Animal Law (2nd edition) 2013

Anne Louise Schillmoller, Southern Cross University

Available at: https://works.bepress.com/anne_schillmoller/34/
# Contents

Introduction ........................................................................................................................................... 1

About the writers .................................................................................................................................... 2

**Topic 1 Legal and philosophical frameworks of animal law** ................................................................. 3
  Objectives ........................................................................................................................................... 3
  Introduction .......................................................................................................................................... 4
  The context of animal law .................................................................................................................... 4
  Historical and philosophical contexts .................................................................................................. 6
  Post-property paradigms ....................................................................................................................... 12
  Regulatory framework in Australia ....................................................................................................... 13
  International context ........................................................................................................................... 15
  Topic summary .................................................................................................................................... 17

**Topic 2 Criminal and cruelty offences** ............................................................................................... 19
  Objectives ........................................................................................................................................... 19
  Introduction .......................................................................................................................................... 20
  Evidence of cruelty ............................................................................................................................... 20
  Animal welfare offences: Compliance, enforcement and sentencing .................................................. 22
  The legal framework in NSW .............................................................................................................. 24
  Sexual assault upon animals ................................................................................................................ 27
  Cruelty prevention legislation ............................................................................................................. 28
  Defences to cruelty .............................................................................................................................. 37
  Links between animal cruelty and human abuse ................................................................................. 40
  The international context .................................................................................................................... 42
  Topic summary .................................................................................................................................... 43

**Topic 3 Companion animals** ............................................................................................................. 45
  Objectives ........................................................................................................................................... 45
  Introduction .......................................................................................................................................... 46
  Companion animals as property .......................................................................................................... 47
  NSW Companion Animals Taskforce ................................................................................................. 48
  Legal framework ............................................................................................................................... 51
  General liability in tort ......................................................................................................................... 51
  Statutory framework in New South Wales .......................................................................................... 53
  *Companion Animals Act 1998* (NSW) ............................................................................................ 54
  Causing a dog to inflict bodily harm .................................................................................................... 67
  Bad dogs or bad owners? ..................................................................................................................... 69
  Restricted breed decisions .................................................................................................................. 71
  Animal trades ..................................................................................................................................... 77
  Other legislation relevant to companion animals ................................................................................. 81
  International context ........................................................................................................................... 83
  Topic summary .................................................................................................................................... 83
<table>
<thead>
<tr>
<th>Topic 4</th>
<th>Animals in entertainment and sport</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objectives</td>
<td>85</td>
</tr>
<tr>
<td>Introduction</td>
<td>85</td>
</tr>
<tr>
<td>Using animals in entertainment and sport: the issues</td>
<td>87</td>
</tr>
<tr>
<td>Statutory framework for Australian zoos</td>
<td>95</td>
</tr>
<tr>
<td>Codes of Practice, Guidelines, Standards and Policies</td>
<td>100</td>
</tr>
<tr>
<td>Exhibited animals: Circuses</td>
<td>108</td>
</tr>
<tr>
<td>Regulatory framework for Circus Animals</td>
<td>110</td>
</tr>
<tr>
<td>Animals in recreation and sport</td>
<td>113</td>
</tr>
<tr>
<td>Topic summary</td>
<td>124</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Topic 5</th>
<th>Animals in agriculture and live animal export</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objectives</td>
<td>127</td>
</tr>
<tr>
<td>Introduction</td>
<td>129</td>
</tr>
<tr>
<td>Intensive animal agriculture: Legally sanctioned cruelty?</td>
<td>130</td>
</tr>
<tr>
<td>Different standards for farmed animals?</td>
<td>131</td>
</tr>
<tr>
<td>Out of sight, outside of law?</td>
<td>133</td>
</tr>
<tr>
<td>Codes of practice, standards and guidelines relating to animals used for food production</td>
<td>134</td>
</tr>
<tr>
<td>The regulatory framework governing farmed animals: Cattle, sheep, pigs and poultry</td>
<td>141</td>
</tr>
<tr>
<td>Codes of practice and standards</td>
<td>148</td>
</tr>
<tr>
<td>Animal slaughter</td>
<td>154</td>
</tr>
<tr>
<td>Ethical issues relating to the consumption of animal products</td>
<td>157</td>
</tr>
<tr>
<td>Land transport of agricultural animals</td>
<td>157</td>
</tr>
<tr>
<td>Live animal export</td>
<td>159</td>
</tr>
<tr>
<td>The regulatory framework</td>
<td>165</td>
</tr>
<tr>
<td>Topic summary</td>
<td>168</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Topic 6</th>
<th>Animal experimentation and research</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objectives</td>
<td>169</td>
</tr>
<tr>
<td>Introduction</td>
<td>170</td>
</tr>
<tr>
<td>Ethical issues: Harm and benefit</td>
<td>171</td>
</tr>
<tr>
<td>Statistics on animal research in Australia</td>
<td>173</td>
</tr>
<tr>
<td>Views of abolitionists</td>
<td>178</td>
</tr>
<tr>
<td>The regulatory framework in Australia</td>
<td>179</td>
</tr>
<tr>
<td>Australian Code of Practice for the Care and use of Animals for Scientific Purposes</td>
<td>186</td>
</tr>
<tr>
<td>Replacement, reduction and refinement</td>
<td>188</td>
</tr>
<tr>
<td>Guidelines and policies</td>
<td>193</td>
</tr>
<tr>
<td>Animal Ethics Committees</td>
<td>196</td>
</tr>
<tr>
<td>Tests involving animals</td>
<td>200</td>
</tr>
<tr>
<td>Alternatives to research involving animals</td>
<td>202</td>
</tr>
<tr>
<td>International initiatives</td>
<td>204</td>
</tr>
<tr>
<td>Topic summary</td>
<td>205</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Topic 7</th>
<th>Wild animals and animals in the wild</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objectives</td>
<td>207</td>
</tr>
<tr>
<td>Introduction</td>
<td>208</td>
</tr>
<tr>
<td>Property and wild animals</td>
<td>208</td>
</tr>
<tr>
<td>Regulation of wild animal welfare and conservation in Australia</td>
<td>213</td>
</tr>
<tr>
<td>Australian Animal Welfare Strategy</td>
<td>221</td>
</tr>
<tr>
<td>Introduced wild animals</td>
<td>224</td>
</tr>
</tbody>
</table>
The tension between animal and environmental protection .............................................................. 232
Kangaroo harvesting in Australia .......................................................................................................... 234
Wildlife research ....................................................................................................................................... 249
Nature documentaries ............................................................................................................................. 251
Topic summary ......................................................................................................................................... 252

Topic 8 Animal advocacy and law reform ..................................................................................................................... 253
Objectives .................................................................................................................................................. 253
Introduction: Advocating for animals ................................................................................................... 254
Animal cruelty prosecutions .................................................................................................................. 260
Standing ..................................................................................................................................................... 261
Using the law: Causes of action .............................................................................................................. 264
Illustrative Australian cases .................................................................................................................... 266
Environmental litigation ......................................................................................................................... 270
International law reform initiatives ....................................................................................................... 273
Law reform: Changing law from ‘within’ .............................................................................................. 274
Advocacy ‘outside’ the Law: Civil disobedience ................................................................................... 275
Direct Action: Trespass and reasonable excuse .................................................................................... 276
Animal advocacy and trauma ................................................................................................................. 279
Topic summary ......................................................................................................................................... 280
Introduction

The animal question is one of the primary sites that must be passed through on the way toward another thought of human and nonhuman life, a thought that will perhaps do away with or be unconcerned to think in terms of ‘the human’ and its ‘others’.¹

Welcome to LAW10487 Animal Law. It is with much pleasure that the School of Law and Justice is able to offer this unit which we trust will make a valuable contribution to a significant and emergent area of legal education and practice.

To some extent, the name of this unit, ‘Animal Law’, is a misnomer. While the central concern of this unit is with the well-being and protection of non-human animals, its practical focus is upon the ways in which humans and human institutions, including the apparatus of law, regard, regulate, and interact with non-human beings. Such a focus exhorts ‘we’ humans to reflect upon our behaviours, practices, attitudes and responsibilities towards non-human animals. Specifically, it requires us to interrogate and challenge the assumed sovereignty of humans over animals, the ways in which human interests are routinely privileged over those of animals, and most significantly, the consequences and practical effects of such ‘privileging’ for non-human ‘others’.

To facilitate such insights, this unit will combine a traditional ‘doctrinal’ approach to law, involving the identification of legal regulatory frameworks relating to animals, with broader interdisciplinary reflections upon the ethics of human and animal interaction. Such an approach allows us to situate the legal status of animals within a broader range of contexts, informed by insights from philosophy, politics, economics and science.

As Steven White observes:

Law is a formal manifestation of the way in which our relationship with animals is governed. The way in which the law regulates the treatment of animals reflects how society regards animals. Significantly, law is also constitutive of, or helps to create, our understanding of the place of animals in our world. In this sense law can play a vital educational role … The education of students, legal practitioners and the community about the ways in which human activities impact upon non human others have significant and practical effects upon the lives and well being of animals.²

Because many graduates will go on to become legal practitioners, policy makers and/or key decision-makers in the corporate and political sphere, animal law as applied scholarship has the potential to make a real difference and to be a powerful force for change. The School of Law and Justice and the animal protection movement trusts that you will use what you have learned from your study in this unit both to examine and reassess some of your own attitudes and practices and to engage in practical strategies to advance the well being and protection of non-human animals.

About the writers

Anne Schillmoller (BA (ANU); LLB (UNSW)) was a founding member of the School of Law and Justice where she was employed from 1993 until 2012. She is now an Adjunct Fellow with the School. Her teaching and research interests are in the areas of Legal Philosophy, Administrative Law, Earth Jurisprudence and Animal Law. See <http://works.bepress.com/anne_schillmoller/>.

Amber Hall (BSoSc (SCU); LLB (hons) SCU). For many years Amber has been active in the animal protection movement and has been a tireless campaigner for animal law reform. She has engaged in extensive research relating to animal law issues, initiated and contributed to numerous submissions to Local, State and Federal government agencies and been a public advocate for animals on a wide range of issues. Amber has been a member of the NSW Law Society Young Lawyers’ Animal Law Committee, the coordinator of the Northern Rivers Community Legal Centre Animal Law Project and a team member of the Animal Law Education Project. Amber has worked for a number of law firms and has recently worked with the national peak body advocating for children and young people in out-of-home care. Amber now runs a consulting business and works with lawyers, barristers and community organisations across Australia. See <www.amberhall.com.au>.
Topic 1

Legal and philosophical frameworks of animal law

Objectives

At the completion of this topic students will be able to:

- describe the central elements of the legal framework regulating animal law in Australia;
- describe various philosophical approaches to animals and animal law;
- identify the ways in which the philosophical and political context of human/non human animal relationships influence the legal regulation of these relationships.

Textbook

Chapter 1 – Peter Sankoff ‘The Protection Paradigm: Making the World a Better Place for Animals?’

Chapter 2 – Steven White ‘Exploring Different Philosophical Approaches to Animal Protection in Australia’

Chapter 7 – Arnja Dale and Steven White, ‘Codifying Animal Welfare Standards: Foundations for Better Animal protection or merely a Façade?’

Webcast 1.1
Dr Tom Regan, ‘A Case for Animal Rights’ (7.46 min)
<http://www.youtube.com/watch?v=Y5RRLBC1S3w>

Webcast 1.2
Dr Peter Singer, ‘Animal Equality’ (3.03 min)
<http://www.youtube.com/watch?v=av22cRQNiQ>

Webcast 1.3
Professor Gary Francione on ‘Animal Rights: The Abolitionist Approach’ (slideshow)
<http://www.abolitionistapproach.com/media/slides/theory4.html>

Webcast 1.4
Gary Yourofsky, ‘Best Speech You Will Ever Hear: Part 1’ (11.22 min)
<http://www.youtube.com/watch?v=qhEDOoEcB8k>

Webcast 1.5
Professor Peter Singer and Richard Dawkins, ‘Vegetarianism, Animal Rights and Living Ethically’ (11.18 min)
<http://www.youtube.com/watch?v=ti-WcnqUwLM>

Webcast 1.6
Professor Steven Wise, ‘Legal Personhood for Animals’ (17 min)
<http://www.youtube.com/watch?v=jv4–01DwB-w>

Introduction
This introductory topic considers the historical development of, and the legal regulatory framework relating to, animal law in Australia. It also considers some of the philosophical paradigms which inform the various approaches to animal law.

The context of animal law
There are a number of political and philosophical dimensions to animal law. First, the term ‘animal law’ is perhaps somewhat misleading since animal law is as much about human animals as it is about non–human animals. That is, to a large degree, ‘animal law’ concerns the interrelationship between human and non–human animals, specifically, the ways in which humans both regard and regulate non–human species. For
this reason, the study of animal law will necessarily involve reflection upon both our personal and collective values and practices.

Another political dimension of animal law is that of the tension inherent in a federal system. Regulation of non-human animals is governed by the States and Territories as well as by the Commonwealth.

Particular industries also influence government decisions relating to the regulation of animals. Because there is frequently a business or economic interest in animals and animal regulation, economic arguments based on job creation and industry investment tend to influence government decision making relating to animals.

At a more personal level there is the politics of personal choice. What to eat? What to wear? What products have been tested on animals? How to relate to others with views different to our own?

In his forward to the 2nd edition of the textbook, Professor David Weisbrot notes that until recently, animal law was ‘perceived as being somewhere between an oddity and an indulgence’.

1. To what does he attribute the recent ‘explosion’ of legal, academic and political activity relating to animal law?

2. To what do you attribute the growing global interest in animal protection?

In this reading Peter Sankoff suggests that today, ‘the notion of balancing animal pain against human need or pleasure is central to most legislative systems that regulate the treatment of animals’. He also notes, however, that acknowledging that animals ‘matter’ does not tell us very much about how they should be treated.

1. In what ways have historical attitudes and values towards non human animals shaped the ‘animal protection construct’?

2. Why does Sankoff suggest that the protection construct has failed in its goal of allowing animals to be treated with respect and dignity and what does he suggest as being the protection construct’s specific limitations?

3. What does Sankoff identify as the core objectives of animal protection?

4. Do you agree with Sankoff that the utilitarian calculus which underpins animal protection laws is fundamentally flawed?

5. Why does Sankoff suggest that as long as we define ill-treatment and cruelty in terms of a balancing exercise, ‘we will continue to mask harmful treatment of animals in a sophisticated web of legal terminology that consigns an ever growing number of animals to a lifetime of ‘necessary’ and ‘reasonable’ pain and distress’?

6. Sankoff notes that ‘human privilege allows us to use animals for a wide variety of objectives that the animal protection construct will not question.’ What then, does he suggest the ‘real’ meaning of the protection construct to be?

7. What does Sankoff identify as alternative approaches to animal protection?

In this reading Elizabeth Ellis explores what she refers to as ‘the dissonance between pact and practice’, specifically ‘the rationalisations and implications of living with the pretence that animals are protected [by law] when the facts suggest otherwise.’

Think

1. In the first part of the chapter, Ellis discusses what she refers to as the ‘animal welfare trade-off’, arguing that legal advances in animal welfare are marginal at best. What examples does she use to illustrate her contention that industry and government interests routinely prevail over animal interests and that human compromises in relation to animal welfare are ‘extremely limited’?

2. Why does Ellis suggest that the framing of animal protection as a ‘charitable’ concern, together with a continued reliance on charities, such as the RSPCA, to enforce animal protection laws, is problematic?

3. Ellis argues that in different contexts, different animal cruelty standards often apply. Citing Cohen, she refers to this as ‘interpretative denial’. In what ways, does Ellis suggest that the ‘official narrative’ of animal protection operates to sanction animal cruelty?

4. In what ways, according to Ellis, do ‘cute and cuddly’ representations of farm animals operate to reinforce interpretative denial?

5. What economic arguments do animal food producers rely upon to justify animal welfare? Why does Ellis find such arguments unconvincing?

6. In her conclusion, Ellis reflects upon the implications of interpretative denial. In what ways does she suggest that ‘denial, dissonance and deception’ function to construct social narratives of ‘humane’ animal treatment?

Historical and philosophical contexts

Animals have been exploited by human societies for thousands of years. A range of historical, philosophical and theological traditions have contributed to an entrenched notion of human dominance over animals and have tacitly condoned human violence against non–humans.

In antiquity, law laid the foundation for the status of animals as property. According to biblical law, humans were created in the image of God and animals were created for serving humanity. This alleged ‘natural order’ created a hierarchical continuum of living forms known as the ‘great chain of being’. The assumptions underlying the chain of being continue to be used today as a justification for asserting human superiority over other animals.

Within the Judeo-Christian tradition, one is reminded of Augustine’s City of God in which the commandment ‘Thou shalt not kill’ is specifically limited to human beings alone1 or upon Thomas Aquinas’ remarks in the Summa Theologica relating to human dominion over animals and the rest of nature. Indeed, Aquinas suggested that friendship between human beings and animals was impossible.2

By separating human beings from the rest of the animal world, a number of philosophical assumptions have also functioned to sustain the ethical marginality of animals. A deeply rooted tendency to separate human beings from the rest of the animal world, Alasdair MacIntyre suggests, has resulted in the view that humans are in some way ‘exempt from the hazardous condition of ‘mere’ animality’.3

1 Augustine of Hippo, The City of God (De Civitate Dei contra Paganos) early 5th century AD.
2 Thomas Aquinas, Summa Theologica, 1265–1274.
Within the western philosophical tradition human beings were regarded as possessed of an incorporeal intellect, a ‘rational soul’ or mind which, by virtue of its affinity with an eternal or divine dimension outside the bodily world, sets us radically apart from, or above, all other forms of life. Aristotle (384–322 BCE), for example, argued that while the human ‘rational soul’ allows for affinity with the divine ‘unmoved mover’, the ‘animal soul’ only provides sensation and locomotion and remains inseparable from the earthly world of generation and decay. Aristotle denied the power of thought to animals, maintaining that they are capable only of sensation and appetite, and that they need the rule of humankind in order to survive. (Why or how animals flourish in the wild he appears not have considered). In equating animals with human slaves, the Aristotelian view considered animals as existing solely for human use.4

In Descartes’ hands, two millennia later, the ‘great chain of being’ was polarised into a thorough dichotomy between mechanical unthinking matter (including minerals, plants, animals and the human body) and pure, thinking mind, the exclusive province of humans and God. Uniquely endowed with rational thought, the Cartesian separation between human and non–human animal declared that the ‘perfection of the human mind’ distinguished the human species from the ‘brutes’.5 Such assumptions continue to be used to justify humans’ manipulation and exploitation of the non–human world. Such arguments for human specialness have also been used to justify the exploitation, not only of other organisms, but of other humans particularly those considered to be ‘closer to animals’ such as women, children, the disabled and particular racial groups.6

In his investigation of the historical and philosophical roots of violence against non–humans, Charles Patterson argues that once animals were domesticated for food and produce, this was a significant step towards the separation of human and animal being and of the dominance of humans over animals. Human ‘keepers’ he says, adopted mechanisms of detachment, rationalisation, denial and euphemism to distance themselves emotionally from their captives. This also laid the groundwork for slavery and dehumanisation and the ‘animalizing’ of other humans. He notes that the same practices used to control animals, such as branding, whipping and castration were used to control slaves.7

An explicit concern with, and sensibility towards, non–human animals seems never to have been a significant concern for western philosophy. Some commentators suggest that western philosophy’s displacement of the non–human other is symptomatic of a wider failure in the philosophical project, a significant ‘sin of omission’ which is only recently being addressed.8 Perhaps the failure of western philosophy to adequately deal with the issue of animality is symptomatic of a wider failure in the philosophical project itself, in particular its self-definition with respect to nonhuman others. Judith Butler suggests that the instability of human subjectivity and the attempts to establish the boundaries of the human has resulted in a ‘reiteration of hegemonic norms in relation to human/nonhuman difference’.9 Her suggestion is that because animality resides within the very core of humanity, the ‘human subject’ is only achieved through creating an opposition between humans and their animality.

Think

1. Philosopher Georgio Agamben has refered to the conceptual separation of animal from human as the ‘originary exclusion’, an exercise of ‘biopower’ in which humans are separated from their animal being. This conflict between animality and humanity, he says, has ‘delimited and defined the horizon of human politics’.10

Reflect upon Agamben’s suggestions that:
   a. Human ‘sovereign power’ is only achieved through processes of exclusion and opposition between human and animal.

---

7 Charles Patterson, Eternal Treblinka: Our Treatment of Animals and the Holocaust (Lantern Books, 2002).
b. The marginalisation and consequent mistreatment of animals is a ‘necessary’
consequence of the opposition between human and animal and of a humanism that has
always sought to elevate the human at the expense of animals.

2. The argument that animal cruelty is wrong because it debases or degrades humanity is an age
old rationale for animal protection. Do you agree with the assumption that ‘civilised’ people
do not ill-treat others provides a sound basis for animal protection? Why or why not?

3. Should human interests be used as the benchmark of, and justification for, the ‘humane’
consideration of animals? Why or why not?

---

Textbook

Chapter 2 – Steven White ‘Exploring Different Philosophical Approaches to Animal Protection
in Australia’

This chapter introduces us to some of the major paradigms relating to animals and animal being. Such
paradigms inform the content of the laws that are made. They ask us to consider what an animal is: whether
they are conscious; whether they are sentient? Whether some species are more conscious than others? If
some animals are more conscious than others, do these animals deserve more protections? Should we
balance human interests with animal interests or do all animals have inherent value thus rendering them
worthy of equal consideration?

White suggests that the utilitarian approach is the dominant approach adopted in animal law. Generally
this approach is predicated upon directing activities to the achievement of a greater good. A strict utilitarian
approach attempts to balance animal interests with human interests. According to this approach, if the
benefits to human society outweigh the cost of animal suffering, then the suffering is justified.

Peter Singer, while a utilitarian, suggests that this strict approach is flawed since it fails to accord equal
consideration to animal interests and human interests. He suggests that we need to compare animal
interests just as we compare human interests and balance like with like. Thus, Singer suggests, we cannot
consciously subject 100 animals to suffer a life in a cage for the entertainment of 100 humans. To assume
that animal suffering is less important than human entertainment, he says, is to assume that animals do not
suffer as humans do and that animals are ‘less’ than humans, what is referred to as a ‘speciesist’ perspective.
Singer argues that the issue is not about factual capacities among beings, nor about moral capacities, physical
strength or intelligence. The issue, he suggests, is an ethical one and it is about how we should treat other
beings irrespective of perceived factual differences.11

As the utilitarian, Jeremy Bentham suggested in 1823:

> The day has been, I grieve to say in many places it is not yet past, in which the greater part of the species,
under the denomination of slaves, have been treated by the law exactly upon the same footing, as, in
England for example, the inferior races of animals are still. The day may come when the rest of the
animal creation may acquire those rights which never could have been withholden from them but by
the hand of tyranny. The French have already discovered that the blackness of the skin is no reason a
human being should be abandoned without redress to the caprice of a tormentor. It may one day come
to be recognised that the number of the legs, the villosity of the skin, or the termination of the os sacrum
are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that
should trace the insuperable line? Is it the faculty of reason or perhaps the faculty of discourse? But a
full-grown horse or dog, is beyond comparison a more rational, as well as a more conversable animal,
than an infant of a day or a week or even a month, old. But suppose the case were otherwise, what would
it avail? The question is not, Can they reason? nor, Can they talk? but, Can they suffer?12

The Australian Animal Welfare Strategy states that ‘a sentient animal is one that has the capacity to have
feelings and to experience suffering and pleasure. Sentience implies a level of conscious awareness’.13

---

Think

1. White suggests that legal conceptions of the status of animals rest on contestable philosophical and ethical foundations.
   What does White identify as the central ‘legal’ characteristic of animals?
   In what ways is this legal status of animals a reflection of humans’ moral or ethical relationship with animals?
2. In what ways does White suggest that animal welfare legislation in Australia reflects ‘orthodox understanding’ of the moral status of animals?
3. What is ‘speciesism’?
4. In what ways does White suggest that we should ‘re-think’ the legal significance of animals?
5. What distinction does White make between the approaches of Gary Francione and Steven Wise in relation to the legal status of animals?
6. What limitations does White identify with the ‘similarity’ argument: That is, one based on advancing the interests of animals on the basis of relevant similarities with humans?14
7. Do you think that beings ought to be protected from unnecessary pain and suffering because of their level of consciousness? How do we determine an animals’ level of consciousness? What assumptions do we make when we attempt to determine whether, or to what degree, a being is sentient?
8. After reading White’s chapter, consider how you would characterise the way in which you conceptualise human ethical responsibility towards non-human animals.

Webcast 1.1

Dr Tom Regan, ‘A Case for Animal Rights’ 7.46 min
<http://www.youtube.com/watch?v=Y5RRLBC1S3w>

In this webcast, animal rights advocate Dr Tom Regan, speaks about the need for the ethical treatment of animals. He suggests that discrimination against animals is ‘demonstrably arbitrary’ and that, every day an ‘undeclared war’ is waged against non human animals. He also argues that the philosophy of animal rights is one of ‘peace and justice’.

Think

1. What reasons does Dr Regan give for suggesting that animal advocates are not ‘zealots’?
2. How does he address the objections to opponents of animal rights? Do you find his arguments convincing? Why or why not?

Webcast 1.2

Dr Peter Singer, ‘Animal Equality’ 3.03 min
<http://www.youtube.com/watch?v=av22cRQNBlQ>

In this webcast, well known ethicist Dr Peter Singer argues that humans and animals share an important equality – the capacity to suffer or to enjoy their lives, and that such a shared capacity should lead to moral equality between human and non human animals. He takes the position that we should not discount the suffering of animals just because they belong to a different species.

---

14 See also TL Bryant, ‘Similarity or difference as a basis for justice: must animals be like humans to be legally protected from humans?’ (2007) 48 Law and Contemporary Problems 207.
Think

1. While arguing that equality needs extend beyond species boundaries, for what reasons does Singer suggest himself not to be an advocate for animal ‘rights’?

2. In a well known 2001 debate between Singer and American judge Richard Posner, Posner argues that while gratuitous cruelty to and neglect of animals is wrong, he disagrees with Singer’s argument that we have a duty to animals that arises from their being the equal members of a community composed of all creatures in the universe that can feel pain, and with Singer’s contention that it is merely ‘prejudice’ akin to racial prejudice or sexism that makes us discriminate in favor of our own species. Posner asserts that the boundary of human concern should be drawn more narrowly since humans, like other animals, prefer our own—the ‘pack’ that we run with, and suggests that ‘Americans have distinctly less feeling for the pains and pleasures of foreigners than of other Americans and even less for most of the nonhuman animals that we share the world with.’

Do you agree with Posner that humans share an instinctual preference for their own species and that consequently, the ethical obligations humans owe to each other outweigh those owed to animals? Does such an argument provide a sound justification for the human exploitation of animals? Why or why not?

Webcast 1.3

Professor Gary Francione on ‘Animal Law’

<http://www.abolitionistapproach.com/media/slides/theory4.html>

In this slideshow, Professor Francione, an abolitionist, argues that as long as nonhuman animals are regarded at law as property, ‘animal law’ will function to reinforce the property status of nonhumans. The current agenda of most animal lawyers, he says, is concerned with cases that ‘do nothing more than reinforce the property status of nonhumans’. Furthermore, according to Francione animal law reforms serve the interests of industrial agriculture and enmesh animals further in the ‘property paradigm’.

Francione has formulated the following Six Principles of the Abolitionist Approach to Animal Rights:

1. The abolitionist approach to animal rights maintains that all sentient beings, humans or non–humans, have one right: the basic right not to be treated as the property of others.
2. Our recognition of the one basic right means that we must abolish, and not merely regulate, institutionalised animal exploitation—because it assumes that animals are the property of humans.
3. Just as we reject racism, sexism, ageism, and heterosexism, we reject speciesism. The species of a sentient being is no more reason to deny the protection of this basic right than race, sex, age, or sexual orientation is a reason to deny membership in the human moral community to other humans.
4. We recognise that we will not abolish overnight the property status of non- humans, but we will support only those campaigns and positions that explicitly promote the abolitionist agenda. We will not support positions that call for supposedly ‘improved’ regulation of animal exploitation. We reject any campaign that promotes sexism, racism, heterosexism or other forms of discrimination against humans.
5. We recognise that the most important step that any of us can take toward abolition is to adopt the vegan lifestyle and to educate others about veganism. Veganism is the principle of abolition applied to one’s personal life and the consumption of any meat, fowl, fish, or dairy product, or the wearing or use of animal products, is inconsistent with the abolitionist perspective.
6. We recognise the principle of non violence as the guiding principle of the animal rights movement. Violence is the problem; it is not any part of the solution.

**Think**

1. How does Francione suggest that lawyers can help to change things for animals?
2. For what reasons does Francione suggest that there is no such thing as ‘humane’ exploitation?
3. For what reasons does Francione argue that campaigns for ‘humane’ animal use are flawed?

**Webcast 1.4**

Gary Yourofsky, ‘Best Speech You Will Ever Hear’ (Part 1) 11.22 min
<http://www.youtube.com/watch?v=qhEDoOEcB8k>

In this webcast, Gary Yourofsky, a ‘vegan abolitionist’ speaks of animals as the ‘world’s forgotten victims’ and argues that there is no such thing as the ‘humane’ slaughter of animals. He notes that every year in the United States, 10 billion land animals and 18 billion marine animals are killed for human consumption, a phenomenon he refers to as an ‘animal holocaust’.

**Think**

Do you agree with Yourofsky that it is for reasons of ‘habit, tradition, convenience and taste’ that the massive slaughter of animals persists? Why or why not?

**Webcast 1.5**

Professor Peter Singer and Richard Dawkins, ‘Vegetarianism, Animal Rights and Living Ethically’ (11.18 min)
<http://www.youtube.com/watch?v=ti-WcnqUwLM>

In this webcast, Peter Singer and Richard Dawkins converse about the ethics of human-animal relationships. Singer suggests that to live an ethical life, humans need to consider what its like for others affected by their actions. With reference to Bentham’s observations about an animal’s capacity to suffer, Singer and Dawkins consider whether our ethical responsibility to animals is dependent upon an animal’s capacity to feel pain.

**Think**

1. Do you agree with Dawkins that there is a ‘continuum of capacity’ to feel pain and that consequently, our moral responsibility to oysters is less than that we have to pigs?
2. Do you agree with Singer that, if one consumes animal products one has a ‘serious’ ethical obligation to learn about where the products come from and how they are derived?
3. Singer and Dawkins discuss the historical precedent of human slavery and consider whether the exploitation and enslavement of animals may one day be regarded with the same opprobrium as human slavery is today. Do you share Singer’s optimism that, because humans are ‘conforming’ animals, it may one day become the societal norm not to consume meat?
4. Do you consider Singer to be a more ‘moral’ person than Dawkins? Why or why not?
Post-property paradigms

As we have seen, a fundamental legal assumption which informs the relationship between humans and other animals is that animals are the property of humans.

Australian law typically regards things that exist in the world as either persons or property. However, some non–human entities, most notably corporations, enjoy the limited privileges of artificial personhood. But for the most part, as Dave Fagundes points out, our legal system lacks ‘a vocabulary of status’ that would enable us to think about animals as something intermediate between persons and property.16

Fagundes notes that twelve North American cities have redefined those who keep animals as ‘guardians’ rather than ‘owners,’ and animals themselves as ‘companions’ rather than ‘property.’ He argues, however, that the change in nomenclature does not extend any more rights to animals nor does it impose upon guardians any more obligations than existed under previous law. The point of this movement, he suggests, appears to be about changing perceptions of animals rather than imposing any kinds of legal rules requiring certain treatment. The hope is that the mere change in animals’ formal legal status away from ‘property’ and toward ‘companions’ will enhance their social status and, in turn, improve their treatment at the hands of humans. Fagundes notes that ‘the personification of corporations and ships demonstrates the capacity of the law to recognize non–human entities as persons for particular purposes’ and that changes in the status of married women and African Americans is testament to the ability of law ‘to accept new groups into the fold of personhood where justice demands it’. To deny rights for animals on the basis that they are different from ‘us’ and therefore lack some prerequisite qualities for ‘personhood’, he says, ignores the fact that we have already bypassed such requirements in other instances.

Think

1. In what ways does the property status of animals affect their ability to be protected? Consider ways in which the property status of animals can function both as a form of protection and as a detriment.

2. How does the ‘property’ status of animals compare to the ‘personhood’ status of humans? Do you think that the interests of ‘property’ can be usefully compared to the interests of persons? Why or why not?

3. Do you think that an ‘expressivist strategy’ – one which communicates a non-property status for animals – can have any tangible effect on animals’ wellbeing if not accompanied by substantive changes to the law? Why or why not?

4. Veterinary associations in the United States argue that people who mistreat animals are going to do so regardless of their legal status, and that a ‘bad owner’ would undoubtedly be a ‘bad guardian’. Do you think that changing the definition of ‘owner’ to ‘guardian’ would result in better treatment of animals?

Webcast 1.6

Professor Steven Wise, ‘Legal Personhood for Animals’ (17 min)

<http://www.youtube.com/watch?v=jv4–0IDwB-w>

In this webcast, animal lawyer Steven Wise argues that the common law is sufficiently flexible to accommodate the notion of ‘legal personhood’ for animals. He says that it is quite feasible to put together a case which sets a precedent in recognising specific legal rights to particular animals classifiable as non human ‘persons’.

16 Prawfsblog, Dave Fagundes 18 February, 2006 <http://prawfsblawgblogs.com/prawfsblawg/2006/02/the_legal_statu.html>
Think

1. What does Wise mean by ‘legal personhood’?
2. Do you agree that if the law has the capacity to recognise corporations as ‘persons’, there is no reason why it cannot recognise animals as persons?
3. If animals were to be recognised as ‘persons’ at law, how might the rights and interests of such ‘animal persons’ be determined and represented?

The central features of some of the (sometimes overlapping) philosophical and political frameworks of animal law are summarised in the following table.

<table>
<thead>
<tr>
<th>Approach</th>
<th>Characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rights</td>
<td>Tom Regan</td>
</tr>
<tr>
<td>The idea that the most basic interests of non-human animals should be afforded the same consideration as the similar interests of human beings. Non-human animals are ‘subjects of a life’ and as such are bearers of rights. Because the moral rights of humans are based on their possession of certain cognitive abilities, and because these abilities are also possessed by at least some non-human animals, such animals must have the same moral rights as humans.</td>
<td></td>
</tr>
<tr>
<td>Protection/Welfare</td>
<td>RSPCA</td>
</tr>
<tr>
<td>Systematic concern for animal welfare is based on the awareness that non-human animals are sentient and that consideration should be given to their well-being, especially when they are used for food, in animal testing, as pets, or in other ways. There is nothing inherently wrong with using animals as resources as long there is no unnecessary suffering.</td>
<td></td>
</tr>
<tr>
<td>Contemporary Utilitarian</td>
<td>Peter Singer</td>
</tr>
<tr>
<td>There are no moral grounds for failing to give equal consideration to the interests of human and non-humans. The principle of equality between human and non-human animals does not require equal or identical treatment, but equal consideration of interests.</td>
<td></td>
</tr>
<tr>
<td>Abolitionist</td>
<td>Gary Francione</td>
</tr>
<tr>
<td>Abolitionism falls within the framework of the rights-based approach, though it regards only one right as paramount: the right not to be owned. Abolitionists argue that the key to reducing animal suffering is to recognise that legal ownership of sentient beings is unjust and must be abolished. Abolitionists argue that focusing on animal welfare may actually worsen the position of animals, because it entrenches the view of them as property, and makes the public more comfortable about using them.</td>
<td></td>
</tr>
<tr>
<td>Humanist</td>
<td>Richard Posner</td>
</tr>
<tr>
<td>‘Empathy’ should be a guiding principle for human relationships with animals. But because humans share an instinctual preference for their own species, the ethical obligations humans owe to each other outweigh those owed to animals</td>
<td></td>
</tr>
<tr>
<td>Expressivist: Custodian/ Guardianship</td>
<td>Dave Fagundes</td>
</tr>
<tr>
<td>Transforming the notion of animals as property and humans as ‘owners’. Humans are regarded as ‘guardians’ while animals have an equitable interest in their ‘being’ which is recognised by law. Changing the perceptions we have of other animals through the use of language enshrined in legislation, not necessarily accompanied by any specific changes to legal rights and obligations. An attempt to legislate new belief systems and social attitudes.</td>
<td></td>
</tr>
<tr>
<td>Non-human ‘Personhood’</td>
<td>Steven Wise</td>
</tr>
<tr>
<td>A legal recognition of non human animals as beings rather than property, one which bestows upon them a legal status approximating ‘personhood’.</td>
<td></td>
</tr>
</tbody>
</table>

Regulatory framework in Australia

In the final part of this topic we will consider some of the central features of Australia’s regulatory systems relating to animals.

Animal law in Australia is largely governed by statute, with each State and Territory largely administering its own regulatory framework. There is a lack of uniformity between current state based legislative regimes, with some jurisdictions implementing stricter protective regimes than others.

In addition to statute, there are also numerous legislative and non-legislative Codes of Practice, Standards and Guidelines, some of which enable industries to self regulate in relation to animal welfare standards.
While still primarily a matter of State and Territory jurisdiction, the Commonwealth’s jurisdiction in relation to animal welfare, protection and regulation has been steadily growing. Live animal export (discussed in Topic 5) is a current and newsworthy example.

Apart from fisheries: s 51(x), the Australian Constitution does not specifically address animals and it is for this reason that most animal regulation is assumed by the States and Territories. In addition, few western countries have taken the step of explicit constitutional recognition of animal protection.17

There are, however, a number of potential sources of power which would enable the Commonwealth to legislate in relation to animals:

- s 51(i) – Trade and commerce with other countries and among the states. (Currently used to regulate export of live farmed animals);
- s 51(ii) – Taxation; but so as to not discriminate between States or parts of States. (May be used to impose taxes on products resulting from animal cruelty or provide taxation relief for cruelty free practices);
- s 51(iii) – Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth. (May be used to induce best practice cruelty free conduct in industry);
- s 51(vi) – The naval and military defence of the Commonwealth and the several States, and the control of the forces to execute and maintain the laws of the Commonwealth. (May be used to protect poaching of marine animals);
- s 51(ix) – Quarantine (May be used to protect animals at risk of disease);
- s 51(x) – Fisheries in Australian waters beyond territorial limits;
- s 51(xi) – Census and statistics. (May be used to increase primary data collection regarding animal populations and human-animal relationships);
- s 51(xxix) – External affairs. (Currently used to regulate the import and export of threatened and endangered species);
- s 51(xx) – Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. (May be used to better regulate corporate responsibility relating to animals in agriculture).

In reliance upon Commonwealth heads of legislative power, the Australian Democrats in 2005 introduced a National Animal Welfare Bill. The purpose of the proposed law was to:

- (a) promote the responsible care and use of animals;
- (b) provide standards for the care and use of animals that:
  - (i) where it is deemed necessary to capture and kill wildlife, only those devices and techniques should be used which do not inflict unnecessary cruelty, harm non-target animals or damage natural habitat;
  - (ii) prohibit the capture and killing of wild animals for the purpose of entertainment or sport;
  - (iii) ensure that, in the implementation of the matters contained in paragraphs (i) and (ii), all necessary measures shall be taken to protect habitat and ecosystems;
- (c) protect animals from unjustifiable, unnecessary or unreasonable pain;
- (d) ensure the use of animals for scientific purposes is accountable, open and responsible.

The Bill did not proceed beyond the Senate.

1. For what practical and political reasons might a uniform national approach to animal protection be preferable to the current State and Territorial based approaches?

2. The recently established Animal Justice Party (AJP) which contested its first Federal election in 2013, seeks to toughen animal protection laws, increase penalties for convicted animal abusers, regulate and restrict the sale and use of pets, and enhance education and greater awareness and appreciation of the needs of animals. In what ways might the current regulatory regime in Australia militate against the achievement of these objectives?

**International context**

While particular regions of the world have developed cross-jurisdictional agreements in the area of animal protection, such as the Protocol on Protection and Welfare of Animals in the European Union, there is as yet no international agreement on animal welfare.

The World Organisation for Animal Health recognises that: the internationally recognised ‘five freedoms’ provide valuable guidance in animal welfare:

- freedom from hunger, thirst and malnutrition;
- freedom from fear and distress;
- freedom from physical and thermal discomfort;
- freedom from pain, injury and disease; and
- freedom to express normal patterns of behavior.

These freedoms have been widely accepted and are included in the proposed Universal Declaration on Animal Welfare.

**Think**

How important are international law instruments such as the proposed Universal Declaration on Animal Welfare (UDAW) to ‘changing domestic policies and legislation, improving enforcement and inspiring positive attitudes towards animals in every corner of the world’ as its proponents suggest?

**Codes of Practice, Standards, Guidelines and Regulations**

Increasingly, the regulation of animal welfare is governed by Codes of Practice, Standards and Guidelines. Some of these are legislative in character, others are not. Codes may be adopted under regulations or may be prescribed. For example:

Section 34A of the Prevention of Cruelty to Animals Act 1979 provides that:

1. The regulations may prescribe guidelines, or may adopt a document in the nature of guidelines or a code of practice as guidelines, relating to the welfare of species of farm or companion animals.

2. Before any regulations are made as referred to in sub-s (1), the Animal Welfare Advisory Council, and representatives of any relevant livestock industry, are to be given an opportunity to review and comment on the provisions of the proposed regulation relating to the welfare of species of farm or companion animals.

---

(3) Compliance, or failure to comply, with any guidelines prescribed or adopted by the regulations for the purposes of sub-s (1) is admissible in evidence in proceedings under this Act of compliance, or failure to comply, with this Act or the regulations.

(4) A document adopted as referred to in sub-s (1) may be adopted wholly or in part, with or without modification and as in force at a particular time or as in force from time to time.

Regulation 24 of the Prevention of Cruelty to Animals (General) Regulation 2006 identifies Codes of Practice as ‘guidelines’. It provides:

Guidelines relating to the welfare of farm or companion animals

For the purposes of s 34A (1) of the Act, the following documents, published by CSIRO Publishing and as in force from time to time, are adopted as guidelines:

(a) Model Code of Practice for the Welfare of Animals: Domestic Poultry;
(b) Model Code of Practice for the Welfare of Animals: Farmed Buffalo;
(c) Model Code of Practice for the Welfare of Animals: Animals at Saleyards;
(d) Model Code of Practice for the Welfare of Animals: The Goat;
(e) Model Code of Practice for the Welfare of Animals: The Sheep;
(f) Model Code of Practice for the Welfare of Animals: The Farming of Deer;
(g) Model Code of Practice for the Welfare of Animals: Cattle;
(h) National Guidelines for Beef Cattle Feedlots in Australia.

Irrespective of their legal status, the authority that Codes carry is significant. As we will see in the next reading, of some concern is that codes, standards and guidelines may be developed by non-elected industry committees with interests in tension with animal protection.

The next reading considers animal welfare codes of practice, standards, guidelines and regulations and the processes by which they are developed. It then goes on to investigate some of the shortcomings associated with codes, standards and guidelines.

Textbook

Chapter 7 – Arnja Dale and Steven White, ‘Codifying Animal Welfare Standards: Foundations for Better Animal Protection or Merely a Façade?’

In this chapter Dale and White discuss the development and function of codified animal welfare standards in Australia and New Zealand.

Think

1. Dale and White cite a 2005 report which suggested that codes of practice ‘appear to neither provide a suitable standard for regulation or a vehicle for communicating welfare standards to producers.’ For what reasons do they suggest that codes failed to deliver as promised?
2. What are the writers’ concerns in relation to the bodies that control the processes of establishing codes, standards and guidelines?
3. What other shortcomings do the writers identify with the institutional processes underpinning codified animal welfare standards?
4. For what reasons do Dale and White suggest that taking economic implications into consideration when developing codified welfare standards is problematic?
5. Can compliance with standards operate as a defence to otherwise cruel practices? Is it appropriate that they can?
6. In what ways do the writers suggest that the use of ‘animal welfare science’ in codified standard development may be problematic?
7. Do you agree with the writers that perhaps, at best, codified standards serve a limited quality assurance function?

8. Do you think that codified animal welfare standards enhance animal welfare, or, should they, as the writers suggest, perhaps be regarded as the ‘devil is disguise’ … ones which ‘prevent significant animal welfare improvements from being realised’?

**Topic summary**

In this topic we have considered some of the historical, philosophical and political frameworks governing ‘animal law’. We have investigated the ways in which the regulatory systems governing human/non-human animal interactions in Australia are both a product and consequence of these frameworks.

We briefly considered the Australian jurisdictional framework of animal law, which we noted is largely a State and Territorial concern, although an increasing role for Commonwealth and international law initiatives has been identified. Finally, the topic has explored the important yet problematic role of codified welfare standards relating to animals.
Topic 2

Criminal and cruelty offences

Objectives

At the completion of this topic students will be able to:

- identify some of the major statutory provisions relating to animal cruelty;
- identify the statutory and judicial tests developed in the context of animal cruelty prosecutions;
- explain the legal test for cruelty and consider the extent to which this test may differ from ‘ordinary’ notions of cruelty;
- identify the major issues relating to detection and enforcement of animal welfare and animal cruelty offences;
- explain the link between animal abuse and human interpersonal violence.
Introduction

This topic will consider the criminal law framework governing animal cruelty in New South Wales. In particular, it will examine provisions in the *Crimes Act 1900* (NSW) and the *Prevention of Cruelty to Animals Act 1979* (NSW) both of which establish animal cruelty as a criminal offence. It will also consider some of the issues relating to detection and enforcement of animal welfare and animal cruelty offences, including the use of CCTV to monitor businesses engaged in animal production and the use of surveillance equipment by animal activist groups to collect evidence of animal cruelty. This topic then considers some of the international dimensions of animal cruelty law with reference to whaling and the live animal export trade. Finally, it will consider the relationship between animal cruelty and human abuse. It will investigate whether evidence of childhood animal cruelty being a predictor to adult homicide may serve as a focus for the protection of animal interests.

Evidence of cruelty

Despite the fact that cruelty to animals is a crime punishable by fine or imprisonment, there are relatively few reported Australian cases involving animal cruelty. For example, in 2011/12, out of 51,961 complaints of animal cruelty investigated by the RSPCA, there were only 266 prosecutions and 298 successful convictions.1 Reported cases reflect a degree of uncertainty relating to the elements of cruelty and the nature of the evidence required to establish it. And because the standard of proof is the criminal standard of *beyond reasonable doubt*, the ability to detect offences and the evidence required to support a conviction are often difficult to obtain. This has resulted in recent calls by animal protection groups and political parties to introduce mandatory CCTV monitoring in all abattoirs.2 The RSPCA has supported calls for security cameras to be placed in abattoirs, the RSPCA’s NSW CEO, Steve Coleman, reporting that his organisation ‘would not object’.3 It has also resulted in an increased willingness by animal activist groups to engage in trespass,4 undercover surveillance and more recently to employ drones, to obtain evidence of cruelty.5 In the United States, such ‘whistleblowing’ initiatives have resulted in a call by animal producer groups for ‘ag-gag’ laws which criminalise undercover filming on farms and at slaughterhouses to document criminal animal abuse.6 Such initiatives are being closely watched by the Australian agriculture industry and a number of Australian farmers are calling for tougher laws for anyone who trespasses on land in order to collect evidence of animal cruelty.7 In July 2013, the New South Wales Primary Industries Minister, Katrina

---

2 In February 2013, the NSW Greens introduced the Food Amendment (Recording of Abattoir Operations) Bill 2013 which would require the owner of an abattoir or knackery in NSW to make video and audio recordings of the movement, holding and slaughter of animals to ensure the humane handling of the animals before and during the slaughter process.
Hodgkinson commented that animal rights groups that covertly film farms to monitor livestock welfare were ‘vandals’ and ‘akin to terrorists’.  

---

Webcasts

**Warning:** These videos contain graphic images of animal abuse:

**Webcast 2.1**

‘Demand CCTV in all slaughterhouses’, 21 March 2013  
<http://www.animalsaustralia.org/take_action/CCTV-cameras-in-slaughterhouses/>

**Webcast 2.2**

‘Video Shows Poultry Cruelty’ ABC *Lateline*, 20 March 2013  
<http://www.abc.net.au/lateline/content/2013/s3720275.htm>

**Webcast 2.3**

<http://www.abc.net.au/7.30/content/2013/s3753039.htm>

**Webcast 2.4**

‘Abattoir shut over animal cruelty scandal’ 10 February 2012  
<http://www.theguardian.com/news/2012/nov/10/abattoir-shut-over-animal-cruelty-scandal>

**Webcast 2.5**

‘Gross animal cruelty forces closure of Sydney abattoir’, 10 February 2012  
<http://origin.radioaustralia.net.au/international/2012-02-10/304335>

---

**Think**

1. ‘Animal abuse is legal, but what is illegal is using a camera. Documenting evil is now a crime.’  
   (Veterinarian Mark Simpson commented on *ABC’s Lateline* (21 February 2012))  
   Do you agree with Simpson that ‘animals give their life for the benefit of humans and we have a responsibility to make sure where that happens, it happens as humanely as possible.’

2. When launching the *Food Amendment (Recording of Abattoir Operations) Bill 2013* into NSW Parliament in February 2013, Greens’ MP Cate Faehrmann stated that ‘we should not have to rely on whistle blowers coming forward and risking their personal safety and employment to secretly record and expose cruelty. This bill will make it the responsibility of abattoir owners to ensure the animals in their care are treated as humanely as possible.’  
   Do you agree that only with mandatory CCTV in all abattoirs and regular checks by the authorities, can we guarantee there will be no ‘closed doors’ behind which cruelty can occur?

---

3. Recently, Animal Liberation purchased a surveillance drone to gather evidence of animal abuse on private property. Many people believe a drone is an acute invasion of privacy and should be banned from use in Australia. What do you think – is the use of drones legal genius or privacy invasion?

4. In *Windridge Farm Pty Ltd v Grassi & Ors* [2011] NSWSC 196 the defendants admitted to entering and trespassing upon the Wonga Piggery in order to obtain photographic and video evidence on behalf of Animal Liberation ‘for the purpose of alleging that the plaintiff was failing to comply with appropriate standards of maintaining the animals at the piggery and/or operating the piggery’. The intention of Animal Liberation was to prepare a report from the photographic evidence obtained and to forward it onto the police to investigate possible breaches of the *Prevention of Cruelty to Animals Act*. It was not their intention to release the material to the media. Because trespass was admitted, a central issue in the case was whether copyright subsisted in the plaintiff over the photographs and video film taken during the course of the unlawful trespass.

The defendants successfully argued that because there was no intention to publish or profit from, or to damage the plaintiff’s reputation through the use of the material, they could not be ordered to deliver up the film and negatives. The Court observed that the plaintiff’s evidence failed to establish that it had lost anything of commercial or other value by reason of the video film or photographs having been taken and given to Animal Liberation.

For what legal reasons did the defendants argue that their intention in trespassing was to obtain photographic and video evidence from which Animal Liberation would prepare a written report for forwarding to the police? Would the decision have been otherwise if Animal Liberation had released the photographic material to the media?

## Animal welfare offences: Compliance, enforcement and sentencing

In each State and Territory, RSPCA inspectors are appointed under relevant animal welfare legislation. This legislation gives inspectors a range of powers to investigate cases of animal cruelty and to enforce animal welfare law. These powers are similar in nature to those afforded to police officers. In the course of investigating animal cruelty offences, inspectors are empowered to:

- enter property;
- seize animals;
- seize evidence of animal cruelty offences;
- issue animal welfare directions/notices;
- issue on-the-spot fines; and
- initiate prosecutions under animal welfare legislation.

Although inspectors are afforded these powers, in the majority of cases inspectors will seek to resolve animal welfare issues through the provision of education and advice. Enforcement action, such as the seizure of animals and initiation of prosecutions, is reserved for serious cases of animal mistreatment.9

---

use and a possible culture of defiance to animal welfare law, ‘gives rise to an environment conducive to non-compliance’. He observes that in the context of non-domestic animals, breaches of animal welfare standards are often regarded as no different to ‘typical regulatory rule violations’ and as ‘side-effects of business operations’. Animal welfare laws for non domestic forms of animal use, Goodfellow suggests, ‘represent the minimum standards of care acceptable to society’ and the protections they afford are ‘very modest indeed’. Animal mistreatment in such contexts, he observes, is more often than not regarded as a technical rule violation, a ‘victimless crime’ rather than a criminal offence. A ‘compliance’ approach to enforcement, Goodfellow concludes, ‘effectively creates a system that excuses animal mistreatment and implicitly accepts the management of animal cruelty rather than its prohibition.’

Think

1. What ‘dichotomous approach’ does Goodfellow identify between the regulatory approach applied to companion animals and that applied to animals used for ‘instrumental purposes’? Do you consider such a dichotomy to be justified? Why or why not?
2. What dichotomy does he identify between the enforcement regimes applying to each?
3. What are the some of the differences between a model of ‘co-regulation’ and that of ‘meta-regulation’ identified by Goodfellow and to what classes of animals do each of these models apply?
4. What is a ‘compliance’ approach and what criticisms does Goodfellow have of the compliance model?
5. What body or bodies enforce animal cruelty offences and breaches of animal welfare standards?
6. For what reasons does Goodfellow suggest that taking a soft approach to animal welfare law enforcement will not be sustainable for regulators?
7. Do you agree with Goodfellow that increasing community concern relating to the welfare of ‘instrumental’ animals threatens regulators’ legitimacy and will result in cases of regulatory leniency ‘being more frequently exposed and more vigorously scrutinised’? Provide some recent examples of such ‘exposure’.

Textbook

Chapter 9 - Annabel Markham, ‘Animal Cruelty Sentencing in Australia and New Zealand’

Sentencing

Sentencing in animal cruelty offences continues to be a major concern for animal advocates. Although animal cruelty legislation provides for significant maximum sentences for offences, judges and magistrates have tended to impose sentences at the lower end of the range with ‘moderate fines remaining the norm’. Katrina Sharman has highlighted the dilemma of light sentencing for animal cruelty offences. She argues that undue leniency and light sentences for animal cruelty offends public expectations by ‘disregarding our community’s core moral values’ and that people who commit acts of cruelty against animals are ‘striking out against social norms.’

10 For penalties for animal cruelty offences see <http://kb.rspca.org.au/What-are-the-penalties-for-animal-cruelty-offences_271.html>

11 As a result of consistently low sentences for animal cruelty offences a contingent of Brisbane lawyers are actively lobbying Magistrates to utilise the legislative sentencing range. Brisbane Lawyers Educating & Advocating for Tougher Sentences (BLEATS) are motivated by an apparent lack of justice for animals and the ‘unwillingness or seeming inability of Magistrates to wield their powers’ under cruelty prevention laws. See BLEATS website: <http://www.bleats.com.au/>

Annabel Markham argues, however, that expressions of outrage and unreasoned demands for ‘tougher’ penalties are unlikely to be productive and that what is required is a willingness on the part of law enforcement personnel to give effect to legislative intent.

Think

Annabel Markham suggests that significantly increased penalties and a wider range of criminal sanctions are ‘a clear signal from governments that animal cruelty must be taken more seriously’. What does she identify as the major factors contributing to:

- The low prosecution rates for animal cruelty, and a reluctance by courts to impose maximum penalties in animal cruelty matters?
- What reforms does Markham advocate with a view to ensuring that the ‘punishment fits the crime’?

The legal framework in NSW

Serious animal cruelty

Crimes Act 1900 (NSW) s 530

The offence of ‘serious animal cruelty’ was introduced on the 20th June 2006 under the Crimes Amendment (Animal Cruelty) Act 2006.\(^{13}\)

Section 530 of the Crimes Act 1900 (NSW) provides:

1. A person who, with the intention of inflicting severe pain:
   - tortures, beats or commits any other serious act of cruelty on an animal, and
   - kills or seriously injures or causes prolonged suffering to the animal,
   is guilty of an offence.

   Maximum penalty: Imprisonment for 5 years.

2. A person is not criminally responsible for an offence against this section if:
   - the conduct occurred in accordance with an authority conferred by or under the Animal Research Act 1985 or any other Act or law, or
   - the conduct occurred in the course of or for the purposes of routine agricultural or animal husbandry activities, recognised religious practices, the extermination of pest animals or veterinary practice.

3. In this section: ‘animal’ means a mammal (other than a human being), a bird or a reptile.

The 2nd Reading Speech suggests the legislative reform in NSW was a response to community outrage regarding a number of vicious attacks on animals. This community response prompted the Government to establish an Animal Cruelty Task Force with the aim of bringing animal cruelty laws into alignment with community expectations.\(^{14}\) Prior to the enactment of s 530, the only animal cruelty laws in NSW were found in the Prevention of Cruelty to Animals Act 1979 (NSW) (PoCtAA) and the common law.

The new offence created by s 530 is an ‘aggravated animal cruelty offence’ and purports to deal with the worst kinds of animal cruelty.\(^{15}\) The provision is designed to bring actions against the intentional infliction of pain

---

\(^{13}\) Crimes Act 1900 (NSW) s 531 establishes the crime of killing or seriously injuring animals used for law enforcement and was introduced at the same time as s 530.

\(^{14}\) A similar offence is contained in Criminal Code 1899 (Qld) s 468; Crimes Act 1958 (Vic). There is no similar provision in the Criminal Code 1995 (Cth).

\(^{15}\) However note that s 530 is a Table 2 offence, thus if heard summarily in a Local Court, the maximum penalty is 2 years: Crimes Amendment (Animal Cruelty) Act, s 268.
in circumstances that amount to serious instances of animal cruelty such as ‘torture’, where the animal is ‘killed, seriously injured or experiences prolonged suffering’. The provision is intended to deal with the more serious animal cruelty cases, leaving the PoCtAA to deal with ‘less serious’ offences.

Few actions have been taken to date under s 530. In addition to the provision being relatively new, there may be a number of other reasons for this. The first possible barrier to a successful prosecution is being able to establish the following elements. That:

• The accused engaged in the act or omission with the intention to inflicts severe pain; and
• The act or omission amounts to torture, beating or a serious act of cruelty; and
• The act or omission killed, caused serious injury or prolonged suffering to the animal.

At the time of writing, there has been only one concluded proceeding under s 530. In 2009, the District Court in Larobina v R\(^{16}\) stressed that the act of ‘torturing, beating or committing a serious act of cruelty’ (s 530(1)(a)) is in addition to the consequence of ‘death, serious injury or prolonging suffering’ (s 530(1)(b)). As a matter of statutory interpretation, the Court held that the words ‘torture’ and ‘beating’ do not limit the other ways in which other ‘serious acts of cruelty’ may occur.\(^{17}\)

In Larobina the defendant was charged with injecting a ferret with an unknown substance causing prolonged death. When the matter was prosecuted in the Local Court, the charge omitted an essential element, referring to s 530(1)(a) rather than to both sub-ss 1(a) and (b). The Magistrate found the offence proved.

On appeal to the District Court, the appellant argued that the conduct described did not amount to an offence upon the text of the provision creating the offence and with reference to all of the ingredients of the section. The District Court found that while the charge as entered was not one known to law, it noted that the Magistrate ultimately found the offence to be proved with reference to all of the elements of the offence provided in s 530(1) and that the ‘evidence led extended to be capable of proof of an offence contrary to s 530(1)’.\(^{18}\) The Court held that the conviction should stand.\(^{19}\)

**Other provisions**

• ‘Animal’ is defined in s 530(3) to include a ‘non–human mammal, bird or reptile’. Peter Sankoff notes that where a specific type of animal is not included in a statutory definition, the common law position on animal cruelty will apply, that is: ‘that a person is entitled to treat their own property in any way they choose’.\(^{20}\) This is because, as we saw in Topic 1, under the common law, domestic or tamed animals are considered the property of their ‘owners’. And as we will learn in Topic 7, wild animals become property upon capture.

• Section 530(2) provides that an offence under s 530(1) is not made out if:
  - the conduct occurred in accordance with an authority conferred;
  - by or under the Animal Research Act 1985 or any other Act or law; or
  - the conduct occurred in the course of or for the purposes of:
    - routine agricultural or animal husbandry activities;
    - recognised religious practices;
    - the extermination of pest animals; or
    - veterinary practice.

• Section 134 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) empowers police officers to take ‘identification particulars’, including fingerprints, of persons found guilty of an s 530 offence.

• Section 21 of the Game and Feral Animal Control Act 2002 (NSW) prohibits the granting of licenses to persons who inter alia have an animal cruelty conviction.

---

16 [2009] NSWDC 76, [14].
17 Ibid, [33].
18 Larobina above n 16, [55].
19 Larobina above n 16, [55–56], [97].
Infliction of severe pain

Because communication with animals is compromised by the absence of a shared language, it may be difficult to determine whether an animal is experiencing 'severe pain'. While we may be able to establish what severe pain for a human might be, adducing evidence of what severe pain consists of for an animal is obviously fraught with difficulty.

In *Tooley v State of Indiana* the defendant unsuccessfully argued that the cat which he had abused did not suffer severe pain and that, in any event, the cat could not give evidence that she did suffer. In *Tooley*, the Court had to decide under its cruelty prevention laws, what ‘severe pain’ for an animal consisted of. The facts were that the defendant, whilst wearing steel-toed boots, drop kicked the cat and sent her flying. Another person then picked up the cat, swung her in a circle and let her go. After an eyewitness called the police, the attending officer formed the opinion that the cat had suffered and made a decision that she did not need to be examined by someone qualified to establish that she had suffered severe pain. The officer’s assessment was based on the cat’s behaviour and the officer’s interpretation of that behaviour. The Court found that the consequence of the accused’s conduct was the infliction of severe pain and that a qualified veterinarian was not required to verify this fact.

