<http://www.environment.gov.au/epbc/review/publications/pubs/final-report-12-wildlife-trade.pdf>> accessed 21

This ‘inadequacy’ may have been a reference to the difficulties associated with prosecuting offences under the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* (Cth) which was the previous legislation.⁷⁰ An added problem was that under this previous legislation, it was not necessary for the Minister to consider animal welfare in approving management plans.⁷¹

Under the EPBC Act, the Minister must be satisfied that if an animal is to be killed this will be done in a manner that is generally accepted to minimise pain and suffering and that the method must be known to result in minimal stress and risk of injury to the animal.⁷² Before approving a wildlife trade management plan under s303FO(2), the Minister, among other things, must be satisfied that the welfare requirements found in regulation 9A.05(4) are likely to be complied with.⁷³ Regulations that address the welfare of animals for which the

February 2011, 223.

70 Cao, above n 44, 240. See e.g. *R v Klein* (1989) A Crim R 332 (NSW Court of Criminal Appeal). This case concerned the import of seven parakeets from Singapore to Australia (without a permit). The birds had been drugged and caged and then abandoned at Sydney Airport. The appeal court described the sentencing judge’s concerns about the cruelty involved as ‘sentimentality’. At [334] (per Lee J, Campbell and Loveday JJ agreeing).

71 See e.g. *Re Wildlife Protection Association of Australia Inc and Minister for the Environment and Heritage* (2003) 73 ALD 446 at 453.

72 See Environment Protection and Biodiversity Conversation Regulation 2000 (Cth) reg 9A.05 which sets out conditions for section 303FO (3)(f) of the EPBC Act. Regulation 9A.05(4)(b) states that ‘if the animal is killed, it is done in a way that is generally accepted to minimise pain and suffering’. Regulation 9A.05(4)(a) provides that ‘the animal is taken, transported and held in a way that is known to result in minimal stress and risk of injury to the animal’. However, it appears as though regulation 9A.05(4)(a) does not apply to the killing of kangaroos. See *Re Wildlife Protection Association of Australia Inc and Minister for the Environment, Heritage and the Arts* [2008] AATA 717 at [52]. The word ‘take’ is not defined in the Regulations but is defined in s 303BC of the EPBC Act and for the purposes of Part 13A as including, ‘unless the contrary intention appears’, ‘harvest, catch, capture, trap and kill’. The Tribunal stated that ‘[i]f the Regulations incorporate that definition, the presence of a separate use of “kill” expresses a contrary intention, that is, “take” in paragraph (a) does not include “kill”. If the definition is not incorporated the same result is achieved by the expression unius of statutory construction. In either case we regard only paragraph (b) as having any application.’

The application of regulation 9A.05(3), which relates the welfare of confined wild animals, was tested in *Re International Fund for Animal Welfare (Australia) Pty Ltd and Minister for Environment and Heritage* (2005) 41 AAR 508. This case concerned the conditions under which eight Asian elephants were to be kept in Taronga Zoo and Melbourne Zoo. The Administrative Appeals Tribunal commented that ‘A matter which should be borne in mind as part of the context is that the primary purpose of the Convention upon which the legislation is based is the conservation of threatened species and not the avoidance of cruelty to animals. State legislation, such as the Exhibited Animals Protection Act 1986 (NSW), deal with the actual conditions of animals in zoos. Nevertheless, we accept that the legislation does address welfare issues and the avoidance of cruel treatment.’ At [71].

73 EPBC Act s 303FO(3)(f).

Minister has issued a permit to export or import may be made under section 303GO.⁷⁴

The approved State management trade plans must incorporate the National Codes. In all States that export macropod products (apart from Tasmania) compliance with the Commercial Code is a condition of licences.⁷⁵

CODES OF PRACTICE FOR THE HUMANE SHOOTING OF KANGAROOS AND WALLABIES

The national codes are the key regulatory instruments for the killing of macropods that relate to animal welfare. The national codes ‘do not override state or territory animal welfare legislation’⁷⁶ but seek to provide technical specifications and procedures, including procedures for the euthanasing of injured macropods, pouch young and young at foot. The purpose of the national codes is to ‘ensure all persons intending to shoot free-living kangaroos or wallabies ... undertake the shooting so that the animal is killed in a way that minimises pain and suffering.’⁷⁷ The national codes were approved by the Natural Resource Management Ministerial Council (NRMMC) in 2008. The following discussion outlines and analyses the key provisions of the national codes: conditions on the method of shooting; conditions on the killing of injured macropods; conditions on the killing of dependent young; and conditions for non-commercial killing.

Conditions on the method of shooting

The National Codes provide that the primary objective for shooters ‘must be to achieve instantaneous loss of consciousness and rapid death without regaining consciousness.’⁷⁸ It is generally considered that

74 These regulations may include conditions ‘eliminating or minimising the risk of ... injury to the animal ... adverse effects on the health of the animal ... or cruel treatment of the animal’: EPBC Act s 303GO(2)(b).

75 National Parks and Wildlife Act 1974 (NSW) s 133(4); National Park and Wildlife Act 1972 (SA) s 60J(5); Wildlife Conservation Regulations 1970 (WA) reg 5, 6; Wildlife Regulations 1999 (Tas) reg 6. In Tasmania the Animal Welfare Standard for the Hunting of Wallabies in Tasmania provides the minimum standard. Department of Primary Industries Parks, Water and Environment, Animal Welfare Standard for the Hunting of Wallabies in Tasmania <<http://www.dpiw.tas.gov.au/inter.nsf/Attachments/CPAS-5TE4Y9?open>> accessed 20 January 2011.

76 Commercial Code, 6; Non-Commercial Code, 5. The National Codes further provide that ‘[e]xcept where specifically exempted by law, states and territories will require shooters to have a licence or permit issued by a relevant government authority. The licence or permit will specify any conditions or restrictions that may apply.’

77 Commercial Code, 6; Non-Commercial Code, 5.

78 Commercial Code, 9; Non-Commercial Code, 9.

shooting a macropod in the brain will result in a sudden and painless death for the specific animal.⁷⁹ The National Codes provide that certain conditions must be met and if they cannot be met, or where there is any doubt about achieving a ‘sudden and humane death’ shooting must not be attempted.⁸⁰

In relation to the method of shooting, the National Codes provide that shooters must use the specified firearms and ammunition and that they must not attempt to shoot a macropod from a moving vehicle or other moving platform.⁸¹ The target animal must be standing, stationary and within a range specified in Schedule 1.⁸² Shooters must avoid shooting female macropods where it is obvious that they have pouch young or dependent young at foot.⁸³ Shooters must aim to hit target each macropod in his or her brain. A diagram is provided in Schedule 2.⁸⁴ Shooters must ensure that each animal shot is dead before another macropod is targeted.⁸⁵

Although instantaneous death for the macropod is the objective, this is certainly not achieved in all circumstances. In 1985, the RSPCA found the overall proportion of head shot macropods that were processed was about 86% while in 2000/2002 this was 95.9%, meaning that the remainder were neck or body shot.⁸⁶ Between 2005 and 2008, Animal Liberation NSW identified that an average of 40% of macropods per chiller were neck shot.⁸⁷ The apparently large difference in data may be due to a key difference in methodology between these two studies. Animal Liberation identified neck shot macropods as ‘those whose heads were severed below the atlantal-occipital joint, a location where the cut is much more difficult to make’.⁸⁸ In contrast, the RSPCA sought to identify neck shots through detecting entry bullet holes in or below the neck.⁸⁹ Therefore, it may be that the Animal Liberation data identified neck shot macropods that were missed in the RSPCA’s research. If this is the case, the Animal Liberation data may provide a

79 Commercial Code, 9; Non-Commercial Code, 9.

80 Commercial Code, 9; Non-Commercial Code, 8.

81 Commercial Code, 9-10; Non-Commercial Code, 9.

82 Commercial Code, 10; Non-Commercial Code, 9-10.

83 Commercial Code, 10; Non-Commercial Code, 10.

84 Commercial Code, 10 and Schedule 2; Non-Commercial Code, 10 and Schedule 2.

85 Commercial Code, 10; Non-Commercial Code, 10.

86 RSPCA Australia, Report 2002, above n 5, Summary.

87 Dror Ben-Ami, A Shot in the Dark: A Report on Kangaroo Harvesting (Report prepared for Animal Liberation NSW, 2009), 25.

88 Ibid.

89 RSPCA Australia, Report 2002, above n 5, chapter 4.

more reliable measure of the number of neck shot macropods that are brought in by shooters.

The RSPCA and Animal Liberation estimates are limited by the fact that the samples were taken at processors or chillers.⁹⁰ They do not take into account the number of dead or injured macropods left in the field.⁹¹ Based upon the RSPCA's 2002 research, a conservative estimate is that at least 120,000 macropods are body shot and processed each year.⁹² The Animal Liberation data indicates that the number of neck shot macropods processed at chillers may be very high, perhaps as many as 1,200,000 annually.⁹³ Many of these animals would not have experienced a 'sudden and humane death' and instead would have experienced considerable pain and suffering.

In 2004, the NSW Young Lawyers Animal Rights Committee argued that 'often animals are shot in the head but not in the brain.'⁹⁴ The NSW Young Lawyers Committee called for a change in the text whereby where ever the term 'head' was used in the National Codes (in reference to shooting) that it should be replaced by the word 'brain'. They further recommended that better diagrams should be inserted to 'precisely indicate the size and location of the brain within the animal's head.'⁹⁵ The National Codes have since been amended to use the term 'brain' rather than 'head'. However the Animal Liberation data indicates that the requirement for carcasses to be brain shot in order to

90 The Animal Liberation study encompassed 24 chillers throughout New South Wales and Queensland. The RSPCA study encompassed 24 processors and 2 tanneries across New South Wales, Queensland, Western Australia and South Australia. The RSPCA chose to use processors as a sampling point rather than chillers because it 'made it possible to inspect samples from a number of locations at a single inspection point.' Ibid.

91 See discussion of methodology in *ibid*.

92 On average 3 million kangaroos are shot commercially each year. Using the RSPCA's 2002 figure of 95.9% being head shot, this means that about 123,000 of the carcasses at chillers were not head shot. The actual total of body shot kangaroos would be higher as these carcasses should not be processed.

93 Forty per cent of 3 million macropods killed commercially each year would bring the total annual number of neck shot macropods to 1,200,000.

94 NSW Young Lawyers Animal Rights Committee, 'A submission to the NRMCC Working Group on the National Code of Practice for the Humane Shooting of Kangaroos' (prepared by Kristen Dorman, Carolyn Wilson, Angela Radich, Katrina Sharman, Stephanie Abbott and Nigel Myers), October 2004, 13. The authors appear to rely upon Maryland Wilson, Cruelty and the Kangaroo Industry at <<http://www.awpc.org.au/kangaroos/cruelty.htm>> accessed 28 February 2011 which states 'Because head shots are attempted, these may not strike the brain but injure the head including the mouth. These kangaroos escape into the scrub outside the spotlight's beam and will die over several days from their horrific injuries and starvation.' No data is provided in either the NSW Young Lawyers submission or article by Wilson.

95 NSW Young Lawyers Animal Rights Committee, above n 98, 14. Also see NSW Young Lawyers Animal Law Committee, above n 54.

be processed is not being adhered to due to the high occurrence of neck shot carcasses.