In *Larobina* little attention was paid to the meaning of severe pain, but the presence of blood, a deflected rear limb, and the animal’s lack of motion prior to death seemed to imply severe pain. The Local Court at first instance said:

> From what I have observed from the photographs and the video recording, it is quite clear that whilst one cannot be satisfied, beyond reasonable doubt, as to what exactly they were doing with them, the court can infer from the circumstances, as it saw in the video, and the pictures, that there was an intention of inflicting severe pain, that the injection of a ferret, in the circumstances, where it is held down and injected by a person or persons very drunk, that the court – it is an inescapable conclusion to this court that it was a serious act of cruelty, and true it is again, I accept Mr Herring’s submission that there is no proof that it is killed, but the position of its leg, and the way it is just sitting motionless between the beer bottles, again makes the court come to the inescapable conclusion that the white ferret was seriously injured, and was undergoing prolonged suffering.

In *Commonwealth v Zalensky*, a witness observed the defendant beat a dog with a bat at ‘full swing’ and continued to strike the dog on the neck and back of the head at least ten times. The defendant argued that he was disciplining the dog. A veterinarian examined the dog six days after the incident and could not find any evidence of trauma. The veterinarian gave evidence that ‘a dog probably would experience pain and suffering if struck repeatedly in the manner employed’. The court found the conduct caused severe pain.

The notion of severe pain was also considered in the European Court of Human Rights in *Bladet Tronsx and Anor v Norway* which noted that skinning an animal alive causes the animal severe pain. While in that case there was no specific evidence to support the alleged conduct (skinning seal pups alive or kicking or flaying seal pups) the Court accepted as ‘given’ that skinning an animal alive would cause an animal severe pain.

---

1. Do you regard an offence under s 530 as equivalent to murder, ‘manslaughter’ and/or assault causing grievous bodily harm? Why or why not?
2. In what ways is the status of animals as property related to
   (a) the difficulty in establishing a s 530 offence; and
   (b) the lack of successful prosecutions under s 530?
3. What other factors might contribute to the paucity of successful prosecutions under s 530?

---

22 *Larobina* above n 16, [85].
23 *Larobina* above n 16, [87].
25 (2000) 29 EHFF 125, [35].
4. Is it appropriate, do you think, that a person who, with the intention of inflicting severe pain kills, seriously injures or causes prolonged suffering to an animal is not guilty of an offence under s 530(1) if the conduct occurred in accordance with any other Act or law, or in the course of or for the purposes of ‘routine agricultural or animal husbandry activities, recognised religious practices, the extermination of pest animals or veterinary practice’? Why or why not? How might subs 530(2) be better expressed to protect allegedly ‘legitimate’ practices which may result in animal death or suffering?

Sexual assault upon animals

Section 79 of the Crimes Act 1900 (NSW) provides:

Any person who commits an act of bestiality with any animal shall be liable to imprisonment for fourteen years.26

Section 80 of the Crimes Act 1900 (NSW) provides:

Any person who attempts to commit an act of bestiality with any animal shall be liable to imprisonment for five years.

Both are strict liability offences, thus the commission or attempted commission of the unlawful act is considered blameworthy, regardless of the intent of the perpetrator.27

In Rattling the Cage, Steven Wise notes that in the 1600’s carnal knowledge or ‘lying with an animal’ was considered so serious an offence in parts of North America that:

If any man or woman shall lye with any beaste or bruite creature by Carnall Copulaton the human was to be put to death and the victim slain and buried and not eaten.28

He suggests that because bestiality was and still is considered ‘against the order of nature’ all evidence of the act needed to be extinguished. Thus, the animal victim was slain, buried and not eaten.

It is also interesting to note that, although the law does not regard animals as ‘persons, Part 3 of the Crimes Act 1900 (NSW) (in which ss 79 and 80 are found) is headed ‘offences against the person’.

Bestiality is not defined by statute, but the common law has defined it as an act of sexual penetration by or with an animal or bird: R v Bourne (1952) 36 CR App R 125, and can be committed by a man or a woman: R v Packer [1932] VLR 225.

In R v Cap [2009] QCA 174 the accused (in the presence of his de facto wife) forced the complainant to lie on the ground. The accused then grabbed the family dog, placed him between the complainant’s legs and pushed the dog’s groin towards the complainant’s groin. He continued to do this until the dog became sexually aroused and he positioned the animal so that his penis penetrated the complainant’s vagina. Because the complainant did not consent to the act the accused was found to have committed no offence pursuant to s 211 of the Criminal Code 1899 (Qld):

Any person who has carnal knowledge of an animal is guilty of a crime and is liable to imprisonment for seven years.

The court suggested that bestiality would have been made out if the complainant did consent and that the defendant would have been held liable as an accomplice.

26 See also Criminal Code 1899 (Qld) s 211 where bestiality carries the maximum penalty of 7 years. Prior to 1984 s 79 Crimes Act 1900 (NSW) read: ‘whosoever commits the abominable crime of buggery, or bestiality with mankind, or with any animal shall be liable to penal servitude … ’ See R v Pritchard [1999] NSWCCA 182, [10–12].
Think

1. Bestiality does not necessarily result in pain or suffering to an animal yet it is an offence of strict liability and carries a severe penalty. What do you think accounts for the harsh legal response to the offence (hitherto ‘abominable crime’) of bestiality?
2. How might Parliament justify the difference between the sentence for a s 79 offence (where an animal may or may not suffer) with a s 530 offence (where animal suffering and/or death results)? In your answer consider that the penalty for a s 530 offence is 5 years while that for a s 79 offence is 14 years.
3. There appear to be few cases of stand-alone charges of bestiality. More commonly, a charge of bestiality is coupled with charges of human sexual assault and/or paedophilia. To what might this state of affairs be attributed?

In camera proceedings

Because the offence of bestiality is a prescribed sexual offence under s 3(1) Criminal Procedure Act 1986 (NSW), proceedings can be held in camera under s 291(1) of that Act. If a party to the proceedings requests evidence given by the complainant to be held in open court, the court can do so if the court is satisfied that ‘special reasons in the interests of justice require the part of the proceedings to be held in open court’: s 291(3). This is important because the ‘private’ nature of in camera proceedings means that they are unlikely to attract public attention and hence affect public perceptions, nor will they have the effect of deterring potential offenders. If animal law is to progress, it may be argued that prosecutors and complainants need ‘in the interests of justice’ to request open court hearings under s 291(3). Similarly, they need to consider the importance of ensuring that evidence in bestiality cases is available for publication (see s 292 Criminal Procedure Act 1986 (NSW)).

Cruelty prevention legislation

Prevention of Cruelty to Animals Act 1979 (NSW)

Animal cruelty prevention laws in NSW are informed by notions of ‘utilitarian welfarism’. As we saw in Topic 1, this is an approach which balances the need to protect animals with the ostensible ‘need’ to utilise animals for human requirements.

As Sharman and Abbot note:

One would be well justified in observing that anti-cruelty laws call for little moral or ethical deliberation. How else can we explain the fact that a man who fails to give his dog food or water for a week commits an act of cruelty but a man who commits the same act in a laboratory, having obtained the appropriate approvals, is applauded for conducting a worthy experiment?

Section 5 of the Prevention of Cruelty to Animals Act 1979 (NSW) (PoCtAA) provides:

Cruelty to animals

(1) A person shall not commit an act of cruelty upon an animal.

(2) A person in charge of an animal shall not authorise the commission of an act of cruelty upon the animal.

29 Piers Beirne, ‘For a nonspeciesist criminology: Animal abuse as a object of study’ (1999) 37 Criminology 117, however, suggests that ‘bestiality is a coercive act that often causes animals physical and emotional pain and even death’.
31 Similar provisions in other jurisdictions are Animal Care and Protection Act 2001 (Qld) s 18. Note also s 17 expressly establishes a duty of care owed by a person in charge; Prevention of Cruelty to Animals Act 1986 (Vic) s 9; Animal Welfare Act 1993 (Tas) s 8. Note also s 6 expressly establishes a duty of care owed by a person who has care or charge of an animal; Animal Welfare Act 1985 (SA) s 13; Animal Welfare Act 2002 (WA) s 19; Animal Welfare Act 1992 (ACT) ss 7, 7A, 8; and Animal Welfare Act (NT) s 6.
(3) A person in charge of an animal shall not fail at any time:
(a) to exercise reasonable care, control or supervision of an animal to prevent the commission of an act of cruelty upon the animal,
(b) where pain is being inflicted upon the animal, to take such reasonable steps as are necessary to alleviate the pain, or
(c) where it is necessary for the animal to be provided with veterinary treatment, whether or not over a period of time, to provide it with that treatment.

Maximum penalty: 250 penalty units in the case of a corporation and 50 penalty units or imprisonment for 6 months, or both, in the case of an individual.

‘Cruelty’ is defined in s 4(2):
For 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 unreasonably, unnecessarily or unjustifiably:
(a) beaten, kicked, wounded, pinioned, mutilated, maimed, abused, tormented, tortured, terrified or infuriated,
(b) over-loaded, over-worked, over-driven, over-ridden or over-used,
(c) exposed to excessive heat or excessive cold, or
(d) inflicted with pain.

Section 6 makes it an offence to commit ‘aggravated cruelty’ to an animal.
(1) A person shall not commit an act of aggravated cruelty upon an animal

Maximum penalty: 1,000 penalty units in the case of a corporation and 200 penalty units or imprisonment for 2 years, or both, in the case of an individual.

(2) In any proceedings for an offence against sub-s (1), the court may:
(a) where it is not satisfied that the person accused of the offence is guilty of the offence, and
(b) where it is satisfied that that person is guilty of an offence against s 5(1), convict that person of an offence against s 5(1).

‘Aggravated cruelty’ is defined in s 4(3):
For the purposes of this Act, a person commits an act of aggravated cruelty upon an animal if the person commits an act of cruelty upon the animal or (being the person in charge of the animal) contravenes s 5(3) in a way which results in:
(a) the death, deformity or serious disablement of the animal, or
(b) the animal being so severely injured, so diseased or in such a physical condition that it is cruel to keep it alive.

Illustrative case: RSPCA v Hamilton [2008] NSWLC 13
This case involved 102 charges of aggravated cruelty to animals contrary to s 6(1) of the Prevention of Cruelty to Animals Act 1979, 23 charges of failure to provide proper and sufficient food contrary to s 8(3) of the Act and 19 charges of failure to provide veterinary treatment contrary s 5(3)(c) of the Act. The charges of aggravated cruelty were brought on the basis that the accused, the ‘person in charge’ (see s 4 of the Act) of the animals had allowed those animals to decline in condition to such an extent that it was cruel to keep them alive (see s 4(2A) of the Act).

After carefully considering the facts, the Magistrate stated that:
In all of the circumstances, I am satisfied to the requisite extent that given the enormity of the situation that the totality of the offending on which I now have to pass sentence is with the ‘worst case’ category, or if not, extremely close thereto. The offending involves many thousands of animals, it was over a relatively lengthy period of time, and the problems should have been blatantly obvious to the offender. The properties were chronically and woefully overstocked. This too would have been obvious to a
layman, let alone anyone with experience in farming and animal husbandry. However, despite the problems literally staring him in the face he sat idly by, did absolutely nothing and simply left those wretched animals starve to death.

Activity

Read RSPCA v Hamilton at the link provided. What sentence, costs and other orders did His Honour make and why?

Persons in charge

In Song v Coddington & Anor [2003] NSWCS 1196 the NSW Supreme Court considered the meaning of ‘person in charge’ in ss 5(2) and (3) of the PoCtAA. The case concerned the issue of a certificate of health and export permit by Dr Song, an authorised officer of the Australian Quarantine and Inspection Service. The certificate and permit provided that 1137 goats were healthy and fit for export to Abu Dhabi. The RSPCA was called to inspect the goats and subsequently brought proceedings. With reference to (the then) reg 5 of the Prevention of Cruelty to Animals (General) Regulation 1996 (NSW), the RSPCA argued that the crates housing the goats were too small and were unlawful. The issue in the case was whether Dr Song was the ‘person in charge’. At the first hearing, a Magistrate held that he was.

Relevant legislative provisions

Regulation 5 of the Prevention of Cruelty to Animals (General) Regulation 1996 provided that:

1 A person must not: …
   (b) being a person in charge of a large stock animal [including goats], authorise the carriage or conveyance of the animal in a cage or vehicle, unless the cage or vehicle is of a height that allows the animal to stand upright without any part of the animal coming into contact with the roof, ceiling or cover of the cage or vehicle.

The objects of the PoCtAA are set out in s 3:

(a) to prevent cruelty to animals, and

(b) to promote the welfare of animals by requiring a person in charge of an animal
   (i) to provide care for the animal, and
   (ii) to treat the animal in a humane manner, and
   (iii) to ensure the welfare of the animal.

Section 4 of the PoCtAA provides that a ‘person in charge’ in relation to an animal includes:

(b) a person who has the animal in the person’s possession or custody, or under the person’s care, control or supervision

Was the plaintiff a person in charge?

The Court noted that Dr Song was both an authorised officer of the AQIS and a veterinarian and that he had issued the certificate of health and the export permit.

The prosecutor argued that by reason of Dr Song’s functions as an officer of the AQIS, the goats were under his supervision and thus he came within the definition of ‘person in charge’ in the PoCtAA. He was also, the prosecution argued, the person who ‘authorise(d) the carriage or conveyance’ of the goats.

The plaintiff argued that the only connection he had to the goats was that he was empowered to exercise a limited particular Governmental function in relation to what was being done with the goats by others, namely, their export. His function was merely to review, inspect and grant certificates. Because of this, his relationship with the goats involved no notion of general responsibility or authority over the goats as is reflected in the language ‘person in charge’ under the PoCtAA.

The Court concluded that the goats were not under Dr Song’s supervision ‘by dint of his mere exercise of the limited Governmental function with which he was entrusted’.
James J stated:

In my view, before a person might be held to be in charge for the purpose of the Prevention of Cruelty to Animals Act 1979 and the Prevention of Cruelty to Animals (General) Regulation 1996 it is necessary for that person to have some responsibility or authority of an immediate kind for the physical control of an animal rather than merely having some legal responsibility to undertake a limited function in connection with the animal even if that function involves a visual looking over of the animal.

The concept of person in charge, in my view, in the Prevention of Cruelty to Animals (General) Regulation 1996 particularly refers to a person's ability and authority to take positive steps to effect the immediate physical circumstances of the animal so that person's authority might be employed to ensure care, treatment in a humane manner and the welfare of the animal. The s 4 definition particularly refers to a physical relationship in which the person is able to exercise some degree of ultimate responsibility or authority over an animal in its physical environment. I do not understand that the definition, by reference to the concept of supervision or by the use of the word 'has' includes some concept of passive permitting or detached observation as seems to have been included in the concept of interested oversight as amounting to supervision as referred to by the magistrate. In my view, in order for the person to be able to be held to be a person in charge of the goats, it is not enough that the person perform some ancillary legal function in relation to the goats but it is necessary that the person, whether on their own or in combination with others, have that degree of authority and responsibility as would enable the person to engage in the physical disposition of the goats. The functions Dr Song performed were simply not within that concept.33

**Think**

1. For what reasons do you think that James J adopted a narrow interpretation of ‘person in charge’? Do you agree with his reasons? Why or why not?
2. Do you agree with the judge’s suggestion that the definition of ‘person in charge in’ s 4 PoCtAA particularly refers to a physical relationship in which the person is able to exercise some degree of ultimate responsibility or authority over an animal in its physical environment?
3. How might the requirement of ‘physical disposition’ reduce the possibility of successful prosecutions under the PoCtAA?

**RSPCA NSW (Inspector Milton) v Elliott**

Song v Coddington was applied in the recent Supreme Court decision of RSPCA NSW (Inspector Milton) v Elliott [2012] NSWSC 585. This case was an appeal by the RSPCA against a decision of the Local Court acquitting the Respondent, Ms Elliott, of 23 offences under s 5(3)(c) and s 8(1) of the Prevention of Cruelty to Animals Act 1979. The decision to acquit was based on the Magistrate’s finding that it had not been shown that Ms Elliott was a ‘person in charge’ of the greyhounds the subject of the charges.

The relevant facts were that the greyhounds were not owned by Ms Elliott. Ten were owned by her friend, Ms Julie Ryan and five by a Mrs Janet Flan. They were housed in a kennel located at a property at Riverstone, owned by a Mr Ronald Ansteed. During the relevant period Ms Elliott had volunteered to provide assistance to Ms Ryan, by cleaning the kennels and feeding the dogs.

The Supreme Court upheld the appeal, concluding that the Magistrate had erred in his determination of whether the material facts which he found were such as to bring the case within the provisions of s 5 and s 8 of the Act, given the proper construction of the term ‘person in charge’. The Court observed that although Ms Elliott did not have the ability to ‘engage in the physical disposition of the dogs’, she had the ability, responsibility and authority to take positive steps to affect the dogs’ immediate physical circumstances and their physical environment.

---

Offences of strict liability

Bell v Gunter NSWSC (unreported 24/10/1997)

In Bell v Gunter NSWSC (unreported 24/10/1997) a cow was found emaciated and unable to stand. The owner gave evidence that the cow became sick after giving birth and that he was tending to the cow every day, giving it water and food, lifting her with hip lifters and massaging her legs. The RSPCA was called to investigate and euthanased the cow. The person in charge was charged with aggravated cruelty under s 6(1) PoCtAA 1979 (NSW).

At first instance, the Magistrate stated that the phrase ‘inflicted with pain’ in s 4(2)(d) required:

[S]ome type of aspect of knowledge, aspect of direct causing, aspect of perhaps intent to a degree in respect of inflicting, when one talks about inflicting pain.34

He found that the defendant was doing all that he could and that it was not a case of ‘blatant disregard for the general wellbeing of the calf at the time’.

On appeal to the Supreme Court, the appellant argued that the Magistrate had erred in:

• holding that the phrase ‘inflicted pain’ required proof that the respondent acted either with knowledge of the pain inflicted or intended to cause pain;
• dismissing the information on the basis that the respondent had been unintentionally cruel to the animal;
• dismissing the information on the basis that the evidence did not disclose blatant disregard for the general well being.

The Supreme Court had to determine whether offences such as aggravated cruelty under s 6 PoCtAA are offences of absolute liability, strict liability or require mens rea for their commission.

Think

What did the Court conclude and for what reasons? For what reasons did the Court conclude that no legislative intention to create an absolute offence could be discerned?

Pearson v Janlin Circuses Pty Ltd (2002) NSWSC 1118

Bell v Gunter was followed in Pearson v Janlin Circuses Pty Ltd (2002) NSWSC 1118. It concerned Arna, a circus elephant who was kept separated from other elephants by Janlin Circuses. Janlin had introduced three elephants and kept them in close proximity to Arna for a number of hours before taking them away. Arna showed signs of distress and suffering. The complainant argued that Janlin’s conduct caused Arna unnecessary, unreasonable or unjustified pain and brought an action under s 5(2).

The question on appeal to the Supreme Court was whether the Magistrate had erred in requiring a mens rea element of intention.

Windeyer J said:

The attention of the Magistrate was not, it seems, drawn to the decision of Dowd J in Bell v Gunter. That decision was a determination of a stated case relating to a prosecution for aggravated cruelty under s 6(1) of the Act, but the decision is clearly applicable to offences under s 5(1) of the Act and, I consider s 5(2). His Honour held that the offences created under the Act were not absolute.

He said:

The offences created, in my view, are created with the purposeful legislative intention of protecting animals, in most cases totally unable to protect themselves from a range of activities which contemplate certain circumstances in which the court would have to evaluate whether reasonable steps have been taken. In my view the offences … are such that the legislative intention seems clearly not to require a component of mens rea in the proof of the offence.35

34 Bell v Gunter NSWSC (unreported 24/10/1997), [4].
35 Pearson v Janlin Circuses Pty Ltd [2002] NSWSC 1118, [7].
Fleet v District Court of NSW & Ors [1999] NSWCA 363

Three police officers entered premises and removed a dog, Jason, from the premises. Jason was emaciated and unable to stand. He had hair loss and thickened skin indicative of chronic flea allergy, a 10cm tumour on his abdomen and another 3m tumour on his right leg. X-rays showed severe spondylosis of the vertebrae and advanced and severe arthritis in both hips. Jason had an enlarged heart and lung changes that indicated congestive heart failure. Jason was euthanased, pursuant to s 26A PoCtAA. The RSPCA took action for aggravated cruelty under s 6(1).

The appellant, Jason’s guardian, did not argue that Jason should not have been euthanased due to his suffering. Rather he argued that he held an honest and reasonable belief that his methods of treating Jason were effective and he had no intention to harm him. The District Court rejected his claim and Fleet appealed to the Supreme Court.

The Court of Appeal found no merit in the appellant’s submission due to lack of evidence but said that had evidence been available to it, then honest and reasonable belief might have operated as a defence. The case was remitted back to the District Court for the prosecution to clarify the evidence in relation to the elements of the charge. Because Fleet failed to appear at the District Court hearing, the Court upheld its original finding.

Fleet pursued his appeal and also commenced a damages action against the RSPCA for trespass and unlawful search and seizure.36

Think

In Topic 1 we noted that the RSPCA is one of the primary organisations responsible for enforcing animal protection legislation in most Australian states and territories. As a non-profit community based organisation that in NSW receives approximately $800,000 government funding per year, is it appropriate that such a body have the carriage of costly litigation such as the Fleet cases, which have continued for over 10 years? Can you suggest alternatives to our current prosecutorial regime in cases of animal cruelty?

Standard of proof

The criminal standard of proof is the standard applied in animal cruelty prosecutions. This means that the prosecution needs to establish the elements of the offence beyond a reasonable doubt.37

Reasonable steps

As we have seen, cruelty prevention laws require that a person in charge or a person who inflicted the pain must take reasonable steps to alleviate the pain. Recall s 5(3)(b) of PoCtAA:

A person in charge of an animal shall not fail at any time (b) where pain is being inflicted upon the animal, to take such reasonable steps as are necessary to alleviate the pain.

The case law suggests that what constitutes ‘reasonable steps’ will depend upon the circumstances of the case. The objective test identified in Anderson v Moore is whether or not the animal suffered harm which ‘could have been alleviated by the taking of other reasonable steps’.38 The Court there stated that it is not enough that the person took some relevant steps if the evidence suggests that more reasonable steps could have been taken.

37 See: Barrie Ramon Tapp v Robert William Hodgetts VSCA (30 Sept 1988); David Jeffery Netherway v RSPCA WASC (22 Dec 1988); Khalifeh v District Court Judge Jon & Anor NSWSC 27 Feb 1996.
38 Anderson v Moore [2007] WASC 135, [50–51].
In *Oshannessy v Heagney* NSWSC (14 Oct 1997) the defendant hit a cat with his motor vehicle and failed to stop. He returned some time later to the scene. He was charged with an offence under s 14 PoCtAA:

The driver of a vehicle which strikes and injures an animal (other than a bird) shall not fail:

(a) where, in consequence of the injury, pain has been inflicted upon the animal-to take reasonable steps to alleviate the pain, and

(b) where that driver believes, or ought reasonably to believe, that the animal is a domestic animal-to inform, as soon as practicable, an officer or a person in charge of the animal that the animal has been injured.

It was alleged by a police officer and an RSPCA officer that the defendant had failed to take reasonable steps to alleviate the pain caused by the car strike. The prosecution submitted that reasonable steps would have included stopping the car and checking the animal. The Magistrate stated:

The way the legislation is framed requires him to take reasonable steps to alleviate the pain of the animal … how does stopping the car alleviate the pain of the animal?

The Magistrate dismissed the case stating:

This is a prosecution brought under the *Prevention of Cruelty to Animals Act* s 14. That requires the driver of a vehicle which strikes and injures an animal where in consequence of the injury pain has been inflicted upon the animal to take reasonable steps to alleviate the pain.

The prosecution has quite failed to satisfy me that there is any evidence that the defendant didn’t do something which was reasonable which would have alleviated the pain of this animal. It’s consistent with the view of the facts presented by the prosecution that the defendant might have behaved more responsibly. He might have stopped immediately at the scene rather than leaving it and returning later, but it seems to me there was nothing in the circumstances of the animal after it had been hit that he could have done to alleviate its pain.

**Think**

1. Do you agree with the Magistrate’s reasoning that ‘stopping and checking’ the cat in this case would not have alleviated its pain?
2. What do you think that ‘reasonable’ steps in any case might require? How would you determine what is ‘reasonable’ in any circumstance?

*RSCPA v Harrison* [1999] SASC 363

This was a prosecution under s 13(1) of the *Prevention of Cruelty to Animals Act 1985* (SA) which provided:

(1) A person who ill treats an animal shall be guilty of an offence.

(2) Without limiting the generality of sub-s (1), a person ill treats an animal if that person -

(a) deliberately or unreasonably causes the animal unnecessary pain; or

(b) being the owner of the animal -

(i) fails to provide it with appropriate, and adequate, food, water, shelter or exercise; or

(ii) fails to take reasonable steps to alleviate any pain suffered by the animal (whether by reason of age, illness or injury); or

(iii) abandons the animal; or

(iv) neglects the animal so as to cause it pain

The particulars of the first count of neglect were that the respondent ill treated her dog in that she:

- failed to clean the dog and the area in which the dog was lying, causing it to suffer distress from urine saturation;
- failed to examine and provide care for the dog to prevent fly larval infestation causing pain, suffering or distress to the dog;
- failed to treat or arrange treatment for the dog to eradicate the fly larval infestation causing pain, suffering or distress to the dog;
• failed to seek veterinary advice and treatment for the dog causing pain, suffering or distress to the dog.

The particulars of the second count were that the respondent failed to take reasonable steps to alleviate any pain suffered by the dog by reason of age, illness or injury in that she:

• failed to clean the dog and the area in which it was lying to alleviate the distress suffered by the dog from urine saturation;
• failed to treat, or arrange for treatment for, the dog to eradicate the fly larval infestation;
• failed to seek veterinary advice and treatment for the dog;
• failed to have the dog humanely destroyed.

The Magistrate at first instance held that the test in s 13 is whether an 'ordinary person in the defendant's circumstances could reasonably be expected to have foreseen that injury’. The Magistrate held that in this case, an ordinary person ‘could not reasonably be expected to have foreseen that injury’.

On appeal Martin J said:

I have made due allowance for the obvious advantage possessed by the Magistrate in seeing and hearing the respondent and other witnesses. The weight of the evidence is such, however, that I am driven to the conclusion that his Honour has failed to give proper weight to the cumulative effect of the evidence, particularly in connection with the events of the morning of 11 December 1997. The evidence concerning that period was overwhelming. With considerable hesitation, I am not prepared to interfere with the Magistrate's finding that it is a reasonable possibility that the respondent was unaware of the maggots infestation and skin ulceration. In my opinion, however, the total weight of the evidence led inevitably to the inescapable conclusion that during the morning of 11 December 1997, the respondent was aware that the dog was in very poor condition. In particular she was aware of the putrid odour and well knew that the dog was experiencing pain, suffering and distress. Notwithstanding that knowledge, she failed to examine the dog or to seek appropriate assistance. The most cursory examination of the dog would have revealed the maggots and the ulceration. The presence of maggots and ulceration on the dog would cause any ordinary and reasonable person considerable alarm and give cause for a close inspection.

The appeal with respect to count one was dismissed and the appeal with respect to count two was allowed. Although the maximum fine under s 13 is $10,000, in view of the respondent’s age, antecedents and the unlikelihood of her re-offending, Martin J imposed a fine of $350 and directed that she pay $275 in veterinary fees incurred by the appellant.

In his judgment Martin J gave ‘anxious consideration’ to whether a conviction should be recorded. He concluded that ‘in view of the respondent’s blatant disregard of the dog’s appalling condition’, it would be ‘inappropriate to refrain from recording a conviction’.

**RSPCA (SA) v Stojcevski [2002] SASC 39**

The objective test was upheld and applied in RSPCA (SA) v Stojcevski [2002] SASC 39 where a dog with a fractured leg was left without medical attention for a number of days. There was evidence that it was probable the dog’s injuries were caused by the owner who had at one stage admitted to kicking the dog. The owner denied this and said that he thought the leg was dislocated from being hit by a car. Officers and informants saw the leg was ‘swinging’ and thought it was broken.

The Magistrate said:

The dog gave no indication of suffering pain … and the respondent did not regard the dog as being in pain.

On appeal Mullighan J said that:

Taking reasonable steps in s 13(2)(b)(ii) is to take the steps which an ordinary reasonable person would take in the circumstances. An ordinary person is a person who does not have special knowledge or training with respect to the particular animal concerned and a reasonable person is a person who would act reasonably in the circumstances.
Think

1. What criteria do you think a ‘reasonable person’ might apply in order to determine whether an animal is suffering or in pain?
2. When the Magistrate reasoned that ‘the respondent did not regard the dog as being in pain’ was he applying an objective test?
3. Is the outcome of Stojcevski reasonable in view of the fact that the informants had formed the view that the dog’s leg was broken and that the animal was suffering?

**Anderson v Moore [2007] WASC 135**

Section 19(3)(h) of the *Animal Welfare Act 2002* (WA) provides that:

> A person in charge of an animal is cruel to an animal if the animal suffers harm which could be alleviated by the taking of reasonable steps.

The case concerned the alleged ill treatment of sheep. The Supreme Court held that the Magistrate had correctly identified and applied the objective test when he stated that:

> Whether or nigh in the circumstances as presented to this [appellant], he took such steps as would be necessary to alleviate the harm that was self-evidently being suffered by these animals.

Although the appeal court identified that the Magistrate had used the word ‘necessary’ rather than ‘reasonable’, it held that the use of the word ‘necessary’ was not an appealable error and if anything, it was an error in the appellant’s favour.

The Court agreed with the respondent’s submission that:

> [T]he statutory test is not whether or not the appellant took reasonable steps to alleviate the suffering of the sheep. Rather, the test is whether or not the sheep suffered harm which could have been alleviated by the taking of other reasonable steps … [T]he issue is whether the evidence discloses that there were reasonable steps which could have been, but were not, taken to alleviate the harm suffered by an animal. Thus, evidence that an accused took some reasonable steps may be relevant but such evidence does not mean that a finding of not guilty is inevitable. If the evidence discloses that further reasonable steps or a reasonable step that could have been taken to alleviate the harm suffered by an animal, an accused will not avoid liability.

Thus, for an offence particularised as being committed against s 19(3)(h) the elements of the offence are:

1. The accused was in charge of the relevant animal,
2. The animal suffered harm, and
3. The harm suffered could have been alleviated by the taking of reasonable steps.

Think

What criteria do you think should be employed to determine whether ‘reasonable steps’ have been taken and/or whether further reasonable steps could have been taken to alleviate the harm suffered by an animal?

**Confinement – s 9**

Section 9 of the *Prevention of Cruelty to Animals Act 1979* (NSW) provides:

**Confined animals to be exercised**

(1) A person in charge of an animal which is confined shall not fail to provide the animal with adequate exercise.

(1A) Subsection (1) does not apply to a person in charge of an animal if the animal is:

(a) a stock animal other than a horse, or

(b) an animal of a species which is usually kept in captivity by means of a cage.
(2) In any proceedings for an offence against sub-s (1), evidence that an animal referred to in that subsection was not released from confinement during a period of 24 hours is evidence that the person accused of the offence has failed to provide the animal with adequate exercise during that period.

(3) A person in charge of an animal (other than a stock animal) shall not confine the animal in a cage of which the height, length or breadth is insufficient to allow the animal a reasonable opportunity for adequate exercise.

(4) In any proceedings for an offence against sub-s (3) in respect of an animal, the person accused of the offence is not guilty of the offence if the person satisfies the court that the person confined the animal:

(a) for the purpose of:
   (i) carrying or conveying the animal, or
   (ii) displaying the animal in a public exhibition or public competition, in a manner that inflicted no unnecessary pain upon the animal, and

(b) for a period not exceeding 24 hours.

The definition of ‘confine’ is provided in s 4(1):

‘confine’, in relation to an animal, includes:

(a) keep the animal in captivity by means of a cage or by any other means,

(b) pinion, mutilate or maim the animal for the purpose of hindering, impeding or preventing the freedom of movement of the animal,

(c) subject the animal to a device or contrivance for the purpose of hindering, impeding or preventing the freedom of movement of the animal, and

(d) tether the animal by means of a rope, chain or cord or by any other means.

See also The Prevention of Cruelty to Animals (General) Regulation 2006 Part 2 of which sets out ‘Provisions Relating to Confinement, Carriage and Use of Animals’ and Part 2a of which sets out guidelines relating to ‘Confinement of Fowl for Egg Production’.

Think

1. In Chapter 1 of the textbook, Sankoff discusses the exception which s 9(1A) extends to stock animals and animals ‘usually kept in captivity by means of a cage’.
   Identify the rationale for this provision and outline arguments both for its retention and for its abolition.

2. Although s 9(2) states that an animal must be released from confinement every 24 hours ‘adequate exercise’ is not defined in the Act.
   Prepare a definition of ‘adequate exercise’ for inclusion in s 4 of the Act.

Defences to cruelty

You will recall that the definition of ‘cruelty’ in s 4 of the PoCtAA provides that a reference to an act of cruelty … includes a reference to any act or omission as a consequence of which the animal is unreasonably, unnecessarily or unjustifiably inflicted with pain, etc [emphasis added].

In addition to the ‘defence’ of reasonableness, necessity, or justifiability referred to in this subsection, s 24 of the PoCtAA identifies a number of situations where the infliction of pain and suffering on animals may be ‘justified’.

These include but are not limited to:

- a number of situations involving stock animals including castration, ear-tagging, branding, dehorning, tailing, mulesing;
- hunting, shooting, snaring, trapping, catching or capturing an animal;
- destroying or preparing an animal for destruction for human consumption;
- destruction in accordance with religion;
- animal research;
- feeding a predatory animal.

In the first chapter of the textbook Peter Sankoff provides a detailed consideration of the notion of ‘unreasonable, unnecessary or unjustified’ pain and suffering and of the scope of the ‘legitimate’ infliction of pain and suffering in the context of animal cruelty law.

- He suggests that the exemptions contained in anti cruelty statutes are a clear articulation of the utilitarian test of ‘necessity’ and discusses the 1978 Canadian case, *R v Menard* in which the Court articulated a ‘legitimate purpose’ test. This test allows humans to utilise their superior position to put animals in their service, but inhibits them from harming animals gratuitously. It suggests that whether a particular act that causes animal suffering can be sanctioned by human need should be resolved by two factors: the purpose of the conduct and the means employed to inflict the suffering.
- While on the surface, Sankoff notes, the purpose criterion appears to provide considerable protection for animals, the language used provides no definition of what constitutes a ‘legitimate purpose’. And while the second part of the necessity test (legitimacy of means) appears to provide animals with some protection from harm, human privilege enables us to prioritise human convenience above a requirement to use measures that may reduce the pain and distress endured by animals.

**Think**

1. As long as we premise our animal protection laws on the current interpretation of ‘protection’, Sankoff suggests, ‘we will continue to mask harmful treatment of animals in a sophisticated web of legal terminology that consigns an ever growing number of animals to a lifetime of ‘necessary’ and ‘reasonable’ pain and distress’. What shortcomings does he identify with the terminology of ‘unreasonable, unnecessary or unjustified pain and suffering’?

2. What is the ‘legitimacy of purpose’ test and for what reasons does Sankoff suggest it to be problematic?

3. A person is not guilty of an offence under the Act if the person satisfies the court that the act or omission in respect of which the proceedings are being taken was done, or authorised to be done or omitted to be done … for the purpose of:
   (i) carrying out animal research; or
   (ii) supplying animals for use in connection with animal research, in accordance with the provisions of the *Animal Research Act 1985* (NSW).

4. What offences are created by Part 5 (ss 46–48) of the *Animal Research Act 1985* (NSW)? Do any of these provisions relate to animal cruelty?

**Other offences**


**Powers of officers and inspectors**

Standing and authority to prosecute

Standing or ‘locus standi’ refers to the right of individuals to bring legal proceedings when they are not personally affected (other than of course in their sensibilities) by the law or regulations complained of. While there is no identifiable test for standing in Australia for public interest groups such as animal protection advocates, in determining whether or not a group should be accorded standing, the Australian courts tend to take the following considerations into account. A group must show that:

- it is representative of a significant public concern; and
- it has an established interest in the subject matter of the proceedings.

Factors which have been deemed relevant by the courts in determining whether a group has a representative nature and an established interest are:

- whether or not the group has some kind of relationship with or recognition by government;
- whether or not the group has some prior participation in the relevant area;
- whether or not there are other possible applicants for standing;
- the ability (including resources) of the group to mount an effective challenge;
- the constitution/objectives of the group;
- the interests of the members of the group; and
- the significance of the issues at stake.

Some statutes, such as the Prevention of Cruelty to Animals Act 1979 contain specific provisions which identify the persons and bodies with authority to bring actions under the Act.

Section 34AA of the PoCtAA which was introduced as an amendment to the Act in 2007 provides.40

**Authority to prosecute**

(1) Proceedings for an offence against this Act or the regulations may be instituted only by:

- an approved charitable organisation, or
- an inspector within the meaning of Division 2 of Part 2A, other than a police officer, or
- a police officer, or
- the Minister or the Director-General of the Department of Primary Industries, or
- a person with the written consent of the Minister or that Director-General, or
- any other person or body prescribed by the regulations for the purpose of this section.

‘Charitable organisation’ is defined in s 4 to mean:

- the Royal Society for the Prevention of Cruelty to Animals New South Wales, and
- any other organisation or association which has as one of its objects the promotion of the welfare of, or the prevention of cruelty to animals, or any class of animals, and which is a non-profit organisation having as one of its objects a charitable, benevolent, philanthropic or patriotic purpose.

**Illustrative cases**

*Pearson v Janlin Circuses Pty Ltd* [2002] NSWSC 1118: Mark Pearson from Animal Liberation brought an action under the (then) open standing provisions of the PoCtAA.

*Animal Liberation v Director General of National Parks & Wildlife Service* [2003] NSWSC 457: Animal Liberation sought an injunction to stop aerial culling of wild goats and standing was not contested by the defendant.

*Animal Liberation Ltd v Department of Environment and Conservation* [2007] NSWSC 221: Animal Liberation again sought an injunction to stop aerial culling of wild goats, however Animal Liberation’s standing was contested by the defendant and refused by the court.

The issue of standing for animals protection groups will be considered in more detail in Topic 8.

---

Think

1. In what ways might limitations on standing function to limit the enforcement of animal cruelty laws?

2. Would you be able to prosecute an action under the PoCtAA in relation to ill-treatment of, or cruelty towards, an animal owned by you? Cite relevant legislative provisions.

Links between animal cruelty and human abuse

He who is cruel to animals becomes hard also in his dealings with men.

Immanuel Kant

The relationship between animal cruelty and human abuse has a long history in philosophy and the arts and more recently in the scientific community. Violence against others is often seen as a type of escalating conduct which begins with animal cruelty and subsequently leads to human assault and/or murder.

The escalation from animal cruelty to human abuse is known as the ‘violence graduation hypothesis’. The theory is that animal cruelty exhibited in early childhood is an indicator of later adult interpersonal violence.

Several studies have shown a correlation between childhood abuse of animals and other problematic behaviour. One US study of 153 young adults who had been convicted of animal cruelty demonstrated that 70 per cent were also convicted for at least one other offence, including violence towards other people. They were also more likely to be involved in property-related offences or drug-related crimes.

While relatively little research has been carried out on the link between cruelty to animals and domestic violence, the authors found that those studies that do exist supported the large body of anecdotal and clinical evidence that there is such a link. In one study 53 per cent of women who had experienced domestic abuse said their partners had either killed or harmed the family pet. The authors argue that child welfare professionals should be alert to animal abuse as a possible indicator of domestic violence. Important to animal protection groups is that the relationship between animal cruelty and interpersonal violence is a persuasive means of bringing attention to animal cruelty matters.

Whilst the theory of the relationship between animal cruelty and human violence is contentious, there have been attempts to put in place interventionist strategies. RSPCA (Qld) for example, has responded to the animal-human violence matrix by engaging in a cross-reporting program between the Queensland Police Service and Department of Child Safety. The purpose of this program is early intervention through the detection of animal cruelty as an indicator of violence in the home.

One problematic issue in interpersonal violence is that many refuges do not make provision for companion animals. This may mean that some victims of violence, in concern for their companion animal’s safety, may be reluctant to leave the domestic environment. In response, RSPCA Qld has developed a program which provides foster care for pets whose guardians wish to obtain refuge from domestic violence.

Below are some findings from the last decade relating to the correlation between animal and human abuse.

41 See William Hogarth’s 1751 woodcuts: The Four Stages of Cruelty (<http://www.graphicwitness.org/coe/cruel.htm>)


Statistics on human violence and animal cruelty

Domestic violence:
- 71% of abused women report that their batterers have threatened to hurt or kill their pets and have done so.
- 32% of battered women with children report that their children have hurt or killed pets.
- 25%-48% of battered women delay leaving an abusive situation for fear of what will happen to her pet if left behind.
- 40% of battered women report that they have been forced to participate in sexual acts with animals as part of their domestic terrorisation.

Sex offenders:
- 48% of rapists have committed acts of animal cruelty as children or adolescents.
- 30% of child molesters have committed acts of animal cruelty as children or adolescents.
- 15% of all active rapists also rape animals.

Child abuse:
- In 80 per cent of homes in which animal control agencies found abused/neglected pets there had been previous investigations by child welfare agencies of physical abuse and neglect.


Illustrative Australian cases
- In Stevens v R [2007] NSWCCA 152 the accused was charged with affray. The statement given by the victim to police included an assault on the victim’s dog. The accused was not, however, charged with animal cruelty. At first instance, the judge cited the assault on the dog as a consideration relevant to sentencing, notwithstanding the absence of a charge. The Court of Appeal found that the judge had erred because:

  The applicant was not charged with an offence involving cruelty to animals but was charged with the offence of affray of which animal cruelty formed no part.

The Court held that while the judge was entitled to have regard to the animal cruelty allegation, he was not entitled to rely on it in determining the sentence.

- In Dee Dougan v R [2006] NSWCCA 34 the court noted the poor criminal record of the appellant beginning at age 14. The criminal record included break and enter, animal cruelty, breach of supervision, escape custody, driving and firearm matters.

- In R v Cap [2009] QCA 174 the defendant was charged with 9 counts of sexual assault upon his daughter and nieces, 1 count of assault occasioning bodily harm and 4 counts of carnal knowledge against the order of nature. The court noted the defendant’s criminal history including aggravated assault, assault, weapons offences, wilful and unlawful damage to property and animal cruelty.

- In R v Piket [2006] VSC 238, a sentencing hearing for murder and attempted murder, the appellant gave evidence of episodes of animal cruelty as a child.

- In Queen v Tutchell [2006] VSCA 294, a sexual assault sentencing appeal, evidence was adduced relating to the accused’s history of paedophilia and bestiality.
The international context

**Chapter 13 – Ruth Hatten, 'International Dimensions of Animal Cruelty Law’**

In this chapter, Ruth Hatten explores Australia and New Zealand’s jurisdiction to act against animal cruelty with reference to whaling in the Southern Ocean (to be considered in greater detail in Topic 7) and the overseas export of live sheep and cattle (to be considered in greater detail in Topic 5).

Hatten investigates some of the Australian legal efforts to restrict Japanese whaling and to enforce the Australian Whale Sanctuary (AWS) established under s 225 of the Environment Protection and Biodiversity Conservation Act 1999 (C’th). One of these cases, *Humane Society International v Kyodo Senpaku Kaisha Ltd. (2005)* involved an application to the Federal Court for a prohibitory injunction restraining Kyodo from carrying out whaling operations in the AWS. While the application was successful, there have been no efforts to enforce the orders, which are not capable of enforcement in Japan. There is also a question whether Australia can lawfully enforce its domestic legislation against foreign nationals in the AWS.

Hatten then discusses proceedings filed by the Australian government in the International Court of Justice in March 2010. The application alleges that Japan has breached and continues to breach its obligations under the *International Convention for the Regulation of Whaling* (ICRW), specifically in relation to the killing of whales for commercial purposes. In its application, Australia seeks to establish, that Japan’s whaling hunt is not for scientific purposes and offends international law. Australia and New Zealand are asking the ICJ to halt Japan’s ‘research’ whaling in the Antarctic, alleging that it breaches the global moratorium on commercial whaling, and has no relevance to whale conservation.

Since the chapter was written, the International Court of Justice conducted public hearings in the case *Whaling in the Antarctic (Australia v Japan, New Zealand intervening)* from Wednesday 26 June to Tuesday 16 July 2013. 45 The 16 judges of Court are now deliberating the Court’s decision. 46 The decision has particular significance in that it is the first time that the ICJ, the final arbiter of legal disputes between nations, has dealt with a global treaty for the conservation of endangered species.

Hatten then considers the international law issues raised by Australia’s attempts to regulate live export with particular attention to the legal developments since the media exposure of inhumane treatment of cattle in Indonesia in May 2011. We will consider Hatten’s discussion in detail and the regulatory regime relating to live animal export in Topic 5, *Animals in Agriculture and Live Animal Export*.

**Think**

What difficulties does Hatten identify in controlling the way animals are treated when that treatment occurs beyond Australia’s coastline?

---


Topic summary

In this topic we have considered criminal offences relating to animals, specifically ‘serious animal cruelty’, ‘animal cruelty’ and ‘aggravated animal cruelty’ under the Crimes Act 1900 (NSW) and the Prevention of Cruelty to Animals Act 1979 (NSW).

The topic also investigated issues relating to the detection, enforcement and sentencing of animal cruelty offences. It then explored the defence of ‘reasonable, necessary or justified’ cruelty and a number of statutory defences in the Prevention of Cruelty to Animals Act 1979. Finally, this topic considered the nexus between animal cruelty and interpersonal violence, and engaged in a brief overview of some recent international initiatives relating to the prevention of animal cruelty.

Activity 2.1

You are employed at the Northern Rivers Community Legal Centre and are meeting with a client who is concerned about animal cruelty issues in her neighbourhood. The client tells you the following:
1. Tom muzzled, tethered and held a dog under water until she drowned.
2. Tom is a member of a religious sect which believes that this type of ‘animal baptism’ enables an animal to become immortal and to enter Paradise.
3. There were 11 other members of the sect observing and assisting in the ‘baptism’ of the dog.
4. There is video evidence of the event. The video shows that the dog may be in distress but there is no obvious sign of resistance and the dog does not make a sound.

What would you advise her?

Activity 2.2

A friend rings you in distress to say that two horses are tethered to a fence by a 1 metre rope. Neighbours confirm that the horses have been tied up for two months and that while they have seen the owner feeding the horses daily and that the horses are provided with water, they have not seen the horses off their tethers for the whole of the two month period. With a view to ‘easing their suffering’ your friend tells you she is planning to enter the property, take the horses, and to relocate them to her paddocks.

What would you advise her?
Topic 3

Companion animals

Objectives

At the completion of this topic students will be able to:

- identify and describe the central features of the legal regulatory frameworks governing the protection of, and liability for, companion animals in NSW. Specifically:
  - the common law framework;
  - liability for damage caused by animals under the Animals Act 1977 (NSW); the Companion Animals Act 1998 (NSW); and the Companion Animals Regulation 2008 (NSW);
  - the powers of Local Government councils related to companion animals under the Local Government Act 1993 (NSW) and the Impounding Act 1993 (NSW);
  - criminal offences relating to dogs under the Crimes Act 1900 (NSW);
  - the functions of the Non Indigenous Animals Act 1987 (NSW) and Non-Indigenous Animals Regulation 1987 (NSW) insofar as it affects the regulation of ‘non indigenous’ companion animals within the state;
  - codes of practice, standards and guidelines related to animal trades (Schedule 1 of the Prevention of Cruelty to Animals Regulation 2012).

Textbook

Chapter 4 – Tony Bogdanoski, ‘A Companion Animal’s Worth: The Only ‘Family Member’ Still Regarded as Legal Property’

Chapter 5 – David Tong and Vernon Tava, ‘Moral Panics and Flawed Laws: Dog Control in New Zealand’
Introduction

All animals are equal, but some animals are more equal than others.

George Orwell, Animal Farm, 1945

Australia has one of the highest rates of companion animal ownership in the world. Studies have shown that 4 out of every 5 Australians have had a companion animal at some point in their lives. In 2009 the Australian Companion Animal Council reported that 59 per cent of companion animals in Australian households are either dogs or cats, with 36 per cent of households owning a dog and 23 per cent of households owning a cat. According to the Council there are approximately 2.35 million cats, 3.41 million dogs, 18.4 million fish, 8.1 million birds and over 1 million other companion animals including horses, rabbits, guinea pigs and other small animals.¹

This topic considers the law relating to companion animals in New South Wales. While each state and territory has its own legislative regime, the laws relating to companion animals do not differ significantly between the different jurisdictions.

The legal framework regulating companion animals and their human ‘owners’ is a significant one both because of the proximity of companion animals and the ‘special’ significance they have in our lives.

The legal regulation of companion animals is governed by both common law and statute, and by standards and guidelines contained in legislative and non legislative Codes of Practice.

In this topic we will examine liability for companion animals at common law and under the Animals Act 1977 (NSW). We will also consider the powers of Local Government councils relating to companion animals under the Local Government Act 1993 (NSW) and the Impounding Act 1993 (NSW). We will then examine in detail central provisions of the Companion Animals Act 1998 (NSW) and of the Companion Animals Regulation 2008 (NSW), specifically as they relate to legal responsibility towards companion animals and legal liability for companion animals. Finally, we will consider the legal effect of Standards and Guidelines relating to animal trades made pursuant to Codes of Practice identified in the Prevention of Cruelty to Animals Regulations.

The two central concerns of this topic are to investigate legal regulatory frameworks relating to companion animals in order to identify:

See also Animals Australia: Companion Animals Fact Sheet at <http://www.animalsaustralia.org/factsheets/companion_animals.php#toc11>
Human responsibilities towards companion animals: that is, the legal framework relating to the protection, care and welfare of companion animals; and

human responsibilities for companion animals: that is, the legal liability of persons ‘in control’ of companion animals for the actions and behaviours of those animals.

Companion animals as property

At law, domestic animals are regarded as the property of their owners. Some of the legal, ethical and practical consequences of this are considered in the following reading.

Textbook

Chapter 4 – Tony Bogdanoski, ‘A Companion Animal’s Worth: The Only ‘Family Member’ Still Regarded as Legal Property’

In this chapter Tony Bogdanoski evaluates a paradox of companion animals being objects of property rights yet also having special status within families. He critiques the ‘pets as property’ paradigm, arguing that it ‘operates to obfuscate the intrinsic worth and inherent value of companion animals as individual beings and sentient subjects, leaving them as disposable human objects or household commodities.’

He explores two particular arenas where the ‘pets as property’ paradigm is particularly problematic: torts and family law.

In tort law, one way in which this paradigm plays out is that the law’s insistence on animals as chattel disables animal guardians from claiming adequate damages when their pet is harmed, injured or killed by others. And unless an animal is used for purposes of economic gain, such as for racing or breeding, their ‘market value’ will tend to be low. In addition, the fact that emotional attachment, companionship and distress are not relevant factors in the calculation of damages means that damages actions in relation to injury to companion animals are rarely pursued.

In the context of family law, Bogdanoski cites an increase in ‘pet custody disputes’ among divorcing and separating couples. He notes that companion animals in such disputes ‘continue to be treated as chattels, part of the property pool of the separating or divorcing parties’. As a consequence, the court has no discretionary power to award shared custody, guardianship or visitation rights in relation to a companion animal.

Bogdanoski observes that some decisions of the Family Court of Australia ‘have shown that there is a willingness by parties seeking post-divorce residence of companion animals to increase the amount of money or property paid to the separating spouse, beyond what the animal would be valued based on its market value.’

Think

1. Given their ‘special status’ should companion animals be classified as something other than ‘property’? What alternatives to the ‘pets as property’ paradigm does Bogandowski suggest?

2. In what ways does Bogandowski suggest that a legal reconceptualization of companion animals will better serve the interests of the animals themselves?

---

2 Domestic animals were held to be ‘property’ in Saltoon v Lake [1978] 1 NSWLR 52, and in Elder Smith Goldsborough Mort Ltd v McBride [1976] 2 NSWLR 631 animals were held to ‘fall within the definition of goods in sale of goods and consumer protection legislation’. See also J Bearup Brooke ‘Pets: Property and the Paradigm of Protection’ (2007) 3 Journal of Animal Law 173 <http://www.animallaw.info/journals/jo_pdf/jouranimallawvol3_p173.pdf>

3 See also Sonia S Waisman, ‘Non-Economic Damages: Where does it get us and how do we get there? (2005) 1 Journal of Animal Law in which the writer considers whether a change in the property status of companion animals would facilitate the development of a new tort to provide money damages to persons losing a companion animal <http://www.animallaw.info/journals/jo_pdf/jouranimallawvol1_p7.pdf>
3. What does Bogandowski identify as some of the legal and practical implications of regarding companion animals as property?

4. In what ways does Bogandowski suggest that the ‘pets as property’ paradigm contributes to the relinquishment and abandonment of companion animals? Do you agree that a ‘guardianship’ or an ‘equitable self ownership’ model would facilitate a greater level of responsibility and accountability by humans towards ‘their’ companion animals? Why or why not?

5. What do you think of Epstein’s argument that ownership actually works to the advantage of animals and not to their detriment?

6. View the webcast below in which an attorney for the American Veterinary Medical Association explains why the AVMA thinks that changes to local ordinances in some U.S. cities which replace pet ‘owner’ with pet ‘guardian’ are not a good idea. What do you think of the AVMA’s views?

‘Pet Guardianship—AVMA statement on why it’s not a good idea,’ 29 March 2011 (4.00 min) <http://www.youtube.com/watch?v=SqmaZ35h6wU>

**NSW Companion Animals Taskforce**

The Companion Animals Taskforce was established in 2011 by the Minister for Local Government and the Minister for Primary Industries to provide advice on key companion animal issues, including strategies to reduce the rate of companion animal euthanasia.

Specifically, the Taskforce was asked to inquire into:

- Euthanasia rates and re-homing options for surrendered or abandoned companion animals;
- The breeding of companion animals including the practices of ‘puppy farms’;
- The sale of companion animals;
- The microchipping and desexing of companion animals;
- Current education programs on ‘responsible pet ownership’;
- Dangerous dogs;
- Any other high priority companion animal issues that become apparent to the Taskforce.

The Taskforce was chaired by Andrew Cornwell MP, and consisted of representatives of the Animal Welfare League NSW, Australian Companion Animal Council, Australian Institute of Local Government Rangers, Australian Veterinary Association, Cat Protection Society of NSW, Local Government and Shires Associations of NSW, Dogs NSW, Pet Industry Association Australia, and Royal Society for the Prevention of Cruelty to Animals NSW.

In October 2012, after considering over 1,400 public submissions, the Taskforce produced a comprehensive report containing 22 recommendations, which are listed below. You are encouraged to read through the report which contains a wealth of information relating to existing law and issues affecting both companion animals and their ‘owners’.

**Recommendation 1**

A breeder licensing system should be established and the Companion Animals Register should be updated to capture breeder licence information for each animal record (with Minister for Local Government).

**Recommendation 2**

_The Animal Welfare Code of Practice – Breeding Dogs and Cats_ should be revised to ensure that the existing guidelines it contains become enforceable standards.

---

Recommendation 3
Relevant animal welfare codes of practice should be amended to require the sellers of cats and dogs to display an animal’s microchip number (or the licence number of the breeder of an animal) in all advertisements, and at point of sale in the case of pet shops, markets and fairs.

Recommendation 5
An information sheet should be issued in relation to the advertising and sale of cats and dogs.

Recommendation 6
Mandatory standardised information on socially responsible pet ownership should be developed to be given out at point of sale (with Minister for Local Government).

Recommendation 7
Relevant animal welfare codes of practice should be updated to require that at least one staff member working in a pet shop, breeding establishment, pound or animal shelter must hold a Certificate II - Animal Studies qualification.

Recommendations for the Minister for Local Government
The Minister for Local Government has been identified as having responsibility for the implementation of the following recommendations.

Recommendation 4
The Companion Animals Regulation should be amended to remove the existing provision that allows recognised breeders to sell unmicrochipped cats or dogs to pet shops.

Recommendation 8
The Companion Animals Act should be amended to require cats and dogs to be registered on an annual basis.

Recommendation 9
Cat and dog registration fees should be reviewed and set at such a level to provide an additional incentive for owners to desex their animals.

Recommendation 10
The Companion Animals Regulation should be amended to require a cat to be registered from the time it is 4 months of age.

Recommendation 11
The Companion Animals Regulation should be amended to allow cat and dog registration fees to be indexed to the Consumer Price Index.

Recommendation 12
A new discounted registration category ‘Desexed animal – purchased from a pound or shelter’ should be established to further encourage the purchase of desexed cats and dogs.

Recommendation 13
A grant funding program should be established for councils and partner organisations to deliver targeted microchipping, registration and desexing programs.

Recommendation 14
Measures should be introduced to improve compliance with companion animal legislation data entry requirements. NSW Companion Animals Taskforce – Report – October 2012

Recommendation 15
A community-wide socially responsible pet ownership education campaign should be developed (with Minister for Primary Industries).
Recommendation 16
The socially responsible pet ownership school-based education program should be expanded to include the preschool age group.

Recommendation 17
Comprehensive education material about the importance of confining cats to their owner’s property should be developed.

Recommendation 18
Funding should be provided for research into key cat and dog issues.

Recommendation 19
Better practice guidelines should be issued to councils with a view to standardising impounding practices.

Recommendation 20
The Companion Animals Register should be updated to provide a centralised impounded animal management tool for use by all councils, relevant State agencies and animal welfare organisations.

Recommendation 21
The Ministers should write to the Minister for Fair Trading to request that barriers to cat and dog ownership in relation to residential tenancy laws be reviewed (with Minister for Primary Industries).

Recommendation 22
An ongoing reference group on cat and dog management issues should be established.

Think

1. Consider the above recommendations. Are there any with which you would disagree? Is there anything further you would have wished the Taskforce to have recommended?
2. With reference to Recommendation 21, consider the following initiatives relating to ‘pet bonds’ in NSW and Queensland.

In NSW the companion animals taskforce found that ‘pet-unfriendly’ rental properties drive up dumping rates and severely inhibit animal adoption from pounds and shelters. ‘In terms of renters, we think there is scope to create some sort of ‘pet bond’ on top of a standard property bond’, the chairperson of the taskforce reported.5

In addition, the Queensland Government has put forward changes to the Residential Tenancies Act that include allowing landlords to charge a ‘pet bond’ to cover any potential damage by a tenant’s pet. The extra bond is designed to allow more pet owners to secure a rental property, and could reduce the number of abandoned pets. Landlords would still be able to refuse tenant’s requests to keep pets, but proponents hope the extra insurance would encourage landlords to allow them.6

Do you agree that having tenants enter into a ‘pet bond’ might reduce the numbers of abandoned companion animals?

Legal framework

Common law antecedents

The law of torts has grown up historically in separate compartments and … beasts have travelled in a compartment of their own.\(^7\)

While the general rules of civil liability in tort continue to apply in relation to liability for injuries and damage caused by companion animals in much the same way as they apply to other ‘chattels’, to a large extent the statutory framework in each Australian jurisdiction has supplanted common law remedies. However, provisions of the Companion Animals Act 1998 (NSW), continue to recognise common law liability for damages or injury caused by companion animals. See for example, s 25 which provides that the owner of a dog is liable in damages in respect of: (a) bodily injury to a person caused by the dog wounding or attacking that person, and (b) damage to the personal property of a person (including clothing) caused by the dog in the course of attacking that person.\(^8\)

Historically, the general rules of tort liability applied to injuries caused by companion animals. So, for example, if a dog bit a person, the owner was in some circumstances liable in trespass, negligence, nuisance and/or under the heading of occupiers’ liability.\(^9\)

In Alsop v Lidgerwood (1916) 22 ALR (CN) 13 the Court said:

Both the owner of an animal and any person in control of the animal may be sued for the actions of an animal. Liability for the actions of an animal lies firstly with the keeper, or the person who harbours or controls the animal, and not the owner.

In some cases the Courts applied principles of strict liability for damage done by animals. For example, in Aleksoski v State Rail Authority of NSW (2000) 30 MVR 403 the Court held that:

The keeper of a domestic animal may be liable for damage done by it which is attributable to its vicious propensity, without proof of negligence on the keeper’s part if he or she has knowledge of the animal’s vicious propensity to cause injury or damage to human beings.

General liability in tort

Animals Act 1977 (NSW)

Section 7 of the Animals Act 1977 provides:

General liability for damage by an animal\(^10\)

(1) Liability for damage caused by an animal depends on so much of the law relating to liability as does not include the common law abrogated by sub-s (2).

(2) Any common law qualification, restriction, exclusion, extension or imposition of liability that had effect immediately before the commencement of this Act and related exclusively to liability for damage caused by an animal is hereby abrogated, whether or not:

(a) it related to the nature or propensity of an animal or any class of animal, or knowledge of any such nature or propensity, or

(b) it applied generally or in the circumstances of escape on to a highway or in any other particular circumstances.

\(^7\) Lord Simonds in Read v I. Lyons & Co Ltd [1947] A.C. 156. At 182.

\(^8\) See also ss 54 and 58 of the Companion Animals Act 1998 (NSW) which provide that the fact that a dog has at any time been declared to be dangerous or is a restricted dog under the Act does not affect the civil liability of the owner of the dog in any other proceedings.