Conditions on the killing of injured macropods

The National Codes provide that if a macropod is still alive after being shot, ‘every reasonable effort must be made immediately to locate and kill it before any attempt is made to shoot another animal.’⁹⁶ Injured macropods ‘should be euthanased quickly and humanely to alleviate suffering.’⁹⁷ Conditions are set out in Section 4.1 which provide that the preferred method for killing these animals is a shot to the brain, however where this is impractical or unsafe, a shot to the heart is permissible. Furthermore, if either a shot to the brain or heart is impractical or unsafe, the conditions state that ‘a heavy blow to the base of the skull with sufficient force to destroy the brain ... is permissible.’⁹⁸

However, the National Codes also provide that shooters are permitted to shoot more than one macropod in a group before retrieving the carcass. Although the shooter must be ‘certain that each kangaroo or wallaby is dead before another is targeted’,⁹⁹ the National Codes provide sufficient ambiguity that shooters may continue shooting even when an animal is injured. The key ambiguity arises from the requirement that shooters make ‘every reasonable effort’ to locate and kill injured macropods before continuing to shoot others. It is not clear what ‘every reasonable effort’ refers to and what is expected of shooters. The commercial interest is to obtain as many brain-shot macropods as possible, as these are sellable. There is no commercial incentive to retrieve and kill injured macropods. The ambiguity in the National Codes compounds this problem. It is not known how many macropods are injured and either killed or left to die in the field. Where an instantaneous death is not achieved, and the shooter does not pursue and kill the animal, the animal is likely to experience a slow and/or painful death.

Conditions on the killing of dependent young

A large number of joeys are killed each year as part of the commercial and non-commercial kill. Around 300,000 young at foot and 800,000 pouch young are either killed or left to die each year as collateral of the

96 Commercial Code, 10; Non-Commercial Code, 10.

97 Commercial Code, 12; Non-Commercial Code, 11.

98 Commercial Code, 12; Non-Commercial Code, 12.

99 Commercial Code, 10; Non-Commercial Code, 10.

commercial industry.¹⁰⁰ The National Codes provide that any target female macropods, including injured animals, must be ‘thoroughly examined for pouch young.’¹⁰¹ Where pouch young or young at foot are present, these animals must be euthanased in accordance with the methods provided. However, the National Codes prescribe methods of killing joeys which would be considered clear breaches of animal welfare law if committed against a range of other animals.¹⁰²

The recommended methods of killing for furred pouch young is euthanasia by a single ‘forceful blow to the base of the skull sufficient to destroy the functional capacity of the brain’¹⁰³ (e.g. by a steel water pipe or the tow bar of a vehicle). For small furless pouch young (fits within the palm of the hand) the method is ‘stunning, immediately followed by decapitation by rapidly severing the head from the body with a sharp blade’ or a ‘single forceful blow to the base of the skull sufficient to destroy the functional capacity of the brain.’¹⁰⁴ For young at foot the National Codes provide the following methods: ‘Single shot to the brain or heart where it can be delivered accurately and in safety using the firearms and ammunition specified...’¹⁰⁵

A number of studies have shown that there is doubt as to whether the current methods of killing joeys ensure a sudden and painless death in all cases.¹⁰⁶ The American Veterinary Medical Association (AVMA) Report of the AVMA Panel on Euthanasia stated ‘[p]ersonnel performing physical methods of euthanasia [such as a blow to the head or decapitation] must be well trained and monitored for each type of physical technique performed.’¹⁰⁷ No formal training is required for the killing of joeys and these practices are virtually unmonitored.

The RSPCA’s research on the National Codes revealed that shooters often have difficulty catching young at foot.¹⁰⁸ Many of these joeys later die from exposure, starvation or predation.¹⁰⁹ The RSPCA found that even if young at foot are captured by shooters, there is difficulty in

100 Croft, above n 4.

101 Commercial Code, 11; Non-Commercial Code, 11.

102 Voiceless, above n 10.

103 Commercial Code, 14; Non-Commercial Code, 13.

104 Commercial Code, 14; Non-Commercial Code, 13.

105 Commercial Code, 14; Non-Commercial Code, 13.

106 See, e.g., the material referred to in RSPCA Australia, Report 2002, above n 5, [5.2.1.].

107 American Veterinary Medical Association, ‘Report of the AVMA Panel on Euthanasia’ (2001) 218 *Journal of the AVMA* 669, 681.

108 RSPCA Australia, Report 2002, above n 5, [5.2].

109 *Ibid.*

killing them.¹¹⁰ The National Codes provide that any dependent young must be shot as soon as possible,¹¹¹ yet it is clear that many joeys endure death, pain and suffering each year as collateral of the commercial and non-commercial killing.

Conditions for non-commercial killing

The Non-Commercial National Code permits shooters to use shotguns in certain circumstances instead of centrefire rifles.¹¹² However, the use of shotguns has been heavily criticised on the basis that there are too many variables associated with shotguns to ever achieve a high level of consistency in achieving brain shot outcomes.¹¹³ The Non-Commercial Code recognises that a shotgun will only 'cause a sudden and painless death if the pattern is centred on the head, neck or chest of the target animal' at 'ranges up to the maximum specified in Schedule 1.' There are no competency requirements for non-commercial shooters.¹¹⁴

The RSPCA Report of 2002 found high levels of cruelty in the non-commercial killing of macropods. This may well be because the competency of non-commercial shooters is not tested. Non-commercial killing is even less regulated than commercial killing, as the carcasses are not brought to a processor.¹¹⁵ The RSPCA and NSW Young Lawyers Animal Law Committee have recommended the Commercial Code be applied to non-commercial shooters so as to improve animal welfare outcomes.¹¹⁶

Conclusion

The national codes condone cruelty towards macropods through a number of methods. The killing of joeys is the issue that has attracted the most criticism and concern within Australia and internationally.¹¹⁷ However, this issue is closely followed by concern for macropods that are not killed instantaneously and the separate issues that arise around

110 Ibid.

111 Commercial Code, 11; Non-Commercial Code, 11.

112 Non-Commercial Code, 7.

113 RSPCA Australia, Report 2002, above n 5, [6.2.1].

114 See Non-Commercial Code.

115 Ibid.

116 RSPCA Australia, 'Is there a difference between non-commercial and commercial kangaroo shooting?'

<<http://kb.rspca.org.au/entry/78/>> accessed 1.11.2010; NSW Young Lawyers Animal Law Committee, above n54.

117 See e.g. the 440,000 joeys campaign in the EU: <<http://www.440000joeys.eu/>> accessed 22 February 2011; Animals

Australia, Kangaroo shooting <http://www.animalsaustralia.org/issues/kangaroo_shooting.php> accessed 22

February 2011; Voiceless, above n 10.

non-commercial shooting. It is clear that many adult and young macropods experience pain and suffering as a result of current commercial and non-commercial killing. This analysis supports the conclusion reached earlier in this paper that the killing of macropods causes pain and suffering to many adult and young animals (the first element in an act of cruelty). Further, the scale and extent of the suffering endured by these animals is considerable and arguably outweighs the potential commercial gains. This supports the conclusion that the killing of macropods is unnecessary (the second element in an act of cruelty). The EPBC act relies upon the national codes to establish the welfare standards for the current commercial and non-commercial killing. However, it is clear that these welfare standards are inadequate.

CASE LAW

"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 inhabitants."¹¹⁸

In 2008, the NSW management plan was unsuccessfully challenged in *Wildlife Protection Association of Australia Inc v Minister for the Environment, Heritage and the Arts (Cth)*.¹¹⁹ In this case, the applicant submitted that the National Codes allow the inhumane and cruel treatment of adult macropods and joeys, noting that young at foot which are left behind are likely to die from predation, starvation or exposure. However, the Tribunal found that this did not amount to a failure to ensure that these animals were humanely killed and ruled that killing in compliance with the National Code minimised pain and suffering to the macropods concerned.¹²⁰ Appeals from decisions made personally by the Minister, such as approval of macropod management plans, are not possible under the current Act.¹²¹

On macropods not being killed instantaneously, the Tribunal said:

As it seems to us, no system, short of absolute prohibition, could prevent instances where instantaneous death was not achieved. The question is whether the Plan, by accepting that these instances will occur, promotes the humane treatment of kangaroos. We think that it

118 Peter Singer, Foreword to Maryland Wilson and David Croft, *Kangaroos Myths and Realities* (2005), 9.

119 [2008] AATA 717. See submissions at <<http://www.kangaroo-protection-coalition.com/nswaatappeal2008.html>>.

120 The Tribunal referred to its earlier decision on this part of the Commercial Code in *Wildlife Protection Association of Australia Inc and Minister for the Environment and Heritage* [2004] AATA 1383.

121 Caulfield, *Handbook of Australian Animal Cruelty Law*, above n 24, 152.

does ... It may be accepted that there will, nonetheless, be instances where instantaneous death by brain shot is not achieved ... Any management plan that involves the commercial killing of free-ranging animals will involve a risk that perfection is not always going to be achieved. What is required is that the Plan achieve as near to perfection as human frailty will permit. We are satisfied that the system of accreditation, licensing, and compliance management achieves that object.¹²²

On cruelty to joeys, the Tribunal said:

The concern of the [applicant] is directed particularly to those young at foot that are not able to be killed by the trapper following the killing of the mother ... Again, it may be accepted that there will be a very small number of instances where young at foot die [due to starving or being taken by predators], but we do not regard that fact, even in combination with the instances where an instantaneous killing of the adult is not possible, as leading to the conclusion that the Plan does not satisfy the object of promoting the humane treatment of wildlife. We are satisfied that it does meet that object.¹²³

The Tribunal's reasoning with regard to adult and joey welfare is problematic. Firstly, a result of 120,000 animals (and probably significantly more) being neck or body shot each year is very far from perfection. Similarly, about 1.1 million joeys being killed or left to die each year as collateral of the industry is no small matter. This case indicates that allowances for 'human frailty' can permit high levels of pain and suffering by animals. Secondly, apart from the RSPCA and Animal Liberation research, there has been very limited research to try to determine shooter success rates (and the corresponding levels of pain and suffering). This makes it very difficult to assess whether the current management system is achieving 'as near to perfection as human frailty will permit.' Finally, if more than 120,000 animals are body shot each year in commercial killing, the rates of body shots for non-commercial kills would be much higher.

The basis of the decision was that the National Code should seek to provide the best welfare outcomes possible assuming that commercial killing was to continue. Such reasoning ignores the possibility of

122 Re Wildlife Protection Association of Australia Inc and Minister for the Environment, Heritage and the Arts [2008] AATA 717 at [48] and [50].

123 Re Wildlife Protection Association of Australia Inc and Minister for the Environment, Heritage and the Arts [2008] AATA 717 at [51].

improved welfare outcomes (e.g. through a male-only kill) or that the welfare outcomes for joeys are just simply unacceptable.¹²⁴

However, the AAT's role was not to suggest alternative policy measures but to determine whether the Commercial Code met the statutory requirement for humane treatment. On that basis, it appears that the AAT's decision is correct as Part 13A of the EPBC Act only refers to 'promoting' humaneness, rather than ensuring that humaneness is achieved in all cases.¹²⁵ This case supports a conclusion that existing law and policy is a form of legalised cruelty¹²⁶ and requires reform.

LEGAL REFORM

Australian Animal Welfare Strategy (AAWS)

There is a lack of animal protection legislation at a Commonwealth level. In response to this deficiency, the national Australian Animal Welfare Strategy (AAWS) was established under the Commonwealth Department of Agriculture, Fisheries and Forestry (DAFF). The AAWS vision of promoting animal welfare in Australia extends to the 'care, uses and direct and indirect impacts of human activity on all sentient species.'¹²⁷ The AAWS Advisory Committee comprises representatives of the Commonwealth, State and Territory Governments, animal welfare groups, agriculture, veterinary, teaching and research organisations.¹²⁸

124 White states that '...if, in the commercial 'harvesting' of kangaroos, it is not possible to avoid slow and/or painful deaths for even a small proportion of animals, the practice of commercial kangaroo hunting and killing per se needs to be drawn into question, rather than accepting welfare outcomes that 'in the circumstances [are] as humane as can be expected'.' Steven White, 'Animals in the wild' in Peter Sankoff and Steven White, above n 17, 257 citing Re Wildlife Protection Association of Australia Inc and Minister for the Environment and Heritage [2004] AATA 1383 at [56].

125 Section 303BA(1)(e) provides that one of the objects of Part 13A is to 'promote the humane treatment of wildlife.' EPBC Act.

126 Furthermore, in the case of Re The Wildlife Protection Association of Australia Inc and Minister for Environment and Heritage [2006] AATA 953 the King Island and Flinders Island Management Plans for commercial killing of wallabies and pademelons were unsuccessfully challenged. The plaintiffs challenged the decision to permit the use of rimfire rifles on the basis that these weapons do not result in humane outcomes. For a discussion of the humaneness of rimfire rifles see NSW Young Lawyers Animal Law Committee, Letter to the Hon. Ian Campbell, Minister for the Environment and Heritage: Commercial Wallaby Cull on King and Flinders Islands (9 January 2007) <<http://www.lawsociety.com.au/idc/groups/public/documents/internetyounglawyers/023627.pdf>> accessed 11 November 2010.

127 The AAWS is available here: <<http://www.daff.gov.au/animal-plant-health/welfare/aaws>> accessed 1 October 2010.

128 Cao, above n 44, 101.

The AAWS process provided a review by Scott which reported on the animal welfare arrangements for animals in the wild.¹²⁹ This report suggested that macropods could be considered pests ‘in some situations’,¹³⁰ although it did not provide any reasoning for this conclusion. The report noted that there was a need to complete the review of the code of practice.¹³¹ Although this process has been completed,¹³² meaningful reform of the National Codes is unlikely to occur due to inherent weaknesses within the AAWS process itself.

Caulfield has criticised the AAWS for undermining ‘its credibility by its over-indulgence in breathless and enthusiastic prose’ and that it appears to be ‘a combined public relations exercise and procedure intended to endorse and insulate current animal farm industry practices.’¹³³ The problem with the AAWS is that it is not, and cannot be, an independent body. It is run by the Commonwealth department that is responsible for looking after the farm industry as well as animal welfare. The AAWS does not offer an independent review of the National Codes. It helps solidify the current welfare standards for macropods and other animals.

Possible Areas for Legal Reform

Although not the focus of this article, some possible areas for reform of the current law and policy have arisen from the analysis. A key area concerns joey welfare. The NSW Young Lawyers Animal Law Committee has proposed that all the current prescribed methods for killing joeys be replaced with the following requirement:

Shooters must administer lethal injection to pouch young and young at foot whose mothers have been killed. After administering the injection the shooter must be certain that the animal is dead ... The shooter must not dispose of the dead pouch joey or young at foot in any manner other than: incineration by fire so that the entire carcass is

129 Lindy Scott, Australian Animal Welfare Strategy, Final Report – Animals in the Wild Sector: Review of Existing Animal Welfare Arrangements, <http://www.daff.gov.au/_data/assets/pdf_file/0016/152107/aaws_stocktake_wildlife.pdf> accessed 1 September 2010.

130 *Ibid.*, 2.

131 *Ibid.*, 13.

132 As new standards and guidelines are being developed they are publicised on

<<http://www.animalwelfarestandards.net.au/>>. No new standard or guideline for the killing of macropods has been included.

133 Caulfield, Handbook of Australian Animal Cruelty Law, above n 24, 16-17.

destroyed or burying the carcass so that the top of the carcass is at least 30cm underground.¹³⁴

This suggestion is problematic. Administering such lethal injections would require a specific skill. If poorly performed, the procedure could cause joeys great pain and suffering. It seems neither practical nor safe to supply shooters with large amounts of lethal poisons for use in remote locations, with little or no supervision.

The NSW Young Lawyers Animal Law Committee also proposed that it 'be mandatory that a qualified veterinarian supervise all shootings and administer the lethal injections.'¹³⁵ This proposal (apparently contradicting the previous requirement that shooters administer the injection?) poses separate issues. More than one million joeys are killed each year in remote locations as collateral of the commercial industry. There are not likely to be enough veterinarians to supervise all shootings and administer the lethal injections. Even if there were, the costs would be commercially unviable.

Research is underway to determine whether spring-loaded captive-bolt guns can be used to achieve improved welfare outcomes for joeys.¹³⁶ It may be doubted that this will resolve those welfare issues. It has been argued that captive-bolt guns only achieve 'acceptable' animal welfare outcomes if the gun is placed on the head of the animal between the base of the ears and the animal is bled dry by cutting a large artery immediately after the shooting.¹³⁷

Cruelty to joeys will probably continue unless the killing of female macropods ceases. In many places, killing young wildlife is considered unacceptable practice, as in the banning of products from Canadian Harp Seals in the US, Mexico, Russia and the European Union.¹³⁸ The NSW Young Lawyers Animal Law Committee and RSPCA support a ban on shooting female macropods.¹³⁹ What ecological ramifications

134 NSW Young Lawyers Animal Law Committee, above n 54, 13.

135 Ibid.

136 Agriculture Today, 'Improving Kangaroo Welfare in Harvest' <<http://www.dpi.nsw.gov.au/archive/agriculture-today-stories/november-2009/improving-kangaroo-welfare>> accessed 22 February 2011.

137 M Hultmann, 'Killing of Experimental Rabbits with Captive Bolt Guns According to Animal Welfare Regulations' (1991) 34(5-6) *Journal of Experimental Animal Science* 203.

138 Ben-Ami, above n 91; S Fink, *Seals and Sealing in Canada* (International Fund for Animal Welfare, 2007) available at <http://www.ifaw.org/Publications/Program_Publications/Seals/asset_upload_file707_13735.pdf> accessed 1 November 2010.

139 The NSW Young Lawyers Animal Law Committee has proposed that 2.3 of the Commercial Code be amended to substitute 'Shooters should avoid shooting female kangaroos where it is obvious that she has a dependant young'

such a ban might have on (e.g.) population structure,¹⁴⁰ or whether it would make the commercial industry unviable are not known .

As to adult macropods, the National Codes should be amended to clearly provide that neck shots are not compliant with the National Codes. The National Codes should specify what ‘every reasonable effort’ means in the context of locating and killing injured macropods. This could be done through the use of examples.

Non-commercial shooters should not be subject to more lenient standards than commercial shooters, in order to raise the welfare outcomes. A critical issue is effective monitoring of the shooting, with breaches subject to enforcement. If such scrutiny cannot be provided, there is a strong argument that the shooting should be discontinued.

CONCLUSION

This analysis of the animal protection and nature conservation legislation relevant to the killing of macropods, welfare provisions and outcomes, has concluded that the likelihood and scale of pain, injury and death outweighs the current objects, including the object of potential commercial gains. Clearly, current methods of killing joeys do not ensure a sudden and painless death. No formal training is provided for the killing of joeys and the process is effectively unmonitored. Although shooters are required to seek an instantaneous death through a brain shot, this is certainly not achieved in many circumstances. The article has found areas requiring legal reform. Conditions set out in the National Codes need to be effectively monitored and compliance enforced. Inspectorial and enforcement activities are limited due to the sheer number of animals and the remote nature of the killing. Ultimately, a total prohibition on killing may be the only way to adequately address the welfare of macropods.

with ‘Shooters must not shoot female kangaroos.’ NSW Young Lawyers Animal Law Committee, above n 54, 11.

140 RSPCA Australia has stated that ‘It may be that the only solution which would totally avoid the potential of cruelty to pouch young would be not to shoot females at all, and research is needed to examine the potential effects of such a policy on commercially harvested kangaroo populations.’ RSPCA Australia, ‘What happens to joeys when female kangaroos are shot?’ < http://kb.rspca.org.au/What-happens-to-joeys-when-female-kangaroos-are-shot_76.html> accessed 22 February 2011.

Towards the Legal Protection of Animals in China

By Deborah Cao *

China is one of the few countries not to have laws for protecting domestic animals. However, with animal protection and animal abuse attracting increasing interest in the news and social media, efforts are continuing to try to persuade the Chinese government and legislature to regulate some aspects of animal-related practices. This article briefly discusses some of these efforts, and outlines some obstacles and challenges facing proponents for the legal protection of animals against abuse and violence.¹

Efforts for Legislation Past and Present

Animals have occupied a very important place in Chinese history. They have been used for human consumption, healing, hunting, transport and as victims in religious and ritual sacrifices. They appear as symbols and metaphors in everyday life (e.g. the Chinese zodiac uses the character traits of animals to describe people, and vice versa) and as symbols of authority (an imaginary one-horned animal, the *xie zhi*, was used as a symbol of law and justice). In traditional China, animals were considered part of the social order, subject to bureaucratic management

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1 References:

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- Chang, Jiwen and G Michaels eds. 2010. *Animal Protection Law of the PRC and Prevention of Cruelty to Animal Law of the PRC: Experts' Proposal and the Public Responses*, Beijing, Zhongguo Huanjing kexue chubanshe.
- Johnson, Wallace. 1997. *The T'ang Code: Volume II, Specific Articles*, trans. Princeton: Princeton University Press.
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and control in the form of legal regulation in the service of government and emperors.²

In Chinese imperial law, there were legal provisions adopted more than a thousand years ago for the care and treatment of domestic working animals. In traditional Chinese philosophy, animals were regarded as a constituent part of the cosmos. Ancient philosophers saw no strict delineation between humans and non-human animals.

China has some of the earliest decrees and official regulations on the protection of animals in human history, e.g. around 2100 BC, Emperor Da Yu decreed that “for three months in summer, fishing nets must not be cast into the rivers and streams so as to ensure the thriving of fish and turtles”. In Han Dynasty (206BC – 220 AD), there were official orders and decrees that limited and controlled the killing of young animals. There were provisions on animal protection in the imperial Codes in traditional China. The Tang Code enforced during the Tang Dynasty (618-907 AD) introduced provisions on animal treatment used for official purposes including public stables and sacrificial animals.³ There were provisions in the Code such as the examination of the conditions of domestic animals not reported truthfully; persons in charge of government animals that become sick; sacrificial animals used not conforming to the rules, use of government animals in a manner that their backs are laid bare or their throats are worn through by the harness; and intentionally killing government or private horses or cattle. These provisions were retained with minor variations in all the succeeding imperial codes from Tang Dynasty onwards to the end of imperial China in the Qing Dynasty (1644 – 1911). Working animals were considered valuable property that warranted legal protection, and people in charge of the government animals assumed certain responsibilities for their well-being and would be punished for failure.