\(^9\) The occupier of premises may be liable if injury is caused to a lawful entrant by the occupier’s dog: Kavanagh v Stokes [1942] I.R. 596. Although the liability of an owner or keeper of an animal usually lies in negligence or trespass, it may also lie in nuisance: Leeman v Montagu [1936] 2 All ER 1677.

\(^10\) ‘Liability’ is defined in s 6 to mean ‘liability in damages for tort.’
The effect of this section is to preserve common law actions in relation to liability for damage caused by animals (see negligence, trespass and nuisance, below). However, it is subject to the qualification that historical common law rules relating specifically to damage caused by animals, such as the scienter action, no longer apply.\footnote{From the seventeenth century the common law recognised, for the purposes of the scienter action, a division of animals into two classes - animals ferae naturae (wild) and animals mansuetae naturae (tame). In respect of an animal ferae naturae it was presumed that the animal was dangerous and that the keeper of it knew this. If a ‘tame animal’ had a vicious propensity known to the keeper, the keeper was liable for damage caused by the animal: Besozzi v Harris (1858) 1 F. & F. 92 at p 93; 175 E.R. 640 at p 641.}

**Negligence**

Liability in negligence for damage caused by animals may be established if: (a) there been a failure to take reasonable care and (b) damage has resulted.

The tort of negligence employs the criterion of ‘reasonableness’. This involves a consideration of what was ‘reasonably foreseeable’ in order to determine the person or persons upon whom the duty to take care is imposed.\footnote{For example, a person may be liable in negligence if he or she brings a dog onto the highway and does not exercise reasonable care controlling the dog: Gomberg v Smith, [1962] 1 All E.R. 725.}


**Trespass**

The tort of trespass may result in liability for damage caused by animals in the following circumstances: (a) the deliberate driving of animals onto land may constitute the tort of trespass to land and (b) deliberately causing animals to inflict physical injury upon a person may constitute the tort of trespass to the person.\footnote{An owner who commands a dog to attack a person or to enter onto another’s land may be liable in trespass: Cronin v Connor [1913] 2 I.R. 119.}

**Nuisance**

The essence of the tort of nuisance is damage to, or impairment in, the use and enjoyment of land occupied by another where the damage or impairment caused is more than what the occupier ought, having regard to the prevailing general standards of the locality, reasonably to accept. If the keeping upon land of animals causes emanations such as noise or smell which impairs the use and enjoyment of land occupied by another, an action in nuisance may lie.\footnote{If a person keeps animals in such numbers that they unreasonably interfere with his or her neighbour’s enjoyment of his or her property then the owner of the animals may be liable in nuisance: O’Gorman v O’Gorman [1903], 2 I.R. 573. An owner may be liable if the noise or smell which their animals emit unreasonably interferes with the quiet enjoyment of an adjoining property: William Aldred’s Case (1610), 9 Co. Rep. 576.}

**Occupier’s liability**

The occupier of premises may be liable if injury is caused to a lawful entrant by an animal kept on the premises.\footnote{Kavanagh v Stokes [1942] I.R. 596. Although the liability of an owner or keeper of an animal usually lies in negligence or trespass, it may also lie in nuisance: Leeman v Montagu [1936] 2 All ER 1677.}

In relation to the civil liability of an occupier for damage done by an animal see s 8 of the Animals Act 1977 which provides:

**Danger from presence or behaviour of animal on premises**

Where damage results from a danger to a person entering premises, being a danger due to the state of the premises or due to things done or left undone on the premises, the liability (if any) of a person as an occupier of the premises in respect of the damage depends only on the law relating to the liability of occupiers, notwithstanding that the danger is, or is associated with, the presence or behaviour of an animal in or on the premises.
The effect of this provision is to render the occupier of premises liable under the general law relating to occupier’s liability for damage caused by an animal on the premises as if the animal was an element of the ‘state of the premises.’

Statutory framework in New South Wales

Prior to the enactment of the Companion Animals Act 1998 and the Impounding Act 1993, the Dog Act 1966 (NSW) and the Local Government Act 1993 (NSW) constituted the statutory regime relating to responsible pet ownership. With the enactment of the Companion Animals Act 1998, the Dog Act 1966 was repealed. However, the Local Government Act 1993 (NSW) continues to provide local government councils with a range of specific statutory powers in relation to companion animals.

For example, s 124 Local Government Act 1993 empowers a council to order the occupiers of premises not to keep birds or animals if the birds or animals are of an inappropriate kind or number or are kept inappropriately. The number of dogs or cats that are able to be kept on premises can be restricted by a council by giving an order to the occupier in terms of order no 18 in the Table to s 124 of the Local Government Act 1993:

Local Government Act 1993 – Section 124

A council may order a person to do or to refrain from doing a thing specified in Column 1 of the following Table if the circumstances specified opposite it in Column 2 of the Table exist and the person comes within the description opposite it in Column 3 of the Table.

<table>
<thead>
<tr>
<th>To do what?</th>
<th>In what circumstances?</th>
<th>To whom?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not to keep birds or animals on premises, other than of such kinds, in such numbers or in such manner as specified in the order</td>
<td>Birds or animals kept on premises are: (a) in the case of any premises (whether or not in a catchment district) - of an inappropriate kind or number or are kept inappropriately, or (b) in the case of premises in a catchment district - birds or animals (being birds or animals that are suffering from a disease which is communicable to man or to other birds or animals) or pigs</td>
<td>Occupier of premises</td>
</tr>
</tbody>
</table>

Local government councils in NSW also have a range of powers under the Companion Animals Act 1998 (NSW) relating to planning, service provision, community education and enforcement.

Section 6A of the Companion Animals Act 1998 sets out the following ‘general duties of councils’:

1. A council is required:
   (a) to promote awareness within its area of the requirements of this Act with respect to the ownership of companion animals, and
   (b) to take such steps as are appropriate to ensure that it is notified or otherwise made aware of the existence of all dangerous and restricted dogs (including dogs that might reasonably be considered to be the subject of a declaration under Division 1 or 6 of Part 5) that are ordinarily kept within its area,

2. Subsection (1) does not limit the other functions that may be conferred or imposed on a council by or under this Act.

---


17 Including power to seize animals, issue on-the-spot fines, nuisance orders and to declare dogs dangerous. In addition, a number of councils have developed Local Companion Animals Management Plans in consultation with their communities.
Companion Animals Act 1998 (NSW)

The long title of the Act is stated as:

An Act to provide for the identification and registration of companion animals and for the duties and responsibilities of their owners; and for other purposes.

The Companion Animals Act commenced in October 1998. The Act has as its principle objective ‘to provide for the effective and responsible care and management of companion animals’: s 3A. The Act contains provisions relating both to the responsibilities and liabilities of owners of companion animals.

What is a companion animal?

‘Companion animal’ is defined in s 5 Companion Animals Act 1998 (NSW) to mean:

(a) a dog;
(b) a cat;
(c) any other animal that is prescribed by the regulations as a companion animal.

Prior to the development of a statutory definition of ‘companion animal’, the High Court held that the phrase ‘domestic animal’ referred to ‘such animals as are commonly kept and cared for in or about human habitations’.19

The fact that an animal is not strictly a ‘companion’ does not prevent it from being a companion animal for the purposes of the Companion Animals Act 1998. For example, all dogs are regarded as companion animals including working dogs on rural properties, guard dogs and police dogs.

‘Owner’ is defined in s 7 to mean:

(1) Each of the following persons is the ‘owner’ of a companion animal for the purposes of this Act:
   (a) the owner of the animal (in the sense of being the owner of the animal as personal property),
   (b) the person by whom the animal is ordinarily kept,
   (c) the registered owner of the animal.20

Note the reference in paragraph (a) in relation to the status of animals as ‘personal property’.

The legislation provides a framework for the identification and registration of companion animals, and for the duties and responsibilities of their owners and councils. It aims to actively promote the welfare of companion animals through responsible ownership and to strike a balance between the needs of people in the community who own companion animals and those who do not. Responsible ownership is understood to mean considering the interests of other community members in relation to noise and the impact which companion animals may have on neighbours and in public places. In addition, the Act aims to strike a balance between the interests of animals and their owners and those of the environment and wildlife.

The progress of the Companion Animals Act, from its first draft through to the final bill in Parliament, ‘carries the distinction of being the most widely debated Act ever in the history of the NSW Parliament, with over 10,000 submissions received and over two days of debate, before the bill was eventually passed.’21

---

18 A comprehensive review of the Act conducted in 2004/05 concluded that following five years of operation, the implementation of the Act and subsequent amendments has been ‘thorough and ultimately successful’. The review demonstrated that for the most part, animal owners embraced the requirements of the Act and, particular, the compulsory micro chipping and registration of dogs and cats.
19 CJ Dixon, Attorney-General (SA) v Bray (1964) 111 CLR 402.
20 In Zappia v Allsop the NSW Court of Appeal held that under the Dog Act 1966 (NSW) a person was the ‘owner’ of a dog for the purposes of the Act if ‘he/she is the owner of the dog, ordinarily keeps the dog or is the registered owner of the dog’. See Zappia v Allsop (unreported NSWCA, Kirby P, Clarke and Handley JJA, CA40192 of 1993, 17 March 1994, BC9402327).
Key features of the Act

There are four key components to the Act:

- Permanent identification by microchip;
- Lifetime registration for cats and dogs;
- A single statewide Companion Animal Register;
- Community education.

Permanent identification

The Act requires cats and dogs to be ‘permanently identified’ by the implanting of a microchip from 12 weeks of age or at time of sale, whichever occurs sooner: Companion Animals Act 1998 (NSW): s 8.

Clause 8 of the Companion Animals Regulation 2008 (NSW) sets out the information to be recorded for identification purposes.

The following information is the identification information for companion animals for the purposes of the Act:

(a) the unique identification number allocated to the microchip implanted in the animal in connection with the identification of the animal,

(b) in the case of a category 1 or category 2 companion animal, the name of the authorised identifier who carried out, or supervised, the implantation of the microchip and, if the authorised identifier is accredited, their authorised identifier number,

(c) the date on which the animal was identified,

(d) the full name and residential address of the owner of the animal together with any other available contact details for the owner,

(e) the address of the place at which the animal is ordinarily kept,

(f) the name of the council of the area in which the animal is ordinarily kept,

(g) the type of animal (dog or cat), and the breed of the animal,

(h) the animal’s date of birth (known or approximate),

(i) the animal’s gender,

(j) the animal’s colour and details of any unusual or identifying marks on the animal.

From 1 October 1999 any microchip inserted in a cat or dog must be of the International Standard Organisation (ISO) standard.22

To ensure the welfare of animals and the integrity of the registration system, the Companion Animals Act provides for a system of authorised identifiers: see s 70 of the Act and cl 6 of the Companion Animals Regulation 2008 (NSW): cl 6. All veterinarians registered with the NSW Veterinary Surgeons Boards are automatically authorised identifiers.

Lifetime registration


The Companion Animals Act replaces the old system of annual registration under the Dog Act with a lifetime registration system. Owners of cats and dogs now only have to pay a single registration fee for the lifetime of their animals and the costs of registration is reduced for de-sexed animals: Companion Animals Regulation 2008 (NSW): cl 17. Micro chipping is a condition of registration: cl 19.

---

22 The NSW Department of Local Government has power under clause 6(1) of the Companion Animals Regulation 1999 to issue orders relating to the specification of approved transponders (microchips).
NSW Companion Animals Register

Under the repealed Dog Act each of the state’s 177 local councils maintained their own dog register. These individual council registers were not necessarily compatible and a council only had access to its own register. This system sometimes resulted in animals being euthanased before their owners could trace them to a council area different to where the animal was registered.

To address this problem, the Companion Animals Act established a single state wide Companion Animals Register which better enables councils to contact the owner of seized animals: s 74. Information contained on the Register can only be accessed by authorised users for the purposes of enforcing the Companion Animals Act: s 75. Nearly 1.2 million cats and dogs are currently listed on the Companion Animals Register.

Companion Animals Fund

The Act establishes a Companion Animals Fund which is made up of registration and other fees, payments from Parliament and the Greyhound Racing Authority (NSW): s 84. The funds are applied to meet expenditure incurred in the administration of the Act, and to councils for purposes that relate to the management and control of companion animals in its area: s 85.

Review of the Act

In June 2003 a comprehensive 5-year review of the Companion Animals Act was tabled in Parliament. The purpose of the review, required by s 97 of the Act, was ‘to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.’


Responsibilities for control of cats

With the introduction of the Companion Animals Act 1998 the management of cats became a new issue for most councils. At the time the legislation was being debated, the introduction of cat controls was controversial. The final controls for cats are significantly less severe that those for dogs, with only five provisions (Division 2: Part 4, ss 29–32) which specifically address cats. The Companion Animals Advisory Board has suggested that ‘any attempt to simply apply provisions applicable to dogs to cat issues is not appropriate’ and that ‘what is needed is application of common sense to solving some of the cat issues’ with regard to the interests of the cats, the owners of cats, aggrieved persons and the environment.23

Section 30 of the Act provides that cats are prohibited in food preparation/consumption areas and in wildlife protection areas and that if a cat is one of these prohibited places the owner is guilty of an offence and the cat can be seized by any person ‘for the cat’s own protection’.

Section 31 of the Act contains provisions relating to ‘nuisance’ cats. A cat is a nuisance if it:

- makes a noise that persistently occurs or continues to such a degree or extent that it unreasonably interferes with the peace, comfort or convenience of any person in any other premises, or
- repeatedly damages anything outside the property on which it is ordinarily kept.

Section 31A provides that if an authorised officer of a council is satisfied that a cat is a nuisance, the officer must give notice to the owner of the cat of the officer’s intention to issue an order under s 31(2). The owner has 7 days after the date the notice is given in which to object to the proposed order. If the owner does object within that time, the authorised officer must consider the objection before deciding whether or not to issue an order requiring the owner to prevent the behaviour that is alleged to constitute the nuisance.

Section 32(1) gives any person the authority to seize a cat where:

- such an action is ‘reasonable and necessary’ for the protection of any person or animal (other than vermin) from injury or death.
Section 32(3) gives the occupier of land the authority to injure or destroy a cat if:

- the cat enters any enclosed lands and approaches any animal being farmed on the land and the occupier reasonably believes that the cat will molest, attack or cause injury to any of those animals.

Section 32(4) gives an authorised officer the authority to injure or destroy a cat if:

- the cat is found attacking or harassing an animal (other than vermin) within a wildlife protection area if there is no other ‘reasonably practicable’ way of protecting the animal.

Section 32(7) provides that ‘nothing in this section authorises a contravention of the Prevention of Cruelty to Animals Act 1979’.

Section 32(8) provides that the authority conferred by this section to destroy a cat extends only to authorising the destruction of the cat in a manner that causes it to ‘die quickly and without unnecessary suffering’.

Think

1. The principal object of the Companion Animals Act 1998 (NSW) is to ‘provide for the effective and responsible care and management of companion animals’:
   (a) identify some of the ways in which the Companion Animals Act regulates the behavior of humans with respect to the care of companion animals;
   (b) identify some of the ways in which the Act regulates the behavior of humans with respect to the management of companion animals.

2. With reference to relevant legislative provisions, what would you identify as the central concerns of the Companion Animals Act 1998?

3. Section 4 of the Act declares that ‘the protection of native birds and animals is an objective of animal welfare policy in the State’. With reference to relevant legislative provisions, to what extent does the Companion Animals Act 1998 give effect to this policy?

4. Can a cat wandering in a public place be seized under s 32? Can a cat wandering on someone’s private property be seized under s 32? Consider with reference to the following:

   There is no legal notion of a ‘stray cat’. Unlike a dog (see below), an owner is not required to have a cat under ‘effective control’ in the same way as is required for a dog. However, a cat may be seized under s 32 of the Act if that action is ‘reasonable and necessary’ in the circumstances set out in that section. This has been interpreted by some to mean that any cat can be seized because if left at large, the cat might be hit by a car, attacked by dogs, mistreated by people or treated in such a way as to cause ‘injury or death’. The Companion Animals Advisory Board, however, suggests that this is a liberal interpretation of the Act and one open to abuse. The Board argues that s 32 should only be applied in exceptional circumstances and not used as a surrogate means for seizing ‘stray’ cats in the same way that dogs can be seized. That is, it should only be applied where a genuine need to protect any person or animal can be demonstrated. To date, the interpretation and application of s 32 and what is ‘reasonable and necessary’ is uncertain since there has been no judicial ruling or precedent established.

5. If your neighbour’s well fed companion cat has wandered onto your property to stalk birds, are you legally entitled to trap it and take it to the pound?

6. Do you think that Part 4 (ss 31, 31A, 32) of the Companion Animals Act 1998 provides wildlife with sufficient protection from cats? Should NSW enact legislation similar to the Victorian Domestic (Feral and Nuisance) Animals Act 1994 which seeks to address community concerns relating to damage to the environment?

7. Should there be a legally enforceable ‘cat curfew’? Argue both for and against the imposition of such a curfew having regard to the interests of (i) cats, (ii) cat owners, (iii) the community and (iv) the environment.
Responsibilities for control of dogs

As noted earlier in this topic, there are an estimated 3.51 million dogs in Australia, 1.2 million of which are in NSW. As seen above, while cats and their owners are subject to some regulatory controls under the Companion Animals Act, these are insignificant compared to the regulatory provisions relating to dogs and their owners.24

Dog ownership and dog control

Part 3: Divisions 1 and 2, Part 5: Divisions 1–7

Effective control of dogs

The Companion Animals Act 1998 (NSW) provides:

- The owner of a dog must take all reasonable precautions to prevent the dog from escaping the property in which it is kept: s 12A
- Dog owners are required to have their dog(s) under the effective control of some competent person by means of an adequate chain, cord or leash when in public places: s 13(1). Exceptions to this requirement are listed in s 13(5) to include:
  - a dog accompanied by some competent person in an area declared to be an off-leash area by a declaration under this section (but only if the total number of dogs that the person is accompanied by or has control of does not exceed 4), or
  - a dog engaged in the droving, tending or working of stock, or
  - a dog being exhibited for show purposes, or
  - a dog participating in an obedience class, trial or exhibition, or
  - a police dog, or
  - a corrective services dog, or
  - a dog secured in a cage or vehicle or tethered to a fixed object or structure.
- While ‘effective control’ is not defined in the Act, a dog is not considered to be under the effective control of a person if the person has more than 4 dogs under his or her control: s 13(2)(b)
- Councils are required to provide at least one public place in the area of a local authority that is an off-leash area, although owners using these areas are still expected to have control of their animals: s 13(6)
- It is an offence if the owner does not remove their dog’s faeces from any public place and properly dispose of them: s 20(1):
- Councils are required to provide dog waste bins in areas where dogs are usually exercised: s 20(2)
- Dogs are prohibited in food preparation and consumption areas; children’s play areas; school grounds and child care centres and wildlife protection areas. Councils may also prohibit dogs in specified recreation, public bathing and shopping areas: s 14
- The Companion Animals Amendment (Outdoor Dining Areas) Act 2010 commenced on 15 June 2010. It introduced a new s 14A into the Act providing that dogs are allowed in outdoor dining areas in certain circumstances. The provision is intended to ‘balance the convenience of having pets in cafes with the protection of public health and safety’.

Section 14A(1) provides:

Dogs not prohibited in outdoor dining areas in certain circumstances

(1) The relevant legal restrictions do not prohibit a dog (other than a dangerous or restricted dog) from being in an outdoor dining area if:

---

24 As with dogs, kittens and cats are required to be micro chipped and registered. Cats are prohibited from food preparation and consumption areas and wildlife protection areas in the same way as dogs. Cats which persistently make noise or repeatedly damage anything outside the property where they are kept may be subject to a nuisance order in the same way as dogs.
(a) the dog is under the effective control of some competent person and is restrained by means of an adequate chain, cord or leash that is attached to the dog, and
(b) the person does not feed the dog or permit the dog to be fed, and
(c) the dog is kept on the ground.

**Meaning of ‘effective control’**

In *Ryde City Council v Pedras* the court considered whether a person not present at the time of an offence was ‘in effective control’ of the dog at the time.25 The defendant, during a period of absence, had left the general care and control of his dog to his wife and children. The dog was found in a public place although it was uncertain how it got there. At first instance the judge held that the defendant was not in ‘effective control’ of the dog at the relevant time and identified the wife and children as those in ‘effective control’ of the dog.

On appeal Giles JA stated:

There is a contravention of s 13, for the purposes of s 13(2), in the circumstances set out in s 13(1); that is, where a dog is in a public place not under a competent person’s effective control in the required manner. Section 13(2) then provides that if the section is contravened there is guilt of an offence, either guilt of the owner of the dog or guilt of another person who was in charge of the dog at the time. These are alternatives, the second being conditional on an additional fact. The owner is guilty if the owner was present at the time of the offence. The other person may be guilty if the owner was not present at the time of the offence.

For the second of the alternatives to operate, it is necessary that the owner was not present ‘at the time of the offence’: unhappy wording but meaning at the time the dog was in a public place not under the control of a competent person as stated in s 13(1). It is also necessary that another person was in charge of the dog at the time of the offence. The owner of the dog is guilty of an offence pursuant to s 13(2)(a) unless the dual requirements in s 13(2)(b) are fulfilled, in which event the other person is guilty of an offence pursuant to s 13(2)(b).

In the present case the dog was in a public place and was not under the effective control of a competent person in the required manner. The defendant was the owner of the dog, but was not present at the time of the offence. Accordingly, and subject to the defendant’s submissions concerning s 12A of the Companion Animals Act next mentioned, whether the defendant was guilty of an offence turned on whether his wife and/or children were in charge of the dog at the time of the offence.

Putting the construction issue in accord with the arguments as described by Harrison J, being in charge of the dog at the time of the offence could mean having the general care and control of the dog, or could mean having the particular control of the dog when the dog was in the public place. In my opinion, the latter is the correct construction. The section is concerned with the control of dogs in public places through the exercise of control by the owner of the dog or by some other person who is in charge of the dog. The words ‘at the time of the offence’ and ‘at that time’ make it clear that being in charge is directed to the effective control of the dog which should be exercised but is not being exercised. Being in charge of a dog means more than responsibility for its general care and control; it means having the particular responsibility for its control when the dog is in the public place.

Accordingly, the judge was wrong in law to be satisfied that the defendant’s wife and/or children were in charge of the dog because the dog had been left in their care and control.

**Think**

1. Do you think that the distinction which Giles JA makes between ‘general’ control and ‘particular’ control is a valid one? Why or why not?
2. Do you agree that, as a matter of statutory construction, a person in whose care and control a dog had been left but who is not present when the dog is in a public place, cannot properly be construed as a person in ‘effective control’ of the dog? Do you think that such a construction defeats the purposes of the statutory provision? Provide reasons.
3. What are some of the implications of this decision for absent dog owners and for those to whom a dog’s care is entrusted?

---

25 *Ryde City Council v Pedras* [2009] NSWCCA 248
Nuisance orders

Section 21 provides for ‘nuisance orders’ where a dog:

- is habitually at large
- makes a noise, by barking or otherwise, that persistently occurs or continues to such a degree or extent that it unreasonably interferes with the peace, comfort or convenience of any person in any other premises
- repeatedly defecates on property (other than a public place) outside the property on which it is ordinarily kept
- repeatedly runs at or chases any person, animal (other than vermin and, in relation to an animal, otherwise than in the course of droving, tending, working or protecting stock) or vehicle
- endangers the health of any person or animal (other than vermin and, in relation to an animal, otherwise than in the course of droving, tending, working or protecting stock), or
- repeatedly causes substantial damage to anything outside the property on which it is ordinarily kept.

If an authorised officer of a council is satisfied that a dog is a nuisance, the officer may, after complying with s 21A (similar in terms to s 31A in relation to cats) , issue an order to the owner of the dog requiring the owner to prevent the behaviour that is alleged to constitute the nuisance.

Action to protect persons and property against dogs

It is an offence if a dog rushes at, attacks, bites, harasses or chases any person or animal, whether or not any injury is caused. It is an offence for a dog to attack any person or animal in any public or private place, including the property where it is usually kept.

Section 16(1) of the Act provides that if a dog ‘rushes at, attacks, bites, harasses or chases any person or animal’ (other than vermin), whether or not any injury is caused to the person or animal the owner of the dog is guilty of an offence.

In relation to ‘dangerous’ or ‘restricted’ dogs’ (see below) the owner of such a dog is guilty of an offence if:

- the dog attacks or bites any person (whether or not any injury is caused to the person); and
- the incident occurs as a result of the owner’s failure to comply with any one or more of the requirements of ss 51 or 56 (see below) in relation to the dog.

Section 16(2) provides that it is not an offence under s 16(1) if the incident occurred:

- as a result of the dog being teased, mistreated, attacked or otherwise provoked, or
- as a result of the person or animal trespassing on the property on which the dog was being kept, or
- as a result of the dog acting in reasonable defence of a person or property, or
- in the course of lawful hunting, or
- in the course of the working of stock by the dog or the training of the dog in the working of stock.

Authorised council officers have powers to seize a dog which has attacked within the previous 4 hours if the dog cannot be secured on its own property. Stronger penalties apply if a dog is encouraged to attack (see s 17 Companion Animals Act 1998; s 35A Crimes Act 1900) or if the attacking dog is one which has been declared dangerous or is a restricted breed (see below).

Section 17(1) deals with situations where a person urges a dog to attack another person or animal:

A person who sets on or urges a dog to attack, bite, harass or chase any person or animal (other than vermin) is guilty of an offence, whether or not actual injury is caused.

The penalties that apply for such an offence are severe in the case of restricted or dangerous dogs and conviction for an offence under this section results in permanent disqualification from owning a dog or from being in charge of a dog in a public place: s 23.
Section 17(2) provides that s 17(1) does not apply to something done by a person:
- in the reasonable defence of a person or property,
- in the proper performance of the person’s duties as a police officer or correctional officer
- in the course of the use of a dog for the working of stock or the training of a dog in the working of stock,
- in the course of lawful hunting.

Section 18 of the Act provides that a dog that has attacked or bitten (whether or not any injury is caused to a person or animal by the dog’s attack or bite) may be secured or seized by an authorised officer or by any other person if the dog is on property owned or occupied by the person.

Section 18(3) provides that if the dog is on property that an authorised officer has reason to believe is occupied by the dog’s owner, the officer may seize the dog only if the officer is satisfied that:
- the dog cannot be kept adequately secured on that property, or
- the dog cannot be kept under the effective control of some competent person while it is on that property, or
- the owner of the dog has repeatedly failed to keep the dog secured on that property or under the effective control of a competent person while it is on that property (regardless of whether the dog is secured or under effective control at the relevant time).

Section 22(1) of the Act gives any person the authority to seize a dog where:
- Such an action is ‘reasonable and necessary’ for the prevention of damage to property.

Section 22(2) provides that any person may lawfully seize, injure or destroy a dog if:
- that action is reasonable and necessary for the protection of any person or animal (other than vermin) from injury or death.

Section 22(5) gives the occupier of land the authority to injure or destroy a dog if:
- the dog enters any enclosed lands and approaches any animal being farmed on the land and the occupier reasonably believes that the dog will molest, attack or cause injury to any of those animals.

Section 22(6) gives an authorised officer the authority to injure or destroy a dog if:
- the dog is found attacking or harassing an animal (other than vermin) within a wildlife protection area if there is no other ‘reasonably practicable’ way of protecting the animal.

Section 22(9) provides that ‘nothing in this section authorises a contravention of the Prevention of Cruelty to Animals Act 1979’.

Section 22(10) provides that the authority conferred by this section to destroy a dog extends only to authorising the destruction of the dog in a manner that causes it to ‘die quickly and without unnecessary suffering’.

Disqualification from owning or being in charge of dog

Section 23 of the Act provides that a person who is convicted of any of the following offences is permanently disqualified from owning a dog or from being in charge of a dog in a public place:
- an offence under s 16 (1A): offences where dog attacks person or animal
- an offence under s 17: dog must not be encouraged to attack
- an offence under s 35A of the Crimes Act 1900 (NSW): causing a dog to inflict bodily harm.

26 This provision reflects the common law position that in certain circumstances destruction or injuring of a dog may be justified or excused on grounds of necessity or self defence. See Charlton v Crafter [1943] SASR 158.
Liability for injury to person or damage to personal property

Section 25(1) provides that the owner of a dog is liable in damages in respect of:

- bodily injury to a person caused by the dog wounding or attacking that person, and
- damage to the personal property of a person (including clothing) caused by the dog in the course of attacking that person.

Section 25(2) provides that the section does not apply in respect of:

- an attack by a dog occurring on any property or vehicle of which the owner of the dog is an occupier or on which the dog is ordinarily kept, but only if the person attacked was not lawfully on the property or vehicle and the dog was not a dangerous dog or restricted dog at the time of the attack, or
- an attack by a dog that is in immediate response to, and is wholly induced by, intentional provocation of the dog by a person other than the owner of the dog or the owner’s employees or agents.

In *Eadie v Groombridge* [1992] NSWCA 61 the Court considered the meaning of s 20 of the *Dog Act 1966* (NSW) which was similar in terms to s 25 of the *Companion Animals Act 1998.* In that case a German Shepherd dog ‘came at’ the plaintiff motorcycle rider from the footpath. The rider hit the dog, killing it and injuring himself. The owner of the dog had a fully fenced yard but was aware that the dog was able to jump over the gate. At the relevant time the defendant was sick in bed and his family had left the premises leaving the gate open. The case involved a common law negligence action and a statutory action pursuant to s 20 of the *Dog Act.* The court at first instance found for the plaintiff on both counts and the defendant appealed. Meagher JA defined ‘attack’ as conduct by the dog that indirectly causes injury or wounding.

He said:

It is sufficient to conclude that in the case of this particular dog, and the recognised need to fence it in, the owner was negligent if he did not adopt some precaution to ensure that the gate once opened did not remain open … I would add that I also agree with the trial judge on the question arising under s 20(1) of the *Dog Act.* There was an ‘attack’: the plaintiff’s evidence that the dog ‘came at me’, which was accepted by his Honour, proves that. There was a ‘wounding’ within the section. The Plaintiff’s skin was broken. This is sufficient to constitute wounding for the purpose of the criminal law … Such an injury also satisfies the requirements of s 20 …

One can be ‘wounded’ by a dog even if the beast does not lacerate one’s flesh. It is well established that an accused whose conduct has indirectly caused the wounding of another may be convicted for that wounding … I can discern no reason why wounding which is an indirect result of an attack by a dog should fall outside the section.

The liability of the owner under s 20 (1) depends upon findings that bodily injury was caused to a person by the dog wounding that person and that this occurred in the course of the dog’s attacking that person. I am inclined to think that ‘attacking’ is an act of hostility or aggression … Section 20 (2) (b) excludes from the application of subs(1) ‘an attack by a dog which is in immediate response to, and is wholly induced by, intentional cruelty to, or intentional provocation of, the dog by a person other than the owner of the dog, his servants or his agents.’ … If … a person in the street holds out a juicy bone to a dog and the dog in the course of a natural but enthusiastic acceptance of the offer wounds the offeror, it is not, in my opinion, ‘attacking’ the offeror. No more is a dog attacking a person if it knocks over a person in the course of chasing a cat or, while running across the road, causes injury to a person driving a motor vehicle.

…

The purpose of the new s 20 was to make it clear that the conduct of a dog which was relevant for the imposition of liability without fault was that of the dog attacking a person. I am not, at this time, persuaded that a dog coming onto a road and injuring a person by failing … to pay sufficient attention to the presence of other users of the highway’ or running beside a motor cycle and then turning onto or at the person riding the motor cycle or even ‘coming at’ such person ‘attacks’ that person.

---

Eadie v Groombridge [1992] NSWCA 61 was followed in Coleman v Barrat [2004] NSWCA 27 which held that under s 25 of the Companion Animals Act wounding caused by a dog includes indirect wounding. In that case a dog ran across a street and barked at the plaintiff who was riding a horse. The horse shied and the plaintiff was thrown from the horse and injured. The Court found that the dog caused the injuries.28

See also See Anne Penfold v John Betteridge & Carol Betteridge [2011] NSWDC 146,29 a case involving a claim for negligence both under the Civil Liability Act 2005 (NSW) and under s 25 of the Companion Animals Act.

The facts were that while walking her dog Sam, Sam was attacked by a neighbour’s dog, Buster. While trying to separate the dogs, Sam’s owner claims she was bitten by Buster. The defendants disputed causation, arguing that it was not possible to find with certainty which of the dogs was responsible for the plaintiff’s injuries. The District Court noted that s 25 of the Companion Animals Act imposes liability for injury caused both by a dog and by a dog’s attacking a person. Citing Coleman v Barrat [2004] NSWCA 27, the Court observed that it is not necessary, that the wounding referred to in s 25 be directly inflicted by the animal that was responsible for the attack. It was sufficient if it was established that a person suffered injury as a result of an act of aggression by the animal.

Liability for injury to animal

Section 27(1) of the Companion Animals Act 1998 provides that the owner of a dog is liable in damages in respect of injury to another animal (not including vermin) caused by the dog attacking or chasing it.

Section 27(2) provides that the section does not apply in respect of:

- a dog attacking or chasing another animal on any property or vehicle of which the owner of the dog is an occupier or on which the dog is ordinarily kept, but only if the dog is not a dangerous dog under this Act at the time of the incident, or
- a dog attacking or chasing another animal in the course of droving, tending, working or protecting stock, or
- a dog attacking or chasing another animal where the attacking or chasing is in immediate response to, and is wholly induced by, intentional provocation of the dog by a person other than the owner of the dog or the owner’s employees or agents, or
- a dog attacking or causing injury to another animal, where its doing so is in immediate response to, and is wholly induced by, an attack on the dog made by the other animal.

Think

1. You notice your neighbour’s dog barking and growling and attempting to dig into your pet rabbit’s enclosure in your back yard. You call your own dog and urge it to ‘attack’ the neighbour’s dog. Before chasing it away, your dog bites and injures the neighbour’s dog. Are you guilty of an offence? Cite relevant legislative provisions.

2. In the United States, the Tennessee Code s 44–17–403 provides for non-economic damages of up to $5,000 where a person’s pet dog or cat is killed or sustains injuries resulting in death caused by the intentional or negligent act of another.

Are damages available in Australia for death or injury to companion animals? Do you think that Australian law should provide companion animal owners with a similar statutory remedy as that in Tennessee? Why or why not?

3. With reference to relevant statutory provisions, outline the circumstances in which a person (not being an authorised officer) may lawfully kill or injure another person’s companion animal. Identify any applicable qualifications.

---

28 See also Partridge v Ireland [2002] NSWCS 654 in which the Court considered the operation of the exemption in s 23(2)(a) in relation to ‘an attack by a dog occurring on any property or vehicle of which the owner of the dog is an occupier or on which the dog is ordinarily kept, but only if the person attacked was not lawfully on the property or vehicle and the dog was not a dangerous dog or restricted dog at the time of the attack’.  
**Dangerous dogs**

Prior to the enactment of the *Companion Animals Act*, the *Dog Act 1966* and the common law governed liability for injuries caused by dogs.30

Part 5 of the *Companion Animals Act* sets out the provisions relating to dangerous dogs. A dog is regarded as ‘dangerous’ (s 33) if it:

- has, without provocation, attacked or killed a person or animal (other than vermin)
- has, without provocation, repeatedly threatened to attack or repeatedly chased a person or animal (other than vermin)
- has displayed unreasonable aggression towards a person or animal (other than vermin), or
- is kept or used for the purposes of hunting.31

**Meaning of ‘dangerous’**

In *Holland v Crisafulli* the Queensland Supreme Court held that the meaning of ‘dangerous’ is not restricted to ‘dangerous to humans’ 32

Wilson J stated:

> [T]he description of a dog as ‘dangerous’ or ‘ferocious’ relates to its nature or disposition. The issue is whether there was evidence from which the Council officer could be satisfied that the dog was dangerous. I do not accept that there is a logical distinction between a dog’s propensity to pursue animals such as sheep and its propensity to pursue other animals such as guinea pigs. There was no evidence that it is the natural instinct of a dog to pursue some animals (such as a guinea pig, be it wild or tame), but not others. Further, one of the elements of keeping a dangerous dog under proper control is ensuring that, at any time it is in a place to which the public has access, it has a muzzle securely fixed on its mouth in such a manner as will prevent it from biting ‘any person or other animal.’ The ordinance contains a definition of ‘animal’ which is inclusive – the word includes poultry and domesticated birds. While this may be some indication that undomesticated birds are not to be protected from prescribed dogs and dangerous dogs, there is no reason to distinguish between four-legged animals according to whether they are of a type which dogs normally pursue or whether they are wild or tame.

**Meaning of ‘attack’**

Section 16(1)(a) of the *Companion Animals Act* provides:

If a dog attacks any person or animal (other than vermin) whether or not any injury is caused to the person or animal, the owner of the dog is guilty of an offence.

Section 16(2)(a) provides that:

It is not an offence under this section if the incident occurred … as a result of the dog being teased, mistreated, attacked or otherwise provoked.

In *Lake Macquarie City Council v Morris* [2005] NSWSC 387 an American Pit Bull terrier and a Rottweiler allegedly severely attacked a Staffordshire terrier. The Council Ranger found the two dogs standing over the injured Staffordshire and as the Ranger approached, the Pit Bull lunged at the incapacitated Staffordshire. In construing s 16 of the *Companion Animals Act*, the court considered (i) the meaning of the term ‘attack’ and (ii) the onus of proof in relation to the provocation exemption under s 16(2). The defendant argued that the American pit bull terrier had been ‘otherwise provoked’ and that the evidentiary burden in relation to s 16(2) had been discharged by reference to a minor injury to the face of the Pit Bull terrier.

---


31 A dog is not, to be regarded as being kept or used for the purposes of hunting if it is used only to locate, flush, point or retrieve birds or vermin. If a hunting dog is declared to be a dangerous dog, the declaration does not necessarily mean that the dog cannot be used for the purposes of lawful hunting – see s 51 (3).

32 *Holland v Crisafulli* [1999] 2 Qd R 249.
Johnson J said:

The word ‘attack’ is not defined in the Companion Animals Act. Accordingly, the word should be given its ordinary and current meaning viewed in its statutory context.

Consideration has been given by courts to the meaning of the word ‘attack’ as it appeared in the repealed Dog Act 1966 … In Eadie v Groombridge (1992) 16 MVR 263 Meagher JA (Handley JA agreeing) accepted that evidence that a dog ‘came at’ a person in the street constituted an ‘attack’ under s 20(1) of the Dog Act. In the same case, Sheller JA concluded that ‘attacking’ is ‘an act of hostility or aggression’.

In Zappia v Allsop (Court of Appeal, 17 March 1994, unreported) at 8, Clarke JA (Handley JA agreeing) accepted that an ‘attack’ may be constituted by a growling and barking dog charging at a person.

In Crump v Sharah t/as Sharah Henville & Co [1999] NSWSC 884 at [24] Davies AJ applied the meaning attributed to the word ‘attack’ in Eadie v Groombridge [and] concluded that an actual contact is not necessary to establish an ‘attack’ and that it was sufficient, on the facts of that case, that two dogs joined in barking at a horse and that one of the dogs at least had nipped at its hocks.

In Coleman v Barrat [2004] NSWCA 27, Gzell J (Sheller JA agreeing), in considering the meaning of the word ‘attacking’ in s 25 of the Companion Animals Act, applied reasoning in Eadie v Groombridge and Crump v Sharah. In the circumstances of that case, Gzell J concluded that the actions of a dog running at a horse, at the rider’s stirrup and under the horse, whilst yapping aggressively constituted an ‘attack’.

Although it is necessary to bear in mind that the statutory context in which the word ‘attack’ was considered in these cases is not identical to that in s 16(1) of the Companion Animals Act, I consider that the word in s 16(1) may be accorded a similar meaning.

After noting that the cases referred to above were in respect of civil liability provisions, Johnson J concluded that this would not affect the meaning to be given to the word ‘attacks’ in s 16(1), a penal provision. He continued:

To constitute an ‘attack’ within s 16(1), it is clear from the section itself that it is not necessary that injury be caused. Nor, in my view, is it necessary that the prosecution prove that physical contact occurred between the dog and animal which is said to have been attacked. A court may conclude that a dog has attacked a person or animal for the purposes of s 16(1) if the dog’s actions involve an act of hostility or aggression of the type exemplified in the cases referred to above.

His honour then considered the question of who held the evidentiary burden in relation to s 16(2).

… Section 16(2) does not cast expressly an onus on the defendant. However, the matters referred to in s 16(2) are of a type which ordinarily would be, or ought to be, within the knowledge of the owner (s 16(1)(a)) or person in charge (s 16(1)(b)) of the dog at the relevant time. In a statute which places statutory responsibilities upon the owners and persons in charge of dogs, the statute ought not be construed as requiring the prosecution to negative, in every case, the existence of s 16(2) matters whether or not there is any evidence which raised such matters.

… Section 16(2) constitutes a defence to a charge under s 16(1) and … an evidentiary burden lies upon the defendant to raise the matter contained within s 16(2). Thereafter, once the issue is raised by the defendant, it is for the plaintiff, as prosecutor, to negative the matter beyond reasonable doubt … The evidentiary material raising the s 16(2) matter may be introduced by cross-examination of a prosecution witness or in the defence case and, once introduced, the ultimate burden lies upon the prosecution to negative the matter beyond reasonable doubt.

There is no definition of ‘provocation’ in the Companion Animals Act … It was not argued before me that s 16(2)(a) could only apply to a dog being ‘otherwise provoked’ by a person. I accept, for the purposes of s 16(2)(a), that a dog may be ‘otherwise provoked’ by another dog. The meaning of the words ‘otherwise provoked’ in s 16(2) is coloured by the other terms in the provision: ‘as a result of the dog being teased, mistreated, attacked or otherwise provoked’ … All of this is consistent with the ordinary and current meaning of the verb ‘provoke’.

In the context of a statute which speaks of provocation of a dog, it is only meaningful to consider what objective external events or actions existed or occurred which are capable of discharging the evidentiary onus upon an owner charged under s 16(1) of the Companion Animals Act so as to raise the issue of provocation.

Section 16(2) applied if ‘the incident’ occurred as a result of an occurrence which falls within s 16(2)(a)–(e). Reference to ‘the incident’ focuses attention upon the actions of the dog which are said to fall within s 16(1). In a given case, can it be said that there is evidence that ‘the incident’ involving a dog attacking
another dog occurred ‘as a result of’ the first dog being ‘provoked’ by the second dog? It is necessary that there be a causal nexus between the alleged provocation by the second dog and ‘the incident’ — the actions of the first dog which are said to involve an attack upon the second dog. The use of the phrase ‘as a result of’ indicates that a causal relationship is required …

Conduct constituting an ‘Incident’ under s 16(1) of the Companion Animals Act

A charge for an offence under s 16(1) of the Companion Animals Act may be based upon a single discrete act or a series of related acts which may be considered as a course of conduct.

…

It is possible to approach the charge involving the American pit bull terrier upon the basis that the actions of the dog as observed by the Council Rangers were capable in law of constituting an ‘attack’ in the sense referred to earlier in this judgment.

It might be inferred from the presence of the two attacking dogs in the vicinity of the badly injured Staffordshire terrier that those two dogs had occasioned injuries to the third dog. Such an inference was available in the same way as an inference may be drawn from circumstances where two men are found standing over a prone and badly injured man in the street and one of the two men was seen to swing a punch or a kick towards the prone person, even if no contact was made.

As I have stated earlier in this judgment, s 16(2) of the Companion Animals Act requires an understanding of ‘the incident’ falling within s 16(1) to which the defence provisions may apply. As the case was argued before me, s 16(2)(a) is raised once the accused person discharges an evidentiary burden that ‘the incident occurred … as a result of the dog being teased, mistreated, attacked or otherwise provoked’ ….

Johnson J concluded that it was not for the plaintiff to prove beyond reasonable doubt the absence of s 16(2) matters, and that those matters are not elements of the offence which a prosecutor must negative beyond reasonable doubt in every s 16 prosecution whether or not they have been raised. He held that it would be entirely contrary to the purposes of s 16 of the Companion Animals Act to place such a burden on a prosecutor in every case.

He concluded that:

The aggressive action of this dog, as observed by the Council Rangers, taken alone, was capable of constituting a prima facie case of an ‘attack’ under s 16(1) of the Companion Animals Act. Further, this evidence of aggressive conduct may be viewed with the other circumstances, including that dog standing over the badly injured Staffordshire terrier, so to give rise to a prima facie case of an offence under s 16(1) of the Companion Animals Act involving the American pit bull terrier with respect to the injuries sustained by the Staffordshire terrier.

Think

1. *Lake Macquarie City Council v Morris* and earlier authorities suggest that to constitute an ‘attack’ within s 16(1), it is not necessary that injury be caused or that physical contact occurred between the dog and person or animal which is said to have been attacked. A court may conclude that a dog has attacked a person or animal for the purposes of s 16(1) if the dog’s actions involve ‘an act of hostility or aggression’.

   If a person with a particular fear of dogs perceives that they are being attacked by a ‘yapping’ (but essentially ‘harmless’) dog, is this sufficient to ground an offence under s 16(1)? How would an authority determine whether a dog’s actions are ‘hostile or aggressive’?

2. Does a plaintiff have to establish that a hostile or aggressive dog had not been ‘teased, mistreated, attacked or otherwise provoked’ in order to establish an offence under s 16?
Causing a dog to inflict bodily harm

**Crimes Act 1900 (NSW) – Section 35A**

Under s 35A of the *Crimes Act* it is considered a serious offence to cause a dog to inflict ‘grievous’ or ‘actual’ bodily harm. That section provides:

35A Causing dog to inflict grievous bodily harm or actual bodily harm

(1) Cause dog to inflict grievous bodily harm

A person who:

(a) has control of a dog, and

(b) does any act that causes the dog to inflict grievous bodily harm on another person, and

(c) is reckless as to the injury that may be caused to a person by the act, is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(2) Cause dog to inflict actual bodily harm

A person who:

(a) has control of a dog, and

(b) does any act that causes the dog to inflict actual bodily harm on another person, and

(c) is reckless as to the injury that may be caused to a person by the act, is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

**Think**

What are the differences between the offences created in s 35A *Crimes Act 1900 (NSW)* and those created by s 17(1) of the *Companion Animals Act 1998*?

(Note the different use of language in the Acts. While s 35A of the *Crimes Act* refers to doing an act that ‘causes the dog to inflict … bodily harm’, s 17 of the *Companion Animals Act 1998* refers to ‘setting on or ‘urging’ a dog to ‘attack, bite, harass or chase any person or animal … whether or not actual injury is caused.’).

**Power to declare dogs dangerous**

**Section 34(1)** of the *Companion Animals Act 1998* provides that an authorised officer of a council, if satisfied that a dog is dangerous, may declare it to be a dangerous dog. A declaration can be made on the officer’s own initiative or on the written application of a police officer or any other person: s 34(2).  

There are higher penalties and more specific requirements on owners of dogs declared dangerous. In extreme cases a court can impose a lifetime ban on a person owning a dog. A council dangerous dog order has effect throughout the state and council officers have powers to seize a dog where the owner does not comply with the conditions of keeping a dangerous dog. Owners of dogs who are notified that their dog may be declared dangerous must ensure that their dog is on a leash and muzzled when away from the property where it is ordinarily kept until the matter is determined by council. If an owner does not comply with these conditions a council officer may seize the dog. Owners have a right to appeal a dangerous dog declaration and can request a council to repeal a dangerous dog order: s 41.

33 Section 44 also gives the Local Court power to declare a dog to be dangerous in any proceedings in that Court under the *Act*. 
**Section 35** provides that the authorised officer must give notice to the owner of a dog of their intention to declare the dog to be dangerous. The notice must set out:

- the requirements with which the owner will be required to comply if the declaration is made; and
- the owner’s right to object to the proposed declaration in writing to the authorised officer within 7 days after the date the notice is given.

If issued with a notice under s 35, the owner of the dog must ensure that at all times when the dog is away from the property where it is ordinarily kept:

- it is under the effective control of some competent person by means of an adequate chain, cord or leash that is attached to the dog and is held by (or secured to) the person: s 36(1)(a)(i);
- it has a muzzle securely fixed on its mouth in such a manner as will prevent it from biting any person or animal: s 36(1)(a)(ii).

These requirements must be complied with for 28 days after the notice has been given or until the authorised officer notifies the owner that the officer has made a dangerous dog declaration or has decided not to make it: s 36(2). An authorised officer may seize a dog that is the subject of a proposed declaration if satisfied that the requirements in s 36(1) have not been complied with in relation to the dog, or if the dog is not confined, tethered or restrained in such a way as to prevent it attacking or chasing a person lawfully at the property where the dog is ordinarily kept: s 36(3).

**Section 51** of the Act provides that he owner of a dog declared to be dangerous must ensure that:

- The dog is desexed (if not already) within 28 days after it is declared a dangerous dog,
- The dog must not at any time be in the sole charge of a person under the age of 18 years,
- While the dog is on property on which the dog is ordinarily kept, the dog must be kept in an enclosure that complies with the requirements prescribed by the regulations. A certificate of compliance in relation to the prescribed enclosure must be obtained by the owner of the dog: s 58H,
- One or more signs must be displayed on that property showing the words ‘Warning Dangerous Dog’ in letters clearly visible from the boundaries of the property on which the dog is ordinarily kept,
- The dog must at all times wear a collar of the kind prescribed by the regulations,
- Whenever the dog is outside its enclosure it must be under the effective control of some competent person by means of an adequate chain, cord or leash that is attached to the dog and that is being held by (or secured to) the person, and it must be muzzled in a manner that is sufficient to prevent it from biting any person or animal.

An owner of a dog who does not comply with any of the above requirements is guilty of an offence. Clauses 24–28 of the Companion Animal Regulation 2008 set out detailed specifications in relation to these requirements, including the enclosure requirements for dangerous or restricted dogs.

**Destruction and control**

A ‘control order’ is an order of a Court that the owner of a dog take such action (other than destroying the dog) within the period specified in the order as the Court thinks necessary to prevent, or reduce the likelihood of, the dog attacking or causing injury to persons or animals:

**Section 47(1) Companion Animals Act 1998** provides that a control order can be made by a Court in the following circumstances:

- in proceedings for an offence under ss 16, 17, 49, 51 or 56 of the Act, or under s 35A of the Crimes Act 1900,
- on an appeal under the Act against the declaration by an authorised officer of a council that a dog is dangerous or against a council’s refusal to revoke such a declaration,
- on the Court declaring the dog to be dangerous under Division 2 of the Act.

The action that a control order can require the owner of a dog to take includes:

- the desexing of the dog;
- the behavioural or socialisation training of the dog.
A ‘destruction order’ is an order of a Court that the owner of a dog destroy the dog or cause the dog to be destroyed, or that a dog be destroyed by some person authorised by the Court, within the period specified in the order:

Section 48(1) Companion Animals Act 1998 provides that a destruction order can be made by a Court in the following circumstances:

on conviction of the owner of the dog of an offence under s 35A of the Crimes Act 1900, or under ss 16, 17, 49, 51 or 56 of this Act,

on confirming the declaration by an authorised officer of a council that a dog is dangerous or a council’s refusal to revoke such a declaration.

A Court must not make a destruction order unless it is satisfied that the making of a control order, or an order permanently removing the dog from its owner will not be sufficient to protect the public from any threat posed by the dog: s 48(3). A destruction order is sufficient authority for the destruction of a dog. The dog must be destroyed in a manner that causes it to die quickly and without unnecessary suffering.

**Bad dogs or bad owners?**

**Textbook**

Chapter 5 – David Tong and Vernon Tava, ‘Moral Panics and Flawed Laws: Dog Control in New Zealand’

In this chapter, the writers challenge the focus of New Zealand’s Dog Control Act 1996, specifically its focus on breed-banning and on the law’s ‘troublesome presumption’ that any dog that attacks a person or animal must be destroyed as a consequence. While recognising a need for strong, clear and effective dog control legislation, they argue that the welfare of dogs must be ensured in the process.

The writers conclude that New Zealand’s dog control legislation is ‘based on a flawed perception of dogs as a threat to public safety, and has been ‘strengthened’ repeatedly in response to moral panics sparked by media coverage of extreme incidents.’ As a result, they suggest, ‘it focuses unduly on controlling perceived bad dogs, particularly of certain breeds, while failing to prevent bad owners.’

**Webcast 3.1**

‘Death of girl forces new thinking at dog review’, August 20 2011, (1.34 min)


This webcast considers an incident in 2011 involving a fatal attack on a 4 year old Victorian girl by a pit bull cross terrier deemed dangerous and subsequently destroyed.

**Think**

Do you agree with Tong and Tava that ‘[a] better dog control regime would focus less on criminalising dog attacks themselves, less of defining good and bad dogs, and more on ensuring that dog owners are equipped to ensure that their dogs do not attack others?’
Dog attack register

Clause 33A of the *Companions Animals Regulation 2008* requires all councils to report dog attacks in their area within 72 hours of receiving the information. A dog attack can include any incident where a dog rushes at, attacks, bites, harasses or chases any person or animal (other than vermin), whether or not any injury is caused to the animal or person.

‘Dog attack’ is defined in clause 33A(4) to mean:

- an incident that involves or is alleged to involve a dog rushing at, attacking, biting, harassing or chasing a person or animal (other than vermin), whether or not any injury is caused to the person or animal, but not including an incident that occurs in the course of:
  - (a)  lawful hunting, or
  - (b)  the working of stock by the dog or the training of the dog in the working of stock, or
  - (c)  the working or training of a police dog or corrective services dog.

The NSW Department of Local Government maintains a Dog Attack Register which provides detailed analysis of dog attacks and councils’ responses to them. The Dog Attack Register for the January – March 2010 quarter reported:

- 1122 reported dog attacks between January and March, up from 793 the previous quarter.
- Of these, 505 resulted in no injury or a minor injury, 131 required medical treatment and 30 required hospitalisation. No fatalities were reported in this quarter.
- Breeds most often involved in attacks included the Staffordshire bull terrier with 156 attacks, the Australian cattle dog with 93 attacks and the German Shepherd with 60.
- Councils issued 281 Penalty Infringement Notices for dog attacks reported in this quarter, an increase of 39 per cent from the previous quarter.
- Following the attacks, there were 114 dangerous dog declarations in this quarter, an increase from 100 in the previous quarter.
- Councils reported that 159 attacking dogs were destroyed in this quarter, an increase of 47 per cent from the previous quarter.

Restricted dogs

Division 6 of Part 5 of the Act, which commenced on 28 April 2006, empowers councils to declare a dog to be a dog of ‘restricted breed’. Division 6 also provides a mechanism to allow for both breed and temperament assessments for dogs that councils may declare as restricted dogs. In May 2007 the NSW Government announced its intention to ban certain dogs of restricted breeds including pit bull terriers, American Pit Bull Terriers, Japanese Tosas, Argentinean fighting dogs and Brazilian fighting dogs. Owners of restricted dogs are required to comply with similar provisions to those for dangerous dogs, including having the dogs muzzled when in public.

‘Restricted dog’ is defined in s 55 as follows:

The following dogs are ‘restricted dogs’ for the purposes of this Act:

- American pit bull terrier or pit bull terrier,
- Japanese tosa,
- dogo Argentino,
- fila Brasileiro,
- any other dog of a breed, kind or description whose importation into Australia is prohibited by or under the *Customs Act 1901* of the Commonwealth,
- any dog declared by an authorised officer of a council under Division 6 of this Part to be a restricted dog.

In NSW it is now an offence to breed, sell, acquire or give away a dog of restricted breed and existing restricted dogs must be desexed and closely confined, which is consistent with the current requirements for declared dangerous dogs: ss 56–57C.

**Restricted breed decisions**

For a recent restricted breed case in Victoria, see *Ngo v Melbourne City Council (General) [2012] VCAT 1697*. The case concerned whether a female dog, known as ‘Bella’ was a restricted breed dog under s 98A of the *Domestic Animals Act 1994* (Vic). The Victorian Civil and Administrative Tribunal was required to decide whether Bella was a restricted breed dog as defined under the *Act* and if so whether the Council’s declaration should be affirmed or set aside. After an exhaustive consideration of expert evidence, the Tribunal found that Bella did not fall within the approved standards for a breed of dog specified in the legislation as a restricted breed dog, and set the Council’s decision aside.

See also ‘Monash dog fight: Kerser a pit bull, says VCAT” in which the Tribunal had to determine whether Kerser met the standards of a restricted breed dog. If found to be a restricted breed, under Victorian law, the dog must be destroyed because it was unregistered. Kerser’s owner claims him to be an American Staffordshire terrier cross. In April 2013 the Tribunal concluded that:

“The overall impression of Kerser is one of compliance. He may not be a perfect example of a pit bull. However, such a dog probably does not exist. Even in the areas where he does not meet the standard to a substantial degree, he meets the standard to some degree and importantly in the areas of musculature and strength.”

**Breed and temperament assessment**

Where a council serves a notice of intention to declare a dog as a restricted dog (s 58A) the owner has 28 days to seek the opinion of an approved breed assessor to confirm the breed of the dog. If the dog is identified as neither a pure or cross breed of a restricted dog, the process ends and the dog is not restricted. If the dog is deemed to be a restricted breed of dog the council will make the declaration. If the dog is confirmed as a cross breed restricted dog the owner has the option to seek a temperament assessment conducted by an approved temperament assessor: s 58C. The Director General of the Department of Local Government has authority to approve both breed and temperament assessors to conduct breed identification assessments of dogs that are considered to be restricted for the purpose of Division 6.

A temperament assessment protocol has been developed in consultation with several leading animal behaviourists and animal welfare organisations and is designed to provide a temperament assessor with an informed judgment about the behaviour of a dog against identified criteria and whether or not it is likely, without provocation, to attack or bite another person or animal.

If the dog is assessed as not being a likely danger to the public, the dog will not be declared a restricted dog. If the temperament assessment indicates that this dog is a danger to the public and is likely, without provocation, to attack or bite any person or animal the council will declare the dog to be restricted. There is no appeal process from the breed and temperament assessments. Where owners do not comply with control provisions or ignore their responsibilities, councils are able to seize and destroy the dog: s 58G.

Since the commencement of Division 6 on 28 April 2006 some 63 breed assessments have taken place.

The assessment processes are outlined in the following document.

**Temperament assessment**

If a local council issues a notice of intention to declare a dog a restricted dog, the following assessment processes follow. The dog’s owner must continue to comply with the requirements in that notice until the assessment processes are finalised. A Temperament Assessor must provide a copy of the assessment statement to the owner of the animal within 3 working days of the assessment.


Notice to dog owner:

If your dog PASSES this assessment (ie: the temperament assessor has indicated that this dog is not a danger to the public and is not likely, without provocation, to attack or bite any person or animal):

1. Your dog will NOT be declared a RESTRICTED dog.
2. The temperament assessor who assessed your dog will provide the written statement to the local council that served the notice of intention to declare the dog restricted.
3. The council will record your dog’s breed and temperament statements on the NSW Companion Animals Register.

If your dog FAILS this assessment (ie: the temperament assessor has indicated that this dog is a danger to the public and is likely, without provocation, to attack or bite any person or animal):

1. The approved temperament assessor who conducted this assessment will send a copy of this statement to the local council that served the notice of intention to declare the dog a restricted dog.
2. The council will declare your dog to be RESTRICTED. You MUST then, by law, comply with the following control requirements as prescribed by Section 56 (1) (a)–(h) of the Companion Animals Act 1998, including:
   - Desex your dog within 28 days.
   - Display a sign on your property showing the words ‘Warning Dangerous Dog’ in letters clearly visible from the boundaries of the property.
   - Enclose your dog in its prescribed enclosure within 3 months. Your local council will give you specifications for the enclosure in which the dog must be kept. As soon as your dog is declared RESTRICTED, and until you have completed its enclosure, the dog must be sufficiently restrained to prevent a child from having access to it.
   - Collar your dog at all times with the prescribed collar required by law, whenever your dog is outside its enclosure.
   - Muzzle your dog securely enough to prevent your dog biting any person or animal, whenever your dog is outside its enclosure.
   - Leash your dog whenever it is outside its enclosure, with an adequate chain, cord or leash held by or secured to a competent person.
   - Control your dog when it is outside its enclosure. A competent person must accompany your dog. A maximum of two (2) dogs at one time can be under the control of a competent person, if one of the dogs is dangerous or restricted. The dog must not at any time be in the sole charge of a person under the age of 18 years.
   - Register your dog within 7 days, if it is not already registered.
   - Notify your Council that the dog:
     - has attacked or injured a person or animal (within 24 hours of the attack),
     - cannot be found (within 24 hours after the dog’s absence is noted),
     - has died (as soon as practicable),
     - is no longer being ordinarily kept in the area of the council, or that the dog is ordinarily being kept at a different location in the area of the council (as soon as practicable).
3. The temperament assessor who assessed your dog will send the assessment statement to the local council that served the notice of intention. The council will contact you regarding the outcome of this assessment.
4. The council that served the notice of intention will record your dog’s breed and temperament statements on the NSW.
Seizure and impoundment

Earlier in this topic we considered some of the circumstances in which authorised officers and other persons may seize a companion animal and the powers of councils to seize and destroy dangerous dogs under the Companion Animals Act 1998.