Since the founding of the People’s Republic of China in 1949, a number of laws and provisions concerning animal protection have been passed. The Chinese Constitution, when promulgated in 1954, made no mention of animals. The 1982 Constitution, still in force, states in Article 9 that ‘the State ensures the rational use of natural resources and protects rare and valuable animals and plants.’ Thus, such area and valuable animals

2 Cao, Deborah, 2011. ‘Visibility and Invisibility of Animals in Traditional Chinese Philosophy and Law.’ *The International Journal for the Semiotics of Law*, 24(3).

3 see Johnson, Wallace. 1997. *The T’ang Code: Volume II, Specific Articles*, trans. Princeton: Princeton University Press and Cao, Deborah, 2011. ‘Visibility and Invisibility of Animals in Traditional Chinese Philosophy and Law.’ *The International Journal for the Semiotics of Law*, 24(3).

or wildlife as referred to in the Constitution are regarded natural resources for protection or utilisation. The most important law related to animals is the Law on the Protection of Wildlife (1988) and the Environmental Protection Law (1989) with subordinate regulations and measures involving wildlife protection, health and quarantine. The Regulation on the Management of Laboratory Animals (1988) was made for the purpose of strengthening the management of animals used for research. The Criminal Code (1997) has a provision on wildlife protection and penalty for killing certain endangered animals. China is a signatory to the Convention on the International Trade in Endangered Species of Wild Fauna and Flora.

China's animal-related laws are limited to wildlife protection as resources. China does not have any law for domestic animals used for various purposes. Most animals including companion animals, farm animals and even wild animals used for entertainment have no protection. In late 2008, a team of Chinese legal scholars, including myself, led by Professor Chang Jiwen of the Law Institute of the Academy of Social Sciences of China started work on a proposal for a law to protect and improve the treatment of domestic animals in China, with support from international animal welfare organisations. The first draft, entitled Animal Protection Law of the People's Republic of China (Expert Proposal), was released for public comment in September 2009. Thousands of comments were received across China from individuals and animal welfare NGOs and other volunteer organisations. Heated debates were staged in national television shows, newspapers and internet forums as a result. A revised proposal was released in March 2010, entitled The Law for the Prevention of Cruelty to Animals of the People's Republic of China (Expert Proposal). In late 2010, a further revised version was submitted, in the name of the Law Institute of CASS, to the Chinese national legislative body and relevant government departments. Separately, in March 2011, a number of delegates (equivalent to parliamentarians) to the National People's Congress (the equivalent to Parliament) during its annual session, submitted formal bills and proposals for legislating against animal cruelty. There is no official indication, no positive or negative response from the Chinese legislative body so far, as to its plan or intention for legislation in this area. It may take many years before any such law is enacted.

Obstacles and Challenges

Many intellectuals and other people in China believe animal welfare laws are ahead of their time for China, and that even if such law was passed it would be unrealistic and almost impossible to enforce. A common view is that, with many human welfare issues and human

problems in China to be tackled and solved, there are not enough human laws, without worrying about animal welfare and animal law.

This attitude has persisted despite the efforts made to promote awareness of animal welfare and human animal relations. In recent years, there has been increasing interest in animal welfare in Chinese society. News media and the internet are playing an important role in reporting and exposing horrific cases of animal abuse - such media coverage was rare in China just a decade ago. A growing number of Chinese people are having first-hand experience with animals through keeping pets. This was rare about a decade ago.

Many animal rescue and welfare NGOs, other charities and volunteer organisations, including most of the major Western animal charities, are now operating in China - another recent phenomenon. In popular culture, Chinese TV channels have started broadcasting nature and other programs featuring animals, much more than in the past. On the whole, the Chinese people have an increased awareness of the value and vital role the natural environment and other live forms in that environment play in their lives, and are becoming more interested in animals and animal welfare. Nevertheless, to many if not most Chinese, animals including cats and dogs are just there to serve human needs and purposes, as food and tools. This is so although, at a deeper philosophical level, people recognise the basic idea of animals having feelings and souls.⁴

In major cities like Beijing and Shanghai, homeless cats and dogs pose an increasingly serious problem. Many were abandoned by previous owners, compounded by the problem of lack of desexing services, and many pet owners are reluctant to use what there is for various reasons including the cost involved.

Another issue is eating cats and dogs. Cat and dog eating is not part of traditional Chinese culture, but some people in southern China eat cats and many eat dogs in both the north and south. In mid-April 2011, a truck with about 500 dogs crammed on it was stopped on a highway outside Beijing by animal lovers and advocates and people from animal charities. The truck was heading to the north-eastern part of China, and the dogs were to be sold and slaughtered for human consumption. After

⁴ See, for instance, Shuxian Zu, Peter J. Li, Pei-Feng Su, 2005. Animal Welfare Consciousness of Chinese College Students: Findings and Analysis, *China Information*, Vol. 19, No. 1, 67-95 (2005), which reports that 93.6% of the Chinese college respondents surveyed believe that animals are capable of suffering and pain, and 93% believe that animals and their welfare deserve respect and equal consideration.

about 25 hours of negotiation between the truck driver and animal advocates assisted by police, health and other local officials, an animal charity and a private company paid about \$A18,000 (RMB100,000) to the driver, as the dogs' owner, for their release. Many of the dogs were emaciated and in very poor health. A few died during transit, but they were eventually transported to an animal charity dog shelter and some to hospital for treatment before they could be re-homed. This event sparked heated debates in China, especially in the electronic media and social media, about whether Chinese should continue to eat dogs and whether the volunteer animal carers and rescuers should take the law into their own hands (even though there is no law in this area) and stop businesses from carrying out their normal commercial activities which happen to be dealing in dogs and selling and serving dogs as food. The debates and discussions show many are against legislating against dog-eating. It is a very controversial topic in China.

A significant problem is a lack of intellectual debate about animals and their moral status in China. There is hardly any high profile public intellectual in China as an advocate for animals, except Professor Chang Jiwen.⁵ who was in charge of the drafting group for the Law for the Prevention of Cruelty Against Animals (Experts' Proposal). Apart from his legislative work, Professor Chang has been actively involved in promoting the idea of animal law and animal protection in the mainstream media in China, including the major newspapers and the most important TV talk shows and current affairs programs. I have also been working to promote animal welfare and legal protection in China as a legitimate intellectual topic. I published a book *Dongwu feiwu (Animals are not Things: Animal Law in the West)* in 2007 in Chinese⁶, and since 2009 I have been writing Chinese blog articles on animal-related topics. These have attracted considerable interest from the Chinese internet community.

Animal law as a branch of legal studies or as an academic discipline is new in Western countries. It is newer still in China. Animal law and animal welfare are concepts introduced from the West in recent years. Only one law school teaches animal law in China, in the Northwestern University of Political Science and Law, started in 2009.

There are many legal loopholes and deficiencies, or legal vacuum, in terms of the protection of animal welfare in general. An incident in

⁵ see, for instance, Chang, Jiwen, 2000. *A Comparative Study of Animal Welfare Law in China and the European Union* (in Chinese). Beijing: Kexue huanjing chubanshe.

⁶ Cao, Deborah, 2007. *Animals are not Things: Animal Law in the West* (in Chinese), Beijing: China Law Press.

which a student from Qinghua University in Beijing poured acid on a zoo bear is a case in point. The guilt or innocence of this student has been debated, but it shows, among other things, that there is no applicable law in China for situations like this. According to China's Wildlife Protection Law, bears should be classified as Category 2 state protected animals, but the law does not clearly say whether bears kept in zoos are regarded as wildlife or not. Besides, the law only stipulates that 'illegal hunting and killing of wildlife' is a crime. It does not say anything about how to deal with the wilful harming of wildlife. Thus, people have different opinions about whether the perpetrator in this case should be charged. There were also violent acts of hurting tigers and lions of a circus by a circus in Kaifeng city, Henan Province. Tigers and lions are Category 1 state protected animals. People in Kaifeng reported this case of cruelty to the local animal protection office. In early 2010 - in the year of the Tiger - a dozen or so Siberian tigers were starved to death in a zoo in Shenyang in the Northeast. However, as there is no specific law applicable for such cases, the people who were responsible for these abuses were not punished.

Under Chinese law, animals are objects, not legal subjects. Animals do not have not rights or standing - as in most other countries. Animals are not recognised as sentient beings or having intrinsic values of their own. Most of the laws and regulations are designed to protect people, not animals. Animals are things, private or state property, they are products or agricultural or food products. However, this may be beneficial to animals in China, as at least the owners of pets can exert some claim and rights over their private property.

There is a need for public and intellectual debates about the status of animals in China, as well as for making legislative and other regulatory efforts for the protection of animals there. I believe such debates and public discussions and education should be conducted concurrently with any legislative work on animal welfare in China. This will help to ensure a fresh understanding of the status of animals as sentient beings among the ordinary as well as the academic community, and of animal welfare as a legitimate ethical and moral concern for a progressive Chinese society in the twenty-first century.

NOTES

WHALING UPDATE

*By Celeste M Black*¹

Introduction

In mid-February, 2011, the Japanese whaling fleet was recalled for the season, one month earlier than planned, citing the continuing harassment by the Sea Shepherd Conservation Society as the cause.² Although this was clearly a welcomed announcement, it does not indicate a long-term change in Japan's policy towards whaling. Greenpeace reports suggest that another reason for the early abandonment of the Antarctic season was excess stockpiles of whale meat³ and no announcement has been made by the Japanese government regarding its plans for the future of whaling. Given the devastating earthquake and tsunami, it may also be the case that the Japanese government will have to review its considerable expenditure on its scientific whaling program.

The legal controversy over whaling is also likely to continue for some time, especially with the Australian Government's move to initiate proceedings against Japan at the International Court of Justice ("ICJ"). This note provides a brief overview of the role of the International Whaling Commission and the background to Australia's ICJ proceedings. It also questions the ethical justifications underlying the objections to whaling and raises a largely ignored issue, the inherent cruelty of whale killing methods. This note will only consider the case of large cetaceans and will not seek to address the issues presented by the commercial use of small cetaceans (such as dolphins and porpoises).

¹ Senior Lecturer, Sydney Law School. I wish to thank Dr Tim Stephens of Sydney Law School for his helpful comments on an earlier draft. Any opinions expressed in this note are entirely the author's own.

² Martin Fackler 'With whaling ships under attack, Japan will recall fleet' *The New York Times* (online), 18 February 2011 <<http://www.nytimes.com/2011/02/19/world/asia/19japan.html>>.

³ Greenpeace, Press release, 'Japan's whaling fleet recall should be final: Greenpeace' (18.2.2011) <<http://www.greenpeace.org/international/en/press/releases/Japans-Whaling-Fleet-Recall-Should-Be-Final-Greenpeace/>> and Junichi Sato, 'Japanese whaling will come to an end – the question is simply when' (28.1.2011) Blogpost on Greenpeace International <<http://www.greenpeace.org/international/en/news/Blogs/makingwaves/japanese-whaling-will-come-to-an-end-the-ques/blog/32735>>.