Companion animals can be seized under the Companion Animals Act in the following circumstances:

- s 13(3) authorises any person to seize a dog in a public place in contravention to s 13. However if the owner is present, a dog cannot be seized except by an authorised officer and only then if a contravention continues after the owner (or person in charge) has been told of the contravention.
- s 14(3) authorises any person to seize a dog that is in a place in which dogs are prohibited under the section. If the owner of the dog is present, the dog cannot be seized except by an authorised officer and only then if the owner (or person in charge) fails to remove the dog from the place when the officer directs the owner to do so.
- s 18 empowers anyone who owns or occupies a property to seize a dog that is on their property that attacks or bites a person or other animal (that is not vermin). Note s 18(6) where seizure is permitted whether or not any injury was caused by the bite or attack.
- s 22 empowers any person to seize, injure or destroy a dog if that action is reasonable and necessary for the protection of any person or animal from injury or death. Subsection 22(5) requires a ‘reasonable belief’ that the dog will molest, attack or cause injury.
- s 30: Seizure of cats in prohibited public places.
- s 32 Seizure of cats to protect persons and animals against cats.
- s 36 seizure of dogs subject of a proposed dangerous dog declaration if the requirements of the section have not been complied with in relation to the dog, the dog is not confined, tethered or restrained in such a way as to prevent the dog attacking or chasing a person lawfully at the property where the dog is ordinarily kept, or the dog is not registered.
- s 52 Dangerous dog may be seized if control requirements not complied with.
- s 57 Restricted dog may be seized if control requirements not complied with.
- s 57D Power to seize and destroy declared restricted dogs in certain circumstances.
- s 58B: Power to seize dog subject to restricted dog declaration if control requirements not complied with.
- s 58G Power to seize and destroy dangerous or restricted dog in certain circumstances.

Division 7 (ss 62A–69) of the Companion Animals Act 1998 sets out the procedures for dealing with seized or surrendered animals:

Section 62 of the Act provides that a person who seizes an animal under the authority of the Act must cause the seized animal to be delivered as soon as possible to its owner, to a council pound, or to any approved premises. Note that this section does not apply to dangerous and restricted dogs seized under ss 57D and 58G.

In the case of an animal that has been seized by a person who is not an authorised officer, the section is complied with if the person, as soon as possible after seizing the animal, makes an arrangement with an authorised officer for the animal to be delivered by the officer to its owner, a council pound or approved premises.37

Sections 63–67 set out the procedures for dealing with seized or surrendered animals. Note that an unclaimed seized or surrendered animal may be sold or destroyed: s 64. Council may impose fees and charges for animals for animals detained, including: release fees and maintenance charges: s 65.

37 This reflect the common law position that occupiers of land are entitled to seize trespassing animals and send them to the nearest pound: Peak Hill Municipal Council v Wright (1960) 6 LGRA 149.
Meaning of ‘lawful seizure’

In Klewer v Coffs Harbour City Council [2003] NSWSC 637 the appellant’s dogs, which were ordinarily confined on her premises, escaped and were captured by golf course personnel in a public place. The dogs were held in private premises pending their seizure by an authorised council officer the following day. The appellant submitted that the dogs were unlawfully seized and detained under s 62 and requested that the dogs be returned to her and not destroyed. The court discussed the lawfulness of the seizure under s 62 of the Companion Animals Act 1998 having regard to the provisions of s 13(3) which empowers any person, including an authorised officer, to seize a dog that is in a public place in contravention of the section. The Court reasoned that although s 13 refers to seizure of a dog in a public place and the dogs in this case were seized by the council officer on private land and irrespective of the wording of s 62 that the dog must be delivered to a ‘council pound’ and not a council officer, the seizure was held to be lawful.

After noting that s 62 ‘is directed to the seizure, under the authority of the Act, of an animal’ the Supreme Court concluded that s 13(3) provided the authority for the seizure because the dogs were in a public place in contravention of s 13(1), and were not under the effective control of a competent person by means of an adequate chain, cord or leash.

The Court said:

Because the owner of the dogs was not present, s 13(3) permitted any person, not necessarily an authorised officer, to seize the dogs. The plaintiff does not assert that that regime was unlawful. That seizure was therefore made under the authority of the Act. That circumstance had the consequence of bringing into play the provisions of s 62.

Section 62(1) required the resort employees, as the persons who seized the dogs, to cause them to be delivered as soon as possible to their owner if the owner could be identified, or otherwise, at a Council pound, to any duly authorised employee or agent of the Council of the area in which the dogs were seized.

At the time the resort employees took custody of the dogs the owner could not be identified. The primary obligation of the resort employees, therefore, to cause them to be delivered to their owner, could not be satisfied. The secondary obligation on them was to deliver the dogs as soon as possible, at a Council pound, to a duly authorised employee or agent of the Council. At the time of seizure this, also, was not possible. The dogs were, in fact, delivered the following morning, which was as soon as possible, to [the authorized Council officer]. The drafting of the concluding clauses of s 62 is inelegant. The only way I am sensibly to read the section is as though the words ‘at a council pound’ appeared after the word ‘otherwise’: in other words, the section requires delivery of a seized animal, if not to the owner, then at a Council pound to a duly authorised Council officer.

The Court noted that the dogs were being kept on private premises pending their seizure by the authorised council officer. It said:

Seizure under the authority of the Act did not occur when [the authorised Council officer] took control of the dogs because they were then in the private premises … It will be recalled that seizure under the authority of the Act occurs when the dogs are in a public place in contravention of s 13(1).

The Court concluded that the private premises where the dogs were being held was not a ‘public place’ as defined in s 5(1) of the Act.

The Court continued:

I am satisfied that the dogs were seized under the authority of the Act at the resort, and by resort employees. What [the authorized council officer] was doing was to take delivery of the dogs in broad compliance with s 62.

The Court suggested that the authorised council officer was in the position where something had to be done with the dogs while he made the necessary searches for the dogs’ owner and noted that s 62 ‘has some difficulties, in that it does not allow for a reasonable period of time, or any specified period of time, in which identification of the owner is to occur’:

In my opinion, the section must be read in a common sense fashion: as meaning that a seized dog must be delivered as soon as possible to its owner if the owner can readily be identified, or can be identified within a reasonable time. Certainly, it cannot be read as requiring a person who seizes an animal … to retain and house the dogs while extensive or time-consuming or cumbersome inquiries are made. By
way of illustration, the owner of a dog may be identifiable by advertisement in the local media; but I do not think that s 62 envisages that the person seizing an animal under the authority of the Act should be obliged to retain custody of the dog while such advertisements were placed.’

The Court concluded:

[T]he evidence in this court establishes that there is no reasonable prospect that the plaintiff can make out a case against [the authorised council officer] for contravention of s 62. This is for two independent reasons: firstly he was not the person who seized the dogs under the authority of the Act, and was therefore not bound by s 62(1) to deliver them to their owner; secondly, neither at the time of seizure nor at the time [the authorised council officer] took custody of the dogs … was it possible to identify their owner. Section 62 required delivery of the dogs to the Council pound. Once that was done, the provisions of s 63 overtook the provisions of s 62.

Note that s 63(1) provides that ‘when a seized animal is delivered to a council pound or approved premises, the person in charge of the pound or premises is to give notice of the seizure of the animal to the person who appears (from the best endeavours of the person in charge to establish who the owner is) to be the owner of the animal. Notice of seizure need not be given if those best endeavours fail to establish the name and address of the owner of the animal.

Think

With reference to relevant statutory provisions, outline the circumstances in which a person may lawfully seize another person’s companion animal. What does ‘lawful seizure’ in such cases require?

The Impounding Act 1993 (NSW)

From 1 July 1999 councils are required to ensure that provisions are made for appropriate holding facilities for cats as well as for dogs.

Section 21 of the Impounding Act provides that an impounding authority has a duty to ensure that every impounded animal held at its pound:

- is provided with adequate food, water and veterinary care, and
- is kept in a place that is well drained and maintained in a clean condition, and
- is provided with adequate shade for the climatic conditions, and
- is kept secure, and
- is separated from other animals that are diseased or, if the animal is or appears to be diseased, is kept separate from other animal.

While there is currently no Code of Practice for council pounds in NSW, such a code is currently under development and will be consistent with the existing provisions of the NSW Animal Welfare Code of Practice No 5 – Dogs and Cats in Animal Boarding Establishments.38

The objective of such a Code would be to develop general guidelines on the minimum standards of accommodation, management and care that are appropriate to the physical and behavioural needs of impounded animals in order to:

- ensure that all animals in pounds receive proper treatment consistent with the need to maintain their comfort, security and well being;
- ensure that all reasonable action is taken to reunite animals with their owners, or where relocation occurs, to place animals in safe and caring permanent homes;
- increase public confidence in pounds and shelters;
- promote responsible pet ownership.

The objects of the Impounding Act (s 3) are:

- to empower authorised persons to impound and deal with animals and articles in public places and places owned or under the control of certain public authorities if, in the case of animals, they are unattended or trespassing or, in the case of articles, they have been abandoned or left unattended; and
- to empower occupiers of private land to impound and deal with animals trespassing on their land; and
- to provide for the release of impounded animals and articles that are claimed by their owners; and
- to provide for the disposal of impounded animals and articles that are not claimed by their owners and, if they are disposed of by sale, to provide for the disposal of the proceeds of sale.

Part 2 Divisions 2 and 3 of the Act deal specifically with the impounding of animals. Some central provisions include:

**Who can impound?**

- **Section 5(1)** provides that ‘impounding officers can impound certain animals … as provided by this Act.’
- **Section 5(2)** provides that ‘occupiers of private land can impound certain animals, as provided by this Act.’
- **Section 5(3)** provides that ‘a police officer has and may exercise the powers of any impounding officer’.

**Circumstances in which animals may be impounded**

**Section 7** provides that a dog cannot be impounded under the Act unless it is in a national park, historic site, nature reserve, state game reserve, karst conservation reserve or Aboriginal area as defined in the National Parks and Wildlife Act 1974 (NSW). This section is directed towards both attended and unattended dogs.

**Section 9** provides that an impounding officer may impound an animal that is in a public place … if the officer believes on reasonable grounds that the animal is unattended.

**Section 10** provides that an impounding officer may impound an animal that the officer believes on reasonable grounds to be trespassing in a place in the area of operations of the officer (other than a public place).

**Section 11** provides that an impounding officer must have an impounded animal delivered to a pound as soon as practicable after the animal is impounded although an impounding officer may detain an animal liable to be impounded for up to 7 days by placing it on any land on agistment or on any land owned by or under the control of the council.

**Section 12** provides that an occupier of private land may impound any animal that is trespassing on the land.

**Offences under the Impounding Act**

- **Section 32(2)** provides that a person who causes or permits an animal to be unattended in a public place is guilty of an offence unless the person establishes that the person took all reasonable precautions to prevent the animal from being unattended.
- **Section 33(1)** provides that a person who causes or permits an animal under his or her control to trespass in a place (other than a public place) is guilty of an offence.

**Power to destroy animals**

- **Section 22** provides that an impounding authority may destroy an impounded animal held at its pound if of the opinion that the animal is seriously injured, diseased or starved or is otherwise in a distressed state but that if the impounding authority knows the identity of the owner of the animal, it must not destroy the animal unless it has informed the owner that it is proposed to destroy the animal and has given the owner a reasonable opportunity to obtain its release.
- **Section 41** provides that an authorised person may destroy, or remove and destroy, any animal found unattended in a public place if he or she believes on reasonable grounds that the animal is a danger to the public or is likely to die from a disease or injury from which it is suffering.
Can the *Impounding Act* be used to impound cats?

*Consider with reference to the definition of animal in the Act.*

‘Animal’ means any of the following:

- cattle, horses, donkeys, mules, asses, camels, sheep, goats, pigs and deer,
- any dog that is in a national park, historic site, nature reserve, state game reserve, karst conservation area or Aboriginal area (as defined in the *National Parks and Wildlife Act 1974*).

### Codes of Practice, Standards and Guidelines

As discussed in Topic 1, there are numerous state, federal and industry-based animal welfare codes of practice. Together with uncertainty regarding the enforceability of such codes, concerns in relation to the persons and bodies that control the development of the codes and a lack of consistency between jurisdictions were identified.39

There are a number of state-based codes of practice relevant to the welfare of companion animals. Some industry and user groups also have codes of practice. Whilst codes generally have no legal standing they provide a set of mandatory industry based ‘best practice’ standards, which are often a requirement for membership. For example, the Australian Veterinary Association has numerous codes of practice that provide veterinarians with guidance on welfare related issues. Many of these ‘codes’, however, are perhaps better characterised as ‘position statements’ in that they establish the profession’s position in relation to a range of welfare related issues.

Other industry groups with codes of practice include the RSPCA, the Australian National Kennel Council, the Australian Horse Industry Council, the Avicultural Society of Australia, some pigeon racing associations, the Australia New Guinea Fishes Association, the Australian Veterinary Poultry Association, the Pet Industry Association of Australia, the Pet Food Industry Association of Australia and the Aquaculture Council of Australia.

A distinction is sometimes made between standards and guidelines. As suggested in the *Animal Welfare Code of Practice: Breeding Dogs and Cats*, August 2009:

- **Standards** describe the mandatory specific actions needed to achieve acceptable animal welfare levels. These are the minimum standards that must be met under law.
- **Guidelines** describe the best practice agreed at a particular time following consideration of scientific information and accumulated experience. Guidelines are also intended to reflects society’s values and expectations regarding the care of animals. A guideline is usually a higher standard of care than minimum standards, except where the standard is best practice. Guidelines will be particularly appropriate where it is desirable to promote or encourage better care for animals than is provided by a minimum standard. Guidelines are also appropriate where it is difficult to determine an assessable standard.

### Animal trades

Under s 35 of the *Prevention of Cruelty to Animals Act* the Regulations may make provision for licensing, prohibiting, regulating and controlling animal trades.

**Section 4** of the *Act* defines animal trade as: ‘a trade, business or profession in the course of which any animal is kept or used for a purpose prescribed for the purposes of this definition’.

Clause 20 of the Regulations governs the conduct of animal trades and works in conjunction with codes of practice. See especially cl 20(3)(i) which (relevantly) provides that ‘any person employed by or working in a business that conducts an animal trade must comply with … the provisions of each relevant Code of

39 See textbook, Chapter 7 – Arnja Dale and Steven White, ‘Codifying Animal Welfare Standards: Foundations for Better Animal protection or Merely a Façade?’
Practice’. This means that compliance with relevant codes of practice relating to animal trades is a legislative requirement.

Schedule 1 of the Prevention of Cruelty to Animals Regulation 2012 sets out the code of practice applicable to specific animal trades.

Compliance with the following codes does not remove the need to abide by the requirements of the Prevention of Cruelty to Animals Act 1979 and any other laws and regulations, for example the Local Government Act 1993 or the Companion Animals Act 1998.

**Companion animal transport agencies**

**Animals in Pet Shops**

**Horses in riding centres and boarding stables**

**Keeping and trading of birds**

**Dogs and cats in animal boarding establishments**

**Breeding dogs and cats**

**Animals in pet grooming establishments**

**Security dogs**

**Code of practice for welfare of animals in films or theatrical performances**

### Animal Welfare Code of Practice: Breeding dogs and cats

The preface to the Code states that ‘[b]y adhering to this Code, people involved in animal breeding demonstrate to the general community their concern for the welfare of the animals in their care.’

This Code contains both standards and guidelines for the care of dogs or cats for breeding. It applies to ‘animal breeding establishments’ that are ‘business[es] in the course of which dogs or cats are bred for fee or reward’. It would seem that an animal breeding establishment is one that breeds dogs or cats and sells the young for consideration. Clearly while commercial breeders would fit this definition, it leaves open the question whether a ‘backyard’ breeder could be characterised as a ‘business’.

Under the Prevention of Cruelty to Animals Act 1979 the person in charge of an animal is responsible for meeting the legal obligations regarding an animal’s welfare. The person in charge, who may be the owner of the animal or another person who has the care or control of the animal, for example the manager or a member of staff, is legally responsible for the care of the animal, and therefore for meeting the standards of the Code.

Compliance with this Code then, does not remove the need to abide by the requirements of the Prevention of Cruelty to Animals Act 1979 and any other laws and regulations, for example; the Local Government Act 1993; or the Companion Animals Act 1998. This Code contains both standards and guidelines for the care of dogs or cats for breeding. The standards contained in the Code have legal effect in the following ways:

- Failure to meet a standard may result in a Penalty Infringement Notice or a prosecution under Clause 20 of the Prevention of Cruelty to Animals (General) Regulation 2006.
- In more serious cases, failure to meet a standard may support a prosecution for an offence under the Prevention of Cruelty to Animals Act 1979.

---

49 Note that in NSW the current Draft Standard Local Environmental Plan includes both ‘animal breeding’ and ‘agriculture’ in the definition of ‘animal boarding or training establishment’. It is important to check the LEP in the local government area to determine whether an animal breeding establishment is permitted.
Think


1. Identify some of the ways in which adherence to the Code demonstrates a concern for animal welfare. Identify ways in which the Code fails to adequately address the welfare of animals.

2. What distinction does the Code make between ‘standards’ and ‘guidelines’?


4. Has the Code has been effective in preventing the proliferation of ‘puppy farms’? Why or why not? Consider with reference to the following:

Puppy farms

Webcast 3.2

‘Puppy Farms’, ABC 7.30 Report, 30/3/2010, (9.43 min)
<http://www.youtube.com/watch?v=iqdx9h89mxs>

Webcast 3.3

<http://www.youtube.com/watch?v=f6e-x96XO6U>

A puppy farm (also known as a puppy factory or puppy mill) is defined as:

An intensive dog breeding facility that is operated under inadequate conditions that fail to meet the dogs’ behavioural, social and/or physiological needs. Puppy farms are usually large-scale commercial operations, but inadequate conditions may also exist in small volume breeding establishments which may or may not be run for profit.

Puppy farming is a major animal welfare issue in Australia. The main welfare problems associated with puppy farms include but are not limited to:

• extreme confinement – in some cases breeding animals may never be allowed out of their cage to exercise, play, socialise, have companionship or even to go to the toilet;
• inadequate veterinary care and general care (grooming and parasite control);
• unhygienic living conditions;
• inadequate and overcrowded housing conditions.

As noted by the RSPCA, breeding dogs and puppies born in puppy farms often have long-term health and/or behavioural problems as a result of the poor conditions they are bred in and a lack of adequate socialization.50

See also, Animals Australia, ‘Where Do Puppies Come From?’51 and the ‘Oscar’s Law’ campaign to end the factory farming of companion animals.52

50 See “What is a puppy farm?” <http://kb.rspca.org.au/What-is-a-puppy-farm_322.html>
51 <http://www.animalsaustralia.org/puppies>
52 <http://www.oscarslaw.org/>
Animal Welfare Code of Practice – animals in pet shops

This Code identifies legally enforceable standards and best practice guidelines relating to animals in pet shops. Animal retailers in NSW are expected to conduct themselves in accordance with the Code although compliance does not remove the need to abide by the requirements of the Prevention of Cruelty to Animals Act 1979 and any other laws, such as the Local Government Act 1993 or the National Parks and Wildlife Act 1974 and their associated Regulations.

As indicated above, evidence of failure to meet a standard may be used in proceedings under Clause 26 of the Prevention of Cruelty to Animals Regulation 2012. In more serious cases, failure to meet a standard may support a prosecution for an offence under the Prevention of Cruelty to Animals Act 1979.

Part 10 of the Code, ‘Sale of Animals’ sets out the following standards in relation to the transfer of ownership of animals with a view to promoting ‘responsible pet ownership’.

- **10.1.1** Dogs and cats must not be sold to people less than 18 years of age.
- **10.1.3** (Other) Animals may be sold only to people aged less than 16 years with the written consent or in the physical presence of their parent or guardian.
- **10.1.4** At the time of purchase of an animal, clients must be offered, at no charge, accurate written information on the care of animal purchased. This should include information about:
  - general care requirements of the species, including appropriate diet and feeding regimes
  - usual life span of breed/species
  - minimum requirements for humane shelter and accommodation
  - minimum requirements for security of the animal
  - minimum requirements for social contact with humans and with other animals of the same species
  - minimum requirements for disease and parasite control/prevention
  - how to identify and appropriately manage common diseases
  - procedures for seeking emergency treatment for the animal
  - the estimated costs associated with providing food and shelter
  - routine veterinary treatment that may be required for the animal(s), for example vaccination or parasite control
  - maximum time an animal can be left unattended
  - the expected behaviours of the species or breed, for example digging or scratching
  - information about the legal requirements for pet ownership, and the penalties for non-compliance
  - Where applicable, information provided must also include the animal’s vaccination status, and the need for ongoing vaccinations, the desirability and advantages of desexing animals, minimum requirements for exercise and costs associated with registering the animal.
- **10.1.5** If within 3 days an animal (except a fish) is not acceptable to the purchaser for any reason, the pet shop proprietor is required to take the animal back and refund 50 per cent of the purchase price of the animal.
- **10.1.7** If an animal dies or is euthanased as a result of a disease that is traceable to the point of sale and is verified by an appropriate authority such as a veterinarian, the person in charge will refund the purchase price or offer a replacement animal with the same guarantee.
- **10.1.8** No animal suspected of being sick, injured or diseased may be sold under any circumstances.
- **10.1.9** All animals sold must be able to independently sustain themselves if suitable food and water are provided at the appropriate times. The minimum age of animals offered for sale or advertised must be: dogs and cats: 8 weeks; rabbits: 6 weeks; guinea pigs, mice and rats: 4 weeks.
Late one afternoon, your twelve year old daughter, Phaedra, arrives home with a rabbit she has purchased from a pet shop. You tell her that she will not be allowed to keep the rabbit and that you will be returning it to the pet shop the following day. During the night your Maltese terrier attacks and kills the rabbit which is in a cardboard box beside Phaedra’s bed.

With reference to the *Animal in Pet Shops Code of Practice*, what options, if any, may be available to you?

**Other legislation relevant to companion animals**

**Non-Indigenous Animals Act 1987 (NSW)**

Not all species of what may properly be regarded as ‘companion animals’ are covered by the *Companion Animals Act*. Certain species of amphibians, reptiles, birds and mammals which may be kept as ‘domestic’ animals may be regulated by the *Non-Indigenous Animals Act 1987 (NSW)* which provides for the issue of permits and licences for certain species of non indigenous animals, especially ‘exotic’ animals.\(^{53}\) The long title of the Act is ‘an Act to control and regulate the introduction into the State of certain species of animals and the movement and keeping of those animals within the State’.

The Act provides (s 6A) for the ‘classification’ of animals based on:

- the animal’s pest potential with respect to agricultural and pastoral interests and the environment,
- any danger posed by the animal to humans,
- security requirements for keeping or transporting the animal,
- the degree to which the animal, if actually or potentially a pest, is already established, and
- any other factors identified by the regulations.

Clause 4 of the *Non-Indigenous Animals Regulation 2006* provides that the following categories of animals are prescribed for the purposes of s 6 (a) of the Act:

<table>
<thead>
<tr>
<th>Category</th>
<th>Characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td>category 1a and 1b animals the importation and keeping of which are prohibited</td>
<td>species categorised as being of extreme pest potential and are generally not permitted to enter Australia or be kept there; species that have not been classified as belonging to any particular category and are generally not permitted to enter Australia or be kept there</td>
</tr>
<tr>
<td>category 2 animals limited to restricted collections</td>
<td>species of high pest potential or of significant conservation value</td>
</tr>
<tr>
<td>category 3a and 3b animals permitted in other collections</td>
<td>species that pose some threat to persons or domestic or native fauna and are permitted to be kept primarily for the purpose of exhibition, education, entertainment or conservation in high security institutions; species that have the potential to establish in the wild a population that would present a new threat or aggravate an existing threat and may be kept in private collections only under licence subject to special conditions.</td>
</tr>
</tbody>
</table>

---

### Category Characteristics

<table>
<thead>
<tr>
<th>Category</th>
<th>Characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td>category 4 animals the importation and keeping of which are not restricted</td>
<td>species that would be unlikely to present a threat or greatly worsen an existing threat if they escaped into the wild. Animals in this category will usually be domestic or farm animals having no pest potential</td>
</tr>
<tr>
<td>category 5 animals that are already widespread pests</td>
<td>species that if they escaped into the wild would be unlikely to establish a population that would present a threat or greatly worsen an existing threat</td>
</tr>
</tbody>
</table>

Essentially, the Act provides for the issue of permits and licences to regulate the importation (s 10), keeping (s 11) and movement (s 12) of non-indigenous animals within the state. Part 6 of the Regulations prescribe standards for the keeping of non indigenous animals. The Act also establishes a penalty regime in relation to breaches of the Act and/or Regulations.

**Section 25** of the Act provides that an authorised officer may seize and take charge of an animal (and its cage or enclosure) belonging to a controlled category which is unlawfully in any person’s keeping or charge or which is at large. An animal seized under this section becomes, upon seizure, the property of the Crown and may be dealt with in accordance with directions given by the Director-General.

**Section 25(3)** provides that an animal belonging to a controlled category which is at large and poses an immediate threat to life or property may be destroyed by an authorised officer or any other person.

### Activity

Bejo is a *Macaca fascicularis* or crab-eating Macaque, originally from Sumatra. In 2008 Julius ‘smuggled’ Bejo into Australia on a private yacht. Julius, an animal rights activist, claims to have ‘liberated’ Bejo from captivity in a Sumatran village where the macaque was caged, chained by the neck and in very poor condition.

The monkey has been living with Julius on a rural property in northern NSW since that time. With Julius’ care and attention Bejo now appears to be thriving, is very attached to Julius and the two sometimes travel around the state together.

Two weeks ago an authorised officer arrived at Julius’ home and seized Bejo pursuant to s 25 of the *Indigenous Animals Act 1987* (NSW).

*M. fascicularis* are a Category 3a animal under the *Indigenous Animals Act 1987* (NSW).

With reference to relevant statutory provisions, advise Julius of his rights (if any) and his liabilities under the *Indigenous Animals Act 1987* (NSW).

### Think

See ‘Chimpanzee Attack Lawsuit’ at <http://www.youtube.com/watch?v=uQcVCNCwiY0&feature=channel>

What issues does Joyce Tischler from the Animal Legal Defence Fund identify in relation to the keeping of ‘wild’ animals as pets?54

---

International context

In 1987 the Council of Europe made available for signature and ratification the European Convention for the Protection of Pet Animals. 55 The Convention is voluntary and has been signed and ratified by a number of European countries.56

The Preamble to the Convention sets out the rationale for the Convention, including:
- the moral obligation of man to respect all living creatures and the ‘special relationship’ between pet animals and man;
- the importance of pet animals in contributing to the quality of life and their consequent value to society;
- the difficulties arising from the enormous variety of animals which are kept by man;
- the risks which are inherent in pet animal overpopulation for hygiene, health and safety of man and of other animals;
- that the keeping of specimens of wild fauna as pet animals should not be encouraged;
- that different conditions govern the acquisition, keeping, commercial and non-commercial breeding and disposal of and the trading in pet animals;
- that pet animals are not always kept in conditions that promote their health and well-being;
- that attitudes towards pet animals vary widely, sometimes because of limited knowledge and awareness;
- that a basic common standard of attitude and practice which results in responsible pet ownership is not only a desirable, but a realistic goal.

Think

1. The Convention uses outdated positional language such as ‘man’ and ‘pet’. Why do animal advocates and legislators now prefer the use of the term ‘companion animal’ rather than ‘pet’?
2. The Convention uses both the language of ‘protection’ and that of ‘welfare’. Are there any relevant differences between ‘animal welfare’ and ‘animal protection’?

Topic summary

This topic has considered a wide range of issues and statutory frameworks relating to the relationship between humans and companion animals. Specifically, it has identified and described the central features of the legal regulatory frameworks at common law, and liability for damage caused by companion animals under the Animals Act 1977 (NSW) and the Civil Liability Act 2002 (NSW).

It then considered the central features of the Companion Animals Act 1998 (NSW) and Companion Animals Regulation 2008 (NSW) and the powers of Local Government councils under the Local Government Act 1993 (NSW) and the Impounding Act 1993 (NSW). The topic then considered Codes of Practice, Standards and Guidelines relating to animal trades and provided a brief overview of the Non-Indigenous Animals Act 1987 (NSW) and Non-Indigenous Animals Regulation 1987 (NSW) insofar as it applies to the regulation of ‘non indigenous’ companion animals within the state.

Finally, this topic has provided a brief overview of European Union initiatives in relation to companion animal protection.

56 For the current status of the Convention which has now been ratified by 22 states, see <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=125&CM=&DF=&CL=ENG>
Georgina takes her poodle Ralph for a daily walk at a designated off-leash dog exercise area. Ralph is generally a well behaved and sociable dog that frequently runs up to other people and their dogs to greet them. One day Ralph runs up to a young child, Bradley, who becomes very frightened. A terrified Bradley starts to run, thinking that Ralph wants to attack him. Ralph, yapping, chases after Bradley who trips over while running and breaks his arm.

Identify the legal issues and relevant statutory provisions in order to advise both Georgina and Bradley’s parents on their respective legal positions.
Objectives

At the completion of this topic students will be able to:

- describe the legal regulatory frameworks governing the exhibition of animals in zoos and aquaria in New South Wales;
- describe the legal regulatory frameworks governing the use of animals in circuses in New South Wales;
- describe the legal regulatory framework governing animal welfare in the context of recreational hunting in New South Wales;
- describe and discuss the significance and legal effect of Codes of Practice relating to human-animal interaction in the above contexts;
- critique existing practices and regulatory controls relating to animals in circuses, zoos and aquaria and in relation to recreational hunting.

Introduction

The exploitation of animals for purposes of human 'entertainment' has a long history. While some forms of animal exploitation for purposes of human entertainment may seem benign, others cause significant distress to animals and require close interrogation. This topic considers the federal and New South Wales regulatory regimes relating to animals in entertainment. For the purposes of this topic, 'animals in entertainment' includes:

- animals in zoos and aquaria;
- animals in circuses;
- animals in 'sport';
- recreational hunting.
Specifically, this topic will consider the regulatory framework governing:

- the exhibition of animals in zoological parks (including aquaria) and circuses under the *Exhibited Animals Protection Act 1986* (NSW) and the *Exhibited Animals Protection Regulation 2010* (NSW);

- the recreational hunting of game animals under the *Game And Feral Animal Control Act 2002* (NSW) and the *Game And Feral Animal Control Regulation 2004* (NSW);

- Federal and New South Wales Codes of Practice relating to the (i) exhibition of animals in circuses and zoos and the (ii) recreational hunting of animals.

While the following are significant areas of the ‘animal entertainment’ industry, for reasons of length, this topic will NOT consider in detail:

- The regulatory regime governing the use of horses in the contexts of rodeos, horse racing and jumps racing.

- Greyhound racing.

- ‘Blood sport’ activities such as trophy-hunting.

- Other ‘blood sports’ such as deer hunting, bull-fighting, fox chasing, cock fighting, and dog fighting.

- Recreational fishing.

- The regulatory regime applicable to eco-tourism activities such as whale-watching.

- The use of animals in films and theatrical performances which is governed by animal welfare legislation in each state and territory and by Codes of Practice such as the NSW ‘Code of Practice for welfare of animals in films or theatrical performances’.

- If any of these areas are of interest to you, you may wish to consider researching it as a topic for your research essay.

---

1 The regulatory regime relating to the culling and control of ‘wild’ animals for ‘non-recreational’ purposes will be considered in Topic 7 ‘Wild Animals and Animals in the Wild’.


7 See the ‘Greyhound Racing New South Wales (GRNSW) Code of Practice for the Keeping of Greyhounds in Training’.

Webcast 4.1

‘The Case Against Marine Mammals in Captivity’, WSPA (3.40 min)

Using animals in entertainment and sport: the issues

A number of arguments for and against the use of animals in entertainment and sport may be identified:

<table>
<thead>
<tr>
<th>Arguments against</th>
<th>Arguments for</th>
</tr>
</thead>
<tbody>
<tr>
<td>All forms of sport and entertainment that exploit non-human animals should be banned; animals, like us, can feel fear, stress, exhaustion, and pain. To use animals for our own amusement, whether hunting them for sport or making them perform for us, is demeaning to ourselves as well as to them. Being a species with a great amount of power and control over other species brings with it a responsibility not to abuse that power. Using animals in sports and entertainment is an abuse of our position of responsibility and brutalises society towards animals and nature.</td>
<td>All cultures throughout history have used animals in the context of sport and entertainment, from Roman chariot racing up to present day hunting, racing, and circuses. The issue here is not whether or not we can use other species for our own purposes – we can and it is only natural – the issue is animal cruelty, which everyone can agree should be ended. The proposition needs to demonstrate that the practices they are referring to are cruel – it is not enough to appeal to vague principles such as animal rights. There are two categories of activity that are acceptable: first, killing animals that are pests or that are going to be eaten; and secondly, using animals in enjoyable human sports in ways that do not involve cruelty.</td>
</tr>
</tbody>
</table>

It is very easy to take up the opposition’s challenge to provide concrete examples of cruelty to animals – there are many. Take the case of ‘blood sports’. All sorts of hunting, shooting, and fishing boil down to slaughtering other animals for pleasure. If the prey is a pest (eg foxes), or needs culling (eg hares, deer), there are always more humane ways to kill it than hunting it to the point of terror and exhaustion with a pack of hounds – eg killing it with a rifle shot. If the prey is being killed for food it is entirely gratuitous. In modern society people do not need to kill food for themselves but can buy it from a source where animals have been killed humanely; indeed no-one needs to eat meat at all and for moral, health, and environmental reasons they should not (see vegetarianism debate). As for fishing, again there is absolutely no need to catch or eat fish; even when anglers throw their catch back in they have first put a hook through its palate. | Hunting and fishing are natural activities – many other species in the wild kill and eat each other and there is no reason why we should be any different. These sports are always undertaken for a rational reason and are never gratuitous – they are either to exterminate pests or to provide food. In the case of foxes they are pests. Most of the alternative ways of killing them are more cruel – eg trapping, snaring, or shooting, which often have the end result of maiming the fox and leaving it to die slowly of starvation and infection. A fox killed by hounds dies instantaneously. In the case of killing animals to eat – such as fish, or game birds such as pheasants and grouse – the justification is even more straightforward; it is the most natural activity in the world to hunt and eat. And given the controversy surrounding the welfare of animals in modern farms, it would seem preferable to eat an animal that had had a free and happy life in the wild than one that had been reared in a factory farm. In the case of fishing, many anglers who fish for sport throw their catches back in, so the fish come to no lasting harm. |

---

Arguments against | Arguments for
---|---
Horses and dogs are among the principle victims of exploitation in human sporting activities. The main purpose of horse- and dog-racing is for human beings to indulge their penchant for gambling. The welfare of the animals involved is at best a secondary concern. Horses are frequently injured and die in horse races, especially races over hurdles such as the infamous British 'Grand National'; they are also blinkered and whipped to make them run faster. It is unconvincing to claim that the animals can enjoy being subjected to this. As for the conditions the animals are kept in, these may be good for the top dogs and horses, but in the main conditions are poor, and once the animals cease to win races they are likely to be neglected, abandoned, or slaughtered. Horses are also forced to take part in the dangerous contact sport of polo in which collisions and a hard, fast-moving puck pose serious danger to the animals who, unlike their riders, have no choice in whether they take part. | We need to strike a balance between human pleasure and animal welfare. The proposition’s point of view is much too unbalanced. Putting the animal welfare case at its strongest, we should ban all sports in which animals are treated cruelly, or are at high risk of injury or death. None of the sports mentioned by the proposition here fall into that category. Anyone who works in horse- or dog-racing will tell you that it is in their interest to ensure that the animals are healthy and happy, or else they will not perform well. They will also tell you that most of these animals enjoy racing and enjoy winning. As for polo, horses are rarely injured, the risk of injury is acceptably low.

The circus is another arena in which human beings abuse other animals. Animals are trained to perform tricks using whips, electronic goads, sticks, food-deprivation etc. Wild animals such as lions, tigers, and elephants are kept in shamefully inadequate conditions in tiny spaces. The necessity of regular transportation means that the circus can never provide an appropriate home for wild animals. These animals are forced to travel thousands of miles in cramped and squalid conditions and frequently end up physically and mentally ill. And what for? Purely for the entertainment of we arrogant exploitative humans. What sort of lesson does it teach our children about non-human animals to take them to the circus and see these great creatures demeaned and controlled by force to perform silly tricks? | The circus is where children first learn to love animals! The propositions are right to draw attention to issues of animal welfare but again, they do not need to take such an extremist approach. There is evidence that animals enjoy performing and can form close relationships with their trainers and with an audience. Closer scrutiny of circuses and better enforcement of animal welfare laws are desirable, but once those conditions are met the circus can be seen as a celebration of wild animals and the relationships they can form with animal-loving human beings. If the reality falls short of this ideal then reform is called for, not abolition.

Jennifer Tilden considers some of the issues relating to the exhibition of animals in circuses and zoos. She argues that as long as society teaches children that it is okay to view captive animals in these contexts, it will ‘fail to reach a point where the interests of the animals outweigh the financial considerations of their captors’.

The Captive Animals Protection Society (CAPS) provides the following arguments for a ban on the keeping of animals in zoos:

- **Ethics:** CAPS maintains that holding any animal captive for human entertainment is unethical and cannot be justified. It argues that the keeping of animals in zoos sends a damaging message to the general public, and particularly children and young people, by the implication that animals can be maintained in captivity to satisfy our own curiosity, despite the animal gaining no benefit from the practice.

- **Welfare:** CAPS maintain that zoos cannot meet animals’ natural physical, social, behavioural and emotional needs and thus the welfare of zoo animals is severely compromised.

- **Education and Conservation:** CAPS maintain that zoos deliver a misleading, and damaging message by implying (both implicitly and explicitly) that captivity is beneficial to the cause of species conservation and that visitors are able to witness ‘wildlife’ first-hand in the zoo environment. This message directly contradicts that of many leading experts in the field of conservation and the overwhelming body of evidence that demonstrates that species can be conserved only as part of their entire ecosystem; that is, habitat conservation is the only way in which effective conservation can be realised. In addition, by virtue of their captive state, zoo animals do not behave as their wild counterparts thus seeing an animal in a zoo does not educate as to that species’ life in the wild. As a result, the zoo animal represents a distorted view of its own species.

---


11 [http://www.captiveanimals.org/our-work/zoos]
1. What is your response to the above arguments? See the results of a debate: ‘Should animals be used as objects of sports and entertainment?’ at Debate.org where 76% of respondents voted ‘no’ and 24% voted ‘yes’.  
<http://www.debate.org/opinions/should-animals-be-used-as-objects-of-sport-and-entertainment>

2. Do you agree with the suggestion that ‘being a species with a great amount of power and control over other species brings with it a responsibility not to abuse that power’ and that ‘using animals in sports and entertainment is an abuse of our position of responsibility and brutalises society towards animals and nature.’ Why or why not?

3. Do you agree with the suggestion that ‘the issue … is not whether or not we can use other species for our own purposes – we can and it is only natural.’ Why or why not?

4. Do you think that whether animals should be exploited for purposes of human sport and entertainment should depend upon the particular context of the ‘entertainment’ and the effect of the ‘entertainment’ on the animals involved? Provide examples to support your conclusions.

5. Jennifer Tilden suggests that cruelty to animals is frequently rationalised under the wide net of ‘education’, since many people still believe there is valuable information to be gained from viewing animals trapped behind bars. What is required above all else, she says, is the ‘re-education of educators’, who still believe that observing animals in zoos and exhibits is a proper teaching tool.  
Consider these sentiments. What ‘educational value’, if any, may be derived from viewing captive animals?

6. Do you agree that if the public were ‘re-educated to understand the pain and suffering that is inexorably entwined with these exhibits’, market pressures could lead to the phase out of animal acts and non conservation-based facilities? Why or why not?

7. Tilden suggests that the complete ban of the use of animals for human entertainment is highly unlikely within any of our lifetimes. Identify the factors which militate against such a ban.

---

**Textbook**

**Chapter 6 – Jackson Walkden-Brown, ‘Animals and Entertainment’**

In this chapter of the textbook, Jackson Walkden-Brown notes that ‘most often, humans are blissfully unaware of the suffering animals endure to be the subject of our amusement’. Typically, he notes, the interests of humans in the sphere of entertainment are predominantly economic, social and cultural and are weighed against the interests of the animals being used. He suggests, however, that ‘the scales at the centre of the relevant balancing act remain firmly slanted in favour of human interests.’

The industries examined by Walken-Brown in which animals are exploited for the entertainment of humans are rodeos, zoos, circuses and film and theatrical performances.

---

**Think**

1. What examples from the industries he discusses, does Walken-Brown provide to support his conclusion that ‘most forms of entertainment come at a significant cost to the animals concerned’?

2. In what ways does he suggest the regulatory frameworks governing these industries are deficient?
Exhibited animals: Zoos and aquaria

Captive animals and the animal welfare debate

As Andrew Tribe from the School of Animal Studies at the University of Queensland notes, despite their popularity and place in the Australian tourism history, in recent years zoos have undergone considerable change in both their structure and function. Zoos, he says, ‘now seek a new image – one that emphasises their role in conservation and public education’. In addition, changes in public expectations and the zoo’s own objectives mean that ‘today there is far more scrutiny of the way in which their animals are managed and utilised’.12

The history of zoos as menageries of animals in cramped conditions and maintained largely for human amusement has left a lasting impression on some people of poor animal welfare. As Stevens and McAlister explain: ‘It is quite apparent that, for the most part until fairly recent times, the way in which wild animals were kept is something of which humankind should be embarrassed and ashamed.’13

Despite improvements in their captive animal management and adoption of conservation objectives, zoos are still seen by some as being ‘superficial, expensive, unnecessary and therefore indefensible’. For instance, the Australian and New Zealand Federation of Animal Societies is opposed to keeping wild animals in captivity.14 Similarly, the Born Free Foundation (BFF) and ENDCAP continues to campaign strongly in the UK and the EU for the abolition of ‘the confinement of wild animals for human entertainment’, while in the U.S., organisations such as the Animal Liberation Front and People for the Ethical Treatment of Animals (PETA) provide a consistent voice for the anti-zoo lobby.15 This continued growth in public concern for the welfare of animals in captivity seems likely to continue.

In July 1994, the World Society for the Protection of Animals (WPSA) and the Born Free Foundation issued The Zoo Inquiry.16 Although critical of zoos, this document was significant in that it made constructive recommendations regarding animal welfare standards, and the role of zoos in conservation. In the years since this report, many of its recommendations have been adopted by the zoo industry, at least in developed countries. This has come about through a combination of three factors:

• zoo legislation and codes of practice;
• the development of captive animal exhibits; and
• improvements in husbandry and veterinary care.

Zoo legislation

Zoo legislation now exists in most countries around the world. Although their content varies, there are some basic provisions that are common to all, including aspects of animal accommodation and facilities; special needs of particular species; animal welfare and nutrition; veterinary attention and facilities; hygiene; emergency procedures; staff safety; training and facilities.17

Captive animal exhibits

The development of Captive Animal Exhibits over the past 200 years can best be understood by reference to ‘first, second and third generation’ exhibits:18

• *First generation* exhibits refer to the barred cages used in the 18th and 19th centuries to display exotic animal species, which were designed primarily to display the animals in isolation to the visiting public.

• *Second generation* exhibits refer to the larger, more open cement enclosures often surrounded by moats developed during the 20th century.

• *Third generation* exhibits refer to the more naturalistic enclosures that sought to replicate animals’ natural habitats. These exhibits, developed from the middle of the 20th century, provided more space and typically used more vegetation.

In the current century exhibit design has continued to develop and now combines technology and new construction techniques to create an ‘immersion experience’. However as Knowles observes, there are still zoos in the world where the standards of animal welfare remain low.19

The Zoo and Aquarium Association (previously ARAZPA) was established in 1990 to link zoos and aquaria in Australia, New Zealand and the South Pacific in a cooperative regional network for wildlife conservation. The Association argues that ‘zoos and aquaria contribute significantly to wildlife conservation and that each year member institutions contribute over $5.7 million to programs conserving biodiversity in the wild.’ The Association also undertakes environmental education programs that ‘aim to raise awareness and knowledge of animals and their habitats, and encouraging visitors to support conservation projects and take local action to protect wildlife.’20

**Improvements in husbandry and veterinary care**

Improvements in husbandry and veterinary care have occurred over the last half century, and have included advances in nutrition, knowledge of infectious and non-infectious diseases and their treatment and prevention. This is linked with growth in research into aspects of captive animal biology, husbandry and medicine. Kirkwood notes that, the result is that ‘most wild animals now live longer in captivity than they would in the wild’.21

Despite the ‘improvements’ described above, as Andrew Tribe explains, ‘no amount of data or enhanced environments will objectively settle the debate over the ethics of zoological institutions.’22

This debate has been seen in the recent controversy over the importation of elephants to Melbourne and Taronga Zoos. Despite spending tens of millions of dollars to create the latest elephant enclosures, these institutions have faced continual criticism for a number of animal welfare concerns. Lack of space and the absence of natural foraging behaviour, inadequate social groupings and diet are all significant concerns.23

Of greatest concern to animal welfare advocates are behavioural abnormalities displayed by animals in captivity.

**The effects of captivity on behaviour**

Shepherdson notes that while there may be some ‘advantages’ to captive enclosures (food is in plentiful supply, travel distances are small, health is closely monitored, maters are often provided and there are no predators) captive animals are faced with the problem of how to fill large amounts of time with the limited number of appropriate behaviours allowed by the enclosure. Captive conditions, being more restrictive and less diversified than the wild, may offer the animal little opportunity for behavioural control and are likely to exert significant effects on their behaviour.24

---

22 See above n 11.
A number of studies have described abnormal behaviours that appear to be induced by captive environments. Kiley-Worthington suggest that the development and expression of any of these behaviours may be an indication of distress and hence of a lowered level of welfare.

These behavioural abnormalities include:

- **Stereotypic behaviours** – behaviours that are fixed, apparently purposeless and repeated, such as weaving, rocking and pacing.
- **Increased aggression** – to both social partners and other animals.
- **Increased frustration or conflict behaviour** – including displacement behaviours or behaviours that seem out of context such as head-shaking, scratching, chewing or licking.
- **Increased fearful behaviour** – including avoidance, shivering, sweating or over-reaction to slight environmental changes.
- **Ontogenic behavioural changes** – where an animal no longer performs the normal behaviour for its species at that age or stage of development.

Proponents of zoos argue that as the populations of wild animals become increasingly threatened, the role of zoos becomes more important, but that if this role is to be fully recognised it is essential that zoos take all steps to minimise the welfare costs to their animals.

**Exhibition of Australian wildlife**

In 1999 the Senate Rural and Regional Affairs and Transport Committee published a report on the ‘Commercial Utilisation of Australian Native Wildlife’. In that report the Committee noted that the exhibition of wildlife in Australia is a multi-million dollar industry, but that excluding the large public zoos in the capital cities and in Dubbo, the majority of wildlife parks are privately owned. More than twice the number of animals (and species) exist in private zoos as exist in public institutions. The Committee concluded that both public and private zoos and wildlife parks can play an important role in species conservation. This, it suggested, occurs in two main areas:

- public education about the status of species; and
- breeding of rare and endangered species to increase their numbers for return to the wild.

However, not everyone supports the involvement of public zoos in conservation work and in evidence to the Committee there were a number of critics of this role. In particular, Dr John Wamsley claimed that: ‘We have publicly funded zoos all over the country pretending they have something to do with the conservation of wildlife. The fact of the matter is that there has not been one successful reintroduction of an endangered species back into the wild by any zoo anywhere in the world ever.’ The Australian Koala Foundation also believes that zoos and wildlife parks play a very limited role in the conservation of species.

---

27 Ibid.
28 <https://www.savethekoala.com/>
The argument in support of zoos\textsuperscript{29}

The World Association of Zoos and Aquaria (WAZA)

Zoos and aquaria play a vital role in conservation. The role of zoos and aquaria is described in the World Zoo and Aquarium Strategy.

In many countries historical and social perceptions of zoos as entertainment menageries still persist, and in some cases are justified. A sector frequently hostile to zoos is the growing animal-rights and animal-welfare lobby, which emphasises the interests of individual animals, rather than the conservation of species or eco-systems; further opposition comes from that part of the conservation movement which doubts the justification for removing animals from the wild. If zoos and aquaria are to play an active part in conservation they must face opposition head-on, by understanding criticisms, adapting where necessary and explaining their actions in a way that gains public support. They must also make clear to the general public that their mission is one of conservation, which is conducted in tandem with the highest welfare standards.

Within these wider contexts and alongside major trends, zoos and aquaria have to achieve and promote a clearer view of their unique role and the contribution they can make as part of a global conservation coalition. More coordination of activities and focus of resources towards high priorities need to be coupled with a wider application of good management practices, in particular continuous evaluation of the impact of key projects.

Individual zoos and aquaria, and the zoo community, are pre-eminently suited to emphasise the global aspects of conservation. Scientific knowledge of the interconnections of all life systems and habitats has greatly increased in the last few years and it is becoming increasingly evident that conservation is not only a matter of saving species and habitats but, to be successful, also needs cooperation and a global approach. Zoos and aquaria, because they care for, and have expertise in collections of living animals from around the world, and because of their global network, can play a major role in promoting conservation cooperation on a global scale.

Only zoos, aquaria and botanic gardens can operate across the whole spectrum of conservation activities, from ex situ breeding of threatened species, research, public education, training and influencing and advocacy, through to in situ support of species, populations and their habitats; they uniquely have a massive ‘captive audience’ of visitors whose knowledge, understanding, attitude, behaviour and involvement can all be positively influenced and harnessed. They have a huge resource of technical skills and dedicated people. As habitats shrink and collection-managed populations grow, the definition of what is a zoo, what is a botanic garden, what is a reserve, and who is a collection-based conservationist, who is a field-based conservationist, will inevitably blur. Zoos, aquaria and botanic gardens have an opportunity to establish themselves as models of ‘integrated conservation’ and the means of achieving this in a collective fashion for zoos and aquaria is through the WZACS. Other bodies, such as conservation bodies and governmental departments, can use the WZACS and the integrated conservation approach, and this will bring benefits to all concerned with conservation.

\textsuperscript{29} World Association of Zoos and Aquaria, \texttt{<http://www.waza.org/en/site/home>}
The argument against zoos

Animals Australia
Jenny Moxham questions the motivations behind keeping wild animals in zoos.

Sadly, for the zoo animals involved, this game has no winners. The only outcome for them is a lifetime of imprisonment, far from their natural homes. With no tasks to exercise their intelligence or skills, they become depressed and listless and totally dependent on humans.

Some of them go crazy from the boredom, deprivation, frustration and stress. Signs of this are self-mutilation and abnormal repetitive behaviours like pacing up and down or rocking back and forth.

Even though the animals may look physically healthy and well cared for, they are telling us they are suffering from inadequate lives.

An additional cause of stress for zoo animals is the fact that they may be confined in countries which, climate wise, are the total opposite of those in which they have evolved to live.

Each year elephants, giraffes and other animals adapted to the heat are forced to endure freezing winter temperatures in countries such as Russia and Canada where the winter temperature plummets to minus 30 degrees celsius. Likewise, polar bears are forced to bake in our searing 40 degree summer temperatures.

The Sumatran tiger who gave birth to Melbourne Zoos’ recent batch of cubs came here from a zoo in Holland – a country vastly different in climate from her hot and steamy homeland.

For long living animals such as elephants, this miserable life in captivity must seem interminable. Last year the world oldest captive elephant died in Taipei Zoo at the age of 86. Captured in 1943 when 26 years of age, he had spent more than 66 years in captivity!

In this era of enlightenment when circuses are being publicly condemned for confining wild animals and the keeping of elephants in zoos has been banned in India, zoos have realised that they must change their image if they are to continue to receive public acceptance.

Consequently, zoos worldwide now justify their existence by telling us that they are ‘saving animals from extinction’.

Whilst this sounds like a selfless and noble cause the reality is that most animals in zoos are not endangered and those which are, would, I’m sure, prefer a life of freedom regardless of what the outcome is for the survival of their species.

If we wish to ensure species survival the way to do it is to ensure the survival of their habitat – for without habitat, where will all of these ‘saved’ animals go. Clearly, in a world with no habitat, there will be nowhere for them to go – except zoos.

Consider the following comments:

- ‘Zoos and aquaria, because they care for, and have expertise in collections of living animals from around the world, and because of their global network, can play a major role in promoting conservation cooperation on a global scale.’ (World Association of Zoos and Aquaria, International Zoo Conservation Strategy (2008))

- ‘Zoos, aquaria and parks have the capacity to encourage conservation action by connecting visitors to wildlife’. (J Fraser and D Wharton, ‘The future of Zoos: a new model for cultural institutions’ (2007) 50(1) Curator 41–54)

- ‘[Z]oos … undertake environmental education programs that aim to raise awareness and knowledge of animals and their habitats, and encourage visitors to support conservation projects and take local action to protect wildlife.’ (Taronga Conservation Society Australia, Annual Report (2009))

- ‘Zoos play an important role in the conservation of endangered species and in research into habitat, animal wellbeing and animal management. Zoos actively promote education about animals and their environments and the development of positive attitudes towards animals. This is enhanced by opportunities for the public to ‘foster’ animals or to participate in volunteer programs. Zoos also provide recreational opportunities for the public.’ (Australian Veterinary Association, 2008)

---

• ‘Most animals in zoos are not endangered and those which are, would, I’m sure, prefer a life of freedom regardless of what the outcome is for the survival of their species. If we wish to ensure species survival the way to do it is to ensure the survival of their habitat – for without habitat, where will all of these ‘saved’ animals go? Clearly, in a world with no habitat, there will be nowhere for them to go – except zoos.’ (Jenny Moxham, ‘Zoos engage in games with no winners’ (2009))

• ‘[T]here has not been one successful reintroduction of an endangered species back into the wild by any zoo anywhere in the world ever’. (Dr John Wamsley, cited Senate Rural and Regional Affairs and Transport Committee ‘Commercial Utilisation of Australian Native Wildlife’ (1999))

• ‘[Z]oos and wildlife parks play a very limited role in the conservation of species.’ (The Australian Koala Foundation, cited Senate Rural and Regional Affairs and Transport Committee ‘Commercial Utilisation of Australian Native Wildlife’ (1999))

With reference to these comments articulate your views in relation to the exhibition of captive animals, having regard to:

• conservation of threatened species;
• education and entertainment;
• the welfare and interests of captive animals.

**Statutory framework for Australian zoos**

**Exhibited Animals Protection Act 1986 (NSW)**

Animals can be exhibited in permanent, temporary and/or movable displays in NSW. Their use in these displays raises issues related to the welfare, public safety and the educational and conservation values of these displays. The Exhibited Animals Protection Act requires individuals and organisations which exhibit certain animals to be authorised, and regulates the exhibition of animals at zoos, marine parks, circuses and other establishments where animals are displayed.

In s 5 of the Exhibited Animals Protection Act 1986 ‘zoological park’ is defined to mean:

• zoological gardens;
• aquaria
• and similar institutions in which animals are exhibited or displayed, or kept for display, for any prescribed purpose.

The objectives of the Exhibited Animals Protection Act are to ‘ensure that the welfare of these animals is protected, that public safety is maintained and that exhibitions provide educational and conservation value’ by:

• establishing an advisory committee to provide advice on policy and administration for the importation, control, care and welfare of animals, and to monitor the effectiveness of the licensing scheme (ss 6–11, schs 1–2);
• prohibiting the following activities (ss 12–32), unless exempted under the Regulations (s 4) or granted an authority:
  • use of an animal display establishment of a prescribed class (ss 12–17);
  • construction and/or alteration of an animal display establishment (ss 18–19);
  • exhibition of certain animals on premises occupied by temporary or movable structures (ss 22–23); and
  • exhibition of prescribed species (ss 24–25);
• establishing a register of animal display establishments (s 20);
• providing for conditions of authorities and for the suspension, cancellation or disqualification of authorities, and refusal to issue authorities (ss 26–32);
• establishing Standards with respect to animal exhibition facilities (s 14, sch.3);
• establishing requirements for the exhibition of whales and dolphins (ss 34–37); and
• establishing an inspectorate (ss 38–51).

The Act addresses aspects of animal management not dealt with under the Prevention of Cruelty to Animals Act including such matters as the housing and hygiene and nutrition of animals and the records to be kept with regard to animals and public safety. But note s 3(2) which provides that:

Nothing in this Act affects the operation of the Prevention of Cruelty to Animals Act 1979 or any regulation made under that Act.

Note also Schedule 4 of the Act which provides that:

- Where by or under any other Act (other than the Prevention of Cruelty to Animals Act 1979 or the Non-Indigenous Animals Act 1987) any provision is made relating to the exhibition of animals, being a provision that is inconsistent with this Act or regulation made under this Act, the provision of this Act or the regulation shall prevail.

The effect of these provisions is that the Exhibited Animals Protection Act is subject to the Prevention of Cruelty to Animals Act 1979 and that the latter, to the extent of any inconsistency, prevails.

Licences, approvals and permits: Key provisions

Section 12 of the Act provides that:

Each occupier of premises used as an animal display establishment of a prescribed class is guilty of an offence and liable to a penalty not exceeding 20 penalty units or to imprisonment for not more than 6 months, or to both, if the use of the premises as an animal display establishment of that class is not authorised by a licence.

Section 22 provides that a person in charge of an animal of any species … shall not exhibit the animal on premises occupied by temporary or movable structures used for the purposes of a circus, fair, fun-fair, amusement park or similar place of public entertainment, or at a preschool, school, TAFE establishment, university or other place of education, unless the person is the holder, or is supervised by the holder, of an approval authorising the holder to exhibit animals of that species.

Section 23(1) provides that an approval authorising the exhibition of animals of a species shall not be issued unless the Director-General is satisfied that the person to whom it is issued has appropriate qualifications or experience, or both, to exhibit animals of that species.

Section 23(1) provides that an approval authorises the holder to exhibit, or supervise the exhibition of, animals of the species specified in the approval, but only when the animals are exhibited in accordance with the terms and conditions to which the approval is subject.

Section 24 provides that a person shall not exhibit an animal of a prescribed species unless the person is the holder, or is supervised by the holder, of a permit authorising the holder to exhibit that animal.

Section 25(1) provides that a permit authorising the exhibition of an animal of a prescribed species shall not be issued unless the Director-General is satisfied that the animal will be exhibited in accordance with the standards prescribed in respect of animals of that species for the purposes of this section.

Clause 9 of the Exhibited Animals Protection Regulation 2010 provides that ‘the species of animals prescribed for the purposes of ss 24 and 25 of the Act are set out in Schedule 2 of the Exhibited Animals Protection Regulation 2010’.

The Standards prescribed in relation to particular species of animals will be discussed later in this topic.

31 Section 22(1): ‘person in charge’ in relation to an animal, includes the owner of the animal, a person who has the animal in his or her possession or custody, or under his or her care, control or supervision, and … any servant or agent of the owner of the animal, that servant or agent, as the case may be.

32 But note that Clause 4 of the regulations provides that an animal display establishment is exempt from the requirement to be licensed in respect of an animal if the animal is in an enclosed area and the Director-General is satisfied that: ‘the animal is in a wild state’, and ‘given the nature and circumstances of the animal and establishment concerned, it would be unreasonable to require the use of the establishment to be licensed (and comply with the licensing requirements) under the Act’. This clause would exempt some wildlife sanctuaries where there is limited interaction between humans and the animals kept on the premises. In such cases the Director-General may form the view that it is unreasonable to require the operator of the sanctuary to comply with the strict requirements of a licence under the Act.
Section 27 provides that an application for the issue, renewal or variation of an authority or for the transfer of a licence shall be considered by the Director-General who may grant or refuse the application. In considering whether to grant or refuse the application, s 27 (3A) provides that the Director-General may consider the following:

(a) whether the applicant has been convicted or found guilty of an offence under this Act, the Prevention of Cruelty to Animals Act 1979, the Animal Research Act 1985, the National Parks and Wildlife Act 1974, an instrument made under this Act or any of those Acts or any law of another State, a Territory or the Commonwealth relating to the keeping or protection of animals,
(b) whether the applicant has previously failed to comply with any term or condition of an authority held by the applicant,
(c) whether the applicant has previously held an authority that has been suspended or cancelled by the Director-General,
(d) the capacity of the applicant to comply with this Act and any prescribed standards,
(e) the capacity of the applicant to care for the animals,
(f) whether the applicant has made a statement or furnished information in connection with the application that was, in the opinion of the Director-General, false or misleading in a material particular,
(g) whether the applicant is a fit and proper person to hold the authority.

Section 30 gives the Director-General power to suspend or cancel authorities if:

- the holder commits an offence against this Act, the Prevention of Cruelty to Animals Act 1979, the Animal Research Act 1985, the National Parks and Wildlife Act 1974 or an instrument made under this Act or any of those Acts,
- the holder fails to comply with any term or condition of the authority or of any other authority, being a term or condition applicable to the holder,
- the holder fails to ensure that the licensed animal display establishment conforms to and is conducted in accordance with the prescribed standards,
- the authority was issued pursuant to a false or misleading document, statement or representation,
- the Director-General is of the opinion that the holder is not a fit and proper person to hold the authority.

Section 31 provides that it is an offence to contravene any of the terms or conditions of any authority issued under this Act or the regulations, or to fail to surrender upon the request of the Director-General or of an inspector an authority that has been suspended or cancelled under this Act or the regulations.33

Governance

The following bodies have advisory and enforcement functions under the Exhibited Animals Protection Act:

- The Director-General of NSW Department of Primary Industries: Issue of licences, permits and approvals, maintaining register: Parts 3 and 4;
- Inspectors appointed or authorised under s 38: Part 5;
- The Exhibited Animals Advisory Committee: Part 2, Schedules 1 and 2.