The International Whaling Commission

The International Convention for the Regulation of Whaling was first signed in 1946 by 14 then whaling nations and with the express purpose of “safeguarding for future generations the great natural resources represented by the whale stocks”.⁴ So, it should be of no surprise that the efforts of the International Whaling Commission (“IWC”) established under the Convention⁵ were directed initially at maintenance of an “optimum level of whale stocks” to support the whaling industry. However, over time and with the growth of its membership (now 88 states), the emphasis of the IWC has shifted towards conservation, with a moratorium on commercial whaling put in place with effect from the 1985/86 season. With the recovery and growth of stocks of certain species of whales, there has been increasing pressure from some member states to lift the moratorium. This has led to considerable uncertainty on the future of the IWC.⁶

Importantly there are two significant exceptions to the moratorium: aboriginal subsistence whaling and, more controversially, scientific permit whaling. Under Article VIII of the Convention, a member state may issue permits to kill whales for scientific purposes where such permits override the moratorium. The granting of such permits must be reported to the IWC but the IWC has no power to interfere with the issuing of permits. Attracting most attention is the current Japanese scientific whaling program for the Southern Ocean (JAPRA II), which allows for lethal sampling of specified numbers of Antarctic minke whales, humpback whales and fin whales.

Australia’s laws regarding whaling in the Southern Ocean

At international law, states may not exercise jurisdiction over non-nationals in areas beyond national jurisdiction such as on the high seas. Japan’s whaling operations often occur within 200 nautical miles of the Australian Antarctic Territory, the 42 per cent of the continent over which Australia has asserted a claim since 1933. This means that it occurs within waters claimed as the Australian Exclusive Economic Zone, part of the Australian Whale Sanctuary established under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (‘EPBCA’). However, Australia’s claim to the Australian Antarctic

⁴ International Convention for the Regulation of Whaling (1946), Preamble.

⁵ *Ibid* Art III.

⁶ See, for example, the 2010 report of the fourth meeting of the Small Working Group on the Future of the IWC (available on the IWC website, iwcoffice.org).

Territory has only been recognised by four nations (France, New Zealand, the United Kingdom and Norway), and not by Japan. Moreover, sovereign claims are in abeyance in accordance with the 1959 Antarctic Treaty. This leaves the enforceability of Australian law based on such claims in considerable doubt, and it is a long-standing policy of the Australian government not to enforce Australian law against foreign nationals in Antarctica or in adjacent waters.

The Australian Whale Sanctuary established under the EPBCA provides a high level of protection to cetaceans.⁷ It is a strict liability offence under the Act for any person to take an action resulting in the injury or death of a cetacean whilst within the Australian Whale Sanctuary.⁸ Although a permit system does exist, the Minister may not issue a permit authorising the killing of a cetacean.⁹ The Act also provides a mechanism for the listing of species as endangered or threatened. Currently, only the blue whale and southern right whale are listed as endangered and the sei whale, fin whale, humpback whale are listed as vulnerable. It is interesting to consider why the highest protection from killing (complete prohibition) applies to all whales and other cetaceans, regardless of the level of threat to the species or other conservation interests. It is suggested that this policy is an example of the “charismatic megafauna” approach whereby certain species are given inflated status due to perceived characteristics where similar protections are not afforded to objectively similar cases.

The Japanese Whaling Case

In 2004, the Humane Society International commenced an action in the Federal Court under s475 of the EPBCA seeking an injunction to restrain a Japanese company from engaging in further whaling activities in the Australian Whale Sanctuary.¹⁰ The case, which became known as the Japanese Whaling Case, has been the subject of significant legal analysis which will not be repeated here.¹¹ In January 2008 the Federal Court declared that the Japanese company had contravened the EPBCA by taking minke whales in the Australian Whale Sanctuary and issued an injunction to restrain the company from further whaling activities.¹²

7 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 225.

8 Ibid s 229. A similar protection was provided to whales under the former Whale Protection Act 1980 (Cth).

9 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 238.

10 Humane Society International v Kyodo Senpaku Kaisha Ltd.

11 Interested readers may wish to refer to the special issue of the Asia Pacific Journal of Environmental Law (2008, volume II, issues 3&4) devoted entirely to the issue of Japanese whaling in Antarctica.

12 Humane Society International v Kyodo Senpaku Kaisha Ltd [2008] FCA 3.

However, the Australian government has not sought to enforce the injunction, as this would conflict with its policy against taking enforcement action against foreign nationals or vessels in the Antarctic.

The ICJ Proceedings

The arguments against Japanese whaling took on a decidedly political flavour with the Australian Labor Party's 2007 election promise to undertake international legal action to stop the whaling. Under continuing pressure from many sectors, including the Opposition environment spokesman Greg Hunt,¹³ Australia finally instituted proceedings at the International Court of Justice in May 2010.¹⁴ Australia's written pleadings were not due to be submitted to the ICJ until May 2011, with Japan then having until March 2012 to respond. So it will not be a fast process. In addition it may well be that the proceedings will be suspended given the earthquake and tsunami disaster in Japan, earlier this year.

Australia's application alleges that Japan's continuing whaling activities under JAPRA II constitute a breach of its obligations under the International Convention for the Regulation of Whaling as well as under the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") and the Convention on Biological Diversity. Although the details of the allegations were not available at the time of writing this Note, Anton's recent analysis of the application concludes that, in essence, Australia argues that Japan has abused its rights under the Whaling Convention (basically that the scientific purpose whaling is really a sham for commercial whaling), somewhat prospectively that Japan has breached (or will breach) its obligations under CITES, given that the humpback whale is an Appendix 1 listed species, and that the whaling activities breach the Convention on Biological Diversity's obligations to cooperate in the conservation and sustainable use of biological diversity and to minimise adverse impacts thereon.¹⁵ As the proceedings advance at the ICJ these arguments will become clearer.

13 See, for example, Press Release, "PM jets out for sushi and sake – but no real action against whaling" (14 December 2009) <<http://www.greghunt.com.au/Pages/Article.aspx?ID=1626>>.

14 The documents regarding the case can be found at the ICJ website <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=aj&case=148&k=64>>.

15 Donald Anton, "Dispute Concerning Japan's JAPRA II Program of 'Scientific Whaling' (Australia v Japan): A Backgrounder" ANU College of Law Research Paper No 33-10 available on SSRN (abstract no 1632722).

The inherent cruelty of whaling

What is arguably missing from the debate over whaling (and certainly from the discussion of the legality of whaling) is a consideration of the cruelty of the practice. This is understandable from a legal viewpoint given that one nation cannot impose its standards of humane animal treatment on another — the same limits apply, for example, in relation to slaughter standards in the Middle East where it is only indirectly through restrictions on the supply of animals (which the Australian Government can control) that improvements can be compelled. Objections against the indirect imposition of humane treatment standards have been challenged in many quarters such as, for example, in a number of cases that have been raised at the World Trade Organisation.¹⁶ That said, a growing chorus of voices objecting to a practice on the grounds of cruelty can have an impact.

The following discussion is not intended to summarise all that has been written about the physiological impacts of whaling on individual animals but rather to make a point about welfare protection. Even if one thought it was morally acceptable to use animals including whales as a resource, based on a comparison with the current level of protection afforded to terrestrial domesticated animals during slaughter, the slaughter of whales under current practices undoubtedly inflicts significant pain and suffering on them and is indefensible.

Strong evidence for this conclusion can be found in the records of the IWC, in particular the 2003 workshop report on whale killing methods.¹⁷ The primary killing method for whales is the penthrite grenade harpoon which relies on a body shot such that the energy or shock waves from the exploding grenade travel to the brain and cause immobility or death (blast-induced neurotrauma). Given the small size of the brain in whale species relative to head and body size, a shot directed at the brain is more likely to lead to injury rather than death and is therefore not recommended. Where the first killing method has been ineffective in causing immobility, a second killing method may then be employed. This is a large calibre rifle with full-jacketed round nose bullets where the marksman in this case does aim for the brain.

¹⁶ For examples of WTO disputes which consider an issue of animal protection see the Shrimp-Turtle case (DS58) and the new dispute concerning seal products (DS400 by Canada and DS401 by Norway, “European Communities—Measures prohibiting the importation and marketing of seal products”).

¹⁷ Annual Report of the IWC 2003, Annex E, Report of the Workshop on Whale Killing Methods and Associated Welfare Issues.

According to the 2003 report into whale killing methods, when the penthrite grenade harpoon was first used to hunt in 1984/86, the percentage of instantaneous deaths increased from 17% (1981/83 with cold harpoons) to 45%. Norway reported that with the development of its improved grenade harpoon and better whaler training, the preliminary data for instantaneous kills rose to 80%. Other issues were raised in the report. The physiological stress on whales from the chase was acknowledged as was the obvious impact on whales ‘struck and lost’ but no detailed data was available. The three criteria accepted by the IWC as indications of insensibility or death (being a relaxed lower jaw, no flipper movement and sinking with no active movement) were also said to warrant further research on the basis that they may indicate immobility rather than insensibility.

Would an 80% instantaneous death rate be accepted for the slaughter of terrestrial mammals? An indication of generally accepted standards internationally can be found in the World Organisation for Animal Health (the “OIE”) Terrestrial Animal Health Code where chapter 7.5 provides standards for the slaughter of animals.¹⁸ Numerous recommendations are provided with respect to various livestock species and slaughter methods. Tellingly, the Code states that restraining methods which work through immobilisation by injury, such as breaking legs or leg tendon cutting, cause severe pain and stress to animals and are not acceptable in any species.¹⁹ It is suggested that as the use of penthrite grenade harpoons can under ideal circumstances only deliver an 80% instantaneous death rate, the use of such harpoons is effectively immobilisation by injury. As such methods are not considered acceptable with respect to terrestrial animals, neither should they be considered acceptable with respect to aquatic mammals.

Concluding comments

There are difficulties with the legal arguments most often presented to require Japan or any other country to cease whaling in the Southern Ocean. A prohibition on whaling cannot be effectively enforced by Australia alone given that Australia’s claimed jurisdiction is not generally recognized. Moreover, the capacity to enforce such a prohibition through international forums including the IWC itself and through the ICJ proceedings is uncertain given that some level of scientific whaling is expressly permitted under the International

18 OIE, Terrestrial Animal Code (19th ed, 2010) available at <<http://www.oie.int/international-standard-setting/terrestrial-code/>>.

19 OIE, Terrestrial Animal Code, Article 7.5.10.

Convention for the Regulation of Whaling. The International Convention for the Regulation of Whaling and the IWC were established to regulate, not prohibit, whaling and it is unlikely that pro-whaling members of the IWC are going to consent to a fundamental change to the basis of the Convention. In any event, such a prohibition is ethically suspect as it seems to be based on the charismatic value of the ‘mythical super whale’ rather than detailed scientific studies of intelligence and provides another example of our “moral schizophrenia” about animals.²⁰ Environmental or conservation arguments for species preservation, such as under CITES or the EBPCA, which may hold for humpback whales are arguably inappropriate for more prolific species of whale such as the minke whales, referred to in some whaling quarters as the ‘rats of the sea’ and the ‘cockroaches of the ocean’. Until such time that the intrinsic value of all animals, including whales, is recognised and respected, perhaps the strongest argument against the continuation of whaling is that it inflicts unnecessary and significant suffering and therefore is simply wrong.

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²⁰ Gary L Francione, *Introduction to Animal Rights: Your child or your dog?* (Temple University Press, 2000) 1.

BOBBY CALVES: AN EXAMPLE OF THE STANDARDS DEVELOPMENT PROCESS

*By Elizabeth Ellis**

Background

National model codes of practice governing livestock welfare are gradually being converted into standards and guidelines under the Australian Animal Welfare Strategy. The conversion process is being managed by Animal Health Australia¹ ('AHA'), a non-profit public company established by Australian, State and Territory governments in conjunction with major national livestock industry bodies.² When adopted by all State and Territory governments, the standards will provide nationally consistent and enforceable animal welfare provisions with respect to certain animal uses. The first codes to be converted under this new process are those governing the land transport of livestock.³ These standards⁴ were endorsed by the Primary Industries Ministerial Council in May 2009 and are due for implementation in the various Australian jurisdictions in 2011.⁵

Existing model codes of practice have long been considered problematic. In addition to their largely voluntary status and inconsistent application, the model codes have been criticised for their content and the process of their development.⁶ In this context, conversion of the codes of practice provides a welcome opportunity to improve both animal welfare and the process of developing regulatory standards. The experience in relation to bobby calves, however,

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1 Primary Industries Ministerial Council, Australian Standards and Guidelines for the Welfare of Animals: Land Transport of Livestock, Regulatory Impact Statement, 3 October 2008, 15.

2 *Ibid*, p iii.

3 *Ibid*, p 15.

4 Primary Industries Ministerial Council, Australian Standards and Guidelines for the Welfare of Animals: Land Transport of Livestock, December 2008.

5 <http://www.animalwelfarestandards.net.au/aahc/australian-animal-welfare-standards-and-guidelines/land-transport/land-transport_home.cfm> (accessed 12 April 2011).

6 See, eg, G Neumann, Review of the Australian Model Codes of Practice for the Welfare of Animals, Final Report, 9 February 2005, A Dale, 'Animal Welfare Codes and Regulations – The Devil in Disguise?' in P Sankoff and S White (eds), *Animal Law in Australasia: A New Dialogue* (2009, Federation Press) and E Ellis, 'Making Sausages and Law: the Failure of Animal Welfare Laws to Protect both Animals and Fundamental Tenets of Australia's Legal System' (2010) 4 *AAPLJ* 6.

provides little ground for optimism.

Bobby calves are the unwanted by-product of the dairy industry, with about 700,000 calves slaughtered commercially each year.⁷ Commonly transported for slaughter at around five days old, these calves are widely acknowledged as being especially at risk due to their physiological immaturity.⁸ Concern that the Land Transport Standards failed to adequately address bobby calf welfare⁹ has been heightened by a subsequent proposed amendment with respect to time off feed (“TOF”). The proposal is to amend standard SB4.5 by adding a clause that requires bobby calves between 5 and 30 days old travelling without their mothers to ‘be slaughtered or fed within 30 hours from last feed’.¹⁰

Completion of a regulatory impact statement (‘RIS’) to assess the proposed amendment is a requirement of the standards development process. According to the RIS, scientific research supports 30 hours as a reasonable outer ‘legal’ limit for time off feed for bobby calves when combined with ‘good practice in other aspects of calf management’.¹¹ In reaching this conclusion, the RIS relied heavily on a study commissioned by Dairy Australia and the federal Department of Agriculture, Fisheries and Forestry (‘DAFF’) conducted by Dr Andrew Fisher and others from the University of Melbourne and the Animal Welfare Science Centre. Only a summary of the study’s methodology and findings was available to members of the public who wished to make a submission to AHA in response to the RIS.¹²

The closing date for public submissions was 3 February 2011, with those received from organisations and elected representatives now available online. Viewpoints from other submissions will be

7 Primary Industries Ministerial Council, Proposed amendment to the Land Transport of Livestock Standards (SB4.5) - Bobby Calves Time Off Feed Standard, Regulatory Impact Statement for Public Consultation, 2010, p4
<<http://www.animalwelfarestandards.net.au/australian-animal-welfare-standards-and-guidelines/land-transport/bobby-calf-time-off-feed-standard.cfm>> (accessed 12 April 2011).

8 Ibid, p8.

9 For example, the Preface to the Land Transport Standards, above n 4, states (at p vii) that ‘the current standards for transport of calves, time off water and loading density do not represent complete agreement. The reference group has resolved that bobby calf transport issues will be reviewed within two years, with relevant government and industry parties firmly committed to improving calf welfare outcomes within that time frame.’

10 Primary Industries Ministerial Council, above n7, p2.

11 Ibid, p33.

12 The summary of the study is available at

<http://www.animalwelfarestandards.net.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=0768923D-5056-8A5D-8761-C8DD4090ED25&siteName=aahe> (accessed 19 April 2011).

summarised in the final RIS.¹³ Many of the published submissions are critical of the proposed standard, the study itself and the way that science has been used to support the conclusions of the RIS.¹⁴ The author's submission, set out below,¹⁵ highlights some of the concerns with the proposed amendment, both with respect to bobby calf welfare and broader issues concerning the standards development process.

Submission

Proposed amendment to the Land Transport of Livestock Standards (SB4.5) – Bobby Calves Time Off Feed Standard

1 Selective use of science

Contemporary understanding has moved well beyond reliance on crude physiological measures as a satisfactory indication of animal welfare. If these indices were readily determinative of animal welfare they would be applied across the board. This is not the case. It is inconsistent with any claim to impartiality to rely heavily on science-based evidence for some animals but not others.

2 The study

2.1 It is difficult to comment in detail on the study as the full report appears to be unavailable. From the research summary, however, I note the following points that appear to be problematic.

2.2 The study was commissioned by Dairy Australia and DAFF. It is inconsistent with the claimed objectivity of a scientific approach to rely on research funded by those with a vested interest in its outcome.

13 <<http://www.animalwelfarestandards.net.au/australian-animal-welfare-standards-and-guidelines/land-transport/bobby-calf-time-off-feed-standard.cfm>> (accessed 12 April 2011).

14 <<http://www.animalwelfarestandards.net.au/australian-animal-welfare-standards-and-guidelines/land-transport/bobby-calf-time-off-feed-submissions.cfm>> (accessed 19 April 2011).

15 Reproduced as submitted except to note that the emphasis in para 2.9 was added. When the submission was emailed on 31 January 2011 a request was made for information about when and where the public consultation process was advertised by the project managers. This email, and a further request emailed on 2 February 2011, have not been acknowledged.

2.3 The study involved only 60 calves ranging in ages from 5 to 10 days old. My understanding is that bobby calves are more likely to be routinely transported at 5 days rather than 10.

2.4 Although the study states that prior to transport the ‘calves had been managed by farm staff in accordance with standard farm practice’ there is nothing to indicate that the farm staff (and others involved in the trials) were unaware of the study. In these circumstances, the conditions under which the calves were fed, loaded and conveyed are likely to have been optimal. The same cannot confidently be said of calves routinely dispatched for slaughter.

2.5 Despite the favourable conditions of the study, the research summary notes that the calves still suffered impacts:

In terms of energy status, plasma glucose concentrations were the most altered variable. These increased after feeding, declined slowly for some hours, and then declined more steadily after about 18 h off feed, which is consistent with the expected pattern of a typical daily feeding cycle. Mean glucose at 30 h was close to, but not below published reference values for dairy calves less than 2 weeks of age. A proportion of calves (~12%) were below the lower reference value at this time point, and this proportion was slightly greater than would be assumed by chance.

Moreover, the significance of these and other effects is a matter of interpretation and appears to be gauged by reference to existing industry feeding practices which are open to challenge on animal welfare grounds.

2.6 The study appears to focus on the effects of transport rather than the effects of time off feed:

The blood results indicate that transport *per se* was not a significant additional impost on the animals in terms of the key variables indicating metabolic status and hydration. Muscle enzyme levels did increase somewhat in the 12-h transport group compared with the other groups. Most variation in blood variables measured was due to time off feed, rather than transport duration.

In the Australian study, transport was not a significant additional impost on the animals.

2.7 The study accepts 30 hours as the outer legal limit when combined with ‘good practice in other aspects of calf management’. As

good practice is by no means assured, this would seem to be an argument for a more rigorous standard not a lesser one as the research authors appear to contend (although the lack of clarity of the written expression renders this uncertain).¹⁶

2.8 There is no evidence that the study has at this stage been subject to peer review.

2.9 I took the opportunity of a veterinary appointment scheduled for this week to ask the vet his professional view of the proposed standard. It is easy to dismiss this as mere anecdote – the view of one vet, as reported by me – but it is important to record it nonetheless. I had thought the vet might hesitate to give a clear answer – he doesn't know me and the question came out of the blue – *but his response was immediate, emphatic and unequivocal: 30 hours TOF is inimical to the welfare of young calves.*

I pointed out that the RIS notes the AVA's apparent lack of policy on this issue (p13). The vet replied that, to the extent that the absence of specific policy can be seen as an endorsement of 30 hours TOF, it does not represent the views of vets generally. This is important as the AVA is a stakeholder in the standards development process and the RIS makes a point of stating that '*all* key stakeholder organisations, other than RSPCA Australia and Animals Australia, support the proposed standard amendment of 30 hours maximum TOF' (p36, emphasis added).

3 The process

3.1 Although the standards development process includes a public consultation phase, the draft RIS appears not to have been well publicised, other than through animal welfare networks. I found nothing on the DAFF animal welfare home page to alert readers under the link *Current topics*; while there is a *Bobby calves* link under *Animal welfare issues*, it only takes readers to information that is out of date (see 3.4 below), with no mention of the current public consultation and closing date. There is information about the latter on the DAFF site but to find it requires, in the absence of serendipity, prior knowledge of the

¹⁶ As cited in the draft RIS (p 8): 'Animal welfare standards, where incorporated into law, represent the maximal possible limit, beyond which those responsible can be investigated and prosecuted. Accordingly, adopting a more rigorous standard, based on concerns that people may be unable to do things the right way, risks departing from the solid data derived from science to determine the limit, and requiring the process to estimate a more conservative value one that would be the subject of irresolvable argument. Furthermore, those operations and individuals that do conduct animal management to a very high level would be limited, possibly unfairly.'

process. There is nothing on the NSW DPI's site either. The website for AHA, the project manager, revealed a similar lack. Ironically, when I clicked on the News link on this site, thinking it might contain information about the public consultation, the most recent media release (6 July 2010) advised me that 'Dairy Australia has strengthened its relationship with Animal Health Australia (AHA) by becoming its newest associate member.'¹⁷

3.2 The above illustrates a fundamental flaw in the standards development process, viz. it is managed and dominated by bodies whose primary interests are other than animal welfare.

3.3 The RIS as drafted does not encourage a response from ordinary Australians, even if they are aware of its release. Apart from its heavy reliance on arguably dubious science, the RIS is replete with technical detail and jargon, for example (p8):

The relevant sources of this inadequate risk management addressed by the proposed standard amendment are those associated with externalities and public goods including a lack of information, as discussed below.

This kind of writing is at odds with the emphasis on plain English in other areas of law.