The functions of the Exhibited Animals Advisory Committee (s 8) are to:

- to advise the Director-General so as to promote a co-ordinated approach in policy and administration between the Director-General and government departments administering legislation relating to the importation, control, care and welfare of animals,
- to monitor the effectiveness of the scheme governing the exhibition of animals established under Part 3 and to recommend to the Director-General any changes which may appear to the advisory committee to be necessary for the efficient operation of that scheme,
- to carry out any function which may be delegated to it by the Director-General.

33 Section 40 of the Act gives inspectors broad powers of entry and seizure in relation to licensed animal display establishments or any other place where the inspector believes, on reasonable grounds, that a provision of this Act or the Regulations has been or is being contravened.
In addition s 5 of the *Zoological Parks Board Act 1973* (NSW) establishes the Zoological Parks Board of New South Wales (also called the Taronga Conservation Society Australia), a statutory authority administered by the Minister for Climate Change and the Environment. The Board conducts a range of research projects in support of its stated strategic goals of contributing to ‘the conservation and management of endangered species and other wildlife species and to ‘the improvement of animal health and reproductive management of captive and wild animals.’

The main functions of the TCSA are specified in s 15 of the *Zoological Parks Board Act, 1973*, which provides that the function of the Board is to:

Establish, maintain and control zoological parks for the following purposes:

- carrying out research and breeding programs for the preservation of endangered species;
- carrying out research programs for the conservation and management of other species;
- conducting public education and awareness programs about species conservation and management;
- displaying animals for educational, cultural and recreational purposes.

In addition, the Board:

- may co-operate with, and provide funds and other assistance to, such scientific and other institutions, governments and other bodies and individuals as the Board may determine in connection with species conservation and management and for other scientific and zoological purposes; and
  - may investigate and carry out research into:
  - the design of, and equipment and procedures in, zoological parks; and
  - the care and well-being of animals kept in zoological parks;
  - may provide educational services for the public (whether in the nature of lectures, broadcasts, films, publications or otherwise) about species conservation and management, zoological parks and the biology of animals.

**Exhibited Animals Protection Regulation 2010 (NSW)**

The *Exhibited Animals Protection Regulation 2010* is made pursuant to the *Exhibited Animals Protection Act* and seeks to achieve the animal welfare, public safety and educational and conservation objectives of the Act.

The Regulation prescribes:

- the display establishments and animals that require an authority to be exhibited;
- the Standards that authorised exhibitors must comply with;
- the requirements for authorities, including fees and conditions;
- the requirements for the acquisition, keeping, exhibiting, and transfer of exhibited animals;
- offences and penalty amounts for non-compliance;
- provisions for seized animals.

Specifically, the Regulation provides:

- **Part 2 – Animal display establishments:** providing for exemptions from some requirements under the Act; establishing classes of establishments; prescribing the Standards that exhibitors must comply with; and prescribing the animal species for which exhibition permits are required (clauses 4–9, schedules 1–3).
- **Part 3 – Authorities:** prescribing requirements for authorities and the associated application and issue fees; and prescribing conditions of authorities (clauses 10–18).
- **Part 4 – Offences:** prescribing requirements for matters associated with the acquisition, keeping, exhibiting, and transfer of exhibited animals, and the offences for not complying with these requirements (clauses 19–39).
- **Part 5 – Miscellaneous:** providing for the Exhibited Animals Advisory Committee, bonds required for the display of dolphins and whales, return of seized animals, penalty notice offences and other matters (clauses 40–45).
Exemptions from licencing requirements under the Act

Section 4(1) of the Act provides that the Governor may by regulation:

- exempt, to the extent prescribed, any specified person or premises or persons or premises of a specified class from the operation of this Act, and
- exempt, in prescribed circumstances, any specified person or premises or persons or premises of any specified class from any requirement made by or under this Act.

Clause 4 of the Regulations provides that the following animal display establishments are exempt from the requirement to be licensed:

1. Freshwater fish
   For the purposes of s 4(1) of the Act, an animal display establishment is exempt from the requirement to be licensed if the only animals exhibited at the establishment are freshwater fish that are kept:
   (a) in a decorative or landscaped pond or ponds of any size, or
   (b) in an aquarium that has a capacity of less than 2,000 litres or aquaria that have a total capacity of less than 2,000 litres.

2. Saltwater fish
   For the purposes of s 4(1) of the Act, an animal display establishment is exempt from the requirement to be licensed if the only animals exhibited at the establishment are saltwater fish that are kept in an aquarium that has a capacity of less than 2,000 litres or aquaria that have a total capacity of less than 2,000 litres.

3. Wildlife sanctuaries
   For the purposes of s 4(1) of the Act, an animal display establishment is exempt from the requirement to be licensed in respect of an animal if the animal is in an enclosed area and the Director-General is satisfied that:
   (a) the animal is in a wild state, and
   (b) given the nature and circumstances of the animal and establishment concerned, it would be unreasonable to require the use of the establishment to be licensed (and comply with the licensing requirements) under the Act.

Clause 5 identifies exhibitions which are exempted from the operation of the Act, and so from permit and licencing requirements. The 'display, or keeping for display', of an animal in the following circumstances does not constitute an 'exhibition' of the animal for the purposes of the Act:

Animals are not 'exhibited' for the purposes of the Act where:

- the animal is a free-living animal in its natural habitat,
- the animal is a lawful captive and is part of a competitive display of household pets,
- the animal is part of a competitive display of domestic farm animals,
- the animal is a domestic farm animal being used to demonstrate the acquisition of wool, milk or other produce of a living animal,
- the animal is of domestic hoof-stock and is performing, or is to perform, in an event at a rodeo,
- the animal is a lawful captive that is not displayed or kept for display, to the public,
- the animal is displayed, or kept for display, in accordance with the authority conferred by a licence in force under … the National Parks and Wildlife Act 1974,
- the animal is displayed, or kept for display, in the course of carrying on the business of animal research, or in the course of carrying out animal research, without contravening the Animal Research Act 1985,
- the animal, being an animal of a species listed in Schedule 3 and not being an animal kept pursuant to an approval or permit or at a licensed animal display establishment, is an animal used only for riding or racing,
- the animal is kept in a pet shop for display and not for sale,
• the animal, being an animal of a species listed in Schedule 1 and not being an animal kept pursuant to an approval or permit or at a licensed animal display establishment, is displayed:
  • at an agricultural show or show parade conducted by the Royal Agricultural Society or a society that is a member of the Agricultural Societies Council, or
  • at an agricultural field day conducted on a farm or showground, or
  • on the farm on which the animal is kept,

... the animal is a fish that is kept (otherwise than in a habitat display) at a fish hatchery or a fish farm for the purpose of commercial food production, or re-stocking of lakes, dams or waterways,

• the animal is a lawful captive and is being displayed, or kept for display, at a meeting of an association dedicated to the keeping of that type of animal,

• the animal is being displayed, or kept for display, by a school student at a school for a single ‘show-and-tell’ activity.

In addition Schedules 1 and 3 of the regulations exempt from the operations of the Act:

• Animals displayed at certain agricultural shows and rural areas,

• Animals used for riding or racing.

Think

Clause 23(1) of the Exhibited Animals Protection Regulation 2010 provides that it is an offence to ‘chain or tether an exhibited animal, or cause or permit such an animal to be chained or tethered, to an anchorage except for the purposes of veterinary treatment or grooming’. However, s 23(2) provides that this provision does not apply to elephants … on licensed premises that are not on display. While ‘tethering’ is not defined in the Regulations or the Act s 4 of the Prevention of Cruelty to Animal Act defines tethering in the context of confinement as including ‘by means of rope, chain or cord or by any other means.’

In what circumstances, if any, can tethering of ‘exhibited animals’ be justified on welfare grounds? Provide reasons.

Codes of Practice, Guidelines, Standards and Policies

As we saw in Topic 1, Codes of Practice, Standards and Guidelines represent a form of industry self-regulation. Many of these have been developed over the past decade by zoo associations to try to raise the standards of animal welfare in their member institutions. In some regions these codes are enforced by the terms of membership of the association itself, with expulsion as the penalty for non-compliance, while in others they are only ‘morally’ enforced using self-regulation. More recently, these codes have been supplemented by a Code of Ethics developed by the World Association of Zoos and Aquaria.

Section 14(1) of the Exhibited Animals Protection Act 1986 provides that standards may be prescribed for or with respect to:

• the facilities for the exhibition of animals at, and

• the conduct of, animal display establishments of any class.

Section 14(2) of the Act 1986 provides that a standard may be prescribed in relation to any matter referred to in Schedule 3.

<http://ethics.iit.edu/ecodes/node/3013>
Schedule 3 identifies the licencing standards as:

- Housing, fencing, caging and exercise facilities for animals.
- Hygiene for the keeping and housing of animals.
- Nutrition, general care and husbandry of animals.
- Records to be kept in relation to the breeding, health, welfare, movement, acquisition, death and disposal of animals.
- Destruction of animals and disposal of carcases.
- Educational and scientific requirements for animal exhibits.
- Public safety.

As noted above, s 25 of the 
*Exhibited Animals Protection Act 1986* provides that ‘a permit authorising the exhibition of an animal of a prescribed species 'shall not be issued unless the Director-General is satisfied that the animal will be exhibited in accordance with the standards prescribed in respect of animals of that species for the purposes of this section.’

The effect of this section is that the standards prescribed by the legislation are legislative instruments having legal effect. The prescribed standards, rather than the legislation *per se* are the instruments that specifically address animal welfare concerns and management issues.

**Clause 8** of the 
*Exhibited Animals Protection Regulation 2010 (NSW)* provides that for the purposes of ss 14 and 25 of the *Act* the following standards for animal display establishments are prescribed and that it is a condition of an authority that the exhibition of animals to which it relates must be in accordance with the applicable standards.

In Australia, the applicable general standards are guidelines are:

- Australian Animal Welfare Standards Exhibited Animals: General Standards and Guidelines
- NSW Department of Primary Industries: General Standards for Exhibiting Animals in NSW

In addition, there are a number of more specific standards, policies and guidelines which apply to particular animals or classes of animals:

- Exhibited Animals – Macropod Standards and Guidelines
- Exhibited Animals – Ratite Standards and Guidelines
- Exhibited Animals – Koala Standards and Guidelines
- Exhibited Animals – Crocodilian Standards and Guidelines
- Exhibited Animals – Wombat Standards and Guidelines
- Standards for exhibiting animals at mobile establishments in NSW
- Standards for exhibiting Australian mammals in NSW
- Standards for exhibiting bottle-nosed dolphins in NSW
- Standards for exhibiting carnivores in NSW
- Standards for exhibiting circus animals in NSW
- Standards for exhibiting captive raptors in NSW
- Standards for exhibiting seals in NSW
- Standards for exhibiting animals during temporary removals in NSW
- Mandatory code for the pinioning of birds in the animal exhibition industry.

The following policies while not prescribed by clause 8 of the *Exhibited Animals Protection Regulation 2010*, may be significant as 'relevant considerations' which the Director-General should take into account.

---

37 Australian Animal Welfare Standards and Guidelines for Exhibited Animals
NSW Department of Primary Industries, 'Welfare of zoo, circus, exhibited and other animals'
in exercising his powers to issue permits and licences under the Act, or when determining the terms or conditions of a permit.

- Policy on the Management of Solitary Elephants in New South Wales
- Policy on Authorising New Animal Display Establishments at Premises where Animal Exhibition will not be the Primary Activity

Matthew Crane describes the process that normally ensues once it has been decided that standards need to be written for the exhibition of an animal:

1. A survey of any existing regulatory standards or guidelines is undertaken by the professional staff of the NSW Department of Primary Industries’ Animal Welfare Branch. Crane notes that these documents usually do not provide an explanation of the principles used to develop the standards.
2. Other literature on the care, welfare and wild behaviour of the animals is surveyed by the Animal Welfare Branch staff members who also consult expert keepers and researchers of these animals.
3. Using this information the Animal Welfare Branch staff develops a first draft of the standard.
4. The initial draft is presented to the Exhibited Animals Advisory Committee which, when satisfied with the draft, recommends to the Director-General of NSW Department of Primary Industries that the draft be distributed to industry and other interested groups for comment.
5. The Exhibited Animals Advisory Committee reviews the comments and when the document appears satisfactory to it the Committee recommends to the Director-General that the document become a prescribed standard.
6. Animal Welfare Branch staff prepares the necessary submissions to have the draft reviewed by the government’s legal, executive and political hierarchy.
7. When approved the standards receive the weight of law through an amendment to the Exhibited Animals Protection Regulation 2010.

With reference to the example of elephants, Crane observes that there are currently no prescribed standards for exhibiting elephants in NSW zoos but that many of the issues that need to be addressed by such standards were aired during the 2005 debate over the suitability of importing elephants from Thailand into Australian zoos. These issues, amongst other things, focused on the suitability of the proposed enclosures and management routines. Regulatory agencies at the state and national level were lobbied by the zoo industry and animal welfare organisations. Eventually three animal welfare organisations appealed to the Administrative Appeals Tribunal against the decision of the Commonwealth Environment Minister to issue import permits for the elephants. Crane notes that ‘claim and counter claim were made as evidence was given by expert witnesses called by both parties’.

Crane suggests that:

[As] the agency responsible for setting animal exhibit standards in NSW, it is the responsibility of NSW Department of Primary Industries to try to balance the claim and counter claim against the differing priorities, criteria and values that arise from the range of perspectives possessed by the groups interested in these issues. Differences in background, experience and culture produce a broad range of opinions within our society. These range from moral opposition to confinement of animals, such as in zoos and circuses, to a concern for the welfare of captive animals, to ambivalence, to deliberate mistreatment and hatred of certain animals. People’s views may also change with time and context. This variation in opinion means that there are also many views on how welfare of exhibited animals should be assessed. It is therefore difficult to develop a process or formula for setting enclosure size standards that will satisfy all the interested parties. It is the job of the Animal Welfare Branch to make sure all relevant issues are considered to avoid important matters being overlooked or given too little or too great consideration.

40 Matthew Crane, Leader, Exhibited Animals, NSW Department of Primary Industries ‘Without the wisdom of Solomon or his ring: Setting standards for exhibited animals’, How much space does an elephant need? The impact of confinement on animal welfare 2007 RSPCA Australia Scientific Seminar.
Differences in expertise, interest and awareness can lead to disagreements over the importance of particular behaviours to the animal in question. For example, an expert on the wild biology of elephants might place great importance on the elephants’ habit of roaming widely over vast areas, while another expert in captive elephant care may place greatest emphasis on ensuring that elephants get sufficient exercise to ensure good feet and toenail health.

**Think**

1. What ‘differences in ‘background, experience and culture’ and in ‘expertise, interest and awareness’ might be relevant to the identification and development of standards for the exhibition of an animal? Given this divergence of views and interests, on what criteria should the welfare of exhibited animals be assessed?

2. In *The International Fund for Animal Welfare (Australia) Pty Ltd and Ors and Minister for Environment and Heritage and Ors* [2005] AATA 1210 the Administrative Appeals Tribunal admitted that issues relating to the ‘biological and behavioural needs’ of the elephants for which import permits were sought was the matter which caused it the ‘greatest difficulty’.

   The Tribunal stated:

   > The legislation proceeds on the basis that the animals will be managed, confined and cared for. It follows at once that the biological and behavioural needs to be met are not to be met in accordance with nature. Management involves human intervention in the way the animals conduct themselves. Confinement involves restricting their movement. Care also involves human intrusion in the processes of nature … . The material before us and the literature we have been referred to offers little help. Understandably, the distinguished experts who gave evidence before us and whose careers have been in zoos put forward a different perspective from those who have been involved in the wild or with animals in larger wildlife parks.

   It seems that the biological and behavioural needs of exhibited animals will necessarily be compromised by the fact of confinement, a fact supported by studies that identify abnormal behaviours induced by captive environments.42 Does it follow from this that a lower level of welfare applies to captive animals?

**Case Study: General standards for exhibiting animals in NSW**

The *General Standards for Exhibiting Animals in NSW* apply to all animals displayed, or kept for display, by exhibitors authorised under the *Exhibited Animals Protection Act 1986*. These standards must be used in conjunction with any other applicable standards and Department of Primary Industries policies. The General standards, which are generic in their scope, are intended to ‘ensure the psychological and physical welfare of animals kept for exhibit purposes’ and cover a range of issues, including: manner of display, shelter, space, electric and other equipment, drainage, visitor facilities, diet, food preparation, cleanliness, food storage and presentation, drinking water, waste disposal, infectious disease, pests and predator control, health checks and reports, veterinary attention, new arrivals, dealing with dead animals, design of enclosures, indoor housing of animals, animal handling, construction of enclosures, dangerous animals and safety of structures.

**Clause 19** of the Standards provides that:

> Each animal must be exhibited in a manner that as far as possible provides a naturalistic setting that resembles the animal’s habitat and provides for its behavioural and physical well being.’

However, with the approval of the Director-General, animals may be exhibited in a manner that does not provide a naturalistic setting resembling the animal’s habitat ‘where the exhibitor has demonstrated the exhibit will have sufficient educational merit and that this merit cannot be achieved if this requirement is enforced.

---

Clause 54 of the Standards provides that:

An enclosure occupied by several animals must allow for normal patterns of group behavior and that ‘animals must be housed in social groups typically found in wild populations.

However, the Director-General may exempt an exhibitor from this requirement where the animals:

- were housed in an appropriate social group and following the death of one or more animals the exhibitor either cannot obtain replacements or is in the process of obtaining replacements;
- are being held in quarantine prior to being placed with others of the same species to form an appropriate social grouping;
- are being held in a short-term management facility, a health management facility or a medium term holding facility; and/or
- cannot be housed in groups without significant risk of serious injury.

Think

Reflect upon the above standards. Do you think that the exceptions are reasonable or do they provide exhibitors with too much latitude? Provide reasons.

Other legislation that impacts on the Exhibited Animals Protection Act 1986

In addition to the Exhibited Animals Protection Act 1986, the following acts have an impact on the exhibition of animals in NSW:

The Prevention of Cruelty to Animals Act 1979 (NSW)

As noted above, s 3 of the Exhibited Animals Protection Act 1986 provides that nothing in the Act affects the operation of the Prevention of Cruelty to Animals Act 1979 or regulations.

Non-Indigenous Animals Act 1987 (NSW)

This Act aims to control and regulate the introduction into NSW of certain species of animals and the movement and keeping of these species within the State. The main purpose of the Act is to ensure the security of certain species of animals that are not native to Australia, but are capable of becoming a major threat to agriculture, the environment or public safety.

Stock Diseases Act 1923 (NSW)

This Act relates to the control of disease and the spread of disease in stock. The exhibited animal industry needs to be aware of this legislation when moving stock within the State or over state borders.

Quarantine Act 1908 (Cth)

This Act is administered by the Department of Primary Industries and controls the importation of animals into Australia. It provides for the registration of ‘A’ and ‘B’ class zoological gardens, circuses or theatres, and allows the importation of animals only to registered zoos and circuses.

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

This Act, administered by the federal Department of the Environment makes it an offence to import a species included in Appendix I, II or III to the Convention on International Trade in Endangered Species of Wildlife, Fauna and Flora (CITES). The prohibition does not apply if the specimen is imported pursuant to a permit issued under s 303CG of the Act. (To be considered in detail in Topic 7).

Zoological Parks Board Act 1973 (NSW)

This Act establishes the Zoological Parks Board of New South Wales a statutory authority administered by the Minister for Climate Change and the Environment. The Board conducts a range of research projects in support of its stated strategic goals of contributing to ‘the conservation and management of endangered species and other wildlife species and to ‘the improvement of animal health and reproductive management of captive and wild animals.’
National Parks and Wildlife Act 1974 (NSW)

This Act makes it an offence to take or kill protected or endangered fauna and also makes it an offence to buy, sell or possess protected fauna without a license. This Act is relevant to exhibitors who wish to trade native animals with a person who is not an exhibitor. Any interstate movement of native animals also requires National Parks and Wildlife approval.

Fisheries Act 1935 (NSW)

NSW Fisheries has control over all fish species that includes ‘all forms or marine, estuarine and freshwater animal life’. Fisheries legislation also governs the sale, acquisition and possession of fish as well as minimum size limits for protected species.

Aquaria and oceanaria

Many, but not all, species in aquaria are subject to the Exhibited Animals Protection Act.

Note, for example, clause 4 of the regulations which provides that:

- An animal display establishment is exempt from the requirement to be licensed if the only animals exhibited at the establishment are freshwater fish that are kept:
  - in a decorative or landscaped pond or ponds of any size, or
  - in an aquarium that has a capacity of less than 2,000 litres or aquaria that have a total capacity of less than 2,000 litres.

This means that freshwater fish exhibited in ponds are not subject to the licencing requirements of the Act, nor are fish housed in ‘smaller’ sized aquaria.

Marine mammals in captivity

Cetaceans (dolphins and whales) are subject to the requirements of the Exhibited Animals Protection Act. However, while there are 43 orca in captivity worldwide, none of these are in Australia. Victoria was the first state, in 1985, to ban the capture of cetaceans from the wild for purposes of live display. All dolphins exhibited in Australian aquaria have been born in captivity.

While Part 13 Division 3 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) creates a permit system authorising the permit holder to take ‘specified action’ in relation to the conservation of cetaceans, s 238(4) provides that ‘the Minister must not grant a permit authorising its holder to kill a cetacean or to take a cetacean for live display’.

And in NSW’s 112F of the National Parks and Wildlife Act 1974 (NSW) provides that a licence is not to be issued . . . to authorise a person to harm or obtain a marine mammal for exhibition or other purposes unless the authorised officer who issues the licence is satisfied that the marine mammal is ‘required for genuine scientific or educational purposes or any other purpose connected with the conservation or protection of marine mammals’.

A special status?

Historically in many human societies dolphins and whales have enjoyed a ‘special’ status and are often regarded as possessing an intelligence equal or superior to humans. Randall Eaton has considered the ‘special’ status accorded to cetaceans. Eaton suggests that aquaria are significantly different from zoos because of the human’s perception of the aquatic environment and the nature of the creatures in aquaria. He suggests that ‘few aquarium visitors ever see dolphins or orcas exhibiting what is the equivalent of pacing in a zoo animal’. He also notes that, poor even by zoo standards, dolphins and orcas have ‘miserable’ records in captivity: poor breeding success, shorter life spans and poor health in captivity, a lot of ‘brain disease’. He says that the stress engendered by boredom and lack of emotional need being met should be ‘nothing

43 See Orcas in Captivity webpage <http://www.orcahome.de/orcastat.htm>
44 See the Whale and Dolphin Conservation Society, ‘Case Against Captivity’<http://www.wdcs.org/submissions_bin/Introduction_to_Captivity.pdf>
foreign to human consciousness’ He suggests that ‘ignorance of the behavioural adaptations and needs of captive cetaceans’ is the greatest obstacle to the welfare of cetaceans in captivity.

A 1985 report of the Senate Select Committee on Animal Welfare, *Dolphins and Whales in Captivity*, noted that empirical data has shown that cetaceans suffer varying degrees of stress and trauma during capture and captivity, although ‘the same may not be true of the third generation bottlenose dolphins born in captivity’. But, after weighing all the evidence, the committee concluded that cetaceans should ‘not be subjected to the possibility of deprivation or suffering which conditions and quality of life in captivity might occasion.’ It also concluded that ‘the taking or killing of any cetacea – whether intentionally for scientific, display or other purposes, or incidentally such as in fishing or shark-netting operations – should be carefully scrutinised to ensure that it is either essential or unavoidable.’

In its Report, the Committee noted:

Many people concerned with animal welfare now question whether humans are entitled to exploit animals and to act in a manner which will cause animals to suffer. Critics argue that oceanaria exploit cetacea primarily for profit and that this is morally indefensible because it causes suffering to cetacea who, as intelligent and complex beings, are entitled to greater consideration by humans. They believe that arguments advanced by oceanaria, for keeping cetacea captive, such as enrichment, awareness and improved knowledge, are inconsistent with, and subordinate to, their commercial motives …. Critics consider that, even if oceanaria could show that profit and recreation were not the primary motives of oceanaria, the use of captive cetacea for education and research is not only of dubious benefit but is also morally questionable.

…

The World Society for the Protection of Animals and the US Humane Society has been actively campaigning for the closure of all dolphin attractions. They argue that:

[T]he entire captive experience for marine mammals is so sterile and contrary to even the most basic elements of compassion and humanity that it should be rejected outright. It is unacceptable for marine mammals to be held in captivity for the purpose of public display.

In support of their claims, the groups cite the following evidence:

- To a dolphin, a pool is a cage. These fast moving animals, which form complex social groups when free, cannot behave naturally in captivity.
- The mortality rates and abnormal behaviours of captive dolphins prove that a lack of stimulation causes them terrible stress. Swimming listlessly in circles is just one common indictor of boredom and psychological distress.
- Space is also an issue – pools are miserably small for large, far ranging animals that would swim up to 50 miles a day in the wild. The shallow waters expose dolphins’ delicate skin to painful sunburns.
- A dolphin is trained to behave unnaturally for human amusement. By withholding food, some trainers coerce dolphins into repetitive and unnatural behaviours, performing ‘tricks’ for the public. Hunger forces the dolphins to ignore their most basic natural instincts.
- Already numerous in the United States, the number of captive dolphin attractions in the Caribbean, Mexico and Latin America is growing. These create a demand for live dolphins, most of which are taken from wild populations during bloody hunts. In many dolphin hunts, including those in Japan, the hundreds of animals not selected for live sale are butchered inhumanely for meat.
- Many dolphins do not survive the trauma of capture. Of those that do, 53% die within three months of confinement. Captive dolphins also suffer and die from intestinal disease, stress-related illness and chlorine poisoning.

1. In its 1985 Report, the Senate Select Committee noted that: ‘The fact that cetacea undergo some suffering in captivity is not, of itself, an overriding factor in determining whether cetacea should be held in captivity. All animals, including human beings, suffer to a varying extent in their natural environment and it would be inconceivable for animals not to suffer at times in captivity. Rather, it is the nature and extent of suffering which should be taken into account in deciding whether to keep particular species of animals in captivity.’

As the Committee suggests, while suffering may be an inevitable part of life for all species, is it realistic and/or desirable to have regard to the ‘nature and extent’ of the suffering of an animal in reaching a decision whether to keep particular species of animals in captivity? Why or why not?

2. In February 2012 People for the Ethical Treatment of Animals (PETA) brought a lawsuit in a US District Court claiming that SeaWorld in San Diego was enslaving 5 orcas in violation of the Thirteenth Amendment to the United States Constitution. The orcas were cited as plaintiffs in the proceedings. Judge Jeffrey Miller dismissed the case, writing in his ruling that ‘the only reasonable interpretation of the Thirteenth Amendment’s plain language is that it applies to persons, and not to non-persons such as orcas.’

Considering the challenges facing animal advocacy groups, law professor Rebecca Huss commented that, ‘no one’s established that animals are legal persons. It doesn’t mean we couldn’t … it’s just something that we as a society have not decided to do yet. If we can establish corporations as persons, why can’t we establish whales as persons?’

What do you think of the suggestion that, as was once true of human slavery, it’s animals’ status as property that has prevented their ‘personhood’ from being realised?

Exhibited Animals Protection Act 1986

The licencing of captive cetacea under the Act applies only in relation to dolphins and whales in captivity at the commencement of the Act and to their progeny born in captivity: s 36. As noted above, it is no longer lawful to capture wild cetacea for display purposes and there are no captive whales (including orca) in Australia. The captive dolphin database, however, identifies 20 captive dolphins in Australia; all located at Sea World on the Queensland Gold Coast.

Part 4 of the Act sets out the provisions relating to the exhibition of dolphins and whales.

Section 35 provides that, without the approval of the Minister, the Director-General shall not issue an approval for the erection of, or for the conversion of premises into, a cetacea display establishment, or a licence for a cetacea display establishment:
- so that there will be more than one such licence in force at any time; or
- if the establishment was not in existence before the commencement of this Part.

Section 36 provides that the Director-General may specify as a term of a licence that only those dolphins and whales kept in captivity, when this Part commences, at the premises the subject of the licence, and their progeny born in captivity at those premises, may be exhibited at those premises.

Section 37 provides that:
- The Director-General may, as a condition of the issue of a licence for a cetacea display establishment, require that an amount of money, not exceeding the prescribed amount, be deposited with the Director-General by the holder of the licence or that the holder enter into other prescribed arrangements securing the payment of money to the Director-General.
- The Director-General may use money deposited with the Director-General by the holder of a licence for a cetacea display establishment or secured under other prescribed arrangements to

---

48 <http://www.huffingtonpost.com/2012/02/09/peta-seaworld-slavery-_n_1265014.html>
49 <http://www.angelfire.com/nj4/captivedolphins/>
50 Clause 42 of the Exhibited Animals Protection Regulation 2010 provides that for the purposes of s 37 of the Act the prescribed amount is $60,000.
pay any expense incurred by the Director-General in caring for, rehabilitating or returning to its
natural environment any dolphin or whale:
– placed in the care of the Director-General by the holder of the licence, or
– cared for by the Director-General as a consequence of the failure of the holder of the licence to
care for the dolphin or whale in accordance with this Act or the regulations or the terms and
conditions of the licence.

Think
Identify the policy and welfare concerns which inform the above statutory requirements. Why
is the exhibition of marine mammals is more carefully regulated than other animal species?

Standards and Codes of Practice
The applicable standards relating to cetaceans are those provided by the General standards for exhibiting
animals in NSW and the Standards for exhibiting bottle-nosed dolphins in NSW."\(^1\)

Webcast 4.1
<http://www.youtube.com/watch?v=hhM8y0sxqL4&feature=related>
This webcast is an interview with Naomi Rose of the Humane Society USA regarding marine
mammals in captivity. (Note that it includes methods of capture and footage that may disturb).
<http://www.youtube.com/watch?v=hhM8y0sxqL4&feature=related>

Think
1. With reference to the arguments presented in the webcast, summarise the reasons for
pursuing an international ban on live dolphin displays.
2. In view of the economic value of marine marks and oceanaria, do you consider that such a
ban is achievable?

Exhibited animals: Circuses
When children see animals in a circus, they learn that animals exist for our amusement. Quite apart
from the cruelty involved in training and confining these animals, the whole idea that we should enjoy
the humiliating spectacle of an elephant or lion made to perform circus tricks shows a lack of respect
for the animals as individuals.
— Peter Singer Author/Philosopher, Professor of Bioethics at Princeton University

Arguments against animals in circuses
While many of the issues considered earlier in this topic relating to captive animals in zoos and aquaria
also apply to animals exhibited in circuses, the welfare and cruelty issues relating to ‘performing’ animals
in circuses, particularly exotic animals, are perhaps even more significant.

There are a number of welfare issues common to captive animals in zoos and circuses:
• confinement;
• artificial environments;
• social isolation;

• stereotypical behaviours;\textsuperscript{52}
• exposure to noise.\textsuperscript{53}

The welfare of animals in circuses is additionally compromised by:
• Constant movement: Veterinarians suggest that travelling causes animals stress resulting in elevated heart rates and weakened immune systems.
• Training and performance: whilst some animals such as elephants may benefit from stimulation when held in captivity, a growing body of evidence demonstrates that the training regimes which circus animals endure may include unlawful beatings.\textsuperscript{54} A range of disorders have been experienced by elephants through having to adopt unnatural positions during performance, such as hernias.

For the above reasons, travelling animal circuses are increasingly regarded as unacceptable on welfare grounds. Over the past decade there has been an increasingly vocal lobby against the use of both domestic and exotic animals in circuses resulting in a ban on the use of exotic animals in most circuses in Australia.\textsuperscript{55}

But while most animal circuses in Australia now use ‘domesticated’ animals rather than ‘exotic’ animals, with the exception of the ACT, the use of both types of animals in circuses continues to be condoned by Australian law.

National, regional and local governments in at least 30 countries have already banned the use of exotic or all animals in circuses. But, as \textit{Say No to Animals in Circuses} notes, Australian Federal and State Government policies are failing these animals.\textsuperscript{56}

Anti animal circus advocates note that the requirements contained in the guidelines for the keeping of animals in circuses in Australia are far below what is generally required for the same species kept in zoos and are totally inadequate to protect their welfare. For example, lions in New South Wales are granted an enclosure of at least 300 m\textsuperscript{2} if they live in a zoo, while in a circus they are only entitled to 6 hours a day in an ‘exercise area’ of 20 m\textsuperscript{2} for a single animal and an additional 10 m\textsuperscript{2} for each additional big cat: see cl 7(3) of the Standards. For the remaining 18 hours they can be locked away in beast wagons. On average, wild animals spend just 1 to 9 per cent of their time training, and the rest confined to cages, wagons or enclosures typically covering a quarter the area recommended for zoos.

The first global study of animal welfare in circuses has found that elephants, lions and tigers are the wild animals least suited to life in a circus.\textsuperscript{57} One of the leading researchers of the study, Stephen Harris, states that ‘whether it’s lack of space and exercise, or lack of social contact, all factors combined show it’s a poor quality of life compared with the wild.’ Worst affected are elephants, lions, tigers and bears which are frequently confined to cages where they pace up and down for hours on end. The animals are kept in conditions drastically different from their natural habitat. Elephants, for example, can be shackled for 12 to 23 hours per day when not performing, in areas from just 7 to 12 square metres. Often, they could only move as far as the chain would allow them, sometimes only 1 to 2 metres. In the wild, elephants spend 40 to 75 per cent of their time feeding, and cover up to 50 kilometres in a day.


\textsuperscript{54} See: http://www.bornfreeusa.org/ala6_ringling.php

\textsuperscript{55} An Australian website developed for the purpose of education and advocacy, CircusBan aims to help abolish animal circuses in Australia. It also contains a growing list of Australian local councils that have implemented a ban on animal circuses and general information about the issues with circuses. See: http://www.animalcircuses.com/default.aspx

\textsuperscript{56} <http://www.animalcircuses.com/>

\textsuperscript{57} G Iossa, C D Soulsbury and S Harris, ‘Are wild animals suited to a travelling circus life?’ (2009) 18 (2) Animal Welfare 129–140(12).
The study also reports that travel takes its toll on circus animals. It cites data showing that concentrations of the stress hormone cortisol in saliva from circus tigers remains abnormal up to 6 days after transport, and up to 12 days in tigers who’ve never travelled before. Evidence also shows that circus elephants, lions, tigers, bears and even parrots, adopt repetitive abnormal behaviours, called stereotypies. Also, the animals suffer ill-health both from confinement and from the tricks they learn to perform. Elephants, for example, become obese through inactivity and develop rheumatoid disorders and lameness as a result, as well as joint and hernia problems through having to adopt unnatural positions during performance.

There is no evidence to suggest that the natural needs of non-domesticated animals can be met through the living conditions and husbandry offered by circuses,’ concludes the study. ‘Neither natural environment nor much natural behaviour can be recreated in circuses.’

**Australian and International initiatives**

An increasing number of Australian municipal councils including Lismore, Ipswich and Gold Coast Councils are, however, taking an ethical stance by adopting a ban on the use of animals in circuses on council land. In July 1992, the Australian Capital Territory became the first place in the world to make the keeping of exotic animals in circuses a criminal offence.

There is an increasing trend across the world to have bans or severe restrictions placed on circuses containing exotic animals. Countries that have total bans are Bolivia, Israel, Sweden and Singapore. In Canada there are at least 19 cities/provinces that ban circuses containing exotic animals and in the United Kingdom there are over 200 councils that have bans. The US has many localities with outright bans and many more with varying levels of restrictions.

---

**Think**

Animal advocacy group, *Born Free* makes the following claims about animals in circuses.

- Using animals in circuses is an unnecessary and inhumane practice that’s harmful to both the animals and the public. Unlike the human performers who choose to work in circuses, exotic animals are forced to take part in the show. They are involuntary actors in a degrading, unnatural spectacle.
- While many people associate the circus with safe, wholesome, family fun, the truth is much darker. Government inspection reports reveal failures to provide the basic minimal standards of care required by law.
- Circuses that exploit animals make lofty claims about their educational value and their contributions to conservation. But the real message that these circuses send to children is that it’s acceptable to abuse animals for amusement and profit.

Do you agree with these sentiments? Why or why not?

**Regulatory framework for Circus Animals**

**Exhibited Animals Protection Act 1986**

The licencing requirements of ss 22–24 of the Act apply in relation to animals exhibited in circuses (see *Statutory Framework for Australian Zoos*, above).

The *Prevention of Cruelty to Animals Act 1979* and the *Non-Indigenous Animals Act 1987* apply in relation to animals exhibited in circuses (Schedule 4) and prevail to the extent of any inconsistency with the *Exhibited Animals Protection Act 1986*.

---

58 Ibid at 131.

59 Born Free ‘Animals in Circuses: A Lifetime of Misery’ <http://www.bornfreeusa.org/a1a_circus.php>
Exhibited Animals Protection Regulation 2010

Importantly, clause 17 provides that:

It is a condition of every approval under Division 2 of Part 3 of the Act authorising the exhibition of an animal at a circus that the animal will be kept and exhibited in accordance with the Standards for Exhibiting Circus Animals in New South Wales approved and published by the Director-General.

Clause 8 (1) provides that:

For the purposes of ss 14 and 25 of the Act, the following standards are prescribed:

Standards for Exhibiting Circus Animals in New South Wales

Standards for exhibiting circus animals in New South Wales 2009

Adherence to the Standards is a condition of the exhibition of circus animals in NSW as provided for by Clause 8(2) of the Exhibited Animals Protection Regulation 2010.

The NSW Standards essentially adopt the recommended national standards developed by the National Consultative Committee on Animal Welfare for the management and control of circuses in Australia. The Standards are endorsed by the Circus Federation of Australia and encompass all areas of circus animal care, including transportation, housing, exhibition, and husbandry and training.

Think

1. Should the fact that the Standards are endorsed by the Circus Federation of Australia be a matter for concern? Why or why not?
2. Can you identify any tension between the following clauses in the Standards?
   - Clause 13 (2): ‘Recognising signs of stress and distress, and ascertaining the causes of such stress or distress is vital. The cause of the stress or distress must then be removed or alleviated as much as is possible.’
   - Clause 19: ‘If an animal displays fear or anxiety while in the ring, the reasons for that fear should be explained to the audience. If a movement that the animal is performing looks awkward, the presenter should whenever possible point out the animal will not be hurt.’

Case study: Solitary elephants

In 2009, pursuant to Clause 8(1) of the Exhibited Animals Protection Regulation 2005, the NSW Department of Primary Industries developed a Policy on the Management of Solitary Elephants in New South Wales.

The policy concludes that ‘all reasonable efforts should be made to integrate solitary elephants into other groups unless compelling reasons can be provided that warrant the retention of a solitary elephant. Only in the event that all avenues for integration have been exhausted should the maintenance of a solitary elephant be contemplated.’

The policy was developed largely in response to a case involving the solitary female elephant Arna, owned by Stardust Circus. The case resulted in significant protests by the animal welfare community to the NSW Department of Primary Industries and included hundreds of letters of complaints. These concerns also resulted in animal activist Mark Pearson initiating proceedings against Stardust Circus on the grounds of alleged cruelty. The policy recognises that the ‘highly social nature of female elephants and their high public interest highlights the need to ensure that solitary elephants are appropriately managed.’

You will recall that in Topic 2 we discussed Pearson v Janlin Circuses Pty Ltd T/as Stardust Circus [2002] NSWSC 1118. That case concerned Arna, a well known circus elephant, who had been kept by the defendant.
for a number of years without any contact with other elephants. After her original companion, Bambi died in 1996, Arna was kept by herself. In late 2000 the defendant authorised three elephants owned by Stardust Circus to be kept in close proximity to Arna for a number of hours. The three elephants were then taken away. As a consequence of this act, the appellant argued, Arna was unreasonably, unnecessarily or unjustifiably abused, tormented, infuriated or inflicted with pain. The appellant argued that depriving an elephant of companionship constituted unnecessary, unreasonable or unjustified suffering under s 5(2) of the Prevention of Cruelty to Animals Act 1979 (NSW). Windeyer J agreed that while the offence created under s 5 of the Act was a strict liability offence, there was no evidence that the defendant, by specific statement or action, authorised the removal of the elephants, this being the act of cruelty relied upon. Because there was no evidence that the defendant was in charge of the three visiting elephants or their owner, it was unable to prevent the removal of the elephants and was consequently not guilty of the alleged offence.

The policy notes that ‘the occurrence of solitary elephants in New South Wales could occur due to the age demographics of the elephant population, potential difficulties in captive breeding and potential compatibility problems’. It observes that the national circus industry maintains an aged, all female population.

In November 2004 the Exhibited Animals Advisory Committee recognised that elephants in the wild are typically social, however elephant behaviour in captivity can differ significantly from their behaviour in the wild. The Committee agreed that it was inappropriate to have a policy of compulsory introductions of solitary elephants to other elephants due to the complexity of their behaviour, established bonds with trainers and difficulties in finding appropriate partners, but that ‘all efforts should be made by exhibitors of elephants to either find a compatible companion elephant for a solitary elephant or to introduce it into another group.’

The need for providing adequate social contact for elephants is required by the General Standards for Exhibiting Animals in New South Wales, Standards for Exhibiting Circus Animals in New South Wales, the Exhibited Animals Protection Act 1986 and the National Consultative Committee on Animal Welfare – Recommended National Circus Standards:

- **Clause 54** of the General Standards for Exhibiting Animals in New South Wales states that animals should be housed in social groups such as typically found in wild populations. This Clause also provides the Director-General with the ability to exempt an exhibitor from this requirement in certain circumstances, for example, where the animals were housed in an appropriate social group and following the death of one or more animals the exhibitor either cannot obtain replacements or is in the process of obtaining replacements. In the case of elephants however the period allowed for finding an appropriate companion should be limited.

- **Clause 57** of the General Standards for Exhibiting Animals in New South Wales states that behavioural enrichment activities should be provided to increase activity, stimulate natural behaviours and reduce the incidence of boredom. The Note box under this Clause outlines various types of enrichment that should be considered including social enrichment, which includes providing opportunities to interact with the same or other species by keeping in pairs or groups.

- **Section 28(1) of the Exhibited Animals Protection Act 1986** states that an authority is subject to any terms and conditions specified in the authority when it is issued; and any terms and conditions imposed by the Director-General upon the authority in accordance with the regulations after it has been issued. Therefore a condition requiring an exhibitor to find another elephant or transfer a solitary elephant to a facility with other elephants can be imposed under this provision.

- **The National Consultative Committee on Animal Welfare – Recommended National Circus Standards** makes several references to the holding of solitary elephants. The National Circus Standards suggests that as elephants are social herd animals, unless compelling reasons can be shown, they should always be housed with their own species, ie, being able to see and touch.62

**Postscript**

In 2003 a retired Ashton’s Circus elephant, Gigi became solitary after her two companions, Abu and Tanya, died. Gigi and Arna then became companions, travelling together with Stardust circus until December 2007 when Arna’s handler, Ray Williams, was crushed by Arna in uncertain circumstances. When found,
the 57 year old handler was lying face down in the makeshift elephant enclosure with a broken back and ruptured aorta.

Following expert health and behavioural assessments by zoo elephant managers from across Australia it was decided that Arna (aged 53) and Gigi (aged 50) should stay together and that Taronga Western Plains Zoo at Dubbo was the best location for these older elephants. Arna and Gigi now live in ‘retirement’ at the Western Plains Zoo’s with Asian elephant, Burma in a purpose-built exhibit next to the Zoo’s two African elephants.

**Activity**

1. Identify those circuses in Australia which still use exotic animals in their performances.
2. Research the fate of an exotic animal or animals that have been retired from circus performance in response to welfare concerns.

**Animals in recreation and sport**

The use of animals in sport, both as ‘prey’ and as ‘participants’ is a major concern of animal protection groups. As mentioned in the introduction to this topic, however, due to the huge scope of these concerns, this topic will not address the regulatory regimes governing the use of animals in recreational pursuits such as rodeos, horse racing, horse jumping and greyhound racing. Nor will unlawful ‘blood sport’ activities be considered. Finally, this topic will not consider the regulatory regime governing recreational fishing. If these are areas of interest to you, you are encouraged to engage in independent research into these topics.

The final part of this topic will provide a brief overview of the law in NSW governing recreational hunting. Note that ‘strategic culling’ of wildlife will be addressed in Topic 7, *Wild Animals and Animals in the Wild*.

**Recreational hunting**

Recreational hunting is a controversial activity and one which may precipitate profound tensions among animal activists, environmentalists and sporting enthusiasts. Historically, recreational hunting was a ‘leisure’ pursuit of the nobility. Some people regard recreational hunting as a ‘sport’. Others, including the NSW Game Council regard recreational hunters as ‘frontline conservationists’ and their activities as ‘voluntary conservation hunting’.

**Textbook**


In this chapter Dominique Thiriet investigates the ‘culture’ of contemporary recreational hunting.

---

63 For a significant current animal advocacy campaign relating to the Australian horse racing industry, see ‘Racehorses aren’t pet food: Create an owner’s levy to fund a horse welfare plan.’ Change.org notes that ‘each year, about 18,000 racehorses are shot and killed, most of which are purchased by meat buyers and turned into pet food.’ [http://www.change.org/petitions/australian-racing-industry-racehorses-arent-pet-food-create-an-owners-levy-to-fund-a-horse-welfare-plan?alert_id=FOrFQqbjwP_LITCQjQ4p&utm_campaign=13820&utm_medium=email&utm_source=action_alert](http://www.change.org/petitions/australian-racing-industry-racehorses-arent-pet-food-create-an-owners-levy-to-fund-a-horse-welfare-plan?alert_id=FOrFQqbjwP_LITCQjQ4p&utm_campaign=13820&utm_medium=email&utm_source=action_alert)

See also The Coalition for the Protection of Racehorses, which was formed in 2008 to address the serious animal welfare concerns that are rife throughout the racing industry [http://www.horseracingkills.com/](http://www.horseracingkills.com/)

64 See s 18–21 of the *Prevention of Cruelty to Animals Act 1979* (NSW) for prohibitions on certain types of blood sports.

65 See the NSW Game Council website, the wording on the home page changes from time to time however: [http://www.gamecouncil.nsw.gov.au/](http://www.gamecouncil.nsw.gov.au/)
1. Hunting bodies argue that ‘the hunting of animals is a legitimate and enjoyable cultural tradition’. What three central objections to recreational hunting does Thiriet identify?

2. What ethical distinctions, if any, may be made between the following rationales for hunting animals, and should hunting be sanctioned for some purposes but not others? Provide reasons:
   i. recreation and enjoyment;
   ii. sustenance;
   iii. competitive sport;
   iv. cultural tradition;
   v. contribution to the economy;
   vi. conservation (ie as an ‘environmental management’ tool).

3. Thiriet attempts to ‘explore the paradox inherent in legally sanctioning the act of hunting, an activity that involves the deliberate infliction of injury and death upon hundreds and thousands of animals every year.’ In what ways does she suggest that Australian and New Zealand law has permitted hunters to conduct themselves in a manner that ignores the welfare of animals’ and has failed to protect effectively the interests of animals?

4. Can governments attempt both to address animal welfare concerns while at the same time actively supporting and promoting the continuation of hunting? Why or why not?

Hunting or conservation?

In 2012 recreational hunting became a controversial issue in NSW when the state government enacted changes to the Game and Feral Animal Control Act 2002.66

On 27th June 2012, the NSW Coalition Government, the Shooters and Fishers Party and the Christian Democratic Party voted in changes to legislation that allows amateur, recreational hunting to occur in NSW national parks, nature reserves and state conservation areas: Game and Feral Animal Control Amendment Act 2012.67 Following an extended controversy, that Act was repealed on 27 December 2012, followed by the enactment of the Game and Feral Animal Control Further Amendment Act 2012.68 The amended legislation will allow recreational hunters to shoot an extended list of animals in national parks and includes national parks within the definition of ‘public land’. The NSW Government states that this program, known as the ‘Supplementary Pest Control Program’ is about ‘controlling pest animal populations in national parks’.

Opponents of the new legislation claim that there is no scientific evidence to demonstrate that such a program will impact pest animal populations in any significant way. Moreover, they claim that the hunting program is designed to facilitate the sport of hunting on public land, and has little to do with conservation. In addition, because legislation was already in place for integrated pest management programs to be carried out by professionals, no legislative changes were required to continue dealing with pest animal populations in NSW.

The ‘Supplementary Pest Control Program’ is set to commence in 79 NSW national parks at some point during 2013. Specifically, the Government has announced that 33 national parks, 29 nature reserves and 15 state conservation areas will be assessed for incorporation into the program. In 50 of the 77 parks an ‘open hunting’ model is proposed which involves minimal supervision controls and regulation for hunters. Hunting in these areas can involve licensed children as young as 12 hunting for the first time if they are under the adult supervision of a licensed hunter.

The amended Act also gives the Department of Primary Industries power to issue duck hunting licences and marks the end of a 20 year ban on duck hunting in NSW. The amendments are heralded as being for

the purpose of pest control only but farmers already had the power to engage professional shooters to shoot native ducks on their land.\(^{69}\)

The following events must occur before the program can take place. Until then, any shooting by members of the public in any national parks and reserves is illegal and subject to penalties.

- A comprehensive risk assessment is finalised, and the program is peer reviewed.
- The NSW Minister for Environment makes a formal notification of an intention to declare lands available for supplementary pest control.
- The Minister declares relevant reserves after a statutory period of at least 30 days.
- The National Parks and Wildlife Service provides written permission to individual licence holders through the Game Council-administered booking system.

Of continuing controversy, however, are the findings of a recent review into the Game Council of NSW, the organisation which, until recently, was responsible for overseeing the Act, after initial investigations found evidence suggesting an employee was engaged in illegal activity.\(^{70}\) Following a scathing review of the Council, the NSW Primary Industries Minister announced in July 2013 that all declarations of public land for hunting in NSW were revoked, that hunting on NSW public land will be banned for at least the next two months and that the Game Council will be disbanded, its functions to be transferred to the Department of Primary Industries.\(^{71}\)

However, the provisions of the *Game and Feral Animal Control Act 2002* remain in force and it was announced that a trial of the controversial plan to allow volunteer hunters will begin in 12 parks in October 2013.

---

**Think**

1. In *The Game Council NSW Code of Practice for Hunters – a Case Study in Animal Welfare*\(^{72}\), the author, A.W. English notes that ‘conservation hunting’, is ‘hunting undertaken to enhance overall environmental outcomes by managing the impact of game and feral animals and reducing their populations in natural and agricultural environments’. To what extent does the *Game and Feral Animal Control Act 2002* address the ‘enhancement of environmental outcomes’?

2. English claims that the Game Council had ‘a major compliance function, with successful prosecutions of illegal hunters now occurring’. Consider the ‘compliance function’ of the Game Council NSW with reference to the recent findings of the ‘Governance Review of the Game Council of NSW’ (the Dunn Review).\(^{73}\)

3. English suggests that ‘there are those who oppose hunting because they do not believe that an animal can be killed humanely by a hunter. There is even stronger opposition from animal rights groups who do not believe that an animal should be killed by any means. This latter view is a value judgment that will not be taken any further in this discussion.’

Is the writer justified in dismissing the claims of animal rights groups as ‘value judgments’? Why or why not?

---


Regulatory framework

The regulatory framework governing recreational hunting is NSW is provided by the Game and Feral Animal Control Act 2002. While Part 9 of the National Parks and Wildlife Act 1974 (NSW) provides for the issue of various classes of licences ‘to harm or obtain any protected fauna for any specified purpose’ such licences do not extend to harming or killing fauna for recreational purposes.

Game and Feral Animal Control Act 2002 (NSW)

The objects of the Game and Feral Animal Control Act 2002 are set out in s 3 of the Act:

- to provide for the effective management of introduced species of game animals, and
- to promote responsible and orderly hunting of those game animals on public and private land and of certain pest animals on public land.74

Key provisions

Section 5(1) of the Game and Feral Animal Control Act 2002 (NSW) provides that a ‘game animal’ is any of the following that is living in the wild:

- deer;
- California quail;
- pheasant;
- partridge;
- peafowl;
- turkey.

Section 5(2) provides that any of the following animals that are living in the wild are also a ‘game animals’ for the purposes of the Act. A game hunting licence is not required for hunting these animals on private land, and is only required if the animals are living in the wild on public land (see s 18):

- pig;
- dog (other than dingo);
- cat;
- goat;
- rabbit;
- hare;
- fox.

Section 6 provides that nothing in the Act affects the operation of:

- the Firearms Act 1996;
- the Weapons Prohibition Act 1998; or

Note also s 15(4) which provides that ‘a game hunting licence does not authorise the holder of the licence to contravene any prohibition or restriction imposed by or under any Act or statutory instrument.’

Licencing framework

Section 14 provides for the following classes of game hunting licences:

- general game hunting licences;
- restricted game hunting licences.

Clause 6 of the Game and Feral Animal Control Regulation 2004 further provides that in each class of game hunting licence (general and restricted) there are the following types of licence:

- standard hunting licence: authorises the licensee to engage in the hunting of game animals otherwise than as a hunting guide or commercial hunter (Clause 8);

74 Note that in 2006 state forests were opened to recreational shooters.
• *visitors hunting licence*: available to persons whose principal place of residence is outside Australia, it confers the same authority on the licensee as a standard hunting licence but only so as to authorise the licensee to hunt game animals in the company of the holder of a standard hunting licence or hunting guide licence that is of the same class (general or restricted) as the visitors hunting licence (Clause 9);

• *hunting guide licence*: authorises the licensee to engage in the hunting of game animals as a hunting guide and also confers the authority of a standard hunting licence (Clause 10);

• *commercial hunters licence*: authorises the licensee to engage in the hunting of game animals listed in s 5(1) of the Act as a commercial hunter and also confers the authority of a standard hunting licence (Clause 11).

Clause 13 of the *Regulation* stipulates that ‘only a natural person is eligible to be granted a game hunting licence’ and that:

• A hunting guide licence or commercial hunters licence must not be granted to a person who is under the age of 18 years.

• A standard hunting licence or visitors hunting licence must not be granted to a person who is under the age of 12 years.75

Section 15 sets out the authority conferred by the different classes of game hunting licences:

• *A general licence* authorises the holder of the licence to hunt game animals on any private land.76

• *A restricted licence* authorises the holder of the licence to hunt game animals on public land as well as any private land.

Section 16 creates an offence for hunting without a game hunting licence.

Section 17 sets out the circumstances in which a game hunting licence is not required, including:

• a person who is hunting an animal listed in s 5(2) on private land (ie pigs, dogs (other than dingos), cats, goats, rabbits, hares and foxes living in the wild);

• a person who is hunting on any land owned or occupied by the person or by a member of the person’s household;

• a person who is hunting on any land owned or occupied by the person’s employer or by a corporation of which the person is an officer;

• an Aboriginal person:
  – who is hunting a game animal pursuant to a native title right or interest that is the subject of an approved determination of native title or of a registered native title claim; or
  – who is a member, or in the company of a member, of a Local Aboriginal Land Council and who is undertaking traditional cultural hunting within the area of the Council;

• a person who is hunting animals listed in s 5(2) in accordance with a duty imposed on the person under the *Rural Lands Protection Act 1998* or the *Wild Dog Destruction Act 1921* to suppress and destroy the animals;

• a person who is hunting deer in accordance with a duty imposed on the person or the person’s employer because of a deer control order or compliance direction under the *Deer Act 2006*;

• a person who is hunting as a professional game hunter in the course of any paid employment or engagement;

• a person employed by any public or local authority who is acting in the execution of his or her duties as such an employee;

• a veterinary practitioner within the meaning of the *Veterinary Practice Act 2003* or other person who is acting for the purposes of killing or treating an animal in distress due to injury or illness;

• a person of a class, or hunting in the circumstances, prescribed by the regulations.

75 12 is the minimum age for the grant of a minor’s firearms permit under the *Firearms Act 1996*.

76 But note that a game hunting licence does not authorise the holder of the licence to enter any land that the holder is not otherwise authorised to enter: s 15(3)
Note that clause 19 Game and Feral Animal Control Regulation 2004 further provides that for the purposes of s 17, a game hunting licence is not required in respect of:

- the hunting of any animal in accordance with a power or duty imposed under the Exotic Diseases of Animals Act 1991; or
- the hunting of any animal pursuant to an obligation imposed by or under an Act to manage, control or eradicate the animal concerned, but only on land and for the period in respect of which the obligation applies.

**Hunting for game animals on public lands**

In the case of hunting on public land, s 18 provides that a licence does not authorise hunting unless the land is duly declared to be available for hunting. A licence does not authorise hunting on national park estate land.

**Qualifications for restricted game hunting licence**

Section 19 provides that a person is not entitled to be granted a restricted game hunting licence unless:

- the person is a member of a hunting club, or organisation, approved by the Game Council; and
- the person satisfies the Game Council that he or she has undertaken adequate training for the activities authorised by the licence.

**Granting authority: Game Council NSW**

Section 21 stipulates that game hunting licences are to be granted by the Game Council which must approve or refuse applications for game hunting licences in accordance with this Act and the Regulations.

Section 21(3) provides that the Game Council must refuse to grant a game hunting licence to a person:

- if the person has been found guilty of an offence in New South Wales or elsewhere (in the previous 10 years) involving cruelty or harm to animals, personal violence, damage to property or unlawful entry into land; or
- if the person has been found guilty of an offence under s 55; or
- if the person is not a fit and proper person to hold the licence, or
- in such other circumstances as are prescribed by the regulations.

**Conditions of licences**

Section 22 provides that game hunting licences may be granted unconditionally or subject to conditions. After granting a game hunting licence, the Game Council may impose conditions or further conditions on the licence, or vary or revoke any of the conditions to which the licence is subject.

Section 22(3) provides that a game hunting licence is also ‘subject to such conditions as are prescribed by the regulations’ (See Schedule 1 Conditions of game hunting licences, discussed below).

Section 24 provides that the Minister is to approve a code of practice for the holders of game hunting licences and that the code is to identify the provisions that must be observed by persons hunting game animals pursuant to a game hunting licence. Compliance with those mandatory provisions is a condition of a game hunting licence (See Schedule 2 Mandatory provisions of code of practice, discussed below).

Section 29 provides that the Game Council may suspend or cancel a game hunting licence if:

- the holder is not qualified, or is no longer qualified, to hold the licence;
- the holder contravenes any mandatory provision of the code of practice referred to in s 24;
- the holder is found guilty of an offence in New South Wales or elsewhere involving cruelty to animals;
- if the holder has been found guilty of an offence under s 55;
- the holder contravenes a condition of the licence;


78 Section 55 provides that a person must not release a game animal into the wild for the purpose of hunting the animal or its descendants.

79 A contravention of a mandatory provision constitutes an offence (section 23) and grounds for cancellation or suspension of a licence (section 29).
the holder is found guilty of an offence in New South Wales or elsewhere involving harm to animals, personal violence, damage to property or unlawful entry into land in the past 10 years.

**Conditions of game hunting licences: Schedule 1**

**Clause 18** of the *Game and Feral Animal Control Regulation 2004* provides that ‘the provisions of Schedule 1 are prescribed as conditions of every game hunting licence.’

**Clause 18** further provides that the Game Council may suspend the operation of any provision of clauses 4–12 of *Schedule 1* for a specified period and in relation to specified land, being land that the Game Council is satisfied is the subject of:

- a management plan dealing with game hunting on the land; or
- with the management, control or eradication of game animals on the land.

During the period of any such suspension, the suspended provision is not a condition of any game hunting licence for the purposes of the hunting of game animals in accordance with any conditions of the suspension on the land to which the suspension applies.

Schedule 1 contains the conditions of a game hunting licence. These conditions do not apply to game hunting that does not require a licence: see s 17 of the *Act*.

It is an offence under s 23 of the *Act* to contravene any condition of a game hunting licence. Contravening a condition of a game hunting licence is also grounds for cancelling or suspending the licence under s 29 of the *Act*.

Please refer to Schedule 1 of the *Game and Feral Animal Control Regulation 2004* which sets out the conditions relating to the following:

**Part 1: Hunting generally**

- Hunting on declared public land requires permission to enter;
- Licence to be carried and produced on request;
- Hunting by persons under 18 years of age;
- Open seasons for certain deer;
- Use of spotlights or electronic devices for hunting deer;
- Hunting of game fleeing from fire or smoke prohibited.

**Part 2: Special provisions for s 5(1) game**

- Use of aircraft, watercraft and motor vehicles prohibited for hunting s 5(1) game;
- Use of baits, lures and decoys for hunting s 5(1) game;
- Hunting s 5(1) game at night prohibited.

**Part 3: Use of dogs**

- Use of dogs when hunting game birds;
- Use of dogs for hunting deer;
- Use of dogs for hunting pigs on public land.

**Part 4: Hunting Hog deer**

- Bag limit for Hog deer;
- Hog deer tags;
- Use of Hog deer tags;
- Return about Hog deer tags to be provided;
- Return of unused Hog deer tags.
Code of Practice for licensed game hunters

As identified above, s 24 of the Act provides that the Minister is to approve a code of practice for the holders of game hunting licences and that the code is to identify the provisions that must be observed by persons hunting game animals pursuant to a game hunting licence. Compliance with those mandatory provisions is a condition of a game hunting licence and a contravention of a mandatory provision constitutes an offence (s 23) and grounds for cancellation or suspension of a licence (s 29).

Schedule 2 of the Game and Feral Animal Control Regulation 2004 sets out the mandatory provisions of the code of practice for holders of game hunting licences under s 24 of the Act. These provisions only apply to the holders of game hunting licences.