3.4 The general DAFF website information with respect to bobby calves is out of date and inconsistent with the proposed standard. This is misleading. Referring to the Land Transport Standards approved by the PIMC in 2009, the site states:

While the standards and guidelines within that document reflect a high level of agreement about the welfare aspects of land transport, it was not possible to reach complete agreement on appropriate requirements to cover the transport of calves at this time. However it is pleasing that all levels of government, the RSPCA and industry stakeholders along the supply chain are working together to develop agreed requirements that will provide for better animal welfare outcomes for bobby calves. The members of this working group are examining time off feed, and time in transport as they relate to calves for the Land Transport

¹⁷ <<http://www.animalhealthaustralia.com.au/aahc/index.cfm?D34E79C5-B1B5-582C-63F2-6967370DCF57> (accessed 28 January 2011)

Standards. In the interim, some jurisdictions may adopt additional regulatory requirements for the transport of calves.¹⁸

3.5 In fact, further collaboration appears to have led neither to agreement nor better animal welfare outcomes for bobby calves. The proposed TOF constitutes a lesser standard than recommended by the *Model Code of Practice – Cattle*, one of the existing national Codes whose transport provisions the Land Transport Standards replace. The latter Code states:

- 5.11.1 Young calves are very susceptible to stress and disease and should not be exposed to management procedures which aggravate this situation.
- 5.11.2 Bobby calves being transported or awaiting sale or slaughter should not be deprived of appropriate liquid feed or water for more than 10 hours.

While enforceable national standards are preferable to largely voluntary codes, there may be little or no benefit to animal welfare if the incorporated requirements are deficient. Yet the voluntary status of existing codes is used to dismiss any relevance they may have in relation to developing new animal welfare standards. For example, the RIS notes (p9) the provision in the Tasmanian code that '[c]alves held in saleyards should be fed after 10 hours and at least 24 hourly thereafter'. According to the RIS, however (pp19-20), this and other:

voluntary codes of practice are technically part of the base case, but because compliance with guidelines is not mandatory, and is not intended to be made mandatory, guidelines cannot be considered as part of the existing standards for cost/benefit comparisons.

Other more rigorous approaches are, similarly, conveniently dispatched. For example, the Canadian Agri-Food Research Council recommendation that 'young calves in transit be fed at intervals not exceeding 12 hours' (p11). Even when mandatory, international standards are readily dismissed. For example, the UK regulation requiring all calves to be fed at least twice a day is considered irrelevant because it applies to calves confined for rearing and fattening, and because of the shorter transport distances in the UK (p11). Apart from any logical contradiction in citing both of these, the different Australian conditions would seem to be an argument for more stringent animal welfare regulation.

¹⁸ <http://www.daff.gov.au/animal-plant-health/welfare/animal_welfare_issues> (accessed 28 January 2011)

4 Summary

As noted by the RIS (p17), the ‘successful pursuit of many industries involving animals is dependent on community confidence in the regulation of animal welfare.’ There can be no confidence, however, in a proposed standard that:

- reflects an outdated view of animal welfare;
- is based on an arguably flawed study;
- is inadequately publicised;
- is developed through a process dominated by industry interests; and
- is rejected by the only stakeholders who do not appear to have a conflict of interest with respect to animal welfare.

Rightly or wrongly, standards developed through the above process are not viewed as a genuine attempt to balance animal welfare and economic interests but simply as a means of justifying existing industry practices. There is little reason to suppose that anything said in the public consultation phase will change an outcome which appears, absent a political response to community concern, to have been pre-determined. In these circumstances, there is a grave risk not only to animal welfare but also to public confidence in our system of law and government.

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CASE NOTES

*Australian Consumer and Competition Commission v CI & Co Pty Ltd & Others*¹ - How a consumer protection law may be used to afford some indirect protection to animals.

By Ian Weldon

The 2010 Australian lecture tour by US animal lawyer Joyce Tischler, organised by Voiceless, was encouraging to many who seek to understand and develop the ways in which the law might be used for the benefit of animals. It also illustrated some differences between the US and Australia in the use of law as a tool to effect change. One simple example is that Joyce Tischler spoke eloquently of a number of early and unsuccessful attempts at litigation, including a civil action against

¹ [2011]FCA 1511.

an abattoir. In Australia, the almost universal and standard practice of awarding costs against an unsuccessful litigant might have stopped a nascent animal legal movement in its tracks. For many reasons, it seems that it is generally not easy in Australia to use civil litigation as a method of effecting changes in the law. In some ways, that is hardly surprising. As Kirby J said in *Gipp v The Queen*,² “[u]nder the common law system of justice, jurisdiction is the authority to decide issues between parties”. Since animals cannot be parties to litigation, the benefit to animals must always be indirect.

It is not the purpose, and well beyond the scope, of this short note to develop the wider themes that are thrown up by these differences. In the meantime, there are cases which illustrate the effective, albeit indirect, use of laws which are intended for human benefit. The decision in *Australian Consumer and Competition Commission v CI & Co Pty Ltd & Others*³ (ACCC v CI) provides an illustration of using a consumer protection law to afford some indirect protection to animals.

The background

CI & Co Pty Ltd was a commercial egg supplier. Between June 2008 and April 2010, it labelled and marketed cartons of eggs prominently using the words ‘Free Range Eggs’ when in fact the contents were cage laid eggs. From around April 2010 until around June 2010, it labelled and marketed cartons of eggs prominently using the words ‘Fresh Range - Omega 3’ and created the overall impression that the eggs were free range, when the contents were still cage laid eggs.

The proceedings

The Australian Consumer and Competition Commission (the ACCC) brought proceedings against CI & Co Pty Ltd (CI) and against two individuals, Antonio and Anna Pisano. The action against CI was based on s52, s53(a) and s55 of the *Trade Practices Act 1974* (the TPA). The action against Mr and Mrs Pisano was based on s55 of the Act.

The law

At the relevant time, s52 TPA relevantly stated that:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 53 TPA relevantly stated that:

² [1998] HCA 21; (1998) 194 CLR 106 at [58]

³ [2011]FCA 1511.

A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services:

(a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use ...

Section 55 of the TPA stated that:

A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

Each respondent admitted the relevant contraventions of the TPA, so there was no significant or contested hearing of the facts. The ACCC and the respondents agreed on the disposition of the case in terms of penalties and other consequences. The hearing before North J in the Federal Court was an application for approval of that negotiated outcome.

The more detailed facts

The statement of agreed facts indicated that between April 2004 and 31 March 2008, CI conducted a business of acquiring eggs from egg farms and supplying those eggs to customers, including food retailers, cafes and restaurants in Western Australia. In that period, it acquired 744,589 dozen eggs produced by caged hens, and a substantial proportion of those eggs were supplied by CI to its customers in cartons with labels indicating that the eggs were free range. The agreed facts accepted that 90% of those eggs were labelled as free range. This analysis was based on the labels acquired by CI Co for use on the cartons in which it supplied the eggs.

Antonio and Anna Pisano carried on business from 1 June 2008 until April 2010. In that period, they purchased 1,449,674 dozen eggs produced by caged hens and 12,800 dozen eggs produced by free range hens. Despite these figures, they supplied 878,420 dozen eggs labelled as free range. North J found that Antonio Pisano collected the eggs from suppliers and could not avoid knowing that the eggs that he collected came from caged hens. After the ACCC began its investigation in late 2009, Antonio Pisano changed the labels. The words “Free Range Eggs” were replaced with the words “Fresh Range - Omega 3”. The judgment records that: “the get up of the label in its colouring and lettering was similar to the free range egg label previously used. Whilst the new label included the words “12 cage eggs” in moderately sized letters, the overall impression from the fresh

range labels would likely have indicated to a purchaser rushing through a supermarket that the purchaser was buying the same product as had previously been sold as free range eggs”.

The Trade Practices Act 1974 generally

Section 52 was in the TPA from the beginning. It always proscribed conduct in the course of trade or commerce which was misleading or deceptive or was likely to mislead or deceive. It required no element of intention. In the early litigation under s52 of the TPA, two lines of authority were developed. One set of cases dealt with conduct that was not dissimilar to the older action of passing off – the use of a trade name or description which might create confusion in the mind of a consumer.⁴ Another series of cases dealt with representations made in the course of pre-contractual negotiations – something like the tort of negligent misstatement or the breach of a contractual term or warranty.⁵ Despite these similarities, the authorities were clear that the statute was to be considered in its own terms.⁶ Section 52 of the TPA was couched in imperative terms – “*a corporation shall not ...*”. However, for cases like *ACCC v CI & Co*, its usefulness was significantly limited in two ways. First, s52 did not create an offence, and consequently contravention of s52 did not expose a corporation to any penalty. Second, contravention of s52 did not give rise to a civil action unless a potential plaintiff could demonstrate that it had suffered loss or damage by reason of the contravention.

It is noted that, since the events in *ACCC v CI*, s52 of the TPA has been repealed. The TPA has been substantially restructured, and is now called the *Competition and Consumer Act 2010* (the CCA). Some of the provisions of the former TPA, including the former s52, have been included as the Australian Consumer Law, found in Sch2 of the CCA.

Some comments about the decision in *ACCC v CI* ⁷

Because the case was dealt with by consent, the penalties were lighter than North J indicated that he might have imposed: see *ACCC v CI* at [36]. This was a general comment. In addition, for fairly technical reasons, all of the respondents escaped more severe penalties.

CI was a company effectively run by a Mr D'Alessio. D'Alessio was the

⁴ See *Hornsby Building Information Centre v Sydney Building Information Centre* [1978] HCA 11; (1998) 140 CLR 216.

⁵ See *Henville v Walker* [2001] HCA 52; (2001) 296 CLR 459.

⁶ See *Henville v Walker* at [68] (Gaudron J, [96] McHugh J).

⁷ Some of these comments have been expressed by the author on the animal protection website Voiceless.

father of Anna Pisano, the third respondent, who in turn was the husband of Antonio Pisano, the second respondent. D'Alessio died before the proceedings concluded. After D'Alessio died, his daughter and son-in-law, Anna and Antonio Pisano, continued to run the egg supply business.

The agreed facts showed that "in the 15 days between 15 April and 30 April 2010, [Antonio Pisano] supplied approximately 8,160 cartons of one dozen eggs labelled with free range labels at an average price of \$3.03. It is agreed that the average range of wholesale prices of the relevant types of eggs is, in relation to cage eggs, \$1.90 to \$2.30 and, in relation to free range eggs, \$2.90 to \$3.50. It is also agreed that during this period [Antonio Pisano] did not acquire any free range eggs from any suppliers. It follows that the 8,160 dozen eggs labelled as free range eggs in this period were not, in fact, free range eggs. It is agreed that during the period the second and third respondents derived between about \$5,744 and \$9,008 in revenue which they would not have derived had the eggs been labelled clearly as 'cage eggs'".

In other words, Antonio and Anna Pisano made greater income, in just over two weeks, of between \$5000 and \$9000 by their false labelling.

The court also found, on the basis of the agreed facts, that Antonio and Anna Pisano carried on business between 1 June 2008 and April 2010, and that in this period "they purchased 1,449,674 dozen eggs produced by caged hens and 12,800 dozen eggs produced by free range hens. Despite these figures, they supplied 878,420 dozen eggs labelled as free range".

Using the same figures as above, and taking a conservative premium of 60c per dozen for free range eggs, this suggests an increased revenue, over this period, of at least $[\$878,420 \times 0.6] = \$527,052$. This was the extra money that Antonio and Anna Pisano made by falsely stating that the eggs were free range.

However, as mentioned earlier, not every contravention of the *Trade Practices Act* 1974 gave rights to an automatic remedy or penalty. Relevantly to *ACCC v CI*, the TPA changed on 15.4.10 when s76E of the TPA came into operation, and for the first time allowed a pecuniary penalty order to be made for contravention of s53(a) and s55 of the TPA: see *ACCC v CI* at [21].

It followed that, in relation to penalty, the conduct of Anna and Antonio Pisano could only be considered in the period after 15.4.10. The penalty of \$50,000 imposed on Antonio Pisano reflected this position.

For CI & Co, s76E of the TPA was too late to have any application. To recover any penalty from the company, it would have been necessary for the ACCC to bring and succeed in criminal proceedings against it: see ACCC v CI at [21]. This was complicated by the death of D'Alessio, who had been the controlling mind of CI at the relevant time.

It follows that, for similar conduct in the future, very much greater penalties might be imposed. The evident basis of this and other similar decisions is that the court will usually try to impose pecuniary penalties which, at the very least, mean that respondents do not profit from their contravening conduct. And, in most cases, the courts will attempt to fix a penalty that achieves a significant specific and general deterrent.

There seems, with respect, to be difficulty with the actual terms of the orders made. On one reading, the orders, for example, restrain the Pisanos "for a period of 5 years ... from representing that eggs are free range ... when, in fact, the eggs are not free range". It is unclear why any specific restraints were required to prevent the Pisanos from engaging in conduct which is self-evidently (and as the court had found) unlawful and in contravention of the then TPA, and presumably also of the new Competition and Consumer Act 2010. And surely this cannot mean (as at first glance the orders seem to suggest) that, after 5 years, they would be at liberty to re-engage in the same unlawful conduct?

ACCC v CI is encouraging and interesting. Some other, more general observations might be made. First, the case involved no costs or risk of paying costs to any animal welfare group. Instead, the respondents were ordered to pay \$15,000 towards the costs of the ACCC. Second, the case depends in part on consumer attitudes. It is at least doubtful if any nutritional difference exists or can be demonstrated between cage-produced and free range eggs. The importance of the misleading and deceptive conduct in ACCC v CI is that it plainly matters to many consumers that they are buying eggs from hens that are not kept in battery cages. And as the facts demonstrate, they are prepared to pay a premium for that choice.

□□□□

BOOK REVIEW

Animal Rights

What everyone needs to know

Paul Waldau

Oxford University Press

ISBN 978 0 19 973997 4

If there is a first book to read to gain a broad appreciation of animal protection as a worldwide social justice movement into the 21st century, this paperback may well be it - although, disappointingly for this reviewer, it is not footnoted.

Whether to be regarded as a controversial or traditional topic, the author looks at "Animal Rights" from perspectives of law, religion and social values.

Oxford-educated Paul Waldau spent a decade teaching in a veterinary school and has taught the subject of Animal Law "at some of my country's best law schools". He is president of the Religion and Animals Institute and former director of the Center for Animals and Public Policy at Tufts University. He was the Bob Barker lecturer on Animal Law at Harvard Law School in 2002, 2006, 2008 and 2010.

The book is broadly organised in a question and answer format, with comprehensive and contemporary answers (running to several pages) to staccato questions like: "Which animals are research animals, and how are they treated?", "What is the situation with entertainment animals?", and "What is the status of animals used for food?".

There's a brief Glossary of some common terms, a rather idiosyncratic "Time Line/Chronology of Important Events" (e.g. "400-325 B.C.E. Plato in the *Timaeus* portrays women and other animals as failed men. But he does not deny completely that other animals can think, even reason in some ways"), and nearly five pages of Suggestions for Further Reading, including a handful of web site addresses.

Australian and New Zealand readers won't learn much about Australasian animal protection issues. There's a predictable reference to Peter Singer, mention of the instrumental role of Barbara Leonard in the 1999 passage of NZ's "cutting edge" legislation banning, for all practical purposes, experiments on "non-human hominids" [pp180-1, 107] and an unsourced translation of what is said to be a list of animals in the world of the Yolngu people [pp20-21].

- **John Mancy**, barrister, casual Law lecturer and founding editor Australian Animal Protection Law Journal.

Kitty McSporran Saves the Animals

(with the help of her magic cape)

Written and illustrated by Kathleen McLaren

This very colourfully illustrated A4 paperback tells a simple story about replacing the use of animals in medical research. Young scientist Kitty McSporran is disturbed by the use of animals in medical and product testing". Her "dreams and magic help her find a solution that benefits all animals including humans".

However, references to rabbits being "shut in an airtight room filled with cigarette smoke", then "killed and their lungs cut up and examined to see how the smoke had affected them", suggest parental guidance is needed as to its suitability for solitary consumption by the very young.

Published with the support of an "in-kind" grant from Voiceless the animal protection institute. Printing of 3,000 copies funded by Humane Research Australia Inc. mainly for distribution to Australian school and lending libraries.

- **JM**

Australian Animal Law courses 2011-12

Australian National University College of Law

Animals and the Law (LAWS 2234) - undergraduate elective subject; offered usually in semester 1 of every second year (2011 and 2013). Adopting an inter-disciplinary approach, this elective considers animals within established categories of law such as property, but also examines the legal status and regulation of their treatment within broader social, philosophical and legal contexts. Students are challenged in their traditional understanding of animals as they are conceptualised in law enabling them to critically evaluate the way the legal system influences the interests of animals within society. In this way, an examination of animals through prevailing and traditional legal doctrines is critiqued and evaluated through the insights of other academic disciplines such as philosophy, economics and science. For further information, contact Associate Professor Alex Bruce: alex.bruce@anu.edu.au

Bond University

Animal Law - undergraduate course, offered every year since 2008. Next due to be taught in September 2012. Course coordinator **Jackson Walkden-Brown**. Course focuses on ethical and legal issues arising out of commercial exploitation of animals and animal products. It introduces practical and theoretical perspectives on the way in which we think about animals, with focus on legal regulation and ethical theories of animal rights. Course is taught in a 3-hour seminar-style format over 12 weeks (maximum enrolment of 25 students). Core content is covered in the first 8 seminars. Seminars include practical skills-based components (e.g. moot, letter drafting exercise, mock parliamentary committee meeting, and a short presentation). The latter part of the course is conducted in a 'research clinic' format so that students can explore practical ways in which lawyers may advance the interests of animals, as well as develop their legal research and writing skills. The environment of the research clinic is intended to simulate that of a legal department within a major animal protection institute.

Griffith Law School

Animal Law (5069LAW) - undergraduate course. First taught at Griffith Law School (Nathan Campus, Brisbane) in January 2007. The course has been run annually since then and is available to undergraduate law students and to non-law university graduates with appropriate experience/qualifications. Cross-institutional study is an

option. The course introduces the law relating to non-human animals, with emphasis on the relationship between law and the ethics of animal welfare. Students critically examine prevailing regulation of the treatment of non-human animals in a range of settings. The course also addresses international developments in animal welfare law, and students have the opportunity to explore the different ways in which lawyers engage with animal law. Animal Law is scheduled to be taught in semester 2, 2011 and (subject to confirmation) as an intensive course in December 2012. For further information contact Steven White: steven.white@griffith.edu.au

Sydney Law School

Animal Law (LAWS 3410) - undergraduate elective. First taught in 2009. The unit is generally run annually and is available to undergraduate law students, law graduates and, in some cases, to non-law university students with appropriate experience/qualifications. Cross-institutional study is an option. The unit examines the ways in which the law defines and regulates the relationship between humans and animals. It introduces students to the key issues, legal frameworks and regulatory regimes in this area. Although the primary focus of the unit is the law in Australia, wherever relevant, comparisons with other jurisdictions will be drawn. Animal Law is next scheduled to be taught in semester 2, 2011. For further information contact **Celeste Black**: celeste.black@sydney.edu.au

University of NSW

Animal Law - course open to undergraduate law students from UNSW or other universities, or to people interested in enrolling as a single (non-award) course. Will be held as a summer intensive course from Saturday 10 December to Friday 16 December 2011 (inclusive). Lecturers for the course will include some of Australia's leading animal law practitioners, plus veterinary, philosophical and legal specialists. The course will be taught intensively over the seven days (approx 9am-4pm; with one half-day), and will consist of a mix of lectures, discussions, videos, case studies, exercises, etc. For further information please contact the course convenor, Tara Ward, at: tara.ward@iinet.net.aucourse

University of Wollongong

Animal law (LLB366) - undergraduate subject available every two years. Taught in 2010 and will be offered, in intensive mode, in first half of 2012. Numbers permitting, it is open to cross-institutional

enrolments. Course explores the way in which the law constructs the relationship between human and nonhuman animals. Incorporates a critical examination of the status of animals as property, the theories that underpin the distinction between animal welfare and animal rights, and some approaches that strive to transcend this debate. Primary State and federal laws in relation to animals are identified, with focus on complex legal and regulatory framework governing animal welfare in NSW. Issues arising out of the practical operation of the law are identified and critically examined through case studies of farmed and companion animals. These issues include the development and operation of codes of practice/standards and the enforcement of animal welfare laws by charitable organisations. Course also considers the use of animals in research and in the wild. Emphasis is on Australian law. Some overseas developments are considered, also issues associated with animal advocacy and the role of lawyers. For further information please contact co-ordinator, Elizabeth Ellis: eellis@uow.edu.au.

About the Australian Animal Protection Law Journal

The AAPLJ is Australia's first peer-reviewed animal law journal.

All contributions (apart from brief case notes, letters and book reviews) are subject to "double blind" peer review. Reviewers are not made aware of the contributing authors' identities and the reviewers remain anonymous to all but the Editor.

The AAPLJ is a forum for principled consideration and spirited discussion of issues of law and fact affecting the lives of non-human animals. The greatest threat to animals is passivity and ongoing acceptance of the status quo; a status quo most easily maintained through silence.

The AAPLJ is intended for general information. Information contained in it does not represent legal advice. Where possible, references are given so readers can access original sources or find more information. Concise letters in reply to any articles published are welcomed.

Guidelines for Contributors

Articles must be original and should be accurate as to matters of fact and law. They may be generally informative or they may take a critical or analytical perspective. The best guide to the style is to closely read articles as published in the AAPLJ. Of course, contributors should write in plain English.

There is no recommended length of articles, but if they exceed about 6,000 words referees may consider whether the article is worthy of publication regardless of the length, or whether it could be shortened. Case notes, if they are simply reportage, should be concisely stated. Articles/briefs which take a critical or analytical perspective on interesting cases are particularly welcome.

MS Word is the preferred word processing format.

The AAPLJ style generally follows The Australian Guide to Legal Citation (see <http://mulr.law.unimelb.edu.au/aglc.asp>).

Contributions, proposals and any queries should be marked "Attn: AAPLJ Editor" and emailed to mancyj@gmail.com

The AAPLJ logo was created by Christine Townend who, in 1976, convened the first meeting of Animal Liberation (Australia).

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