1 Awareness of relevant legislation
   It is the responsibility of the holder of a game hunting licence to be aware of and comply with all relevant provisions of legislation relating to hunting, animal welfare and the use of firearms.

2 Safe handling of firearms
   Where firearms are used, the rules for safe handling set out in the NSW Firearms Safety Awareness Handbook published by or under the authority of the Commissioner of Police must be complied with at all times.

3 Permission required to enter land
   A game hunting licence does not automatically authorise the holder of the licence to hunt on any land. The holder of a game hunting licence must not hunt on any land without the express authority of the occupier of the land.

4 Target identification and safety
   A game animal must not be fired at unless it can be clearly seen and identified, and the shot when taken poses no discernible risk of injury to any person or significant damage to any property.

5 Obligation to avoid suffering
   An animal being hunted must not be inflicted with unnecessary pain. To achieve the aim of delivering a humane death to the hunted animal:
   (a) it must be targeted so that a humane kill is likely; and
   (b) it must be shot within the reasonably accepted killing range of the firearm and ammunition or bow being used; and
   (c) the firearm and ammunition, bow and arrow, or other thing used must be such as can reasonably be expected to humanely kill an animal of the target species.

6 Lactating females with dependent young
   If a lactating female is killed, every reasonable effort must be made to locate and humanely kill any dependent young.

7 Wounded animals
   If an animal is wounded, the hunter must take all reasonable steps to locate it, so that it can be killed quickly and humanely.

8 Use of dogs
   Dogs and other animals may be used to assist hunters but only if:
   (a) their use is not in contravention of the Prevention of Cruelty to Animals Act 1979; and
   (b) their use is with the permission of the occupier of the land concerned.

Watch this Space: the Game and Feral Animal Control Further Amendment Act 2012
Section 6A of the amended Act provides:

**Exemptions from certain offences under National Parks and Wildlife legislation**

(1) The holder of a game hunting licence who hunts a game animal on declared public hunting land in accordance with the authority conferred by the licence does not, in connection with that hunting, commit:

   (a) any offence under the *National Parks and Wildlife Act 1974* or the regulations under that Act that involves an activity associated with hunting and that is necessary for the purposes of hunting the game animal, or

   (b) any offence under that Act that involves possessing or exporting, otherwise than for the purposes of sale, the carcass, or the skin or any other part, of a game animal killed by the licence holder.

(2) For the purposes of subsection (1) (a), an *activity associated with hunting* includes carrying a firearm or other hunting device.

(3) This section does not authorise a person to take a dog into any national park estate land or to use a dog to assist in hunting on any such land.

Section 55A of the amended Act provides:

**Interfering with authorised hunting on declared public hunting land**

(1) A person must not, without reasonable excuse, engage in any conduct on declared public hunting land:

   (a) that interferes with the hunting of game animals on that land by another person under the authority conferred by a game hunting licence, and

   (b) with the intention of interfering with that hunting.

---

**National Parks and Wildlife Act 1974**

The *National Parks and Wildlife Act 1974* (NSW) contains provisions relevant to hunting activities in national parks.

Note section 70(1) which provides that:

A person shall not harm any fauna, or use any animal, firearm, explosive, net, trap, hunting device or instrument or means whatever for the purpose of harming any fauna, being fauna within a wildlife refuge, conservation area, wilderness area or area subject to a wilderness protection agreement.

Section 70(2) provides that:

A person shall not carry, discharge or have in the person’s possession any prohibited weapon, carry or have in the person’s possession any explosive, net, trap or hunting device, or be accompanied by a dog, in a wildlife refuge, conservation area, wilderness area or area subject to a wilderness protection agreement.

Section 70(3) provides that:

A person shall not be convicted of an offence arising under subsection (1) or (2) if the person proves that the act constituting the offence was done, or that the state of affairs constituting the offence existed:

- under and in accordance with or by virtue of the authority conferred by a general licence under section 120, an occupier’s licence under section 121, a commercial fauna harvester’s licence under section 123, a scientific licence under section 132C or a licence under Part 6 of the *Threatened Species Conservation Act 1995*; or

- in pursuance of a duty imposed on the person by or under any Act.

Section 98(2) provides that:

A person shall not harm any protected fauna, or harm for sporting or recreational purposes game birds that are locally unprotected fauna, or use any substance, animal, firearm, explosive, net, trap, hunting device or instrument or means whatever for the purpose of harming any protected fauna.
Section 98(3) provides that:

A person shall not be convicted of an offence arising under subsection (2) if the person proves that the act constituting the offence was done:

- under and in accordance with or by virtue of the authority conferred by a general licence under section 120, an occupier’s licence under section 121, a commercial fauna harvester’s licence under section 123, an emu licence under section 125A, a scientific licence under section 132C or a licence under Part 6 of the Threatened Species Conservation Act 1995, or
- in pursuance of a duty imposed on the person by or under any Act.

Section 98(4) provides that:

A person is not to be convicted of an offence arising under subsection (2) if the person proves that:

- the act constituting the offence was authorised by, and done in accordance with, a conservation agreement; or
- the act constituting the offence was authorised by, and done in accordance with, a joint management agreement entered into under Part 7 of the Threatened Species Conservation Act 1995.

Section 98(5) provides that:

Subsection (2) does not apply in relation to things which are essential for the carrying out of:

- development in accordance with a development consent within the meaning of the Environmental Planning and Assessment Act 1979

Licences to harm or obtain protected fauna

In addition, the National Parks and Wildlife Act 1974 (NSW) provides for the issue of licences to ‘harm or obtain’ protected fauna for purposes of harvest, sale, exhibition, disposal and/or trade in the following circumstances:

Section 120 provides that:

The Director-General may issue a licence authorising a person to do any or all of the following:

- to harm or obtain any protected fauna for any specified purpose;
- to hold or keep in possession or under control any protected fauna for any specified purpose;
- to exhibit protected fauna;
- to dispose of, whether by sale or otherwise, any fauna harmed, obtained, held, kept or exhibited under the authority of the licence;
- to sell any fauna in the person’s lawful possession, otherwise than as a fauna dealer or skin dealer;
- to harm any protected fauna (other than a threatened species, population or ecological community) in the course of carrying out specified development or specified activities.

Section 121(1) provides that:

The Director-General may issue a licence authorising an owner or occupier of specified lands ‘to harm, or to permit a person, holding a general licence issued to the person under section 120 or a commercial fauna harvester’s licence issued to the person under section 123, to harm, a specified number of fauna of a specified class found on those lands and the licence may authorise the disposal, whether by sale or otherwise, of fauna harmed under the authority of the licence’.

Section 121(3) provides that:

An occupier’s licence shall not be issued with respect to threatened species, populations or ecological communities or to authorise game birds to be harmed for sporting or recreational purposes. However, a licence can authorise a sporting or recreational shooter to harm game birds for any other specified lawful purpose.

---

80 See section 129 of the NPW Act which authorises shooting in nature reserves and national parks where licences have been issued under ss 120–126.
Section 123 provides that:

The Director-General may issue a licence authorising a person to harm fauna of a species named therein for the purposes of sale’ but that ‘a commercial fauna harvester’s licence must not be issued with respect to threatened species, populations or ecological communities: s 123(3).

Section 124 provides that:

The Director-General may issue a licence authorising a person to buy or sell fauna as a fauna dealer and otherwise to exercise or carry on the business of a fauna dealer.

Section 125 provides that:

The Director-General may issue a licence authorising a person to buy or sell skins as a skin dealer and otherwise to exercise or carry on the business of a skin dealer.

Section 125A provides that:

The Director-General may issue a licence authorising a person to buy or sell live emus, whole emu eggs or other emu products, to kill emus reared or bred under and in accordance with the authority conferred by such a licence.

Section 126 provides that:

The Director-General may issue a licence authorising a person to import protected fauna into New South Wales and/or authorising a person to export protected fauna from New South Wales.

Section 130 provides that:

Except in so far as the licence or certificate otherwise provides, a licence or certificate under this Division that authorises a person to harm or to obtain any fauna also authorises the person to keep and have the fauna in the person’s possession.

Think

Under what circumstances, if any, should hunting for commercial purposes in national parks and nature reserves be licenced under the National Parks and Wildlife Act 1974 (NSW)? Investigate the costs of such licences.

Prevention of Cruelty to Animals Act 1979 (NSW)

As noted above, s 6 of the Game and Feral Animal Control Act 2002 (NSW) provides that nothing in the Act affects the operation of the Prevention of Cruelty to Animals Act 1979. In addition, s 15(4) provides that ‘a game hunting licence does not authorise the holder of the licence to contravene any prohibition or restriction imposed by or under any Act or statutory instrument.’

The following provisions of the Prevention of Cruelty to Animals Act 1979 are, in addition to the offences contained in ss 5 and 6, discussed in Topic 2, applicable to recreational hunting activities:

Section 19 of the Act provides that:

A person shall not advertise, promote or take part in a match, competition or other activity in which an animal is released from confinement for the purpose of that person, or any other person, shooting at it.

Section 19A(1) of the Act provides that:

A person shall not use any premises, manage or control any premises which are used, or authorise any premises to be used, or receive money or any other consideration for the admission of another person to any premises which are used, for the purposes of a game park.
Section 19A(3) of the Act provides that:

A person admitted to a game park by virtue of the payment of an admission fee or the giving of other consideration shall not take or kill any animal in the game park.81

Section 20 of the Act provides that:

A person shall not advertise, promote or take part in a match, competition or other activity in which an animal is released from confinement for the purpose of that person, or any other person, chasing, catching or confining it.

Think

Do you think that the provisions of the Game and Feral Animal Control Act 2002 adequately regulate the activities of licenced recreational hunters on private land? What powers, if any, are available to enforcement personnel under the Game and Feral Animal Control Act 2002 to enable them to enter upon private land to investigate possible breaches of the Prevention of Cruelty to Animals Act 1979 such as using premises for the purposes of a ‘game park’? Do you consider that the activities of recreational hunters are properly scrutinised both by members of the public and by enforcement agencies?

Topic summary

In this topic we have considered the statutory frameworks governing the exhibition of animals in zoos and aquaria in New South Wales, the exhibition of animals in circuses in New South Wales and the conduct of recreational hunting in New South Wales. We have also had regard to the significance and legal effect of Codes of Practice Standards and Guidelines in the above contexts. This topic has also caused us to consider whether animals used in entertainment and recreational sports are adequately protected by existing animal protection legislation. The topic has also considered a range of broader ethical issues relating to the protection of exhibited animals and those the subject of recreational hunting activities, including whether the benefits which humans derive from such activities outweigh the interests of the animals involved.

Activity 4.1

You hear that an animal circus may be coming to your town. You are aware that a number of local Councils have banned animal circuses and decide to instigate a campaign in your local area. You discuss the matter with the Mayor who suggests that you identify a Councillor who is willing to support such a ban. You approach a Councillor who agrees to move a motion to ban all animal circuses within the local government area at the next Council meeting. You know that if you can persuade the majority of Councillors to support the ban that the motion will succeed. What arguments would you present to persuade the Councillors to support the motion?

---

81 In s 19A:

- ‘animal’ does not include a bird, reptile, amphibian or fish;
- ‘game park’ means premises within the boundaries of which animals are confined, and the taking or killing of those animals as a sport or recreation is permitted by virtue of the payment of an admission fee or the giving of other consideration;
- ‘take’, in relation to any animal, includes hunt, shoot, poison, net, snare, spear, pursue, capture and injure the animal.
Activity 4.2

You obtain some ‘undercover’ video footage that suggests that some recreational hunters may have engaged in unlawful animal cruelty. The footage shows a number of foxes being targeted with shotguns and injured pups running into the undergrowth. While the adult foxes were killed either on the first or subsequent shot, there is nothing in the video to suggest that the hunters sought out the injured pups. Citing relevant legislative provisions, what course or courses of action may be available to you?
Topic 5

Animals in agriculture and live animal export

Objectives

At the completion of this topic students will be able to:

- describe the elements of the federal regulatory framework in relation to animals in agriculture;
- describe the elements of the federal regulatory framework in relation to live animal export;
- describe the central features and significance of the Australian Animal Welfare Standards and Guidelines as they apply to animals used in agriculture;
- describe the central features and explain the significance of industry Codes of Practice relating to animal farming practices, animal transport, live animal export and animal slaughter;
- identify the significance of state and federal animal protection and anti cruelty laws in the context of animals in agriculture;
- identify and critically evaluate a range of animal welfare issues related to factory farming practices, animal transport, industrial animal slaughter and live animal export;
- identify and explain some international initiatives relating to the welfare of farmed animals.

Textbook

- Chapter 3 – Katrina Sharman ‘Farm Animals and Welfare: An Unhappy Union’
- Chapter 7 – Arnja Dale and Steven White, ‘Codifying Animal Welfare Standards: Foundations for Better Animal Protection or Merely a Façade?’
Webcast 5.1

Animals Australia, ‘What is Factory Farming?’ (2.25 min)
<http://www.makeitpossible.com/facts/what-is-factory-farming.php#environment>

Webcast 5.2

‘United Nations (UN) Report on Livestock and Global Warming’ (2.26 min)
<http://www.youtube.com/watch?v=VRyfVhawjVU>

Webcast 5.3

‘Victorian abbatoir accused of cruel treatment of unwanted dairy calves’ (4.14 min)
<http://www.abc.net.au/lateline/content/2013/s3681709.htm>

Webcast 5.4

‘Muelsing Sheep’ (5.57 min)
<http://www.youtube.com/watch?v=vbAoOuY9ZE4>

Webcast 5.5

‘Ultra Fine Wool and Intensive sheep farming’
<http://www.animalsaustralia.org/issues/ultra_fine_wool.php>

Webcast 5.6

‘The Difference Between Caged and Free-Range Chickens’ (2.10 min)
<http://www.youtube.com/watch?v=5exEt-b1bag&feature=related>

Webcast 5.7

‘Laying Hens’ (2.30 min)
<http://www.freebetty.com/cage_eggs.php>

Webcast 5.8

‘45 Days – The Life and Death of a Broiler Chicken: Part 2’ (5.57 min)
<http://www.youtube.com/watch?v=-lhoF0T9Ay8&feature=related>

Webcast 5.9

‘Live Fast Die Young – the Life of a Meat Chicken’ (7.56 min)
<http://www.youtube.com/watch?v=rpbtBglfJ50>
Introduction

This topic will provide an overview of the regulatory regimes governing animals in agriculture and live animal export. Perhaps more than any other area of human-animal interaction, the exploitation of animals for agricultural purposes, particularly in view of the scale of the activities and the economic interests involved, gives rise to a vast range of animal welfare issues. Some commentators suggest that the treatment of animals in intensive agriculture is a form of legally sanctioned institutionalised cruelty.

Given the immense scope of a topic such as this and the broad range of issues which it raises, it will not be possible to provide a detailed investigation of all relevant issues. Links and references to relevant resources

Webcast 5.10
‘Australian Pig Farming: The Inside Story’ (13.04 min)
<http://www.youtube.com/watch?v=n_3xwGiB4gs>

Webcast 5.11
‘Animals Australia Pig Factory Farming Investigation’ (2.00 min)
<http://www.youtube.com/watch?v=hHkqrd44dDw>

Webcast 5.12
Australian Animal Welfare – Land Transport of Livestock (6.23 min)
<http://www.youtube.com/watch?v=SnIQhKZd6vM>

Webcast 5.13
Animal transport investigation (7.10 min)
<http://www.youtube.com/watch?v=4HpTOR10nzA>

Webcast 5.14
Driving Pain: The State of Farmed Animal Transport (6.27 min)
<http://www.youtube.com/watch?v=PrZHV6oUSs>

Webcast 5.15
ABC Rural Affairs, ‘Animal welfare and the live stock trade: Live export snapshot’ (2.01 min)

Webcast 5.16
‘If you think live exports are a good idea, watch this’ (3.31 min)
<http://www.filmsforaction.org/watch/if_you_think_live_exports_are_a_good_idea_watch_this/>
Note also that while many farmed animals are bred for purposes of human consumption (‘livestock’ such as cows, pigs, sheep and poultry in particular), this topic will not investigate in detail the many ethical and environmental concerns related to animals as food. Nor will it be able to consider in detail all the issues related to factory farming and corporate agribusiness. Although such issues are implicit to an examination of animal farming practices, particularly those employed in intensive agriculture, an in-depth investigation of these issues is well beyond the scope of a single topic. Nor will this topic investigate the issues relating to the use of animal products in food and cosmetics and associated labelling issues. Again, links and references to relevant resources related to these issues are provided should you wish to investigate them further. Finally, this topic will not investigate animal welfare issues related to fish farming and other forms of commercial aquaculture.

**Intensive animal agriculture: Legally sanctioned cruelty?**

Australia among the world’s largest and most successful and efficient producers of commercial livestock and a leader in the export of red meat and livestock. The total value of Australia’s off-farm beef and sheepmeat industry is A$16 billion.

---

3 See also fishwelfare.net, a website dedicated to research into fish welfare and which serves as a repository and reference point for relevant information relating to the various fish welfare related research initiatives. [http://www.fishwelfare.net/about/]
4 See Elder Smith Goldsborough Mort Ltd v McBride [1976] 2 NSWLR 631 in which it was held that animals fall within the definition of ‘goods’ in sale of goods and consumer protection legislation. Also Rural Export & Trading (WA) Pty Ltd v Hahnheuser [2007] FCA 1535 in which the term ‘goods’ under the Trade Practices Act 1974 (Cth) was held to include animals.
Clause 4A of the Prevention of Cruelty to Animals Amendment (Animal Trades) Regulation 2013 excludes the application of Part 2 of the Prevention of Cruelty to Animals Regulation 2012 relating to minimum standards for the confinement of layer hens for the purposes of carrying or conveying the birds.

Clause 37A of the amended regulation provides that a person who complies with the requirements of the relevant Standards in respect of providing an animal with access to water during the transport process is exempt from the operation of s 8(1) of the Prevention of Cruelty to Animals Act 1979 in respect of providing the animal with drink during that transport process.

While new standards do provide a broad range of protections for the transportation of animals classified as ‘livestock’, protections previous provided to chickens that lay eggs are not dealt with in the new Transport Standards. In particular, for layer hens confined to boxes or cages during transport, there are no specific requirements as to the dimensions of the cage or cage doors, requirements for cage flooring, stocking densities, food/ water requirements or requirements as to multi-layered systems.

As stated by NSW Shadow Environment Minister Luke Foley:

The actions of the O’Farrell Government represent a significant step backward for the welfare of chickens that lay eggs. The reduction in protections could lead to these chickens being transported in totally unsuitable conditions – putting their health and welfare in jeopardy. These hens deserve to be treated in a humane and respectful fashion when being transported.

Think

1. For what reasons does Sharman suggest that Australia’s animal welfare laws are failing farm animals?

2. Sharman states that ‘since all jurisdictions prohibit unnecessary, unreasonable or unjustifiable cruelty, the corollary is that they allow necessary, reasonable or justifiable cruelty.’ Identify examples of what the law condones as ‘necessary, reasonable or justifiable’ cruelty in the context of factory farming.

3. Do you agree with Sharman that if more Australians were aware of the extent and degree of legalised cruelty associated with the corporatisation of animal production, this would remove a significant impediment to farm animal law reform?

Different standards for farmed animals?

More than in any other area of animal law, the welfare of animals used for purposes of food production is governed by Codes of Practice and Standards. While some of these have legislative effect, others operate to provide guidance to producers on acceptable welfare practices.


You will recall that in Topic 1 we considered Arnja Dale and Steven White’s discussion of the codification of animal welfare standards. The authors suggested that the way in which the codes are adopted in the legislation reflects a differential treatment of farmed animals from companion animals and that in many cases, the codification of standards have the effect of providing legal sanction for ‘the possibility of cruelty to farmed animals in a way that would not be permissible for companion animals.’

Steven White states that:

[T]he key factor in understanding this dichotomy is the property status (and hence economic value) of animals: economic theory tells us that rational property owners will only harm their animal property for good reason; ie if it will produce a societal benefit …. In other words, the differential approach to standard setting is justified on the grounds that while cruelty to companion animals yields no

6 Media Release, June 2013.
discernible social benefit, the same cannot be said of cruelty to farmed animals. By permitting some
cruelty to farmed animals, farmers can adopt production methods that are more efficient than would
be possible if higher standards of care were applicable, in turn allowing for the supply of slaughtered
animals to consumers at a lower price.7

Similarly, Gary Francione argues that animal welfare measures are often based on considerations of
economic efficiency and have nothing to do with recognising the inherent value of non-humans.8 This is
particularly the case, he says, in relation to farmed animals.

Note, for example, the following from a McDonalds website:

We consider our priorities for food safety, quality and costs - together with our ethical, environmental
and economic responsibilities - when we make purchasing decisions and evaluate supplier performance.
This includes animal welfare.9

Francione argues that to the extent that animal advocates seek protection for animals that exceeds what
is necessary to exploit them for a particular purpose, the property status of nonhumans and the political
compromise that is required ‘invariably result in regulations that do little –if anything – to affect adversely
the interests of human property owners or to improve the treatment of nonhumans’. The primary effect of
protection measures, Francione suggests, is ‘to make the public feel better about animal exploitation, which
actually may result in a net increase of animal suffering through increased use.’ His argument is that welfare
guidelines enable the producers of animal products to better exploit animals in an economically efficient
manner by adopting measures that improve meat quality and worker safety:

[T]his has absolutely nothing to do with any recognition that animals have inherent value or that they
have interests that should be respected even when it is not economically beneficial for humans to do so …
Any supposed improvements in animal welfare are limited to and justified by economic benefits for
institutional exploiters. Moreover, there is serious doubt whether these changes actually provide any
significant improvement in animal treatment.10

One area where differential treatment of farmed animals is sanctioned by legislation is in relation to defences
to cruelty in s 24(1) of the Prevention of Cruelty to Animals Act 1979 (NSW). That section provides:11

In any proceedings for an offence against this Part or the regulations in respect of an animal, the person
accused of the offence is not guilty of the offence if the person satisfies the court that the act or omission
in respect of which the proceedings are being taken was done, authorised to be done or omitted to be
done by that person:

- where, at the time when the offence is alleged to have been committed, the animal was:
  - a stock animal— in the course of, and for the purpose of, ear-marking or ear-tagging the animal
    or branding, other than firing or hot iron branding of the face of, the animal,
  - a pig of less than 2 months of age or a stock animal of less than 6 months of age which belongs
    to a class of animals comprising cattle, sheep or goats— in the course of, and for the purpose of,
    castrating the animal,
  - a goat of less than 1 month of age or a stock animal of less than 12 months of age which belongs
    to the class of animal comprising cattle— in the course of, and for the purpose of, dehorning the
    animal,
  - a sheep of less than 6 months of age— in the course of, and for the purpose of, tailing the animal,
    or
  - a sheep of less than 12 months of age— in the course of, and for the purpose of, performing the
    Mules operation upon the animal,

in a manner that inflicted no unnecessary pain upon the animal.

---

7 Steven White, ‘Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the
8 Gary L Francione, ‘Reflections on Animals, Property, and The Law and Rain Without Thunder’ (2007) 70 Law and
Contemporary Problems 9.
10 See above n 8, 11.
11 Section 4 of the Act defines ‘stock animal’ as ‘one that belongs to a class of animals including: cattle, horses, sheep, goats,
deer, pigs, poultry and other species that are prescribed.’
See also s 9 of the Prevention of Cruelty to Animals Act 1979 which provides that ‘a person in charge of an animal which is confined shall not fail to provide the animal with adequate exercise’ if the animal is:
- a stock animal other than a horse; or
- an animal of a species which is usually kept in captivity by means of a cage.

Section 9(3) provides that person in charge of an animal (other than a stock animal) shall not confine the animal in a cage of which the height, length or breadth is insufficient to allow the animal a reasonable opportunity for adequate exercise.

**Out of sight, outside of law?**

Animal advocates suggest that the ‘invisibility’ of many agricultural practices enables operators to engage in practices that routinely cause suffering to animals. If those practices were highly visible, it is argued, they would be more likely to change since many people would regard them as morally indefensible.

As Siobhan O’Sullivan suggests, the low visibility of animal farming practices is one reason for the inconsistencies and ‘negative discrimination’ between different types of animals. She states that one of the distinctive features of animal welfare laws throughout the western world is the inconsistent ways in which they protect animals from harm. She argues that agricultural animals are not closely monitored by the state, are not directly visible to most people most of the time, and receive limited media exposure.12

In relation to the low level of visibility of industrialised agricultural practices in the US, Michael Pollen claims:

> The industrialization – and dehumanization – of American animal farming is a relatively new, evitable and local phenomenon: no other country raises and slaughters its food animals quite as intensively or as brutally as we do. Were the walls of our meat industry to become transparent, literally or even figuratively, we would not long continue to do it this way. Tail-docking and sow crates and beak-clipping would disappear overnight, and the days of slaughtering four hundred head of cattle an hour come to an end. **For who could stand the sight?** [emphasis added]13

---

**Think**

1. Many people might regard the ear-tagging, branding, castration, de-horning, tailing and mulesing of farm animals as non-contentious and ‘justified’ agricultural practices. Some might even suggest that they are carried out for animal welfare purposes. What justifications are offered for such practices and why is it considered ‘acceptable’ that they be carried out on ‘stock animals’ without the use of local anesthesia? Do you think that the requirement that these practices are carried out ‘in manner that inflicted no unnecessary pain upon the animal’ might suggest that anesthesia should be used? Why or why not?

2. Why might it be considered ‘justifiable’ to deprive stock animals (other than horses) of a reasonable opportunity for adequate exercise?

3. Do you agree with Dale and White that the differential standards which apply to companion and farmed animals are ‘morally and scientifically incoherent’? Why or why not?

4. Consider Francione’s suggestion that welfare regulations function to sanction the ‘institutionalised exploitation’ of animals. Do you agree with Francione that ‘the level of care required by animal welfare laws rarely rises above that which a rational property owner would provide in order to exploit the animal in an economically efficient way?’

---


5. Do you agree that the ‘invisibility’ of many practices relating to farmed animals both enables producers to engage in practices which cause animals suffering and contributes to a culture of ‘disinterest’ among consumers of farmed animal products?

6. Do you think that if there was greater knowledge of common farming practices which cause suffering to animals, and that such practices were more ‘visible’ that more consumers of animal products would change their purchasing and eating practices? Do you think that consumers would be willing to pay a higher price for animal products which have not resulted from cruel farming practices?

7. While both companion animals and farmed animals share the status of having been ‘domesticated’ by humans, it seems clear that the welfare standards relating to each differ. On what basis can the application of differential standards applicable to companion animals and farmed animals be explained?

8. Michael Pollan comments that ‘a tension has always existed between the capitalist imperative to maximise efficiency and the moral imperatives of religion or community, which have historically served as a counterweight to the moral blindness of the market. This is one of ‘the cultural contradictions of capitalism’–the tendency of the economic impulse to erode the moral underpinnings of society. Mercy toward animals is one such casualty.’ (‘An Animals’ Place’, New York Times Magazine, November 10, 2002)

Do you agree that the ‘moral imperatives’ of religion or community have failed to safeguard the interests of animals in industrialised agriculture? Why or why not?

**Activity**

**Read The Conversation, ‘Why Market Forces Don’t Protect Animal Welfare’ (1 July 2013):**  

Many representatives of the livestock industry and politicians claim that ‘a happy pig equals profit’. Contrary to such claims, Jed Goodfellow and Peter Radin argue that not only are productivity and animal welfare not compatible, they are in conflict. Battery cages and sow stalls, for example, are known to have negative impacts on welfare yet they are designed to achieve productivity gains. The writers argue that it is possible to have a physically healthy productive animal that is in a poor state of welfare due to, for instance, psychological stress. If this is so, there is little economic incentive for a farmer to provide improved welfare, especially if doing so increases costs.

Evaluate Nick Cater’s defence of factory farming practices (that market forces alone can prevent animal suffering) and Goodfellow and Radin’s response, predicated on the notion of ‘values based consumer demands’.

**Codes of practice, standards and guidelines relating to animals used for food production**

As discussed in Topic 1, a feature of most animal welfare legislation in the States and Territories is the incorporation of codes of practice, standards and guidelines which address animal welfare issues in specific contexts. In relation to animals in agriculture a range of Model Codes of Practice for the Welfare of Animals have been developed and approved by the Primary Industries Ministerial Council (PIMC). The PIMC consists of the Australian, State, Territory and New Zealand government ministers responsible for
agriculture, food, fibre, forestry, fisheries and aquaculture industries/production and rural adjustment policy.

The 22 existing Model Codes of Practice apply to various categories of farmed animal species and address welfare issues relating the land transportation of animals and other issues.

In New South Wales, although adherence to codes of practice are not a defence to the prohibition against cruelty under s 5 of the Prevention of Cruelty to Animals Act 1979, evidence of compliance or non-compliance with the codes is admissible in prosecution proceedings:

Section 34A of the PoCtAA provides that compliance, or failure to comply, with any guidelines prescribed or adopted by the regulations ... is admissible in evidence in proceedings under the Act of compliance, or failure to comply, with the Act or regulations.14

For a list of the National Model Codes of Practice for the Welfare of Livestock see the Primary Industries Report Series.15

**Australian Animal Welfare Strategy**

As noted earlier, the Commonwealth is beginning to play a more active role in relation to the regulation of animal welfare through the Australian Animal Welfare Strategy (AAWS).16 The AAWS was approved by the Primary Industries Ministerial Council in May 2004 and launched in October 2005, amidst, White notes ‘rhetorical claims that Australia is a world leader in the field of animal welfare.’ White observes that in order to claim a wide base of support, the development of the AAWS required sensitivity to the ‘significant and often conflicting concerns’ of those interest groups affected by the strategy, including State and Territory governments, animal welfare organisations, farmed animal representative groups, the scientific research community and the veterinary profession. As a result, White suggests, ‘the measured aspirations of the strategy should not be surprising’.17

While the AAWS applies to ‘companion animals, livestock and production animals, animals in the wild, aquatic animals, animals in research and training and animals used in sport, recreation, work and display’, the AAWS enables farmed animals to be regulated in a different way to other categories of animal. White argues that this is because the AAWS endorses the Model Codes of Practice as the source of minimum standards for the treatment of farmed animals, thus repudiating the idea of ‘a universal intrinsic value for animals based on shared sentiency’.

The purpose of the AAWS is stated as:

> [P]roviding ... direction for the development of future animal welfare policies, based on a national consultative approach and a firm commitment to high standards of animal welfare. It will facilitate the establishment of priorities that are consistent with agreed strategic goals and the revision of, and agreement on, acceptable standards. The Strategy clarifies the roles and responsibilities of key community, industry and government organisations.

White suggests, however, that the AAWS does not represent a thorough and critical re-examination of the underlying regulatory framework for animal welfare in Australia but that its more modest mandate is to ‘refine’ and ‘promote’ the existing framework.18

---

14 Similar provisions apply in all Australian jurisdictions. See, for example s 6(1) of the Prevention of Cruelty to Animals Act 1986 (Vic) which states that the Act does not apply to ‘any act or practice with respect to the farming, transport, sale or killing of any farm animal which is carried out in accordance with a Code of Practice’ nor does it apply 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.


18 Ibid p 370.
Within this ‘limited mandate’, however, White identifies a number of important proposed initiatives which have the potential for providing the basis for more substantive change, including to:

- facilitate the maintenance of effective animal welfare units in each jurisdiction;
- facilitate the timely development and revision of codes of practice, standards and guidelines and legislation;
- promote the adoption of a harmonised approach to the development and application of clear, contemporary, adequate and consistent animal welfare legislation and codes of practice across all state, territory and local government jurisdictions;
- undertake a review of the existing animal welfare infrastructure, policies and programs;
- facilitate the development, collection and collation of national statistics on animal welfare standards;
- expand Australia’s efforts to inform international bodies of our current standards for animal welfare through the development of readily available explanatory material outlining the animal welfare arrangements and achievements, in Australia;
- promote and facilitate the inclusion of animal welfare studies in the curricula of educational institutions; and
- create national internet sources for national, state/territory and local animal welfare information.

Nicola Donovan echoes White’s concerns, suggesting that the ‘harmonisation’ of animal laws and policies by means of the Australian Animal Welfare Strategy is a ‘lowest common denominator’ approach to homogenising the ‘so-called’ welfare codes. She notes that ‘[i]n essence, the Australian Animal Welfare Strategy consists of efforts to establish Model Codes of Practice for Animal Welfare for unanimous endorsement by all States and Territories, to replace the existing Codes of Practice that vary slightly from State to State. While it would be unfair not to admit that some progress has been made in some areas of animal law, the signs, Donovan says, are that ‘welfare’ is being eagerly sacrificed on the altar of legal consistency.’

Think

White argues that depending on how the AAWS is implemented, ‘it may prove to be no more than a bureaucratic/administrative exercise, providing some national coordination to an area of regulation which has historically been the domain of the States and Territories, improving access to information about animal welfare regulation and allowing Australia to participate in international fora on animal welfare in a more informed way’.

In view of the significant inconsistencies which exist in the structure, content, and enforcement of animal welfare regulation across the country, do you think that new AAWS Animal Welfare Standards and Guidelines will have the potential to change the lives of animals in Australia for the better? Why or why not?

**AAWS Animal Welfare Standards and Guidelines**

Currently the Australian Animal Welfare Strategy (see below) is working towards replacing the *Model Codes* with nationally agreed mandatory *Australian Animal Welfare Standards and Guidelines*. The plan is to re-write existing Codes in a new format to incorporate both the national welfare standards and industry guidelines for each species or enterprise.

As noted on the AAWS website:

*Standards* will be the legal requirements for livestock welfare and will use the word ‘must’. The standards will provide the basis for developing and implementing consistent legislation and enforcement across Australia.

---

20 <http://www.animalwelfarestandards.net.au/>
The main decision-making principles used for developing the standards are to ensure the standards are:

- desirable for livestock welfare;
- feasible for industry and government to implement;
- important for the livestock-welfare regulatory framework;
- achievable to meet the intended outcome for livestock welfare.

The guidelines are the recommended practices to achieve desirable livestock welfare outcomes. Guidelines will use the word ‘should’ and are designed to complement the standards. Non-compliance with one or more guidelines will not constitute an offence under law.\(^{21}\)

It is to be hoped that the implementation of new mandatory standards will usher in a culture of greater consistency and compliance within animal production industries. Under existing Codes, as Steven White notes, there can be considerable variation in the extent to which the codes are adopted and in their effect once they are adopted:

In relation to compliance with the codes, White states:

> The regulation of farmed animals … approximates a form of command and control regulation, since government (with significant input from those regulated) establishes minimum standards, with the possibility of prosecution for noncompliance.

> It is approximate because compliance with industry standards generally operates by way of incentive rather than force. In each State and Territory the relevant enforcement agency is usually the government department responsible for administering animal welfare legislation, most commonly a primary industries or local government department.\(^{22}\)

That codes and industry guidelines operate ‘by way of incentive rather than force’ means that there are low rates of prosecution for non compliance. There is also little information available, White notes, on enforcement activities by the agencies responsible for enforcing welfare standards applicable to farmed animals. One consequence of this is that the limits of standards and codes of practice have not been subject to sustained judicial or public scrutiny.

Some of the codes, standards and guidelines will be considered in detail later in this topic.

### Think

**What is the practical and legal significance between standards and guidelines?**

### Public consultation and regulation impact analyses

The AAWS proposes to develop a set of new Standards and Guidelines applicable to different classes of animals and animal enterprises. The process of approving proposed standards and guidelines includes a public consultation stage which provides an opportunity for all members of the public to comment on the draft standards and guidelines before they are finalised. The standards and guidelines then progress for endorsement by Standing Council on Primary Industries and then into the regulation stage before the final implementation stage by the states and territories. The AAWS states that ‘relevant scientific literature, current practice and community expectations are utilised to support an evidence-based approach’ and that ‘the new standards are based on the latest knowledge and technology and will be adopted into legislation.’

In addition, a key aspect of creating the new animal welfare standards is to identify the costs and benefits that they will have for a wide range of stakeholders. This is typically done by preparing a Regulation Impact Statement (RIS).

A RIS is a required document prepared by the department, agency, statutory authority or board responsible for a regulatory proposal. The RIS includes recommendations for the most effective and efficient option and

---

\(^{21}\) [http://www.animalwelfarestandards.net.au/about/]

formalises and documents how authorities have assessed the costs, benefits and the possible changes to an existing (or a new) regulation.

Authorities are required to conduct public consultation to seek feedback and determine the level of support for the RIS. When the RIS is assessed, it must include a consultation statement that shows how consultation was undertaken, who was consulted and a summary of their views, and those views that were considered.

The new proposed Australian Animal Welfare Standards and Guidelines for Cattle and for Sheep will be considered later in this topic.

Think

Does the language of the AAWS regarding Regulatory Impact Analysis suggest that animals affected by proposed regulations are ‘stakeholders’ in the process?

Animals and factory farming

Webcast 5.1

Animals Australia, ‘What is Factory Farming?’

[Factory farms] are places where the subtleties of moral philosophy and animal cognition mean less than nothing, where everything we’ve learned about animals at least since Darwin has been simply set aside.23

As Sharman notes, farm animal industries have undergone a rapid transformation in recent decades. A drive for greater agricultural efficiency, she suggests, have enabled a growing number of corporates to acquire small-scale family farms and to ‘control virtually all stages of animal production’.

The corporatisation of animal production, Sharman argues, has transformed the Australian agricultural industry from a system of backyard producers to intensive highly mechanised commercial operations. This corporatisation, has ‘paved the way to institutionalised animal suffering’ in which animals are regarded as ‘commodities or component parts in the food production process’:24

Factory farms dominate … food production, employing abusive practices that maximize agribusiness profits at the expense of the environment, our communities, animal welfare, and even our health.25

In addition, the consolidation of food production has concentrated power in the hands of fewer and fewer corporations. In Australia, three privately owned companies produce 80 per cent of the chicken meat (broiler) market. Correspondingly, over the last 30 years chicken production has increased from 3 million to 470 million per annum. Australia processes more than 4.5 million pigs under factory farming conditions. This constitutes 95 per cent of the pork, ham and bacon market. Fast food industries are a significant contributing factor to this increased production.

The consolidation of food production in the United States is even more profound. Many ‘farms’ in the US today are actually large industrial facilities known as ‘Concentrated (or Confined) Animal Feeding Operations’ (CAFOs) in which the quality of life of animals is sacrificed to high volume food production and the maximisation of profits:

Most CAFOs shouldn’t really even be described as farms—either technically or legally—because they basically operate under an industrial factory framework.26

---


25 See Farm Sanctuary <http://www.farmsanctuary.org/learn/factory-farming/>

David Cassuto notes that industrial agriculture occupies a privileged place in the U.S. legal and regulatory scheme:

The care and upkeep of animals raised for human consumption has devolved into an industrial operation focused on maximizing economic return while paying little or no heed to the needs of the ‘stock.’ Though rife with practices that might otherwise invite governmental scrutiny and criticism, industrial agriculture in the United States operates in a regulatory environment that endorses and subsidizes its methods. The animal-production process results from a legal and regulatory environment designed to facilitate animal-based wealth acquisition.27

Certainly the structure of industrial farms is at odds with the well-being of the animals raised there. Confining animals indoors as closely together as possible, rather than letting them graze on open land, exposes them to high levels of toxins from decomposing manure. To counteract the diseases inherent in such conditions, many animals are given constant low daily doses of antibiotics which are contributing to problems with antibiotic-resistant bacteria. They are also exposed to pesticides, hormones, other unhealthy additives, and types of food they wouldn’t normally eat.28

**Human health concerns**

Because large numbers of animals in factory farms are confined in small spaces, the use of antibiotics and other medications is common practice.

Researcher Dr George Khachatourians suggests that while the use of antibiotics (antimicrobial drugs) promotes growth and prevents infection, it has resulted in the emergence and spread of antibiotic-resistant bacteria.29

For example, *salmonella typhimurium* is a multi-drug resistant bacterium that first emerged in cattle in England in 1988. Human illness with salmonella can occur by contact with infected animals and by consumption of beef, pork and chicken.

*Escherichia coli* (E.coli) is another bacterium that has developed resistance to antibiotics and is able to survive for up to 2 months in fresh or inadequately composted manure.

Khachatourians suggests that vegetables can be infected with E.coli if crops are fertilised with animal manure. His research demonstrates that it can also occur from irrigation water, run-off from animal-processing plants or manure from factory farms.

The chart below shows how the introduction of antibiotics in animal food or water transfers into the environment, food, companion animals and the community.

---

Environmental concerns

Webcast 5.2


Livestock production accounts for 78 per cent of agricultural land used in the world today:

Meat production involves significant energy losses: only around four per cent of crops grown for livestock turn into meat. By focusing on making agriculture more efficient and encouraging people to reduce the amount of meat they eat, we could keep global temperatures within the two degrees threshold.30

Meat Livestock Australia reports that there are 79,322 properties in Australia with cattle. Australia’s national cattle herd stands at 28.5 individual animals. The beef industry accounts for 58 per cent of all farms with agricultural activity. The total area of operational beef cattle farms is approximately 332 million hectares being 75 per cent of all agricultural area and 43 per cent of Australia’s land mass.31

There are 43,828 properties with sheep and lamb and Australia’s national sheep flock stands at 73.1 million. The total area of operational sheep and farms is about 134 million hectares or 30 per cent of all agricultural area and 17 per cent of Australia’s land mass. The sheep industry accounts for 25 per cent of all farms with agricultural activity.32

Thus, combining the cattle and sheep industries, between 43 per cent and 60 per cent of the Australian land mass is devoted to two species of animal, excluding humans.

According to the United Nations Food and Agricultural Organisation, livestock contributes to 18 per cent of human related greenhouse gas emissions, significantly more than transportation. Direct livestock emissions account for around 10 per cent of Australia’s greenhouse gas emissions.33 In Australia, agricultural methane from livestock production accounts for almost 58 per cent of the country’s anthropogenic methane: about 3.1 mega tonnes per year. Australia’s ruminant livestock, including cattle, sheep and goats, directly produce almost 3 of those mega tonnes through a digestive process called ‘enteric fermentation’. Smaller amounts of agricultural methane are produced by prescribed burning of tropical savannah and grasslands – principally for pasture management, and the management of livestock manure. The Inter-Governmental Panel on Climate Change advises that methane is around 23 times more potent than carbon dioxide in heating the Earth’s atmosphere in the short-term – that is over the space of 20 years.34

Jeremy Rifkin, president of the Foundation on Economic Trends agrees that the number one cause of climate change is meat consumption and the agricultural industry.35 The impact of animal farming on the environment starts with deforestation not only for the land required for the actual farm but for the grain that is required to feed the billions of animals world wide contained on those farms. This is inherently inefficient since it takes 9 pounds of grain to produce 1 pound of steak. In addition, the amount of fresh water consumed by stock animals impacts upon the environment as does the emissions of methane, nitrous oxide and water pollutants from farming and slaughter processes.36

In 2008 Dr Rajendra Pachauri, chair of the United Nations Intergovernmental Panel on Climate Change, which in 2007 earned a joint share of the Nobel Peace Prize, said that people should reduce their meat

34 <http://www.ipcc.ch/>
35 Jeremy Rifkin, keynote address on the role of factory farms in climate change: <http://www.aldf.org/article.php?id=434>
36 In EPA v Burrangong Meat Processors Pty Ltd [2003] NSWLEC 102 the court used a table that shows an average use of water to carcass weight is 7.11kl/tonne HSCW. That’s 7110 litres of water for every tonne of HSCW carcass. HSCW is a national weight standard that measures the weight of a carcass two hours after slaughter after all fats have been trimmed out.
consumption. Pachauri said diet change was important because of the huge greenhouse gas emissions and other environmental problems — including habitat destruction — associated with rearing cattle and other animals. The UN’s Food and Agriculture Organisation has estimated that meat production accounts for nearly a fifth of global greenhouse gas emissions. These are generated during the production of animal feeds, for example, while ruminants, particularly cows, emit methane, which is 23 times more effective as a global warming agent than carbon dioxide. The agency has also warned that meat consumption is set to double by the middle of the century.

In ‘The Environmental Impact of Meat’, Ethan Goffman notes that:

In a hungry world with a growing population, meat is an inefficient way to feed people. Meat takes up to ten times as much input — depending on the type of animals and the conditions in which they’re raised — per unit of food as do fruit and vegetables, and consumes an outsized amount of energy. Overall, farmed animals in the United States produce 130 times as much waste as the human population. And, in a world of increasing water shortage, the livestock sector accounts for over 8 per cent of global human water use.37

Goffman suggests that ‘worried about their reputation as messengers of gloom, environmentalists have been wary of treading into people’s diets, among the most personal of lifestyle choices. People get very upset when they feel they are being told what to eat.’ Why do you think that the pernicious environmental effects of meat production have not rated the same level of concern such as land preservation, the impact of automobiles, and alternative energy?

The regulatory framework governing farmed animals: Cattle, sheep, pigs and poultry

Cattle

Australian Animal Welfare Standards and Guidelines for Cattle are currently under review following the circulation of discussion papers and invitation for submissions in March 2012. Public consultation on the draft standards ran from 7 March through until 5 August 2013. Major submissions and a summary of all submissions are to be made publicly on the AAWS website.38


The draft standards and guidelines for cattle currently include chapters on:

- Responsibilities
- Feed and water
- Risk management of extreme weather, natural disasters, disease, injury and predation
- Facilities and equipment
- Handling and management
- Castration, dehorning and spaying
- Breeding management
- Calf rearing systems
- Dairy management

38 <http://www.animalwelfarestandards.net.au/cattle/>
• Beef Feedlots
• Humane killing

Until such time as the new standards are adopted and have legislative effect, the following codes of practice and guidelines are applicable to beef cattle in Australia:39
• Model Code of Practice for the Welfare of Animals: Cattle
• Model Code of Practice for the Welfare of Animals: Animals at Saleyards
• National Guidelines for Beef Cattle Feedlots in Australia
• Model Code of Practice for the Welfare of Animals: Land Transport of Cattle
• Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments

The latter two of these codes will be considered later in this topic in the context of animal transport and animal slaughter.

The Model Code of Practice for the Welfare of Animals: Cattle (2004) (the ‘cattle code’) which applies to both beef and dairy cattle, notes that ‘cattle are raised in situations that vary from extensive grazing to closely confined and housed animals’.40

Clearly the welfare issues relating to cattle will differ depending upon whether the animals are used for meat or dairy production and whether they are grown on pasture, feedlots or a mixture of both. As Nichola Donovan notes however, the dairy industry is also a meat industry. During 2006/07 558,000 bobby calves were slaughtered in Australia. Bobby calves are the young of milking heifers, who are kept pregnant in order to stimulate high milk production. The calves are forcibly separated from their mothers within 12–24 hours of their birth and are not wanted by farmers, who suffer financial loss in having to feed them during their first few days of life. Most farmers sell the calves cheaply, sometimes to become veal for human consumption, but more often for immediate slaughter and processing into pet food.41

In 2012, to address growing public concern relating to the handling, transport and slaughter of bobby calves, Dairy Australia produced non-legislative guidelines relating to ‘Caring for bobby calves before and during transport’.42

Think


• Do you consider the proposed Standards and Guidelines to be an improvement to the existing Code as far as the welfare of cattle is concerned? Provide reasons.

Webcast 5.3

‘Victorian abbatoir accused of cruel treatment of unwanted dairy calves’, 1 February 2013 (4.14 min) <http://www.abc.net.au/lateline/content/2013/s3681709.htm>

41 Nicola Donovan, ‘Challenging the ‘art of disinformation’ in Australian animal law’, paper was delivered at the Australian Law Librarians’ Association Annual Conference in Perth, 19 September 2008.
Think

After reading the transcript and viewing the webcast relating to the fate of dairy calves, what measures are being proposed by farmers such as Lauren and Simon Finger to avoid the ‘wastage’ (and indeed suffering) of unwanted calves in the dairy industry?

Case study: Beef feedlots

Part 2 of the Cattle Code is devoted to ‘intensive cattle systems’. Part 2.2 of the Code sets out the Australian Code of Practice for the Welfare of Cattle in Beef Feedlots and states that the code ‘should be read in conjunction with the National Guidelines for Beef Cattle Feedlots in Australia’.

The proposed Guidelines and Standards relating to Beef Feedlots can also be found in Part 10 of the public consultation version of the Australian Animal Welfare Standards and Guidelines for Cattle.

Feedlots are an intensive way of feeding a large number of cattle in order to maximise the number of cattle on available land. The National Guidelines for Beef Cattle Feedlots state that the Australian feedlot industry is valued at over $1 billion. In 2003, when the Feedlot Guidelines were produced, there were in excess of 1300 feedlots with a nominated capacity of over 1 million cattle. Feedlot accreditation is governed by the National Feedlot Accreditation Scheme, a national quality assurance system regulated by the feedlot industry.

The Feedlot Guidelines defines a cattle feedlot as ‘a confined yard area with watering and feeding facilities where cattle are completely hand or mechanically fed for the purpose of production.’ Clause 1.1.1 of the guidelines provides that when considering what the definition of feedlot includes, the following factors should be considered.

Whether the:
- the cattle are confined;
- the cattle are fed wholly or substantially on prepared of manufactured feed;
- the exclusion of cattle confined for normal management practices, drought or emergency feeding; and
- no crops or pastures grown on the confinement area.

The regulatory framework in relation to feedlots and other forms of intensive agriculture is informed by environmental protection as well as by animal welfare issues. For example, the objects of the NSW State Environmental Planning Policy No 30 – Intensive Agriculture (SEPP 30) provides for public participation and states that the aims of the policy include ‘measures for the health and welfare of animals.’

SEPP 30 provides that a cattle feedlot with a capacity to accommodate more than 50 head of cattle requires development consent: s 6.4 The Draft Standard Local Environmental Plan (NSW) defines a feedlot as ‘a confined or restricted area used to rear or fatten cattle, sheep or other animals for the purpose of meat production, fed (wholly or substantially) on prepared and manufactured feed, but does not include a poultry farm or piggery. It defines ‘intensive livestock agriculture’ as ‘the keeping or breeding of livestock, poultry, or other birds, that are fed wholly or substantially on externally sourced feed, and includes operation of feed lots, piggeries, poultry farms or restricted dairies, but excludes operation of facilities for drought or similar emergency relief’.

Activity

You are employed by the Environmental Defenders Office. A client comes to see you in relation to a neighbour who has over 500 head of cattle on his 40 hectare property onto which animal transport vehicles come and go every day. The property is zoned rural but in recent years residential development has encroached. The surrounding properties are zoned residential and

45 For a consideration of what a ‘feedlot’ is and the circumstances under which development consent is required see: Kempsey Shire Council v Tebran Pty Ltd [2007] NSWLEC 731.
the residents are complaining about the smell, noise and dust from the property. The property fronts a major river that has had fluctuating E-coli readings in the past. The client provides you with a number of documents, one of which is a recent report from the Department of Primary Industries suggesting that the property has been inspected several times in the past 4 years. The document states that the permissible maximum stock density for feedlots is 7 head of cattle per hectare. It also recommends that the amount of cattle be reduced from 500 to 200. The DPI is aware of the decision in *Kempsey Shire Council v Tebran Pty Ltd* [2007] NSWLEC 731 and is concerned that they will be unable to establish that the property is a feedlot. What would you advise?

### Sheep and lambs

#### Webcast 5.4

'Muelsing Sheep' 29 May 2008, (5.57 min):

[http://www.youtube.com/watch?v=vbAoOuY9ZE4](http://www.youtube.com/watch?v=vbAoOuY9ZE4)

#### Webcast 5.5

'Ultra Fine Wool and Intensive sheep farming'


Animal Liberation Victoria reports that in any given year, 99–120 million sheep are kept for their meat and wool in Australia alone, and 10–15 million will face the slaughterer’s knife. Also killed will be around 12 million ‘prime lamb’ which, at 4–6 months of age ‘are driven into killing stalls, surrounded by the stink of blood and the cries of their frightened companions, to be electrocuted and have their throats cut’.46

While sheep have generally been less affected by intensive farming practices than other farmed animals, their living conditions are still far from ideal and can involve considerable suffering. They are kept in a wide variety of conditions ranging from hot dry and drought stricken, to very cold and wet, both of which may cause severe welfare problems. In addition, the selective breeding of most domestic sheep has left them susceptible to a wide variety of diseases and parasites, and with a heavy coat they cannot shed naturally.47

Animal liberation reports that even with human care, around 8 million Australian sheep die in the paddock every year from a variety of causes including hypothermia, drought, poor nutrition, lambing difficulties, fly strike, lameness and viral illnesses. It is estimated that 20 per cent of lambs will die within the first few weeks of life, mostly from disease, exposure or malnutrition:

In order to prevent these deaths, most farmers subject their unfortunate charges to multiple mutilations and assaults ‘for their own good’ over the course of their short lives. According to Australian Law Reform Chairman, M.D. Kirby, Australian sheep suffer over 50 million operations a year that would constitute cruelty if performed on dogs or cats. Millions of Australian sheep every year suffer an agonizingly painful operation known as muelsing, where the folds of skin beneath their tails are sliced away without anesthetic, leaving a bleeding wound the size of a dinner plate where a wool free scar will form. This is intended to reduce the incidence of fly strike, a grizzly condition where blowflies lay their eggs in the damp wool and maggots eat the sheep’s flesh. Even those sheep who escape mulesing will most likely have their tails docked without pain relief. Lambs will have their ears hole punched for identification purposes. Ewes may have their front teeth ground down to the pulp with a stone-cutting machine, to prevent broken teeth in later life. Male lambs will be castrated, most commonly through the use of a tight rubber ring to cut off blood supply to the testicles, one of the most painful methods


47 While wild sheep shed their wool naturally, through selective breeding farmed sheep have become dependent on humans for such a basic aspect of their welfare. Instead of growing a thick coat for winter and shedding it in summer as they would do in nature, sheep are subject to the vagaries of wool prices and the schedules of farmers, often leaving them vulnerable to extreme weather conditions. Animal Liberation reports that an estimated one million sheep die from hypothermia in the 30 days after shearing.
possible. All will be immersed in baths of toxic pesticides at regular intervals, their heads held under with a broom or crook, and will receive numerous drugs and vaccinations which may play havoc with their immune systems.\(^{48}\)

In common with cattle, chickens and pigs, the intensive farming of sheep and a number of the practices noted above are sanctioned by the national code of practice. For example, while stating that overcrowding should be ‘avoided’ the Model Code of Practice for the Welfare of Animals – The Sheep suggests that the minimum floor space for intensively managed sheep is 0.6 square metres per lamb, 0.9 square metres per wether and 1 square metre for a ram, pregnant ewe or heavy wether when in single cages.\(^{49}\)

The Code provides that acceptable methods of tail docking without anaesthesia are ‘cutting with a sharp knife, rubber rings applied according to the manufacturer’s recommendations, or a gas flame heated searing iron used according to the manufacturer’s recommendations’. If males are not to be slaughtered prior to puberty, they should be castrated by 12 weeks of age. Castration after the age of 6 months requires anaesthetic. Acceptable methods of castrating male lambs without anaesthesia include: ‘Cutting: The lamb should be properly restrained and the knife (cutting instrument) kept clean and sharp. Good post-operative drainage of the wound is required.’\(^{50}\)

Mulesing, usually done without anaesthesia, must be carried out in accordance with Appendix 3 of the Sheep Code. While the wool industry has suggested that mulesing will be phased out by 2010, this deadline has been delayed.\(^{51}\) The response of the industry is due largely to global retail outlets and countries boycotting or banning Australian wool products and imports due to this practice.

The contentious issue of live sheep export will be investigated later in this topic.

Australian Animal Welfare Standards and Guidelines for Sheep are currently under review following the circulation of discussion papers and invitation for submissions in March 2012. Public consultation on the draft standards ran from 7th March through until 5 August 2013. Major submissions and a summary of all submissions are to be made publicly on the AAWS website.\(^{52}\)

The draft standards and guidelines for cattle currently include chapters on:

- Responsibilities
- Feed and water
- Risk management of extreme weather, natural disasters, disease, injury and predation
- Facilities and equipment
- Handling and husbandry
- Tail docking and castration
- Mulesing
- Breeding management
- Intensive sheep production systems
- Humane killing

Until such time as the new standards are adopted and have legislative effect, the Model Code of Practice for the Welfare of Animals: The Sheep continue to apply to sheep and lambs in Australia.\(^{53}\)

---

48 Animal Liberation Victoria, n 65, above.
50 Ibid cl 9.4.
Activity


Do you consider the proposed Standards and Guidelines to be an improvement to the existing Code as far as the welfare of sheep is concerned? Provide reasons.

Layer hens and broiler chickens

Reading

‘From nest to Nugget: An Expose of Australia’s Chicken Factories,’ November 2008
Consumer Action Sheet: ‘Chicken Factories’

Webcast 5.6

‘The Difference Between Caged and Free-Range Chickens’ (2.10 min) – This webcast investigates the differences between cage and free range conditions: <http://www.youtube.com/watch?v=5exEt-b1bag&feature=related>

Webcast 5.7

‘Laying Hens’ (2.30 min) – This webcast from the Animals Australia website depicts the life of battery hens:
<http://www.freebetty.com/cage_eggs.php>

Webcast 5.8

‘45 Days – The Life and Death of a Broiler Chicken: Part 2’ (5.57 min) – This webcast demonstrates the transportation and slaughtering processes of broiler chickens:
<http://www.youtube.com/watch?v=-lhoF0T9Ay8&feature=related>

Webcast 5.9

‘Live Fast Die Young – the Life of a Meat Chicken’ (7.56 min) – This webcast explores modern meat chicken production methods
<http://www.youtube.com/watch?v=rpbtBgLf90>
Basic needs?

Numerically, poultry are the most exploited animal in Australia. It is estimated that approximately 630 million chickens were slaughtered in 2013 for their meat.\(^{54}\)

In 2011 there was approximately 392 million dozen eggs from an estimated 15 million egg laying hens.\(^{55}\). Cage production constitutes around 84 per cent of egg production, while barn laid and free range account for six per cent and nine per cent of production respectively.\(^{56}\)

The Model Code of Practice for the Welfare of Animals – Domestic Poultry states that the basic requirements for the welfare of poultry is a husbandry system ‘appropriate for their physiological and behavioural needs’. The basic needs of poultry are identified as:

- readily accessible food and water to maintain health and vigour;
- freedom to move, stand, turn around, stretch, sit and lie down;
- visual contact with other members of the species;
- accommodation which provides protection from the weather and which neither harms nor causes distress;
- prevention of disease, injury and vice, and their rapid treatment should they occur.

The Code also states that ‘it is noted that there are particular behaviours such as a perching, the ability to fully stretch and to lay eggs in a nest that are not currently possible in certain (caged) poultry housing systems’ and that ‘the ability to manage disease is influenced by the housing system’. The code recognises that these are issues that ‘will remain the subject of debate and review’. It appears then, that although the Code identifies certain ‘basic needs’ for intensively farmed poultry, that these needs are not incorporated within the minimum welfare guidelines.

There are three main categories of housing systems used in egg production, these are:

- cage systems – birds in cage systems are continuously housed in cages within a shed;
- barn systems – birds are free to roam within a shed that may have more than one level. The floor can be litter or other material such as slats or wire mesh; and
- free-range systems – birds are housed in sheds and have access to an outdoor range.\(^{57}\)

Broiler or ‘chicken meat production systems’ can be:

- shed systems where chickens can move on a litter substrate in a shed with temperature and ventilation; or
- free-range systems where chickens have access to an outdoor range and an indoor shelter.\(^{58}\)

Broiler chickens constitute the vast majority of chicken meat produced in Australia. The minimum space allowance for broiler chickens is 1 square metre per 40kgs of birds. With an average adult chicken weighing 2kgs by the time it is ready to be taken to slaughter, this means that only about 22 x 23cm of space is given to each adult bird (less than the size of an A4 page). 40,000–60,000 birds are grown in an average shed of which a significant number die from injuries and illnesses.

Contemporary broiler chickens have been bred to grow muscle at a rapid rate which often results in skeletal problems. Indeed, broilers now reach market weight in half the time than they did in the 1940’s. The rapid growth of muscle mass without the corresponding strength in bones may cause serious deformities and loss of the ability to walk. In some case this means that chickens with access to outdoor areas are unable to utilise these areas.\(^{59}\)

---

55 <http://www.poultryhub.org/production/industry-structure-and-organisations/egg-industry/>
57 For detailed information on layer hen housing systems, see Department of Agriculture, Fisheries and Forestry, ‘Review of Layer Hen Housing’ <http://www.daff.gov.au/animal-plant-health/welfare/reports/layer-hen/review>
Approximately 98 per cent of chickens used in egg production live in a cage of only about 48 square inches. Broiler chickens are often reared at similarly high densities in pens with concrete slatted floors or occasionally litter covered concrete floors. Because of this high density and a limited ability to forage, chickens often display aggression and can peck each other to death. In order to prevent this, it is common practice to sear off approximately half the chickens’ beaks, which has been shown to cause severe and lasting pain. The close quarters also facilitates the spread of communicable diseases.

As Pollan observes:

[B]roiler chickens, although they do get their beaks snipped off with a hot knife to keep them from cannibalizing one another under the stress of their confinement, at least don’t spend their eight-week lives in cages too small to ever stretch a wing. That fate is reserved for the laying hen, who passes her brief span piled together with a half-dozen other hens in a wire cage whose floor a single page of this magazine could carpet. Every natural instinct of this animal is thwarted, leading to a range of behavioral ‘vices’ that can include cannibalizing her cage mates and rubbing her body against the wire mesh until it is featherless and bleeding. Pain? Suffering? Madness? The operative suspension of disbelief depends on more neutral descriptors, like ‘vices’ and ‘stress’. Whatever you want to call what’s going on in those cages, the 10 percent or so of hens that can’t bear it and simply die is built into the cost of production. And when the output of the others begins to ebb, the hens will be ‘force-molted’—starved of food and water and light for several days in order to stimulate a final bout of egg laying before their life’s work is done.61

Think

1. The Australian Poultry Cooperative Research Centre (CRC) states that ‘the poultry industry has three strong motives for looking after the birds in their care in a welfare-friendly manner’:
   - Out of respect for the birds themselves, so they do not suffer.
   - So that they grow as well and efficiently as possible and they are not damaged in the process.
   - In recognition of, and respect for, the consumer, retailer and community attitudes and expectations with respect to the humane treatment of livestock farmed specifically for their consumption.62

   Do you consider that there is a tension between ‘humane’ treatment and ‘efficient’ production in the poultry industry?

2. In December 2012 the New Zealand government introduced a new Code which permits the use of enriched cages for poultry which are 200m2 bigger than a traditional battery cage (measuring at 550m2) and which provides nest boxes and perches. The Code puts in place a phase out with all battery cages banned from use from 2022. Is this an initiative which Australia should pursue? Why or why not?

See: ‘Follow NZ and ban battery cages’ <http://www.animalsaustralia.org/media/in_the_news.php?article=3999>

Codes of practice and standards

The conditions under which layer hens and broiler chickens are housed and the way that they are managed during their growing phase, transportation and slaughter are set down in several government/industry endorsed Model Codes of Practice and Standards.

---

Layer hens

The following codes of practice are applicable to layer hens in Australia:

*Model Code of Practice for the Welfare of Animals: Domestic Poultry (2001)* 63

In the 2001 Code, there are requirements which apply to all egg farms and must be met irrespective of the production system (cage, shed, open range and/or free range).

To enable implementation of the 2001 Code in each State or Territory supporting legislation is required to be put in place by each State Government. Parts or all of the 2001 Code may be regulated in each State or Territory or else it is made a requirement that poultry farms comply with the 2001 Code.

The relevant State or Territory government departments will either use their own animal welfare inspectors or RSPCA inspectors to check on compliance with applicable animal cruelty legislation. If a person is charged with an offence they are able to use the 2001 code to demonstrate compliance with the requirements.

In NSW, for example, see s 34A of the *Prevention of Cruelty to Animals Act 1979*

34A Guidelines relating to welfare of farm or companion animals

(1) The regulations may prescribe guidelines, or may adopt a document in the nature of guidelines or a code of practice as guidelines, relating to the welfare of species of farm or companion animals.

(2) Before any regulations are made as referred to in subsection (1), the Animal Welfare Advisory Council, and representatives of any relevant livestock industry, are to be given an opportunity to review and comment on the provisions of the proposed regulation relating to the welfare of species of farm or companion animals.

(3) Compliance, or failure to comply, with any guidelines prescribed or adopted by the regulations for the purposes of subsection (1) is admissible in evidence in proceedings under this Act of compliance, or failure to comply, with this Act or the regulations.

(4) A document adopted as referred to in subsection (1) may be adopted wholly or in part, with or without modification and as in force at a particular time or as in force from time to time.

*The Prevention of Cruelty to Animals Regulation 2012* (NSW), has specific application to ‘laying fowl’, that is ‘any fowl being bred, kept or used for the purpose of commercial egg production’.

*Part 2 Division 2* of the Regulation prescribes minimum standards relating to laying fowl confined in cases, including access to water, cage size and stock density. *Part 2 Division 3* prescribes minimum standards for laying fowl confined in non-cage housing such as sheds, including access to food and water, nests, height of housing and stock density.

But, as discussed earlier in this topic, new transport standards for layer hens in NSW have removed some of the protections previously available to the hens under the now repealed *Prevention of Cruelty to Animals Regulation 2006* (NSW).

Specifically, cl 4A of the 2012 regulation provides that the provisions relating to the confinement of laying fowl ‘do not apply to apply in respect of confinement of laying fowl for the purposes of carrying or conveying the fowl.’

Broiler chickens

The following National Standards are applicable to poultry raised for meat production:

*National Animal Welfare Standards for the Chicken Meat Industry (2008)* 64

*Australian Code of Practice for Poultry Processing (2002)* 65

In addition, there are a number of manuals available to chicken meat producers which provide the key Standards, associated guidelines for the practices under each Standard and example recording sheets by which to implement the Standards. 66

---

Animal Welfare Manual for Meat Chicken Farming (for growers)
Animal Welfare Manual for Breeder production
Animal Welfare Manual for the Hatchery and Chick Transport
Animal Welfare Manual for Pick-Up Operation

The Standards’ Mission Statement provides that:

The overall goal of the meat chicken industry is to deliver high animal welfare standards that are integrated across the production chain to ensure the welfare of poultry from birth to slaughter. The mission of the meat chicken industry with regard to animal welfare is to ensure the uptake of acceptable and agreed national animal welfare standards, that are implemented and effectively verified.

The Standards cover the following areas:
Standard 1. Planning and contingencies
Standard 2. Maintenance and design of sheds, facilities and equipment
Standard 3. Bird handling competency and training
Standard 4. General bird management
Standard 5. Humane destruction
Standard 6. Egg management
Standard 7. Chick management at the hatchery
Standard 8. Bird Pick-up and Transport
Standard 9. Transport of Chicks
Standard 10. Processing (Slaughter)

In addition, Chapter 3 of Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments, (2002) and the Model Code of Practice for the Welfare of Animals: Land Transport of Poultry (2006) have application to both layer hens and broiler chickens.

Think

1. The National Animal Welfare Standards for the Chicken Meat Industry contain guidelines that describe how the intended outcomes for each Standard can be achieved. The preface to the Standards states that ‘there may be a number of practical activities and methods that can be employed to demonstrate that the principles within the Standards are being met …. therefore, the guidelines outlined in the Standards do not preclude individuals or companies from utilising procedures or actions that differ from those described, provided the animal welfare outcomes described are met.’

Is a lack of uniformity in practices adopted by chicken meat farmers a ‘good’ thing for chicken welfare? Why or why not?

2. Do you consider that the Standards and Model Codes of Practice relating to poultry espouse ‘a primary concern for the welfare of birds’ that ‘the health and welfare of animals is a primary consideration at all stages of poultry production’? With reference to relevant provisions in the standards and/or codes, why or why not?

3. In developing the Standards, one of the ‘Guiding Principles’ is stated to be ‘the internationally recognised ‘five freedoms’ for animals:
   - Freedom from hunger and thirst;
   - Freedom from discomfort;
   - Freedom from pain, injury and disease;
   - Freedom to express normal behaviour;
   - Freedom from fear and distress.

Do you consider that the Standards give effect to these freedoms in relation to meat chicken production? Give examples to support your conclusions.

4. Is it a matter of concern that the National Animal Welfare Standards for the Chicken Meat Industry were developed by a steering committee comprised of representatives from the Australian Chicken Meat Federation, Australian Poultry CRC, Department of Primary Industries, Victoria, Inghams Enterprises Pty. Ltd, Queensland Farmers’ Federation, and the Animal Welfare Science Centre?

Pigs

Reading

‘Science and Sense: The Case for Abolishing Sow Stalls’, 2013
‘From Paddocks to Prisons: Pigs in NSW; Current Practices, Future Directions’

Webcast 5.10

‘Australian Pig Farming: The Inside Story’ (13.04 min)
<http://www.youtube.com/watch?v=n_3xwGiB4gs>

Webcast 5.11

‘Animals Australia Pig Factory Farming Investigation’ (2.00 min)
<http://www.youtube.com/watch?v=hHkqrd44dDw>

Intensive pig farming systems

Each month in Australia in excess of 400,000 pigs are slaughtered for food products, specifically pork, bacon and ham. It is estimated that there are more than 4.5 million pigs in Australian factory farms each year, making up 95 per cent of the market. This may be contrasted with the UK where free range pigs make up almost 50 per cent of all pigs.

Some pigs are used exclusively for meat production whilst others are used for breeding. Sows kept for breeding purposes are repeatedly impregnated and slaughtered when they no longer produce enough viable piglets.

A sow stall is a small cage barely bigger than a pig’s body. In Australia, The Model Code of Practice for the Welfare of Pigs endorses the intensive farming of pigs, including in special farrowing crates and stalls where individual animals are kept. Under the Code, the recommended minimum space for sows kept in stalls is 0.6m × 2m, while stalls created after 2007 are required to be 0.6m × 2.2m. Farrowing crates are stalls where pregnant sows are moved to give birth. The recommended minimum space for these crates is 0.5m × 2m. Under the current code, pigs can be confined in these stalls for up to 16 weeks.

Sow stalls are banned in the United Kingdom, Sweden, Switzerland, the Netherlands and Finland and are banned or being phased out in a number of states in the US. Other than the first four weeks of pregnancy, the use of sow stalls in the European Union has been prohibited from 1 January 2013 and the introduction of new sow stalls has been illegal in the EU since 2003. Two of the largest pork producers in the US and Canada have announced their plans to phase out sow stalls. All animal protection groups in Australia oppose sow stalls.
Dr Malcolm Caulfield states that while the Australian pig industry has said that it will voluntarily ban sow stalls from 2017, ‘a voluntary industry-wide ban is unlikely to occur for three reasons’:

- the decision of the industry body is in no way binding on individual pork producers;
- the industry states that it based its decision to voluntarily ban sow stalls on consumer concerns, which it describes as devoid of ‘real science’; and
- it continues to make the contradictory claim that sow stalls are beneficial to welfare.69

Some facts about the Australian pig farming industry:70

- Around 5 million pigs are slaughtered in Australia each year.
- There are about 290,000 breeding sows, each have an average of 2.2 litters a year. In each litter, an average of 10.2 piglets are born alive, and an average of 8.9 are weaned from their mother around 3 weeks later, which means that 12.2 per cent die during this time.
- The largest 2 per cent of farms hold 40 per cent of the sows, with some farms have up to 20,000 breeding sows.
- A survey of pig farms showed that 26 per cent had only individual sow stalls, 28 per cent had only group pens, 36 per cent had both, and 10 per cent had some outside area for sows.
- Up to half the breeding sows still spend their pregnancies in individual sow stalls, where rows of sows are separated from each other by metal bars. These stalls are so small that the pigs are unable turn around, but can only take one or two steps forwards or backwards.
- Lack of exercise produces a high level of lameness in sows. Some are so badly affected that they are killed – around 10 per cent of sows are culled because of lameness.
- Since 1995 it has been legal to inject Porcine Somatotrophin (PST) into pigs to make them grow faster. This requires daily injections, which are stressful to the pigs. It also causes pigs to suffer from leg problems as a result of growing too fast.
- Before they are due to give birth to their piglets, most sows are moved to a smaller space called a farrowing crate. The crate is surrounded by metal bars for the piglets to crawl under to avoid being squashed by the sow. Heavily pregnant pigs with milk-swollen udders often have to lie on cold, hard concrete with no straw for comfort or to make a nest with.
- After they are taken away from their mothers at about 3 weeks of age, most piglets are kept in bare and crowded pens. Young pigs naturally chew objects such as roots and grass. However, in bare pens with nothing to do they sometimes chew each other’s tails.
- Piglets routinely have their eye teeth clipped and their tails docked to prevent the aggression and occasional cannibalism that occurs out of frustration at their confinement. No pain relief is given and piglets can die from the shock.
- Piglets not kept for breeding are fattened until they are 4–6 months old, when they are herded on to trucks and transported to the slaughterhouse. There they are stunned by being given an electric shock behind the ears from a pair of tongs. They are then hung up by the back feet and their throat is cut.

Think

Read ‘Science and Sense’ Science and Sense: The Case for Abolishing Sow Stalls’ (2013)

What reasons does Australian Pork Limited provide for its contention that sow stalls are beneficial to the welfare of sows and piglets?

What scientific evidence does Malcolm Caulfield provide to support the argument that confinement in stalls has been shown to cause physical harm and psychological stress to pigs?


**Codes of Practice**

The applicable national Code of Practice relating to Pigs is the *Model Code of Practice for the Welfare of Animals: Pigs (3rd edition, 2008).*\(^{71}\)

While the national Pig Code provides minimum guidelines for the welfare of pigs, in common with most national codes developed by the Commonwealth Primary Industries Ministerial Committee, it is not legally enforceable.

The NSW *Animal Welfare Code of Practice – Commercial Pig Production (NSW)*\(^{72}\) however, has statutory backing. This is because the Code is referred to in Schedule 2 of the *Prevention of Cruelty to Animals Act 1979* (NSW) as an ‘animal trade’.

The cruel nature of sow stalls and farrowing crates was implicitly recognised by the second edition of the national Pig Code which suggested that ‘practicable alternatives to current conventional stalls (eg turnaround stalls or use of group housing) should be considered as they are developed’ and that ‘practicable alternatives to the current farrowing crates should be considered as they are developed.’

In response to community concerns relating to the second edition code, a revised Pig Code was approved by the Primary Industries Ministerial Council in April 2007. At that time the Department of Agriculture, Fisheries and Forestry stated that:

> Consumers benefit from the cost effective and high quality pig meats currently being supplied from intensive production systems. To achieve economies of scale large numbers of pigs are raised by fewer people with the assistance of mechanised and computerised management systems. Greater efficiencies occur in such systems and the consumer benefits. Over time this has resulted in some systems confining sows in farrowing crates, mating pens and stalls during pregnancy. Intensive farming and the perceived adverse effects on pigs causes some community concern.\(^{73}\)

The revised national code now provides:

4.1.5 From 10 years after endorsement of the code a sow must not be confined in a stall for more than 6 weeks of any gestation period. An exception is for individual sows that are under veterinary advice or special care by a competent stock person.

4.1.6 Facilities for lactating sows must allow them to: a) Stand and lie down without obstruction by the bars or fittings of the crate. b) Give birth to piglets without obstruction, and minimise losses of piglets from crushing, trapping or injuries. c) Suckle piglets so that both sides of her udder are accessible. d) Access feed and water without obstruction.

4.1.7 Sows confined in farrowing crates must not be confined in these for more than 6 weeks in any one reproductive cycle, except in an emergency eg where a sow is required to foster a second litter after her own piglets are weaned. In such an exceptional situation the stock-person must provide additional care to the sow.

The NSW Pig Code, provides:

A producer who keeps a pig in individual housing must ensure that:

- in the case of a sow kept in a stall – the floor space of the stall is not less than 0.6 metres wide and not less than 2.2 metres long; and
- in the case of a sow kept in a farrowing pen – the floor space of the pen is not less than 5.6 square metres; and
- in the case of a sow kept in a farrowing crate adjacent to a creep area (whether or not within a farrowing pen), the floor space of the farrowing crate and creep area, when aggregated, is not less than 3.2 square metres.

---


Think

Malcolm Caulfield argues that ‘[f]armers keeping animals under intensive conditions are permitted by the law to inflict various forms of cruelty on those animals. The example of intensive pig farming illustrates the way the anti-cruelty legislation of Australia sanctions cruel activities.’

With reference to both the national and NSW Pig Codes, identify ways in which the law sanctions institutionalised cruelty to pigs raised for food production.

Animal slaughter

For statistics on livestock slaughter in Australia during 2013 see Australian Bureau of Statistics: Livestock and Meat.

For a graphic insight into the numbers of animals killed worldwide by the meat, egg, and dairy industries see the ADAPTT ‘Kill Counter’.

Guidelines relating to the slaughter of animals raised for food production are set out by the Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments (2002) Guidelines for the processing of poultry are set out in the Australian Code of Practice for Poultry Processing.

The introduction to the national code states that the code:

> [A]ims to encourage the efficient, considerate treatment of animals so that stress is minimised.

Slaughter standards in commercial abattoirs are dictated by the Australian Standard for the Hygienic Production of Meat and Meat Products for Human Consumption which requires that:

- Animals are slaughtered in a way that prevents unnecessary injury, pain and suffering to them and causes them the least practicable disturbance.
- Before sticking commences animals are stunned in a way that ensures that the animals are unconscious and insensible to pain before sticking occurs and do not regain consciousness or sensibility before dying.

Slaughter practices are enforced by the relevant licensing bodies, including the State Meat Authorities under the relevant State Meat Industry Acts, and by the Australian Quarantine Inspection Service (AQIS) for the Commonwealth. The Export Control Act and Regulations also require compliance with the Standards for all exported meat products (compliance managed by AQIS officers stationed in each export abattoir).

The method of stunning can be by electric shock (typically for chickens and pigs) or a bolt to the brain (cattle). In both cases the animal is rendered temporarily paralysed but not necessarily unconscious and unaware. It has been reported that sometimes after ‘stunning’ and during the slaughter process animals retain full bodily movement.

76 <http://www.adaptt.org/killcounter.html>
80 See O’Sullivan v Noarlunga Meat Ltd (No 1) (1954) 92 CLR 565 where the High Court held that parliament is able to prescribe hygiene conditions for premises where animals are slaughtered for export because the conditions affect beneficially overseas trade.
‘Humane’ slaughter?

The RSPCA describes ‘humane killing’ as follows:

An animal must be either killed instantly or rendered insensible to pain until death supervenes'. When killing animals for food, this means they must be stunned prior to slaughter so they immediately become unconscious.81

The Slaughter Code provides that all methods of humane killing, including slaughter and on-farm euthanasia, must meet the same criteria:

- death of an animal without panic, pain or distress;
- instant unconsciousness followed by rapid death without regaining consciousness;
- reliability for both single or large numbers of animals;
- simplicity and minimal maintenance;
- minimal detrimental impact on operators or observers.

A high level of operator skill is essential for the humane killing of animals. Operators must be trained in:

- animal handling;
- selection of the best killing method;
- correct application of the killing method;
- proper maintenance of equipment.

The method of killing will vary according to species and the circumstances at the time. Some procedures for humane slaughter regularly used include:

- operated instruments, such as captive-bolt pistols, followed by bleeding out;
- instruments for stunning by electric current, followed by bleeding out;
- the use of gas, followed by bleeding out.

Humane killing on farm is often carried out using a rifle and, depending on the species, will be done using one of the following positions:

- Frontal method – the firearm is directed at a point midway across the forehead where two lines from the topside of the base of the ears and top of the eyes intersect (pigs – from the bottom side of the ears to the eyes). The line of fire should be aimed horizontally into the skull towards the centre of the brain or spinal cord.
- Poll method (for horned animals) – the animal is shot through the skull just behind the base of the horns. The line of fire should be in line with the animal’s muzzle.
- Temporal method – the firearm is directed at a point midway between the eye and the base of the ear on the same side of the head. The projectile should be directed horizontally into the skull.

The RSPCA notes that killing methods should only be used if they have been declared humane by recognised expert authorities and they meet the basic criteria.

Animal Liberation Victoria contends, however, that there is no humane way to kill cows to supply today’s enormous demand for beef. By law, cows must be stunned before slaughter by having their skulls smashed with a metal bolt. But, Animal Liberation argues, the procedure is imprecise and workers are under constant pressure to keep up the speed of the production line:

As a result, many cows are still conscious when they are hoisted by a hind leg, breaking bones and tearing ligaments in the process, and their throats are cut and dismemberment begins. In the words of a former slaughterhouse worker: On bad days, dozens of animals reached my station clearly alive and conscious. Some would survive as far as the tail cutter, the belly ripper, the hide puller. They die piece by piece.82


Ritual slaughter

The meaning of the term ‘ritual slaughter’ is defined in the *Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption*. The Standard defines ritual slaughter as the ‘slaughter of animals – in accordance with Islamic rites to produce halal meat – or, – in accordance with Judaic rites to produce kosher meat’. 83

Animals Australia notes that there are approximately 32 million sheep killed in Australia each year for human consumption (both domestic and export). They are mostly pre-stunned in accordance with the relevant Australian Standard, and in line with State legislation (for domestic consumption) and federal legislation (for export). Australia’s trade in chilled and frozen ‘halal accredited’ sheep meat to the Middle East is increasing significantly each year.

While Islamic and Jewish leaders in Australia accept the stunning of sheep, Halal and Kosher slaughter requires that the animal not be injured at the time of slaughter. As electrical stunning doesn’t injure the animal, stunning is regarded as an acceptable part of ritual slaughter in Australia both for domestic consumption and export.

A 2008 report written for DAFF, states that animals slaughtered without stunning can suffer ‘panic and terror’ and quotes European studies that sheep can remain conscious for up to 20 seconds after having their throats slit:

Animal welfare risks in unstunned livestock arise firstly from the presence of consciousness during throat cutting and secondly from the ongoing experience of the animal as consciousness rapidly but not immediately disappear subsequent to blood loss. That experience will include pain and is likely to include distress. That pain and distress cannot be alleviated until unconsciousness supervenes and may amplify pre-existing negative emotional states, leading to panic or terror. 84

Even though the Standard stipulates that animals must be stunned unconscious before having their throats slit, clause 7.12 of the Standards enables slaughter without stunning to occur under ‘approved arrangements’:

- This provision only applies to animals killed under an approved arrangement that provides for ritual slaughter involving sticking without prior stunning;
- An animal that is stuck without first being stunned and is not rendered unconscious as part of its ritual slaughter is stunned without delay after it is stuck to ensure that it is rendered unconscious.

As a consequence, the killing of thousands of conscious sheep continues to occur. In 2007 the *Age* newspaper revealed that at least four Victorian abattoirs had been granted exemptions under the disputed federal guideline to fulfill kosher and halal contracts. Animal welfare groups have accused the federal and state governments of putting a ‘cone of silence’ over the issue and fear the report will be used to increase the practice. Animals Australia fears that granting further exemptions or changing the standard could lead to commercial pressure on more abattoirs to kill without stunning. 85

In 2009 Princess Alia bint al-Hussein, the sister of King Abdullah II of Jordan appealed to the then Prime Minister Kevin Rudd to stop the slaughter of conscious animals for halal meat in Australia. She stated that the ritual is not necessary under Islamic principles and that any lowering of any animal welfare standards in Australia for religious reasons would be a blow to the country’s reputation. She also says it would undermine progress in the Middle East and that Muslims who believed animals could not be stunned before slaughter for halal meat were uneducated about the true teachings of Islam. Alia bint al-Hussein is active in Jordan in increasing animal welfare in the livestock industry and is being joined by other Middle East leaders calling animal cruelty anti-Islamic. 86

For more information and opinion, see ‘The Ethics of Ritual Slaughter’. 87

85 <http://www.animalsaustralia.org/features/ritual_slaughter.php>
87 The Conversation, "The Ethics of Ritual Slaughter" 1 July 2011 <http://theconversation.com/explorer/the-ethics-of-ritual-slaughter-2101>
Ethical issues relating to the consumption of animal products

As indicated in the introduction to this topic, a detailed consideration of the ethical issues relating to the human consumption of animal products is beyond the scope of this topic.

**Books**

- Pollan, Michael, *The Omnivore’s Dilemma* (Bloomsbury, 2006)

**Websites**

- Dawnwatch: *Animals as Food* <http://www.dawnwatch.com/animals_as_food.htm>
- farmsanctuary.org <http://www.farmsanctuary.org/issues/factoryfarming/>
- Farm Forward <http://www.farmforward.com/farming>-forward/food-choices>

**Land transport of agricultural animals**

**Webcast 5.12**

Australian Animal Welfare – Land Transport of Livestock (6.23 min)  
<http://www.youtube.com/watch?v=5n1QhKZd6vM>

**Webcast 5.13**

Animal transport investigation (7.10 min)  
<http://www.youtube.com/watch?v=4HpTOR10nzA>
Transport will invoke stress even under ideal conditions and differences in transport tolerance appear to exist between species.88

The food industry processes billions of live animals per year in factory farms across the world. A great many of these animals are moved en masse from farm to slaughter. Earlier in this topic we considered how factory farms subjugate the lives of animals to an industrial system in which animal welfare is subordinate to goals of efficiency and productivity. This relegation of living animals to the status of inanimate objects also extends to their transportation. Food animals who, with the increasing centralisation of slaughter facilities, may have to endure longer and longer transports and may be denied food, water, and protection from extreme temperatures while in transit.

**Relevant legislation, standards and guidelines**

In Australia the *Australian Animal Welfare Standards and Guidelines: Land Transport of Livestock (2012)* governs the transport of livestock.89

The land transport standards were the first Australian Animal Welfare Standards and Guidelines developed under AAWS and apply to livestock being transported by road and by rail. From an animal welfare perspective, this process commences at the time that animals are first deprived of feed and water prior to loading to the time that livestock have access to water at the completion of the journey and includes:

- mustering and assembly;
- handling and waiting periods prior to loading;
- loading, journey duration, travel conditions, spelling periods;
- unloading and holding time.

The Standards were endorsed by the Primary Industry Ministerial Council in May 2009 and a number of states and territories have now enacted legislation to implement them.

The Standards apply to all people responsible for the care and management of livestock that are transported throughout the entire process including agents, transport operators and people on farms, at depots, sale yards, feedlots and processing plants. They apply to all major commercial livestock species; cattle, sheep, pigs, goats, poultry (broilers, layers, turkeys, ducks, geese), ratites (emus and ostrich), buffalo, deer, camels, alpacas and horses (including horses used for sport and recreation).

Livestock transport begins at the loading of livestock into a container or on to a vehicle and concludes on unloading of livestock at the final destination. There is a chain of responsibility for the welfare of livestock that begins with the owner or their agent and extends to the final receiver of the livestock.

The standards and guidelines should be considered in conjunction with other requirements for transporting livestock, and related Commonwealth, State and Territory legislation, including the *Australian Standards for the Export of Livestock*, livestock health and biosecurity requirements, and regulated livestock loading schemes and driver regulations.90

**New South Wales**

In NSW, the *Prevention of Cruelty to Animals (Land Transport of Livestock) Standards 2013* commenced in June 2013 through the *Prevention of Cruelty to Animals Amendment (Animal Trades) Regulation 2013*. The

---


provisions in the NSW Standards reflect those in the national standards which received final endorsement by the Standing Committee on Primary Industries for national implementation into state legislation on 21 September 2012.91

Compliance or non compliance with the Standards may be admissible in proceedings for an offence under the *Prevention of Cruelty to Animals Act 1979* (NSW).

Clause 26 of the *Prevention of Cruelty to Animals Regulation 2012* includes a requirement that the following persons must comply with the provisions of the Standards:

- the proprietor of a business involved in the process of transporting livestock;
- each person concerned in the management of a business involved in the process of transporting livestock;
- any person employed by or working in a business involved in the process of transporting livestock.

**Think**

1. In ‘the effects of road transport on the welfare of cattle’ Siobhan Egan notes that it is well documented that transportation is perhaps the most stressful event encountered by cattle during the production process and that improving the welfare of transported cattle is more an ethical concern than an economic one.92

   In view of extensive scientific evidence suggesting that transported animals experience significant stress, in particular increases in cortisol and catecholamine concentrations, can you think of alternatives to the land transport of animals used in food production?

2. Shortly after they were introduced, the Barristers Animal Welfare Panel suggested the new Standards and Guidelines to be ‘shameful’, arguing that they deny even rudimentary welfare to more than half a billion animals and that producer self-interest continues to prevail in defiance of the public interest. Compliance with the low welfare thresholds of the Standards, BAWP argues, creates a defence or immunity from prosecution for practices which would otherwise constitute a cruelty offence under local animal protection statutes.93

   With reference to relevant provisions of the Standards and Guidelines, in what ways might the land transport Standards and Guidelines fail to protect the welfare of animals?

**Live animal export**

**Textbook**


In this chapter, Ruth Hatten examines international law issues raised by Australia’s attempts to regulate live export with particular attention to the legal developments since the media exposure of inhumane treatment of cattle in Indonesia in May 2011.

**Webcast 5.15**

ABC Rural Affairs, ‘Animal welfare and the live stock trade: Live export snapshot’ 30 May 2013 (2.01 min)


As you are probably aware, live animal export has become a significant and contentious issue in Australia over recent years.

Australia is the world’s largest exporter of live animals for slaughter in other countries, the largest markets being China, Russia, Pakistan, Saudi Arabia, Egypt, Israel and Indonesia. As reported in the 2012 Australian livestock export industry statistical review live cattle exports totalled 617,301 and live sheep exports totalled 2,279,622 head in 2012. Australian live goat exports totalled 61,880 in 2012, the largest market being Malaysia.94 Many of these animals die before reaching their destination.95 Those which survive the gruelling sea voyage often face slaughter without pre-stunning and by crude methods which inflict prolonged pain and terror.96

However, live animal export remains big business for Australia and the trade generates in excess of A$1 billion per year in export income.97

### Animal welfare issues

The following extract is taken from the *Animal Liberation Victoria* website:

Many live sheep are bought for halal slaughter and consumption on the same day. Investigations of this ‘home slaughter’ have revealed sheep being trussed with wire and forced into car boots in sweltering heat for the journey to the buyer’s home. Upon arrival they are carried by their bound legs, which frequently break, and dropped on a concrete surface. Their throats are cut and they may writhe in their own blood for over a minute before losing consciousness.

With this grisly fate awaiting them, the many animals who die in the harsh conditions on board ship can almost be considered the lucky ones. The industry considers a shipboard mortality rate for sheep of 1–1.5 per cent to be ‘acceptable’. This appalling number should be no surprise, given what the animals must endure. Sheep are trucked to ports from all over Australia, which can mean a journey of up to 50 hours without food or water, and are then held in feedlots while being introduced to the pellet diet they must eat on board ship. Around 50 per cent of shipboard deaths result from starvation (or ‘inanition’ in industry newspeak) when sheep accustomed to a grass diet are unable to adjust to pellets. Other causes of death are infection with salmonella bacteria, heat stress, ventilation problems and injuries resulting from rough handling and heavy seas. A shipboard worker leaves us in no doubt about the concern shown for the welfare of these unfortunates: ‘When the sheep die and they’re out at sea, they drop them down a big laundry chute into a mincer … and it just smashes them up … and in quite a lot of cases, the sheep are still alive.

On board the multi-tiered ships, sheep are packed three per square metre. Decks may be open sided, exposing the animals to weather extremes, or enclosed so that they must rely on often inadequate artificial ventilation. Decks are almost never cleaned during the voyage of up to 24 days, and animals must stand in their own urine and faeces. On enclosed decks the dust and ammonia can build up to the extent that many sheep will be blind and suffering from severe respiratory infections upon unloading.

And these are just the ‘normal’ voyages. Countless disasters have occurred over the years where fire, disease outbreaks, ventilation failure, and rejection at the destination port have resulted in the deaths of innumerable animals and taken a massive toll in pain and distress.


The real reasons behind the live export trade are profits, jobs-for-the-boys, and diplomatic relations between governments. It has little to do with religion, and still less to do with the interests of ordinary people or of animals. Australians need to question any rationale that subjects living, feeling beings to such enormous misery, and to decide whether we really want this happening in our names.98

People Against Cruelty in Animal Transport report:

The long distance transportation of animals contradicts the universally accepted principle that animals should be slaughtered as close as possible to the point of production. Animals are packed into multi-storey vessels. Some vessels can hold over 100,000 animals. The large number of animals involved can cause logistical problems. Individual animals have a low value as single economic units. This means that the welfare of individual animals is often overlooked or viewed as insignificant.

The long distance sea transportation of animals often involves animals being packed together in highly cramped conditions for up to several weeks. Animals are unable to move about, suffer respiratory deterioration due to the high levels of ammonia, are forced to lie in their own excrement, suffer heat stress and may suffer blindness from salt spray. Many animals find the journey so stressful they may simply fail to eat.

The most common cause of death is that the animals sometimes do not eat. Some animals refuse to eat the pelletised food which is often contaminated with faeces and urine due to the overcrowded conditions. Other animals find the journey too stressful to eat. Failing to eat can lead to secondary consequences such as bacterial infections, diarrhea, and major organ failure. Animals who suffer an injury, such as from being trampled by other animals in their pen are susceptible to fatal infection.

Once Australian animals arrive in an importing country they are entirely subject to the customs and practices of that country. None of the countries to which Australia sends animals for slaughter have equivalent animal welfare standards, and the vast majority, particularly in the Middle East, have no animal welfare laws, or have inadequate or unenforced standards.99

The RSPCA is also opposed to the live animal export trade because of the serious welfare problems associated with the export of live sheep, cattle and goats for slaughter.

The RSPCA’s stated and longstanding policy is to oppose the export of live animals for slaughter. Instead, the RSPCA advocates the further development and adoption of a chilled and frozen meat-only trade. This would mean animals are slaughtered humanely in Australia, processed at Australian facilities and then their meat exported. The RSPCA has long maintained that livestock should be slaughtered as close as possible to the point of production to avoid the suffering associated with their transport. The trade in live farm animals from Australia, ‘which requires transporting millions of animals over thousands of kilometres on arduous journeys which can last several weeks’, the RSPCA notes, ‘could not be further from this principle’.100

As noted above, once livestock reach their port of destination, those animals that survive and are unloaded are outside the control of Australian law which means that the Australian Government is unable to ensure that exported livestock are slaughtered humanely. Evidence gathered from importing countries has shown that inhumane slaughter and handling practices, that would be contrary to Australian laws and standards, are common.

The Animal Justice Party notes:

Australia has exported over 160 million animals for slaughter in overseas markets in the last thirty years; mainly sheep and cattle, though we also export smaller numbers of deer and goats and have exported camels and buffaloes.

These animals’ primary destinations are countries that have no animal welfare laws, standards or codes of practice in place to offer any degree of protection during their handling and slaughter and 80 per cent will have their throats cut whilst fully conscious.

More than 2.5 million of those animals exported have died en route at sea, from trauma, disease, exposure to extremes of temperature and nearly half of those animals die slow deaths from starvation. Sea transport can take from five to nine days to Indonesia and up to 41 days to more distant destinations such as Russia and Turkey.101

---

99 <http://www.stopliveexports.org/>
101 <http://www.animaljusticeparty.org/portfolio/live-animal-exports/>
As a consequence of the extreme animal welfare issues involved in live export and extensive publicity over recent years, most notably the ABC’s *Four Corners* investigation, ‘A Bloody Business’ in May 2011, campaigns against the live export trade have continued to accelerate. If you wish to learn more about the issues involved in the live export trade and/or about various campaigns to end live export, there are a wealth of informative and credible websites. See in particular:

**The Conversation: Live Exports**
[<http://theconversation.com/topics/live>-exports>

**ABC Rural: Australia’s live export trade**

**RSPCA Live Export Facts**

**WSPA Live Export Campaign**

**Animals’ Angels: Long Distance Transports in Australia**

**Animals Australia: Exposing Live Export Cruelty**
[<http://www.animalsaustralia.org/investigations/live>-export/>

**Animal Justice Party: Live Animal Exports**
[<http://www.animaljusticeparty.org/portfolio/live>-animal-exports/>

**Stop Live Exports.org**
[<http://www.stopoliveexports.org/>

**Live Export Shame**
[<http://www.liveexportshame.com/>

**Ban Live Export**
[<http://www.banliveexport.com/facts/>

## Live animal export: Government and industry perspectives

For an industry worth almost $1 billion p.a. to the Australian economy, it is to be expected that the perspectives of government and industry towards the live export trade may differ from that of animal welfare groups.

As Clive Phillips from the Centre for Animal Welfare and Ethics at the University of Queensland observes:

Most producers care a great deal for their livestock, and many have been deeply disturbed to see how some of the animals that they so attentively nurtured are treated after they’ve left their property.

These welfare problems are not just the multiple stresses that animals are exposed to during the export process, but Australia’s lack of control of the transport and slaughter process after the animals have arrived at their destination port. Regulatory authorities also have little control over practices on the ships: the stockpeople, vets and crew are employed by the industry so there is no independent authority to oversee the process. In other animal-risk situations, such as abattoirs, government inspectors are present: the same should be true on live export boats.103

The Department of Agriculture Forestry and Fisheries states that:

- The Australian Government supports the livestock export trade, which is vital to the economies of rural and regional Australia.
- The government acknowledges that community concern about animal welfare is an important issue that needs to be addressed if the livestock export trade is to be sustainable. It is committed to maintaining the highest possible animal welfare standards.

---


The Australian Government has invested significant resources in addressing the animal welfare issues associated with trade in live sheep, cattle and other livestock. Despite these efforts, DAFF notes, concerns about the handling of livestock before, during and after transit persist.

Following broad-ranging investigations into the livestock export industry the Australian Government has announced a series of initiatives to improve the welfare and treatment of animals involved in the trade. The initiatives included new Australian Standards for the Export of Livestock covering all the main steps along the export chain.

The government and the livestock export industry are continuing to work with receiving countries to improve animal welfare practices post arrival. Australia has signed memoranda of understanding with eight countries in the Middle East and North Africa, and negotiations are continuing with other partners in the region.

Suggestions that the live trade could be completely replaced by chilled and frozen meat fail to take into account the conditions and expectations of the receiving market. Although Australian meat works can slaughter livestock in accordance with the religious requirements of most markets, there is still a need for trade in live animals because of limited refrigeration in and a preference for freshly slaughtered meat in some markets.

For more on the Australian government’s perspective, and for detailed information about the live animal export regulatory regime see:


Department of Agriculture, Fisheries and Forestry: Live Animal Export Trade

Department of Agriculture, Fisheries and Forestry: Livestock: Information for Livestock Exporters

For industry perspectives on live animal export, see:

Meat and Livestock Australia

National Farmer’s Federation

Cattle Council of Australia

Australian Livestock Export Corporation Ltd

A recent article in The Australian (15 August 2013) reports that the National Farmers Federation and Australian Live Exporters Council have rejected a Nielsen poll showing strong voter support for a ban on the live export trade as ‘biased, unconsidered and guilty of pushing a single viewpoint’:

Separate polls reach different conclusions on live export trade

ALEC chief executive Alison Penfold said more detailed but unpublished research held by the NFF showed the animal live export trade did not feature as a major political election issue in either marginal seats or across wider Australia.

She said not one voter in 1000 surveyed last November had raised live exports as a key election issue, without prompting.

Yet a Nielsen poll of 1500 voters, commissioned by the World Society for the Protection of Animals, found 67 per cent of Australians were more likely to vote for a political party or candidate who promised to ban all live exports, while only 14 per cent said such a ban proposal would cost a candidate their vote.

National Party leader Warren Truss dismissed the poll as he reinforced the Coalition’s support for the live export trade.
Speaking at Kalala cattle station near Katherine in the Northern Territory, Mr Truss said the National Party would never abandon livestock producers, their families and communities who rely on the live export trade.

‘WSPA’s position is hypocritical and shows that it has no interest in animals, we will not stand idly by and see the industry destroyed by Labor or by extremist animal rights groups running self-serving political campaigns,’ Mr Truss said.

‘With growing food requirements to Australia’s north and throughout Asia, we need to be backing this industry, not crippli
ting it.’

The NFF survey on attitudes to the live export trade, conducted late last year by Sexton Research but only released this week, found community attitudes to be the polar opposite of the WSPA poll.

The NFF-Sexton survey showed a massive 63 per cent of Australians supported the trade’s continuation with tight monitoring of overseas abattoirs, while only 16 per cent backed an outright ban.

It also found 44 per cent of voters would ‘definitely or probably’ vote against their MP or candidate if they proposed banning or phasing out the $1.8 billion live export trade.

‘These results show that, despite mentioning the reported cases of animal mistreatment in Indonesia (cattle) and Pakistan (sheep), there is strong public support for the continuation of the live export trade, provided that genuine efforts are being made by the industry to improve the treatment of animals in other countries,’ the researchers concluded.

The NFF Sexton poll found that while voters wanted the live export trade to continue; they were also ‘easily swayed’ by evidence that animals were not being treated humanely.

But voters also ranked the future of Australian farming and rural communities as their top priority when asked about prompted key issues such as the future of manufacturing or improving hospitals and education.

They were also concerned that ending the live export trade would cause farmers to go broke, lead to foreigners buying up their farms and damage the Australian economy.

Ms Penfold said the WSPA-Nielsen poll did not give a considered view of voters’ attitudes to the livestock export trade but was akin to ‘push polling.’

She said, in contrast, the NFF polling had genuinely shown that while the community has expectations about animal welfare it also understands the importance of the live export trade to the nation.

‘But, with all that said, livestock exports and animal welfare deserve more than a battle of the polls,’ Ms Penfold said.

‘Polling wasn’t and isn’t delivering improvements to animal welfare on the ground; rather greater collaboration and cooperation across sectoral interests including WSPA about how we can improve animal welfare in the markets in which we operate is the more responsible choice.’

1. With reference to the arguments of government and industry exponents of live animal export and the views of animal welfare groups opposed to live animal export, identify some central tensions and points of difference between animal welfare and industry concerns.

2. The Australian government admits that existing regulatory regimes cannot always safeguard the welfare of animals involved in live export. Provide reasons for this.

3. It has been suggested that the regulatory model associated with the live export of farmed animals reflects the worst aspects of self-regulation and that a frequent failing of self-regulation is that legitimate objectives may be subverted to private purposes. Why is self-regulation particularly problematic in the context of the live animal export trade?

4. While recent investigations into live animal export have responded to a number of animal welfare concerns, they have not engaged with the question of whether live export is prima facie cruel and whether the practice should be continued or phased out.
Do you think that the reformed regulatory regime, including applicable welfare standards, continue to sanction cruelty to animals involved in the live export trade? Why or why not?

The regulatory framework

Live animal export is within the jurisdiction of the Commonwealth under the trade and commerce head of power contained in the *Australian Constitution*.

The regime governing live animal export is a complex one, consisting of principal acts, regulations, standards and orders. There are also a number of regulatory authorities, both from government and industry having compliance, monitoring and enforcement responsibilities under the constituent elements of the regime. A major feature of the regulatory regime relates to the requirements for export licences. The two key statutes are the *Australian Meat and Live-stock Industry Act 1997 (AMLI Act)* and the *Export Control Act 1982*. Both of these regimes are administered by the Australian Quarantine and Inspection Service (AQIS, now known as Biosecurity Australia) under the Commonwealth Department of Agriculture, Fisheries and Forestry (DAFF). In addition to these laws, the Commonwealth *Navigation Act 1912* and state-based animal welfare legislation also play a role in the regulation of the trade.

Live export: Standards, legislation, orders and ESCAS

The following **Standards** apply to the export of livestock:

*Australian Standards for the Export of Livestock (Version 2.3) 2011*[^105]

The following **Acts** apply to the export of livestock:

- *Australian Meat and Live-stock Industry Act 1997*
- *Export Control Act 1982*

The following **Orders** apply to the export of livestock:

- *Export Control (Animals) Order 2004*
- *Australian Meat and Live-stock Industry (Conditions on live-stock export licences) Order 2012*
- *Australian Meat and Live-stock Industry (Export of Live-stock to Saudi Arabia) Order 2005*
- *Australian Meat and Live-stock Industry (Live Cattle Exports to Republic of Korea) Order 2002*
- *Australian Meat and Live-stock Industry (Export of Live-stock to Egypt) Order 2008*

The Exporter Supply Chain Assurance System[^106]

On 8 June 2011, following media exposure of inhumane treatment of cattle in Indonesia, the Australian Government temporarily suspended the export of all livestock for the purpose of slaughter to Indonesia until new animal welfare safeguards were established for the trade. Note that ESCAS only applies to animals intended for slaughter and does not extend to breeding animals.[^107]

Prior to the suspension, exporters of livestock to Indonesia were only required to track exported animals from the property of origin in Australia to the port of export and report on the outcome of the voyage to Indonesia.

An Industry Government Working Group (IGWG) was established to develop a regulatory framework to address the areas of concern with the export of livestock to Indonesia. Under the regulatory framework implemented for livestock exports to Indonesia for the purpose of slaughter, the exporter must supply

[^106]: For a detailed overview of ESCAS, see <http://www.daff.gov.au/biosecurity/export/live-animals/livestock/escas>
[^107]: A recent 2013 DAFF investigation into allegations that pregnant breeding cattle exported to Qatar were beyond the maximum period of gestation allowed under the *Australian Standards for the Export of Livestock* and that the livestock were old and in poor general health and condition, found the cattle to meet all requirements for export laid out in the ASEL. DAFF noted that breeder cattle are not subject to Australian regulation after they have arrived in the importing country. As such, there was no regulatory basis for the investigation to consider the animal welfare claims past the point of disembarkation in Qatar. <http://www.daff.gov.au/about/media-centre/dept-releases/2013/release-investigation-report-qatar>
evidence of an acceptable Exporter Supply Chain Assurance system (ESCAS) before an exporter can be issued with an approval to export by the Department of Agriculture, Fisheries and Forestry (DAFF).

The requirements put the onus on exporting companies to prove slaughtering methods meet international welfare standards, that they can trace and control exported animals right through the supply chain, and that there will be independent auditing of those systems.

The licensed exporter must submit their proposed ESCAS for assessment along with a Notice of Intention to export and a Consignment Risk Management Plan (CRMP). The ESCAS submission must:

- provide evidence of compliance with internationally agreed welfare standards;
- demonstrate control through the supply chain;
- demonstrate traceability through the supply chain;
- meet reporting and accountability requirements;
- include independent auditing.

**How the export trade is regulated**

The following is from RSPCA Australia: 'How is the Export Trade Regulated?'

The *AMLI Act* provides a regime for the licensing of exporters. It prohibits the export of livestock without the appropriate licence. The Secretary of DAFF is empowered to make orders that impose certain conditions on export licences. The relevant order is the *Australian Meat and Live-stock Industry (Standards) Order 2005*. This Order requires licence holders to comply with the *Australian Standards for the Export of Livestock (Version 2.3) 2011 (ASEL)*. The ASEL provide for the substantive animal welfare requirements for the live export process and cover the following stages of the export chain:

- Planning the consignment;
- Sourcing and on farm preparation of animals;
- Land transportation;
- Pre-embarkation assembly;
- Vessel preparation and loading of the vessel; and
- The sea voyage or flight.

The ASEL also impose reporting obligations on exporters. Exporters must notify DAFF if the mortality rate exceeds 1 per cent for cattle or 2 per cent for sheep. In practice, mortality rates are routinely exceeded.

*The Export Control Act* provides a legislative framework for governing the export of ‘prescribed goods’ (including live animals) from Australia. It is responsible for approving individual consignments of animals. The administrative detail of this regime is effected through subordinate instruments known as Export Control Orders. The primary order for the export of live animals is the *Export Control (Animals) Order 2004 (Cth)* (EC (Animals) Order). Under the EC (Animals) Order, a person who wishes to export live animals must first be licensed under the *AMLI Act*, and must comply with any conditions imposed on that licence. The EC (Animals) Order outlines the process for approving consignments of livestock, which begins when the exporter submits a notice of intention to export and a consignment risk management plan.

In addition to these documents exporters must now submit an ‘exporter supply chain assurance system’ (ESCAS). The ESCAS is a new regulatory requirement that was recommended by the *Farmer Review* in 2011 following evidence of cruel animal handling and slaughter practices in Indonesia. The ESCAS is designed to monitor the movement of livestock in importing countries to ensure the animals can be traced from export to slaughter. As part of the ESCAS the exporter must submit an end of processing report and an independent performance audit report.

There are a range of possible sanctions available to DAFF for dealing with breaches of the ASEL and ESCAS under the *AMLI Act* and *EC Act*. These include criminal sanctions such as fines and imprisonment and administrative sanctions such as export licence suspensions or cancellation. In practice, however, DAFF rarely utilises these regulatory mechanisms (even in cases of major breaches) and will instead simply opt to impose further conditions on the offending exporter during future consignments.

As referred to above, the *Navigation Act* also plays a role in regulating the live export trade through the certification of live export vessels. The *Navigation Act*, through *Marine Orders, Part 43: Cargo and Cargo Handling – Livestock*, specifies requirements for animal pen sizes, passage ways to enable inspection of animals, and the possession of humane destruction equipment. The Marine Orders also impose reporting obligations regarding mortality rates on the ship’s master.

Finally, as much of the live export process occurs within state jurisdictions, state-based animal welfare law also applies to the trade. The loading and transportation of unfit animals, as well as the inappropriate handling and treatment of animals during any stage of the live export process may be met with criminal prosecution under state welfare law.

**Concerns with the regulatory framework**

Despite the comprehensive nature of the regulatory framework, the RSPCA identifies ‘a number of fundamental concerns’ which demonstrate the impossibility of ensuring acceptable animal welfare standards within the live export trade:

1. It is not possible to ‘regulate out’ risks that are inherent to the trade. No amount of government regulation can overcome the inevitable welfare issues associated with the stress of prolonged transportation, changes in climatic conditions, and uncontrollable handling and slaughter practices in foreign jurisdictions.

2. There is no requirement for animals in foreign jurisdictions to be stunned before slaughter.

3. The regulatory framework is fundamentally reactive in nature. While the ESCAS is a welcomed improvement, it operates primarily to monitor and detect breaches, not to prevent them. Detecting cruelty after it has occurred is of little benefit to the animals affected.

4. The ASEL and ESCAS take the form of licence conditions rather than legislative provisions. This renders any requirement for compliance with the ASEL and ESCAS vulnerable to the discretion of relevant DAFF officers. A breach of the ASEL or ESCAS is not an offence of itself but a breach of a licence condition, which is ultimately left to DAFF to decide whether any action should be taken in response. If the ASEL or ESCAS were legislated, compliance would be definitively mandatory and any breach would constitute an offence of itself.

5. There are fundamental limitations to any effort by the Australian Government to control the conditions of animal handling and slaughter in foreign jurisdictions.

6. Accountability mechanisms – effected through the various reporting obligations under the ASEL and ESCAS – lack independence. Both AQIS accredited veterinarians under the ASEL and the independent auditors under the ESCAS are engaged and compensated directly by the exporter. The Farmer Review itself acknowledged incidences of undue influence being exerted by exporters over AQIS accredited vets but failed to recommend a change to the way their services are engaged.

7. Sanctions for breaches of the ASEL and ESCAS have to-date been manifestly inadequate and have failed to act as any deterrence to those in the industry who may not take their animal welfare obligations seriously.

See also Siobhan O’Sullivan, ‘Assessing Australia’s regulation of live animal exports’ (29 July 2013) who notes that, since the introduction of ESCAS, 87.5 per cent of complaints have come from ‘animal groups’ or the community and not a single breach has been identified by DAFF itself, nor have investigations into non-compliance with ESCAS requirements resulted in any punitive action. O’Sullivan concludes:

> So the bureaucrats have now had a good go at Australia’s live animal export trade. Is the world a better place as a result? If you value access to knowledge, the answer is probably ‘yes’. If you value the systematic reporting of breaches, then you have to conclude that the system would be a complete failure without Animals Australia and the RSPCA, both of which are charities and both of which depend on donations for their operations. Finally, if you like to see someone being punished when animal welfare is compromised, then ESCAS is probably not for you.\(^{109}\)

Think

1. Are the RSPCA and O’Sullivan suggesting that the regime governing live export establishes a largely self regulatory industry, including in standard setting, compliance monitoring and enforcement?

2. For what reasons does Ruth Hatten (Chapter 13 textbook) suggest that ESCAS and the regulatory system governing live export has been a ‘failure’?

3. Do you agree with Hatten that no amount of regulation will be able to prevent harm to animals involved in the live export trade?

4. In its arguments supporting a ban on live export, the Animal Justice Party states that it ‘recognises that Australian governments have not and will not ban the export of live animals no matter how many graphic, proven and documented instances of cruelty are exposed’ and that ‘until fully qualified independent veterinary supervision and intervention is provided in every live animal transport situation, there can be no transparency in this industry and no confidence that satisfactory animal welfare standards will be adhered to.’

Do you agree that Australian governments will not ban the export of live animals no matter how many documented instances of cruelty are exposed? Why or why not?

Topic summary

This topic has provided an overview of a number of regulatory regimes governing farmed animals in Australia. It has also considered a wide range of issues related to the welfare and protection of animals used for purposes of food and fibre production. Noting that the number of animals exploited in agriculture is increasing and that intensive production practices or ‘factory farming’ is a major contributor to this increase, it has attempted to highlight deficiencies in existing regulatory regimes, with specific reference to Standards and Codes of Practice.
Topic 6

Animal experimentation and research

Objectives

At the completion of this topic students will be able to:

• identify and critically evaluate the ethical issues relating to the use of animals in research and experimentation;
• consider alternatives to the use of animals in scientific research;
• identify the legislative and regulatory framework governing the use of animals in experimentation and research in NSW;
• describe the central features of the National Health and Medical Research Council Australian Code of Practice for the Care and Use of Animals for Scientific Purposes;
• critically evaluate the extent to which the regulatory framework protects the interests and welfare of animals used in research;
• describe the compliance and enforcement regimes in relation to the use of animals in research and identify the remedies which may be available for non-compliance;
• identify some of the global trends relating to the use of animals in research.

Textbook

Chapter 12 – Andrew Knight, ‘The Australasian Regulation of Scientific Animal Use: A Chimera of Protection’
Webcast 6.1

Dr Andrew Knight ‘Animal Experiments’ (9.57 min)
<http://www.youtube.com/watch?v=EVxUM1x2qwA>

Dr Andrew Knight discusses his book *The Costs and Benefits of Animal Experiments* (2011), specifically humane alternatives to using animals in research. In his book, Knight provides more than a decade’s worth of scientific research, personal experience, and an analysis of over 500 scientific publications, to give evidence-based answers to the key question: are animal experiments ethically justifiable?

Knight concludes that, considering overall costs and benefits, one cannot reasonably conclude that the benefits which accrue to human patients or to those motivated by scientific curiosity exceed the costs incurred by animals subjected to scientific procedures. On the contrary, the evidence indicates that actual human benefit is rarely – if ever – sufficient to justify such costs.

Webcast 6.2

People for the Ethical Treatment of Animals: Anti animal testing (3.16 min)
<http://www.youtube.com/watch?v=0QRBcHIIsXc>

This webcast provides an overview of issues relating to the use of animals in research, and highlights the suffering of the animals involved. Please note that it contains scenes which students may find disturbing.

Introduction

Routine use of animals in research assumes that their value is reducible to their possible utility relative to the interests of others.¹

In this topic we will consider the regulatory framework governing the use of animals in scientific experimentation and research. This is a contentious area of animal exploitation, but due to the confidentiality which frequently attends commercially funded research projects, information relating to the use of animals in such projects may be difficult to obtain and as a result, beyond public scrutiny.

This is borne out by two recent cases from the UK and the USA:

- In *United Kingdom Secretary of State for the Home Department v British Union for the Abolition of Vivisection and another*, information supplied by the applicants for animal experimentation licences was held to be exempt from disclosure under the *Freedom of Information Act 2000* if the official in possession of the information knew or had reasonable grounds for believing that it was provided in confidence.²

- In *Mississippi State University and the IAMS Company v PETA*, People for the Ethical Treatment of Animals sought records relating to any research projects, tests and/or experiments that received funding and/or sponsorship from the IAMS Company. PETA failed to rebut the evidence presented by MSU and IAMS that the data and information requested in the subject records constituted trade secrets and/or confidential commercial and financial information of a proprietary nature developed by MSU under contract with IAMS.³

² United Kingdom Secretary of State for the Home Department v British Union for the Abolition of Vivisection and another [2008] EWCA Civ 870; [2008] WLR (D) 273.
³ In Mississippi State University and the IAMS Company v PETA (No 2006 – CA – 02120 – SupCt).
Costs and benefits of animal research

In the next reading Andrew Knight provides detailed statistics relating to the use of animals in research in Australasia, considers the utilitarian and ethical considerations involved, and examines existing regulatory frameworks in Australia and New Zealand. Knight concludes that the evidence indicates that actual human benefit is rarely—if ever—sufficient to justify the costs incurred by animals within the utilitarian framework that underpins public policy and regulation in the field.

Textbook

Chapter 12 – Andrew Knight, ‘The Australasian Regulation of Scientific Animal Use: A Chimera of Protection’

Think

1. What diametrically opposed ‘philosophical, cultural and religious’ viewpoints towards the use of animals in research does Andrew Knight identify?
2. What utilitarian assessment forms the basis for most regulation governing the use of animals in research for scientific or educational purposes?
3. Knight observes that a utilitarian moral case based on ‘the greatest good for the greatest number’ might still be made for experimenting on animals, if it were truly the case that such research yielded tangible advancements in human healthcare. For what reasons does Knight suggest that the use of animal models are unreliably, and often poorly, predictive of human outcomes?
4. Knight provides statistics demonstrating that Australia is the fourth largest user of invasive animal use for scientific or educational purposes in the world, a ‘disproportionately’ large percentage in view of its population. To what does he attribute this state of affairs?
5. What reasons does Knight provide for concluding that the harms inflicted on animals used for scientific or educational purposes is not outweighed by resultant benefits to human patients, consumers or other citizens?
6. What alternatives to the use of animals in research and education does Knight propose?
7. What shortcomings does Knight identify with Animal Ethics Committees?

Ethical issues: Harm and benefit

Perhaps more than any other animal welfare issue, the use of animals in research and teaching is marked by robust public debate and, on occasion, by conflict. From the anti-vivisection rallies in Britain at the end of the nineteenth century to more recent times where we have seen research laboratories vandalised and scientists attacked, this debate highlights the diversity of views and the depth of feelings in our community about our relationships with and duties towards other animals and the complex cultural, social and personal dimensions of these relationships. We are confronted with a range of competing values and passionately held beliefs which challenge and potentially confound our reaching agreement as to the ethical acceptability of our use of animals in these circumstances.

As we will see, the laws and ethical guidelines relating to the use of animals in Australian research and experimentation are expressed to reduce ‘as far as practicable’ the pain and suffering of the animal ‘research subjects’. As a general rule, the pain and suffering experienced by animals is regarded as legally justifiable if the significance of the research is considered to outweigh the harms caused to the animals. The main ethical principle which guides most animal use in science is:

Using animals for scientific purposes is acceptable only when any harm done to the animals is very greatly outweighed by the benefits of their use.5

Tom Regan argues that such an ‘ethical principle’ assumes that it is all right to allow practices that use animals as if their value were reducible to their possible utility relative to the interests of others, provided that we have ‘done our best’ not to do so. He asserts, however, that:

*The best we can do in terms of not using animals is not to use them.* Their inherent value does not disappear just because we have failed to find a way to avoid harming them in pursuit of our chosen goals. Their value is independent of these goals and their possible utility in achieving them.6

Compare Regan’s views with what David DeGrazia suggests is biomedicine’s ‘party line’ on the ethics of animal research, conformity to which, he says ‘may feel like a political litmus test for full acceptability within the professional community’:

According to this party line, animal research is clearly justified because it is necessary for medical progress and therefore human health – and those who disagree are irrational, anti-science, misanthropic ‘extremists’ whose views do not deserve serious attention.7

**Think**

Do you agree with the ‘party line’ of many in the biomedical community that opponents of animal research such as Regan are ‘misanthropic extremists’ whose views are ‘irrational’, ‘anti-science’ and not deserving of serious attention? Why or why not?

**Ethical frameworks**

In ‘Killing for Knowledge’ Tzachi Zamir, discusses the ethical and philosophical arguments which are most frequently advanced as justifications for the use of animals in research. The primary assumption which informs these justifications, he notes, is that humans have greater *value* than animals.8

Zamir notes that four distinct claims are made when the assumption that humans are more valuable than animals is invoked as the justification for research:

1. **Humans are more important** than animals: People value the capacities in which humans excel more than the capacities of animals. Animal-based experimentation is justified given the necessity to harm either humans or animals and given the inferiority of the latter. Pro-vivisection literature is sprinkled with assertions of human superiority that are perceived as adequate support for animal experimentation.

2. **Humans care more for humans than for animals:** Sympathy for human suffering overrides sympathy for animals. The cruder manner by which the greater care for humans excuses research is through questions like: ‘What would you say if the sick person is your child, and saving him requires sacrificing animals?’

3. **Humans deserve more than animals:** Humans have an entirely different level of moral standing than animals have. Since humans deserve more, saving a single human life justifies sacrificing many animals. Supporters of animal research contend that regard for the interests of different species must be differentiated, according to the degree of their mental capacity and of their capacity for suffering. While consideration should be given to the interests of all sentient beings, we should give more consideration to the interests of those species with the greatest mental complexity.

4. **By experimenting on animals, we minimize the harm done to humans:** Terminating animal experimentation will harm humans, either because some life-saving products will not be devised, or as a result of damage to human subjects by experimental drugs that have not been trialed on animals.

---

5 Australian and New Zealand Council for the Care of Animals in Research and Teaching <http://www.adelaide.edu.au/ANZCCART/>
This is perhaps the most commonly used justification for research, that scientific progress requires the use of living animals to investigate the complex systems and functions of the organism because no adequate alternatives exist.

Zamir then asks whether an examination of the above moral claims is even plausible ‘given that we routinely kill huge numbers of animals for much lighter reasons’. He states:

If society does not outlaw eating meat, hunting or fishing, then *a fortiori* it cannot interfere with research which sacrifices animals for weightier reasons. This point is made in pro-research propaganda, which routinely compares the death toll in the meat industry or processes of ‘pest’ control, with the numbers of animals killed by experiments. One such estimate, conducted by the Research Defence Society, shows that in 1991, 11.5 animals per person were killed for food in the UK, whereas 0.05 animals per person have been used (not necessarily killed) in research.

Think

1. With reference to the justifications for the use of animals in research outlined above, consider your responses to the following:
   - Do humans have a higher moral status than animals? Provide reasons.
   - If humans *do* have a higher moral status does this mean that some actions that ought not to be done to humans can be directed at animals, while acknowledging that the latter also have some degree of moral status? Why or why not?
2. Zamir suggests that while the ‘high moral status’ of humans can be linked with greater protection, it also entails greater moral demands like refusing to sacrifice entities of ‘lower status’ for one’s own gain. Do you agree? Why or why not?
3. How do you respond to Zamir’s claim that if society does not outlaw eating meat, hunting or fishing, then *a fortiori* it cannot interfere with research which sacrifices animals for weightier reasons?
4. Humane Research Australia asserts that ‘in principle, regardless of whether an animal is well cared for, their use in research designates them as mere objects – a means to an end – rather than recognising and respecting their intrinsic value.’ Construct arguments both for and against the following propositions:
   - Human and non-human animals have the same intrinsic value.
   - Human animals have greater intrinsic value than non-human animals.

Statistics on animal research in Australia

Despite a global growth in sentiment against the use of animals in research and an emergent research culture which advocates alternatives to research involving animals,9 the widespread use of animals in research and experimentation continues in Australia.

As noted by *Animals Australia*, animal research has become ‘big business’:

Today it is a multi-billion dollar industry, encompassing the pharmaceutical and chemical industries and university and government bodies. There is also a significant industry providing support services in relation to animal research, including animal breeding, food supply, cage manufacture, etc.10

---

The British Union for the Abolition of Vivisection <http://www.buav.org/>
Johns Hopkins University Center for Alternatives to Animal Testing <http://caat.jhsph.edu/>
Fund for the Replacement of Animals in Medical Experiments <http://www.frame.org.uk/>
Animals Australia: Animal Experimentation <http://www.animalsaustralia.org/issues/animal_experimentation.php>
UC Davis Center for Animal Alternatives <http://www.lib.ucdavis.edu/dept/animalalternatives/>

10 <http://www.animalsaustralia.org/issues/animal_experimentation.php>
Animals Australia claims that more than six million animals are used annually in research and teaching in Australia and New Zealand and that many of these animals are subjected to some degree of pain, stress and/or suffering during the experimental procedure or as a result of the environment in which they are kept prior to and/or after the procedures. Many animals, it claims, are kept conscious and subjected to ‘a moderate or large degree of pain/distress that is not effectively alleviated.’\textsuperscript{11} The Australian Association for Humane Research estimates that at least 100,000 animals used in medical and pharmaceutical trials in Australia die annually.\textsuperscript{12}

In relation to the purpose for which animals were used in research, available statistics indicate the following:

<table>
<thead>
<tr>
<th>Purpose</th>
<th>Vic</th>
<th>NSW</th>
<th>Tas</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Understanding human or animal biology</td>
<td>437,379</td>
<td>189,450</td>
<td>15,852</td>
<td>642,681</td>
</tr>
<tr>
<td>Maintenance and improvement of human or animal health and welfare</td>
<td>1,260,936</td>
<td>283,546</td>
<td>12,872</td>
<td>1,557,354</td>
</tr>
<tr>
<td>Improvement of animal management or production</td>
<td>145,134</td>
<td>94,019</td>
<td>7,486</td>
<td>246,639</td>
</tr>
<tr>
<td>Production of biological products</td>
<td>74,625</td>
<td></td>
<td></td>
<td>74,625</td>
</tr>
<tr>
<td>Diagnostic procedures</td>
<td>8,540</td>
<td></td>
<td></td>
<td>8,540</td>
</tr>
<tr>
<td>Achievement of educational objectives</td>
<td>56,732</td>
<td>41,230</td>
<td>18,405</td>
<td>116,367</td>
</tr>
<tr>
<td>Environmental study</td>
<td>714,291</td>
<td>1,402,726</td>
<td>42,473</td>
<td>2,159,490</td>
</tr>
<tr>
<td>Regulatory product testing</td>
<td>24,540</td>
<td></td>
<td></td>
<td>24,540</td>
</tr>
<tr>
<td>Stock Breeding</td>
<td>65,936</td>
<td></td>
<td></td>
<td>65,936</td>
</tr>
<tr>
<td>Stock Maintenance</td>
<td>33,850</td>
<td></td>
<td></td>
<td>33,850</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>2,614,472</strong></td>
<td><strong>2,218,462</strong></td>
<td><strong>97,088</strong></td>
<td><strong>4,930,022</strong></td>
</tr>
</tbody>
</table>

Read the following article, dated 3 July 2009, published in The Australian newspaper.\textsuperscript{13}

The NSW Animal Research Review Panel suggests that the number of animals used in testing in NSW should be reduced while the DPI argues that the number of animals being killed or injured in scientific experiments is ‘justified’. With reference to your reading so far, critically evaluate both of these claims.

\textsuperscript{11} Ibid.
\textsuperscript{12} Humane Research Australia \texttt{<http://www.humaneresearch.org.au/statistics/>}
Animal testing deaths justified, says Department of Primary Industries

THE number of animals being killed or injured in scientific experiments is justified and unlikely to fall in the near future, the New South Wales Department of Primary Industries (DPI) says.

More than 8800 animals were killed and a further 16,000 subjected to pain in NSW during the 12 months to June, according to new figures from the State Government’s advisory body, the Animal Research Review Panel.

The DPI admitted the figures published today were not surprising and said compliance with international standards meant the number of animals affected was unlikely to fall.

‘We are working producing pharmaceuticals and vaccines in an international market and to international standards,’ DPI spokesman Ross Burton said.

‘International product standards require animal testing.

‘There is a lot of work going on here and overseas to replace animal testing.

‘But if we are to have non-animal testing for a certain product, that has to be approved on an international level and that process takes a long time.’

He said laws allowing animal testing in NSW aimed to strike a balance between the welfare of the animal and the benefits to society and were in line with those in place in other Australian states.

Testing on animals in NSW, as well as the introduction of new test methods, are subject to rigorous inspections and regulation by ethics committees, Mr. Burton added.

Greens MP and animal welfare spokeswoman Lee Rhiannon urged the NSW Government to ‘urgently’ revise its policies on animal testing in light of the review panel’s report.

The NSW Animal Research Review Panel has said the number of animals used in testing procedures in NSW should be reduced.1


Types of research

Research and experimentation involving animals extends to a range of activities.14 As noted by HRA, the public perception that animal-based research primarily takes place in the field of medicine is false:

Animal-based research is widely used in agriculture and ‘basic’ scientific research in relation to which the argument ‘animal research saves (human) lives’ does not apply.15

In an article entitled ‘Where is the evidence that animal research benefits humans?’ Pound (et al) note that while clinicians and the public often consider it axiomatic that animal research has contributed to the treatment of human disease, there is little systematic evidence of its effectiveness to support this claim. Few methods exist, they assert, for evaluating the clinical relevance or importance of basic animal research, and its clinical contribution remains uncertain. Anecdotal evidence or unsupported claims are often used as justification; for example, that the need for animal research is ‘self evident’ or that ‘animal experimentation is a valuable research method which has proved itself over time.’ Such statements, the authors claim, are an inadequate form of evidence for such a controversial area of research.16

As reported by HRA, the following are the most common (but not only) categories of animal-based research:

Basic biomedical research

The majority of animals used in research and teaching in universities and research establishments are used in experiments or procedures which are aimed at finding out more about the processes governing the function of living organisms. Some of this work may be relevant to the understanding of human disease, but most of it will not be. For example, nerve cells may be taken from a rat’s brain (or another part of a rat’s

14 For types of research activities involving animals, see <http://www.animalsaustralia.org/factsheets/animal_experimentation.php>
15 Humane Research Australia <http://www.aahr.org.au>
nervous system) to be used in the study of how nerve cells work. This information may indicate how human nerve cells work in general.

Although most basic scientific research using animals is probably not directly aimed at understanding or treating human disease, nevertheless, most researchers will justify the funding of this research on the grounds that it does have human relevance. Some forms of basic research are:

- **Genetic Engineering**: It is now possible to modify or delete a gene responsible for the expression of a particular protein. The modification or deletion can be made in an animal, usually a mouse. An animal whose genome is modified in this way is a ‘transgenic’ animal. While it is debatable whether results obtained in this way can provide useful information about human genes, the use of transgenic animals, particularly mice, has meant the number of animals used in research around the world is increasing.

- **Physiological Research** – This involves the study of how organ systems work, for example the circulatory system, the excretory system or the breathing system. Physiological experiments may involve the use of both anaesthetised animals and conscious animals.

- **Psychological Research** – Psychological research often involves controlling the eating, movement or choices or behaviours of experimental animals and as such may cause distress and frustration.

### Medical research

Proponents of medical research justify research using animals on the basis that it relates to human disease and treatments for those diseases. The bulk of human disease-oriented research is done in universities and specialist institutes, and attracts large amounts of government and private funding.

The main problem with animal research which claims to relate to the causes of human disease or development of human disease therapies is that non-human animals are not humans. Results with ‘animal models’ of human diseases can therefore be very misleading.

### Agricultural research

Agricultural research is almost entirely directed towards increasing the productivity of animals kept for food or food products (see Topic 5). A lot of this research involves the study of animals kept in intensive housing systems, such as sow stalls or battery hen cages. One of the main reasons for the adoption of such housing systems is that they maximize productivity.

Some genetic engineering of species used in agriculture, eg sheep and cattle, is occurring in an attempt to increase production, such as milk or wool production, or to alter the characteristics to the product being produced, such as the meat or finer wool. Cloning techniques are also being developed with the goal of increasing the ability to breed more individuals of a certain genetic makeup.

### Safety testing

The human safety of medicines, agricultural chemicals and various other chemical products, such as shampoos, cleaners and so on, is assessed by testing the products on animals. The tests usually involve poisoning the animals concerned with death as the measured endpoint. ‘LD50’ is the term used to refer to the lethal dose required to result in the death of 50 per cent of test subjects.

### Examples

Helen Marston has indentified the following examples of inhumane procedures that animals may be subjected to:\[17\]

- creating heart attacks, heart failure, abnormal heart rhythms, strokes, and other cardiovascular traumas in monkeys, dogs, pigs, and other animals;
- dropping weights onto rodents to produce spinal cord injuries and paralysis;

---

• producing fatal burn injuries in dogs to study burn treatments;
• inducing a state of ‘learned helplessness’ in dogs, primates and other animals by subjecting them to an inescapable source of fear or frustration, such as electric shock, forced swimming to exhaustion, or hanging by their tails, until the animals despair and stop resisting the irritant;
• implanting electrodes into the brains and eyes of monkeys and cats to conduct neurological and vision experiments;
• implanting electrodes into the intestines of dogs to induce motion sickness and vomiting;
• inducing symptoms of migraines in cats and primates through brain stimulation and manipulation with chemicals.

Marston notes that the following experiments occurred within Australia over the past few years:

• In 2007 the Physiology Department at Monash University used monkeys in neurological and visual experiments. In the experiment 14 marmosets were held in a frame while visual stimuli were presented on a screen in front of the monkey’s eyes and observations made measuring the activity in the brain and cell responses. The experiment concluded that the processing of visual motion is at best only ‘likely’ to translate to the human brain.18

• The University of Sydney uses kittens as a model for eye disease of premature infants. The disease, Retinopathy of Prematurity (ROP), is a disorder of the retina which can result in blindness. In one experiment researchers placed kittens aged between one and four days’ old with a lactating mother in a chamber (which consists of 60–70 per cent oxygen in the air – normal air contains 20 per cent oxygen) for up to 4 days. The purpose was to observe changes to the cells and blood vessels.19

• In an attempt to recreate the effects of the party drugs MDMA (ecstasy) and methamphetamine (speed) in animals, researchers at the University of Sydney and Macquarie University tried to replicate the lasting social behavioural effects of repeated doses of these drugs in rats. In an experiment published in 2007 rats were injected with these drugs once a week for 16 weeks to monitor them for their reactions. In another project in 2008, rats were trained to self-administer speed from a lever in a high temperature enclosure in an attempt to recreate the heat in dance parties or nightclubs where the drug is often consumed and the ambient temperature is high. In order to self administer intravenously the rats underwent surgery to implant a catheter into the jugular vein and a screw assembly heat mount so that the number of drug infusions and lever presses could be recorded. The results of this experiment were that high ambient temperatures encourage higher levels of drug intake in rats.20

• Researchers at the Research Centre for Reproductive Health at the University of Adelaide have been attempting to mimic binge drinking in pregnant sheep to observe the results in the unborn lamb. Pregnant sheep were infused intravenously with ethanol and compared to control sheep. The researchers observed a reduction in fetal weight in the sheep administered with ethanol. The researchers acknowledge in their publication that they were already aware that chronic ethanol consumption in pregnant women reduces birth weight and further that the ‘sensitivity of fetal growth to ethanol may vary between species’.21

Arguing that in the area of animal experimentation we need to focus on replacements rather than welfare, Marston concludes that such experiments were not only ‘scientifically flawed’ but that they also failed to protect the animals concerned. She also notes that it is becoming increasingly acknowledged by researchers that data obtained through animal tests cannot be extrapolated to humans with sufficient accuracy to justify the harm inflicted on the animals concerned. Similarly, the British Union for the Abolition of Vivisection cites evidence that nine out of ten experimental drugs fail in clinical studies because it is not

possible to accurately predict how they will behave in humans based on laboratory and animal studies. As Pound asserts:

The claim that animal experimentation is essential to medical development is not supported by proper, scientific evidence but by opinion and anecdote. Systematic reviews of its effectiveness don’t support the claims made on its behalf.

Views of abolitionists

As Humane Research Australia notes, animal experimentation is sometimes considered a ‘necessary evil.’ While many dislike the notion that it happens, they may accept that it is necessary to save human lives. However, as research by HRA demonstrates, an extremely high volume of animal experiments conducted today cannot be considered ‘life-saving.’ For example, agricultural research, including genetic engineering and cloning, is often directed towards increasing the quality and yields of ‘produce’ from animals; cosmetic testing causes great suffering to millions of animals for purposes of human vanity; toxicity testing is often conducted to determine the safety levels of ‘new and improved’ products, despite these being non-essential luxuries.

Helen Rosser notes that even when we consider those experiments that are directly related to human health, they are not the most efficacious way to medical discoveries. As noted by John McArdle:

Historically, vivisection has been much like a slot machine. If researchers pull the experimentation lever often enough, eventually some benefits will result by pure chance.

So while some research using animals have contributed to advances in medical science, Rosser argues that these could have been made through other means. Additionally, she notes, many discoveries were made by non-animal methods, and later experiments on animals only served to verify these breakthroughs.

Rosser’s claims are echoed by the British Union for the Abolition of Vivisection which argues that animal research and experimentation cannot be justified for the following reasons:

- **Not supported by evidence:** Scientists do not regularly review the predictability of animal tests and assume animal tests work based on certain similarities with humans and a long history of use. It is not enough to come up with one or two examples of where animal tests appear to have been helpful. To be an effective way of doing science, animal tests need to be consistently predictive.

- **Not predictive:** The few studies that have been done to look at how predictive animal tests are of effects in humans have been highly critical of their efficacy. Due to the high variability of the results between sexes, species and laboratories, high doses used, high stress levels, poor methodology used in addition to species differences, animal tests do not appear to accurately predict human effects.

- **Inconclusive:** Because animal experiments don’t provide definitive data about humans, scientists, officials and/or companies may dispute their relevance when it suits them to do so. There are many examples where animal tests exacerbated years of dialogue and debate, including asbestos, smoking, saccharin and bisphenol. The lack of faith in the predictability of animal tests may explain the high rate of non-use of animal data. A high proportion of animal tests are not actually used in the ways that we would expect them to be and there are many examples of animal tests being conducted at the same time as similar studies on humans, suggesting that animal tests do not play the vital role we are led to believe.

- **Inefficient:** Due to their lack of predictability and the volume with which they are conducted, the animal testing is ineffective, wasteful and expensive. Reliance on such a system would not be tolerated in other sectors of professional business. For example, despite using over 100 million animals worldwide every year, less than 30 new drugs come onto the market on average every year in the USA, the world’s largest pharmaceutical market.

---

22 Mike Leavitt, Health and Human Services Secretary, Food and Drug Administration Press Release, Jan 12th 2006, cited British Union for the Abolition of Vivisection <http://www.buav.org/humanescience/keycriticisms>

23 Pandora Pound et al, above n 19.


25 Dr John McArdle, ‘Sorting Out the Facts from the Fiction’ Animals Agenda, March 1988 44–47.

26 Marston, above n 20, 21.

27 British Union for the Abolition of Vivisection <http://www.buav.org/>
• *Old fashioned:* Drug development today is concentrated on highly targeted cell and gene-based therapies. The differences between species at these levels make it difficult and dangerous to use animals to predict human outcomes. Similar concerns about the value of animal tests can be made for chemicals. Animal tests are increasingly being seen as relatively uninformative; toxicologists look at the adverse effects on the animals or count how many die. This doesn’t tell you very much about how and why the chemical had the effect it did.

**Think**

1. ‘Ask the experimenters why they experiment on animals, and the answer is: “Because the animals are like us.” Ask the experimenters why it is morally okay to experiment on animals, and the answer is: “Because the animals are not like us.” Animal experimentation rests on a logical contradiction.’ (Charles R. Magel)

Do you agree with Magel that animal experimentation rests on a logical contradiction? Why or why not?

2. Do you agree with Knight and many others that the only useful animal research law is one which prohibits research on animals, as anything less will entrench and sanction the extensive suffering which is currently considered necessary? Provide reasons.

**The regulatory framework in Australia**

**Textbook**


In Chapter 12 Andrew Knight provides an overview of the regulatory framework in Australia and New Zealand. He also discusses the role and effectiveness of Animal Ethics Committees.

In relation to the regulation of research involving animals in Australia, the following features are common to all Australian jurisdictions:

- a requirement that authorisation be obtained by individuals or research establishments (or both) before scientific research can lawfully proceed;
- the establishment of animal ethics committees to authorise and oversee the conduct of scientific research;
- an express or implied reference to the fact that the Code is to be considered part of the relevant State or Territory’s legislative regime; and
- the inclusion of specific provisions relating to inspecting institutions and dealing with instances of breach of the relevant legislation.

**Sanctioning cruelty: Prevention of Cruelty to Animals Act 1979 (NSW)**

*Section 24(1)(e)* of the *Prevention of Cruelty to Animals Act 1979* implicitly ‘sanctions’ cruelty to animals in relation to procedures carried out in accordance with the *Animal Research Act 1985*:

In any proceedings for an offence against this Part or the regulations in respect of an animal, the person accused of the offence is not guilty of the offence if the person satisfies the court that the act or omission in respect of which the proceedings are being taken was done, authorised to be done or omitted to be done by that person in the course of, and for the purpose of:

---

28 For example, in 2006 the ‘Northwick Park drug trial disaster’ in which a novel antibody treatment tested on monkeys at 500 times the recommended dose failed to predict the severe side effects seen in all six of the trial volunteers. Subsequent test tube trials were quickly performed and actually predicted the effects: Prof Thomas Hartung, ‘European Centre for the Validation of Alternative Methods’ (2006) *Nature* 440.
- carrying out animal research, or
- supplying animals for use in connection with animal research in accordance with the provisions of the Animal Research Act 1985.

In NSW the Animal Research Review Panel Policy (2009) provides that:

An Animal Ethics Committee may not approve a procedure prohibited under the NSW Prevention of Cruelty to Animals Act unless it is an integral part of a research project and both the approval process and the conduct of the research, including the procedure, fully comply with the Animal Research Act and Regulation. There would need to be strong justification for the need to carry out such procedures.29

**Think**

Katrina Sharman suggests that the suffering of animals is ‘often sanctioned by laws which condone the infliction of harm, subject to compliance with a range of requirements, responsibilities and general principles.’ She suggests that while tight systems of regulation appear to reduce the suffering of animals within the context of ongoing research, each of these systems needs to be critically examined to determine their effectiveness as a means of preventing or reducing animal suffering.30

1. In what specific ways does the regulatory regime in Australia sanction the infliction of harm on animals?
2. What problems can you see with the proviso in the AARP policy that otherwise unlawful cruel procedures may be permissible is they are an ‘integral part of a research project’?

**Animal Research Act 1985 (NSW)**

The law relating to the use of animals in research is regulated by State and Territory legislation, all of which make express or implied reference to the fact that the Australian Code of Practice for the Care and Use of Animals for Scientific Purposes Code is to be considered part of the relevant State or Territory’s legislative regime.


- In NSW the Animal Research Act 1995 s 4 provides the Regulations may prescribe a Code of Practice with respect to the conduct of animal research and the supply of animals used in connection with animal research.
- Clause 4 of the Animal Research Regulation 2010 (NSW) states that the Australian Code of Practice for the Care and Use of Animals for Scientific Purposes and Schedule 1 of the Regulations are the prescribed Code of Practice for the purpose of s 4.

The objective of the Animal Research Act 1985 is set out in s 2A:

- To protect the welfare of animals used in connection with research by requiring persons or organisations carrying out animal research or supplying animals for research to be authorised under this Act and by regulating the carrying out of animal research and the supply of animals for research by those persons or organisations.
- Authorisations under this Act may be granted only for recognised research purposes. Recognised research purposes include purposes involving the use of animals for research, teaching, testing and the production of biological products.

---


‘Animal research’ is defined in s 3 to mean:

- any procedure, test, experiment, inquiry, investigation or study in connection with which an animal is used and, without limiting the generality of the foregoing, includes any procedure, test, experiment, inquiry, investigation or study in the course of which
  (a) an animal is subjected to:
    - surgical, medical, psychological, biological, chemical or physical treatment;
    - abnormal conditions of heat, cold, light, dark, confinement, noise, isolation or overcrowding;
    - abnormal dietary conditions; or
    - electric shock or radiation treatment; or
  (b) any material or substance is extracted or derived from the body of an animal, but does not include any procedure, test, experiment, inquiry, investigation or study which is carried out in the course of:
    - the administration of veterinary treatment to an animal for the purpose of protecting the welfare of the animal, or
    - the conduct of normal animal husbandry operations.

‘Recognised research purposes’ is defined in s 3 to mean:

- the purpose of acquiring, demonstrating or developing knowledge in the field of medical, veterinary, agricultural, behavioural or biological science;
- the purpose of acquiring, demonstrating, exercising or developing techniques used in the practice of medical, veterinary, agricultural, behavioural or biological science;
- the purpose of developing or testing substances intended for therapeutic use (within the meaning of the Therapeutic Goods Act 1989 of the Commonwealth); or
- any purpose prescribed for the purposes of this paragraph.

**Think**

1. Consider the definition of ‘animal research’ in s 3, and the activities which are expressly excluded from the definition. Consider also the objects of the Act (s 2A): ‘to protect the welfare of animals used in connection with research’. Are the two provisions compatible?

2. Section 16(2)(a) of the Prevention Cruelty of Animals Act 1979 (NSW) provides that ‘a person shall not use an electrical device upon an animal’. Section 3 of the Animal Research Act 1985 provides that ‘animal research’ includes subjecting an animal to ‘electric shock’. Why in one case is using an electric device on an animal considered an act of cruelty while in the other, subjecting an animal to an electric shock regarded as ‘justifiable harm’?

3. Section 3(c) of the Animal Research Act 1985 refers to ‘developing and testing substances intended for therapeutic use.’ Does this mean that using animals for the purpose of developing and testing cosmetic products is permissible in NSW?

**Accreditation and licencing**

Part 4 of the Act (ss 17–44) provides for the accreditation and licensing regime regarding research establishments (Division 2), animal research authorities (Division 3) and animal suppliers’ licences (Division 5).

In relation to Division 2 and Division 5 applications, the Act provides that the Director-General shall refer all applications to the Animal Research Review Panel established under Part 2 of the Act, for investigation. In relation to Division 3 applications, the Director-General may issue an animal research authority only on the recommendation of an animal care and ethics committee. The roles and functions of the Animal Research Review Panel and of Animal and Ethics Committees will be considered in detail later in this topic.
Case study: Animal supply

Independent animal breeding and supply units require an animal supplier’s licence to supply animals for use in research. An animal supplier’s licence is required for the breeding and supply of all animals (other than ‘exempt animals’ – see below) including dogs, cats, rabbits, rats, mice, guinea pigs and monkeys.

Section 3(3) of the Act provides that ‘a reference to the supply of animals for use in connection with animal research includes a reference to the obtaining, breeding, nurturing or keeping of animals for the purpose of their being supplied for use in connection with animal research’.

Establishments and individuals breeding animals for their own use do not require animal suppliers’ licences as long as certain conditions are met. These are –

- the use of animals is for a purpose approved by the Animal Ethics Committee; (AEC)
- the AEC approves the way in which the animals are managed and cared for;
- the AEC is satisfied that the use of animals is to be within the establishment (or by the individual) only; and
- the AEC has approved the breeding and management of the animals as part of a protocol.

A licence is not required to supply exempt animals.

‘Exempt animals’: Schedule 3 Animal Research Regulation 2010 (NSW) include:

- livestock: sheep, cattle, pigs, poultry, horses and goats;
- commercially farmed deer;
- commercially hatched fish;
- free-living native animals, eg koalas, possums;
- free-living exotic animals, eg feral goats, pigeons;
- unowned animals under conditions described in the Animal Research Regulation;
- privately owned animals under conditions described in the Animal Research Regulation;
- animals from Commonwealth or interstate organisations where the organisation has been approved to supply animals by the Animal Research Review Panel;
- bred for purpose animals under conditions described in the Animal Research Regulation;
- animals used for observation studies under conditions described in the Animal Research Regulation;
- animals with acquired medical or genetic conditions under conditions described in the Animal Research Regulation.

Under the Animal Research Act 1985, special conditions relate to the supply of dogs and cats for use in research. Clause 17 of the Animal Research Regulation 2010 provides that a person is exempt from the operation of s 48(1) of the Act with respect to the supply to a licensed animal supplier of dogs or cats for use in connection with animal research, so long as the person complies with the requirements of Part 3 of Schedule 1.

Schedule 1 Part 3 of the Animal Research Regulation 2010 which is expressed to ‘apply to dogs and cats only’ sets out the conditions to be observed in relation to supply of dogs and cats to licensed animal suppliers. It provides:

- if dogs and cats are to be used in research, they may only be obtained from a licensed animal supplier;
- dogs and cats may not be supplied by an impounding authority (eg a council pound) to a licensed animal supplier for use in research;
- dogs and cats may not be supplied to a licensed animal supplier unless they are accompanied by a declaration by the owner (or agent of the owner) that approval is given for their use in animal research;
- unowned (stray) dogs and cats cannot be supplied to a licensed animal supplier for use in research.

Note that under Clause 16(i) of the Companion Animals Regulation 1999 (NSW) there is an exemption from the requirement to register companion animals that are in the custody of: ‘an accredited research
establishment within the meaning of the *Animal Research Act 1985*, or the holder of an animal research authority or an animal supplier’s licence within the meaning of that Act, for purposes in connection with animal research, as authorised under that Act.’

An application for an animal suppliers’ licence is made to the Director-General under s 37. The Director-General must refer all applications to the Animal Research Review Panel which must investigate each application referred to it and furnish the Director-General with a report on each such application: s 38. Each Licensed Animal Supplier is required to appoint an Animal Ethics Committee to supervise their animal supply activities and the Director-General must not grant the licence if the applicant does not have such a committee or if the applicant has been ‘disqualified’: s 39(2)

**Disqualified corporation** is defined in s 17 to mean a corporation that:
(a) has, within the previous 3 years, been convicted of an offence arising under Part 5 of this Act or Part 2 of the *Prevention of Cruelty to Animals Act 1979*; or
(b) has a disqualified individual as one of its directors.

**Disqualified individual** means an individual who:
(a) has, within the previous 3 years, been convicted of an offence arising under Part 5 of this Act or Part 2 of the *Prevention of Cruelty to Animals Act 1979*; or
(a1) was the holder of an animal research authority or animal supplier’s licence that was cancelled by the Director-General within the previous 12 months; or
(b) is a director of a disqualified corporation.

**Section 41** provides that, unless sooner cancelled, an animal supplier’s licence remains in force for the period of 36 months from the date on which it was granted or, where a shorter period is specified in the licence … for the shorter period so specified.

**Section 42** outlines the complaints that can be made regarding animal suppliers, including:
- that the holder of the licence does not have a duly constituted animal care and ethics committee;
- that the holder of the licence is supplying or has supplied animals for use in connection with animal research otherwise than as authorised by the licence, or otherwise than with the approval, or in contravention of the directions, of the animal care and ethics committee for the animal supplier, or in contravention of the Code of Practice;
- that the holder of the licence is a disqualified individual or a disqualified corporation; or
- that the holder of the licence has failed to comply with a condition to which the licence is subject.

The annual application fee for an Animal Supplier’s Licence is $200.

**Offences under the Animal Research Act 1985**

Institutions must be accredited and individuals must be authorised to use animals. Failure to comply with the *Act*, *Regulation* or the *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes* may result in conditions being imposed on the accreditation or authority. For serious or repeated breaches, the accreditation or authority to conduct research may be withdrawn. Conducting animal research without appropriate authorisation is an offence attracting custodial and financial penalties.

Part 5 (ss 46–48) sets out the offences under the *Act*, including:
- unlawfully carrying on the business of animal research;
- unlawfully carrying out animal research;
- keeping animals with intention of using them for animal research;
- unlawfully supplying animals for use in connection with animal research;
- These provisions make it an offence to carry out any of the specified activities in the absence of an authority or a licence;
- Note that the offences established by ss 47A and 48 do not apply in relation to a ‘procedure, test, experiment, inquiry, investigation or study’ carried out on ‘exempt animals’ by an ‘authorised researcher’: See cl 25 and Schedule 3 *Animal Research Regulations 2005*.  

Complaints

That Act sets out procedures in relation to complaints about the holder of accredited research establishment or animal research authorities and animal suppliers’ licences: ss 22, 28, 42.

Section 22, for example, provides that:

A complaint in respect of an accredited research establishment may be made to the Director-General:

- that the establishment does not have a duly constituted animal care and ethics committee;
- that animal research is being or has been carried out on behalf of the establishment:
  - by an individual who is not the holder of an animal research authority issued by the establishment;
  - otherwise than with the approval, or in contravention of the directions, of the animal care and ethics committee for the establishment;
  - in contravention of the Code of Practice;
  - otherwise than for a recognised research purpose; or
  - in connection with animals (other than exempt animals) that have not been obtained from the holder of an animal supplier’s licence;
    - that the establishment is a disqualified corporation; or
    - that the establishment has failed to comply with a condition to which its accreditation is subject.

Think

1. Do animals require an ‘owner’ before they can be used for licenced research purposes?
2. What do you consider the rationale for the ‘exempt animals’ provisions to be and what qualifications exist in relation to these provisions?
3. What is the difference between an animal research authority and an animal research establishment? In what ways do the licencing requirements relating to each differ?

Animal Research Regulation 2010 (NSW)

On 1 September 2010, the Animal Research Regulation 2010 came into effect, replacing Animal Research Regulation 2005.

Among other things, the Regulation makes provision with respect to the following:

- the Code of Practice with respect to animal research;
- the accreditation and licencing of persons and organisations that conduct animal research or supply animals, specifically:
  - Particulars in relation to accreditation of animal research authorities: (Part 4, Division 2): see s 25A Animal Research Act 1985;
  - Particulars in relation to applications to accredited animal research establishment for animal research authorities: (Part 4, Division 3): see ss 25B and 25C Animal Research Act 1985;
  - Particulars relating to applications for animal suppliers’ licences (Part 4 Division 4): see s 37 Animal Research Act 1985:
    - exempting animals from requirements relating to the supply of animals;
    - the qualifications of members of the Animal Research Review Panel: (Part 2);
• the constitution and procedure of animal care and ethics committees and subcommittees: (Part 3);
• the records to be kept by persons or organisations conducting animal research.

The Regulation also provides for exemptions in relation to animal research activities carried out in ‘certain’ schools:

Clause 15 provides that certain schools may carry on animal research without accreditation:

A non-government school is exempt from the operation of s 46(1) of the Act with respect to the carrying on of the business of animal research:\(^\text{*}\)
• if the school belongs to, or is associated with, a relevant Association that is accredited under the Act; and
• so long as any animal research carried out at the school is carried out with the authority of an ethics committee for the relevant Association and in accordance with the Code of Practice.

‘Relevant Association’ means:
• the Association of Independent Schools of New South Wales Limited;
• the Catholic Education Commission NSW.

Clause 16 provides that a student at a school is exempt from the operation of s 47(1) of the Act with respect to the carrying out of animal research, so long as the animal research is carried out under the supervision, and in accordance with the directions, of the holder of an animal research authority:\(^\text{33}\)

In addition Part 1 of Schedule 1 of the Animal Research Regulation 2010 sets out additional conditions to be observed in relation to animal research conducted in schools, including:
• The establishment of an ethics committee which has the function of preparing, in consultation with the Animal Research Review Panel, a list of approved procedures that link each procedure with an appropriate educational objective.
• The appointment and responsibilities of an animal welfare liaison officer for the School whose duties are:
  (i) to submit proposals for teaching procedures that involve the use of animals for the approval of the ethics committee for the school;
  (ii) to liaise with the ethics committee for the school on all matters concerning teaching procedures that involve the use of animals;
  (iii) to ensure that all teaching procedures at the school that involve the use of animals comply with the requirements of the Regulations;
  (iv) to ensure that appropriate records are kept of all animal research carried out at the school;
  (v) to promote awareness of the requirements of the Regulations within the school.

**Think**

Evaluate the following assertion: ‘Regulation can act as an emotional screen between the researcher and an animal, possibly encouraging researchers to believe that simply to conform to regulations is to act in a moral way.’

---

\(^{32}\) Section 46(1) of the Animal Research Act provides that a corporation shall not carry on the business of animal research unless the corporation is an accredited research establishment.

\(^{33}\) Section 47(1) of the Animal Research Act provides that an individual shall not carry out animal research unless the individual is the holder of an animal research authority.
As we have noted, legislative responsibility for animal welfare in Australia is vested in the States and Territories and each have enacted legislation that regulates the use of animals in research and education. Although there are some differences between the jurisdictions, in all cases the *Australian Code of Practice for the Care and use of Animals for Scientific Purposes* (the Research Code) has been incorporated into State and Territory legislation and so is the national policy that determines the standards for the use of animals in research. In NSW, the Research Code is incorporated by reference into the *Animal Research Regulation 2010* and is central to governing the conduct of animal research in the state.35

The 8th edition of the Code was released on 24 July 2013. The Code is reviewed regularly by a working party of the National Health and Medical Research Council, the Commonwealth Scientific and Industrial Research Organisation, the Primary Industries Ministerial Council, the Australian Research Council, the Australian Vice-Chancellors’ Committee, representatives from the State and Territory Governments of Australia and representatives of animal welfare organisations (RSPCA and Animals Australia).

The Code’s stated purpose is to:

- Encompass all aspects of the care and use of animals for scientific purposes where the aim is to acquire, develop or demonstrate knowledge or techniques in any area of science—for example, medicine, biology, agriculture, veterinary and other animal sciences, industry and teaching. It includes their use in research, teaching associated with an educational outcome in science, field trials, product testing, diagnosis, the production of biological products and environmental studies.

- The Code provides an ethical framework and governing principles to guide the decisions and actions of all those involved in the care and use of animals. It details the responsibilities of investigators, animal carers, institutions, and animal ethics committees, and describes processes for accountability.

- The Code applies to the care and use of all live non-human vertebrates and cephalopods. It applies throughout the animal’s involvement in activities and projects, including acquisition, transport, breeding, housing, husbandry, the use of the animal in a project, and the provisions for the animal at the completion of their use.

- The Code is endorsed by the National Health and Medical Research Council (NHMRC), the Australian Research Council, the Commonwealth Scientific Industrial Research Organisation and Universities Australia … Compliance with the Code is a prerequisite for receipt of NHMRC funding.36

The Code describes the responsibilities of people who use or supply animals for research, those of Animal Ethics Committees in relation to the oversight of these activities, and the responsibilities of accredited research establishments. Specifically, the Code sets out the principles and processes for ethical review, approval and monitoring. Rose suggests that ‘the Code is not a prescriptive document but rather sets out principles which establish the criteria against which, on a case by case basis, the evidence put forward to support a decision to use animals can be tested’ and that such ‘a principle-based approach enables animal welfare outcomes in the context of scientific activities that would not be possible using a more prescriptive document.’37

Ultimate responsibility for animal care and use lies with those who use the animals: that is, the researchers and teachers. The Code states that respect for animals must underpin all decisions and actions involving the care and use of animals for scientific purposes and that this respect is demonstrated by ‘knowing and accepting ones’ responsibilities’ (clause 1.1). The Code also states that that institutions using animals for scientific purposes must ensure, through an ethics committee, that all activities involving the use of animals comply with the Code (clause 2.1.3). Consequently, adherence to the Code is achieved through a system of enforced self-regulation.
Think

1. In the context of animals in research, do you agree with Rose that a ‘principled’ approach which permits a set of common principles to be applied with reference to the specifics of a particular project is preferable to the application of prescriptive standards for the welfare of animals used in research? Why or why not?

2. Existing data demonstrates that animal welfare organisations and members of the public are highly underrepresented on animal ethics committees. Should effective implementation of the Code require that ethical decisions involving animals used in research are not matters for the scientific community alone but should involve ongoing participation by the non-scientific community?

Purpose, scope and justification

Purpose of the Code
To ‘promote the ethical, humane and responsible care and use of animals for scientific purposes. The Code provides an ethical framework and governing principles to guide decisions and actions of all those involved in the care and use of animals for scientific purposes. The Code details the responsibilities of investigators, animal carers, institutions and animal ethics committees (AECs), and all people involved in the care and use of animals, and describes processes for accountability.

An obligation to respect animals underpins the Code. This obligation brings with it a responsibility to ensure that the care and use of animals for scientific purposes is ethically acceptable, balancing whether the potential effects on the wellbeing of the animals involved is justified by the potential benefits to humans, animals or the environment.

The use of animals for scientific purposes must have scientific or educational merit; must aim to benefit humans, animals or the environment; and must be conducted with integrity. When animals are used, the number of animals involved must be minimised, the wellbeing of the animals must be supported, and harm, including pain and distress, in those animals must be avoided or minimised.

Scope of the Code
The Code encompasses all aspects of the care and use of animals when the aim is to acquire, develop or demonstrate knowledge or techniques in any area of science—for example, medicine, biology, agriculture, veterinary and other animal sciences, industry and teaching. It includes the use of animals in research, teaching associated with an educational outcome in science, field trials, product testing, diagnosis, the production of biological products and environmental studies.

The Code applies throughout the animal’s involvement in activities and projects, including acquisition, transport, breeding, housing, husbandry, the use of the animal in a project, and the provisions for the animal at the completion of their use.

Justification
The Code provides in Clause 1.1 that ‘respect for animals must underpin all decisions and actions involving the care and use of animals for scientific purposes’ and that ‘this respect is demonstrated by’:
- using animals only when it is justified;
- supporting the wellbeing of the animals involved;
- avoiding or minimising harm, including pain and distress, to those animals;
- applying high standards of scientific integrity;
- applying Replacement, Reduction and Refinement (the 3Rs) at all stages of animal care and use;
- knowing and accepting one’s responsibilities.

38 Australian Code of Practice for the Care and Use of Animals for Scientific Purposes (8th ed, 2013) 1.
Clause 1.3 provides that a judgement as to whether a proposed use of animals is ethically acceptable must be based on information that demonstrates the principles in Clause 1.1, and must balance whether the potential effects on the wellbeing of the animals involved is justified by the potential benefits.

Clause 1.5 provides that evidence to support a case to use animals must demonstrate that:

(i) the project has scientific or educational merit, and has potential benefit for humans, animals or the environment,

(ii) the use of animals is essential to achieve the stated aims, and suitable alternatives to replace the use of animals to achieve the stated aims are not available,

(iii) the project involves the minimum number of animals required to obtain valid data,

(iv) the project involves the minimum adverse impact on the wellbeing of the animals involved.

Clause 1.6 provides that projects must only be undertaken:

(i) to obtain and establish significant information relevant to the understanding of humans and/or animals, or

(ii) to maintain and improve human and/or animal health and welfare, or

(iii) to improve animal management or production, or

(iv) to obtain and establish significant information relevant to the understanding, maintenance or improvement of the natural environment, or

(v) to achieve educational outcomes in science, as specified in the relevant curriculum or competency requirements.

**Think**

Andrew Knight (Chapter 12 textbook) states that ‘taken at face value, these requirements might inspire confidence that animals will be used sparingly and in ways that minimise animal pain and suffering.’

For what reasons does he suggest that ‘these statements do not hold up to closer scrutiny’?

**Replacement, reduction and refinement**

At page 274 Knight discusses the principles of *replacement, reduction and refinement* (the ‘3Rs’). As noted above, the ‘3R’ principle is enshrined in the Code and its elements set out in clauses 1.18–1.30 of the Code. These principles were first proposed by William Russell and Rex Burch in their manuscript, ‘The principles of humane experimental technique,’ published in 1959. The recommendations were intended to reduce the overall amount of suffering caused to animals during research. The 3Rs are identified as ‘key principles’ in clause 1.3 of the Code. Underlying these principles is strong scientific evidence that animals experience pain and distress in a manner similar to humans. Because of this, decisions regarding an animal’s wellbeing must be based on this premise. The 3Rs are as follows:

1. **Replacement**—If a viable alternative method exists that would partly or wholly replace the use of animals in a project, the Code requires investigators to use that alternative.

   Examples of alternative methods include in vitro techniques and computer models. The replacement of animals in scientific research eliminates the need to subject them to any scientific procedure. They can be replaced by using less (or non) sentient animals, usually in order to study basic cellular events; by using in vitro techniques – cell and tissue cultures to test drug effects; by using nonbiological techniques, such as mathematical modeling, computer simulation, electronic animals and film and studio aids; and by using humans. This may involve obtaining tissue samples from post mortems or human volunteers providing consent to undergo scientific procedures.
2. **Reduction**—A project must be designed to use no more than the minimum number of animals necessary to ensure scientific and statistical validity. However, the principle of reducing the number of animals used should not be implemented at the expense of greater pain and distress for individual animals.

This does not eliminate the use of animals, however, by reducing the number of animals used can reduce the overall amount of suffering. Animal use can be reduced by pooling available resources and sharing information so that procedures will not be repeated unnecessarily, and by using appropriate statistical techniques so that the smallest number of animals may be used.

3. **Refinement**—Studies must be designed to avoid or minimise both pain and distress in animals, consistent with the scientific objective.

This involves the modification of procedures wherever possible to minimize the level of animal suffering. This may be through the use of anaesthesia or analgesia and the improvement of animal husbandry and housing, such as adding environmental enrichment, to reduce the stress factors.

Refinement also means that investigators must be competent in the procedures they perform. Project design must take into account:

- the choice of animals, their housing, management and care and their acclimatisation;
- the choice of techniques and procedures;
- the appropriate use of sedatives, tranquillisers, analgesics and anaesthetics;
- the choice of appropriate measures for assessing pain and distress;
- the establishment of early intervention points and humane endpoints;
- adequate monitoring of the animals;
- appropriate use of pilot studies.

### Think

1. Although the 3Rs are embedded in the regulatory framework governing research on animals, why do you think, as Knight seems to suggest, that there is a significant gap between what is written and what is happening in practice?

2. Katrina Sharman notes that the principles of ‘replacement, refinement and reduction’ appear to be tenets of a system that takes animal protection seriously but that ‘as a practical matter they rarely stand up to scrutiny. Worst still, they are often used as shields to justify ongoing experimentation on animals, diverting attention from important moral and scientific inquiries into why animals are being used as test models in the first place.’

   In what ways might the principles of ‘replacement, refinement and reduction’ operate to divert attention from important moral and scientific inquiries into why animals are being used in research?

3. Humane Research Australia argues that while the replacement, reduction and refinement of animal use are intended to tighten the regulation of animal research and lessen the overall level of animal suffering, ‘reduction and refinement do not address the fact that results from animal experiments can be dangerously misleading when applied to human health’.

   Consider this comment. Do you agree with HRA that it is pointless to use fewer animals or to refine a procedure when it is the wrong procedure to follow, and that ‘replacement’ is the only one of the R’s that remains a credible objective? Why or why not?

---

Balancing harm and benefit

The NSW Animal Research Review Panel states that ‘conducting a harm-benefit analysis is a key part of the thinking that each animal-based scientist and their institutional Animal Ethics Committee must do during the planning stages, before any research, teaching or testing procedure with animals can begin.’ The Panel notes that the main ethical principle which guides most animal use in science is that ‘using animals for scientific purposes is acceptable only when any harm done to the animals is very greatly outweighed by the benefits of their use’.40

The NSW Animal Research Review Panel states that animal-based scientists and animal ethics committees have to do three things before a proposal to conduct a research, teaching or testing procedure can be approved:

1. They must make sure that any harm caused is as low as it can be.
   This is achieved by applying the 3Rs when developing and reviewing the proposed procedure. Application of the 3Rs helps to ensure that animals are only used when that is really necessary, that no more and no fewer animals are used than are required to achieve the objectives of the work, and that if any noxiousness or harm is caused during the work, it is kept as low as possible.

2. They must make sure that the expected benefits of the work are achievable and are as great as possible.
   This is done in two steps. First, by carefully examining the precise scientific aims of the procedure to ensure that those aims can actually be realised by doing the work as proposed. Second, by carefully assessing the beneficial purpose of research projects, teaching exercises and testing procedures as follows:
   - For research projects, what value the new knowledge will or might have in helping to solve the health, welfare, practical, economic or other problem it is designed to address.
   - For teaching exercises, how the proposed procedure will enhance students’ learning about body processes.
   - For testing procedures, whether they are legally required and can appropriately assess the safety or effectiveness of chemicals, drugs, medicines, vaccines and other substances.

3. They must weigh any expected harm to the animals against the anticipated benefits of the work.

When weighing harm against benefit, the following ‘harms’ are identified:

- **Grade O**: No suffering or noxiousness.
  Such procedures would not usually require justification in terms of expected indirect or direct benefits to animals, people or both.

- **Grade A**: Little suffering or noxiousness.
  Such procedures would require justification regarding the expected indirect or direct benefits to animals, people or both.

- **Grade B**: Moderate suffering or noxiousness.
  Such procedures would require good justification regarding the expected direct benefits to animals, people or both.

- **Grade C**: Severe suffering or noxiousness.
  Such procedures would require strong justification regarding the expected direct benefits to animals, people or both.

- **Grade X**: Very severe suffering or noxiousness.
  Such procedures would require the most exceptional justification and would be permitted only very rarely.

Think

The Animal Research Review Panel states that ‘it is not enough for the harm just to be much lower than the benefits. The harm must be made as low as it can be and the benefits must be the greatest they can be, so that the separation between the harm and the benefits is the greatest that can be feasibly achieved.’

a. With reference to the Code, what criteria might an Ethics Committee employ in order to assess the ‘greatest feasible separation’ between harm and benefit?

b. With reference to the Code, what criteria might an Ethics Committee employ to determine the degree of animal ‘suffering or noxiousness’?

Does the Code sanction cruelty to animals?

A report to the academy

We do not put humans into captivity and starve them in order to test their intellectual abilities because we know that such treatment would cause severe suffering. How can we justify such experimentation on apes, knowing that it can work only to the extent that their capacities – including the capacity to suffer – are much like our own? Can there be any compelling ethical defence of using creatures so like ourselves in ways that we would find unbearable? Or is the answer that the animals used in such experiments are simply unfortunate – that we have them in our power and their suffering is a regrettable but unavoidable result of our using them for our benefit?

The last of these options appears to have been taken by a recent spokesman for Cambridge University. Responding to protests against plans to establish a primate research centre there, he observed that it is an unfortunate fact that only primates have brains like our own. The implication is that it is precisely because apes have many of the capacities of humans that they are used for experimentation. It is true that experimenting on primates is a productive research technique; but if their similarities with us justify using apes in this way, it would surely be even more effective to use humans. The argument for experimenting on primates leads inexorably to the conclusion that it is permissible – in fact, preferable – to experiment on humans.

As we saw in Topic 5 in relation to Codes of Practice governing animals in agriculture, Codes may work against the interests of animals and may function to sanction activities which cause pain and suffering to animals as long as such activities conform to the Code. As Humane Research Australia suggests, without Codes exempting certain actions, many animal industries, including research institutions, would be unable to operate as the confinement and treatment would otherwise constitute cruelty under the Prevention of Cruelty to Animals Act.

Pain and distress

The National Health and Medical Research Council (NHMRC) states that ‘the avoidance and minimisation of an animal’s experience of pain and distress has been a guiding principle of the Code since its inception’.41

Margaret Rose acknowledges however, that ‘when animals are used for scientific purposes accepted animal welfare benchmarks cannot always be met; in limited circumstances, animals may experience discomfort, disease, pain or distress as a deliberate component of an experimental study.’42

Indeed, the scientific validity of animal models of human disease rests in part on how closely a given model resembles a particular disease, which may include the animals experiencing the attendant pain or distress of the human disease state.

‘Distress’ is defined in the Code to mean ‘an animal is in a negative mental state and has been unable to adapt to stressors so as to sustain a state of wellbeing. Distress may manifest as abnormal physiological or behavioural responses, a deterioration in physical and psychological health, or a failure to achieve successful biological function. Distress can be acute or chronic and may result in pathological conditions or death.’

‘Pain’ is defined to mean ‘an unpleasant sensory and emotional experience associated with actual or potential tissue damage. It may elicit protective actions, result in learned avoidance and distress and may modify species-specific traits of behaviour, including social behaviour’.

42 Rose and Grant, above n 4.
Humane Research Australia observes that the nature of many forms of medical research means that animals will suffer pain and distress: from the induced conditions themselves, from the invasive procedures and from the effects of many drugs. For example, during research into arthritis the research animals would need to experience the arthritic pain associated with the condition. They may also suffer adverse reactions the drugs may cause such as vomiting, seizures, stroke etc. However HRA argues, induced disease is not an accurate reflection of disease in its natural state. Producing artificial effects to mimic a human disease defeats the purpose of the research as it alters the state.

Indeed, it is difficult to imagine that animals kept in laboratory conditions would not experience some level of distress. A recent article suggests that the distress that animals in laboratories experience is one of the main reasons why animal experimentation doesn’t work.43

Clause 2.4.18(ix) of the Code states:

Alleviating unanticipated pain and distress must take precedence over an individual animal reaching the planned endpoint of the project, or the continuation or completion of the project. If necessary, animals must be humanely killed without delay.

HRA notes that while this statement may seem at first glance to protect animals, it is not always adhered to. This is because, having regard to the justifications identified above, researchers may justify such suffering as being ‘necessary’ to study and understand the disease or condition under investigation.

But it is only in recent years that our knowledge of pain and distress in animals and our ability to assess and treat such pain and distress has been the subject of critical enquiry. Major publications on animal pain did not occur until the late 1980’s and the concept of ‘pain management’ in animals has been an even more recent development.44

Think

1. Identify ways in which the Code may operate to sanction pain and distress experienced by animals used in research.
2. The Code provides that investigators must ensure that the expected level of pain caused by stimuli is less than that which would be expected to cause distress in humans. Is this a realistic criterion to assess an animal’s expected level of pain? Why or why not?

Animal wellbeing and welfare

‘Animal wellbeing’ is understood in the Code as an animal existing in ‘a positive mental state and is able to achieve successful biological function, to have positive experiences, to express innate behaviours, and to respond to and cope with potentially adverse conditions. Animal wellbeing may be assessed by physiological and behavioural measures of an animal’s physical and psychological health and of the animal’s capacity to cope with stressors, and species-specific behaviours in response to social and environmental conditions.’

The Code, defines ‘animal welfare’ as ‘an animal’s quality of life, which encompasses the diverse ways an animal may perceive and respond to their circumstances, ranging from a positive state of wellbeing to a negative state of distress.’

44 See ‘Guidelines for the Recognition and Assessment of Pain in Animals’ <http://www.vet.ed.ac.uk/animalpain/>
Think

1. What criteria does the Code identify as relevant to an assessment of an animal’s wellbeing or welfare?
2. With reference to the definition of wellbeing, how would an animal researcher be able to assess whether an animal is ‘coping with potentially adverse conditions’?
3. With reference to the definition of welfare how would an animal researcher determine an animal’s ‘positive state of well being or negative state of distress’?

Confinement and environmental enrichment

Issues around improving the living conditions of laboratory animals have been raised for many years. Today, as a general principle, the Code requires animals to be provided with living conditions that meet species-specific physiological and behavioral needs. In NSW the Animal Research Review Panel in co-operation with NSW Department of Primary Industries, has developed a series of evidence-based guidelines on the housing and care of animals used in research and teaching – rats, mice, guinea pigs, rabbits and sheep.

But as Humane Research Australia notes, while measures are often taken to provide ‘environmental enrichment’ for captive laboratory animals, these can never compensate for the life that these animals would experience if they were free-living. HRA notes that even ‘well cared’ for animals are kept in confinement when used for research and that confinement may have detrimental effects that may not be immediately apparent.45

Animal Liberation argues that while the Code requires that animal housing ensure the comfort and wellbeing of animals taking into account the behavioural needs of each species, much more could be done to increase the comfort and enrichment of laboratory housing. It also notes that Animal Ethics Committees frequently fail to monitor the conditions in which research animals are kept and that where improvements are made to housing, it is usually due to conscientious animal house staff rather than AECs.46

Think

Clause 3.1.5 of the Code states that ‘animals must be cared for and managed so that species-specific or strain-specific physiological and behavioural needs are met.’ Do you think that the physiological and behavioural needs of animals can be met in the context of most research environments? Why or why not?

Guidelines and policies

The Animal Welfare Committee of the National Health and Medical Research Council (NHMRC) has published a range of policies and guidelines in relation to the use of animals in research and training.47

As stated by the NHMRC, guidelines are sets of non-mandatory rules, principles or recommendations for procedures or practices in a particular field and provide information for achieving best practice. Guidelines only become mandatory if governments turn them into legislation, professional bodies incorporate them into codes of conduct for their members, or funding bodies insist on compliance with them. In the field of animal research, the NHMRC states that guidelines provide the evidence-based information needed to achieve best practice. In regard to ethical issues in those fields, NHMRC guidelines reflect the community’s range of attitudes and concerns.48

The following guidelines apply to research involving animals:

- **Guidelines to Promote the Wellbeing of Animals used for Scientific Purposes: The assessment and alleviation of pain and distress in research animals** (2008)
- **Guidelines for the Generation, Breeding, Care and Use of Genetically Modified and Cloned Animals for Scientific Purposes** (2007)
- **Guidelines on the Care of Cats Used for Scientific Purposes** (2009)
- **Guidelines on the Care of Dogs Used for Scientific Purposes** (2009)
- **Guidelines on the Use of Animals for Training Interventional Medical Practitioners and Demonstrating New Medical Equipment and Techniques** (2009)
- **Guide to the use of Australian native mammals in biomedical research** (1995)

**Case study: the Policy on the Care and Use of Non-Human Primates for Scientific Purposes**

Codes and guidelines, Humane Research Australia suggests, serve a dual purpose: to address specific needs of animals through providing guidelines for their treatment, and to allow animal industries to continue certain procedures and practices without breaking the law.

HRA argues that the **Policy on the Care and Use of Non-Human Primates for Scientific Purposes** lacks a commitment to promoting alternatives to animal use. In the preamble the policy states:

> Animal experimentation remains crucial to a high proportion of NHMRC-funded research designed to find better ways of preventing, treating and curing human disease, as there are many situations where no alternatives exist.50

Such comments, HRA says, indicate that the commitment of the NHMRC to promoting alternatives to the use of animals in research may be limited.

Point 3 of that Policy states that ‘in deciding the fate of the animals, their long-term welfare must be taken into account. If retirement is an option, health, temperament and space availability must be considered because the NBCs will not generally accept animals that have been used for scientific purposes. In most cases, euthanasia will be the only option.’

HRA argues that depending on the type of research conducted on non-human primates, some may be left in such a traumatised and/or dilapidated state that euthanasia may be the most humane option, however some animals may still have the ability to sustain a quality of life. To merely dispose of these animals when they are no longer required, HRA states, is a total disregard of their individual worth. HRA argues that if their use has been funded by a research institution, then that institution must take responsibility to ensure that the wellbeing of these animals is guaranteed for the remainder of their natural lives:

> Primates are individuals, deserving of our respect and with their own intrinsic value and should not be regarded as mere disposable tools for research.51

It is of concern to note that although the NHMRC policy on non-human primates for scientific purposes states that ‘whenever possible investigators obtain non-human primates from National Breeding Centres’ and ‘non-human primates imported from overseas must not be taken from wild populations and must be accompanied by documentation to certify their status’, there is evidence that between 2000–2009 Australia imported from Indonesia 331 pig-tailed macaques listed on the International Union for Conservation of Nature (ICUN) Red List of Threatened Species as vulnerable to extinction, 250 long-tailed macaques

---


51 Humane Research Australia (formerly Australian Association for Humane Research) <http://www.aahr.org.au/about.html>
listed on the IUCN Red List from Indonesia and 71 owl monkeys listed on the IUCN Red List from the US. According to Lee Rhiannon of the Greens, most of these primates are born to wild-caught captive monkeys in Asian facilities set up as lucrative money making facilities. They effectively ‘launder’ wild caught monkeys and sell them as captive breeds. These monkeys, Rhiannon says, are caught in barbaric ways, kept in filthy crowded conditions and transported inhumanely. As a consequence, in 2012, the Greens introduced a Bill in the federal Senate to ban the import of live primates for research.  

For more information on research involving non-human primates, see the following papers, available on the Humane Research Australia website:

Andrew Knight ‘The beginning of the end for chimpanzee experiments?’ (2008) Philosophy, Ethics, and Humanities in Medicine 16
Jacqueline Cuthbertson, ‘Same same but different- a look at primates in research’ (2011)

The NSW Animal Research Review Panel

The NSW Animal Research Review Panel (ARRP) in co-operation with the NSW Department of Primary Industries, has developed a series of evidence-based guidelines relating to the care of animals used in research and teaching. These guidelines are developed by ARRP to assist researchers and teachers, members of Animal Ethics Committees and the management of scientific institutions to understand and comply with the requirements of the Animal Research Act, the Regulation and the Code of Practice. These policies and guidelines apply to aspects of animal care, animal supply, the operation of animal ethics committees and research procedures and include the following:

- Guidelines for the housing of mice in scientific institutions
- Guidelines for the housing of sheep in scientific institutions
- Guidelines for the care and housing of guinea pigs in scientific institutions
- Guidelines for the care and housing of rabbits in scientific institutions
- Guidelines for the care and housing of dogs in scientific institutions
- Guidelines for the care and housing of rats in scientific institutions
- Supply of dogs and cats for use in research

ARRP contends that ‘guidelines are more flexible documents as they establish principles to be adopted in undertaking specific activities and allow scope for interpretation and adaptation in the implementation of a course of action.’

Can you think of circumstances where the ‘scope for interpretation’ may work against the interests of animals? Provide examples.

---

Animal Ethics Committees

Self-regulation operates through institutional Animal Ethics Committees (AECs), which govern the use of animals in research, teaching and product testing. The role of an AEC is to review and monitor all activities concerned with the breeding, supply and use of animals in these circumstances and to approve all animal research before it can commence.56

Under the Code, institutions which use animals for scientific purposes must appoint an AEC whose primary role is to ensure that any use of animals within that institution is in accord with the principles of the Code. Before approval is given for a specific project to commence, the Code requires AEC members to be satisfied that a case has been made that the proposal is justified taking into account the predicted scientific or educational benefit, the evidence that the use of animals is necessary and that, for those animals used, the study will involve the minimum number ‘compatible with the scientific goals’ and minimum impact on their welfare.

The responsibilities of animal ethics committees are set out in Part 2.3 of the Code which states in cl 2.3.1 that:

The primary responsibility of an AEC is to ensure, on behalf of the institution for which it acts, that all activities relating to the care and use of animals are conducted in compliance with the Code.

Responsibilities

An Animal Ethics Committee must:

- review applications for projects and approve only those projects that are ethically acceptable and conform to the requirements of the Code;
- review applications for activities associated with the care and management of animals in facilities, including procedures applicable to breeding programs integral to the maintenance of an animal line, and approve only those activities that are ethically acceptable and conform to the requirements of the Code;
- conduct follow-up review of approved projects and activities and allow the continuation of approval for only those projects and activities that are ethically acceptable and conform to the requirements of the Code;
- monitor the care and use of animals, including housing conditions, practices and procedures involved in the care of animals in facilities;
- take appropriate actions regarding unexpected adverse events;
- take appropriate actions regarding non-compliance;
- approve guidelines for the care and use of animals on behalf of the institution;
- provide advice and recommendations to the institution;
- report on its operations to the institution.

In New South Wales, AEC’s must also ensure that all activities conducted in their institution or by the independent researchers they supervise, complies with the Animal Research Act 1985 and Animal Research Regulation 2010.

Committees must consider and evaluate requests to use animals for research or teaching activities on the basis of investigators’ responses to a comprehensive set of questions including the justification for the research, its likely impact on the animals, and procedures for preventing or alleviating pain and distress. They also provide guidance and support to researchers on matters relevant to animal welfare through the preparation of guidelines and dissemination of relevant scientific literature. They are also responsible for advising the institution on changes to facilities to meet required standards.

Do ethics committees work?

The role of an AEC is to ensure that the research adheres to any guidelines, that the number of animals and the level of suffering are kept to a minimum, that non-animal alternatives are used wherever possible and that the use of animals in the research is ethically justified. *Animal Liberation* states that it is impossible to know, however, how effective these committees are since all information on protocols and decisions made remain confidential. *Animal Liberation* suggests that the presence of ethics committees, and in particular the inclusion of an animal welfare representative, is often used by researchers to promote a positive image of the industry to the public and as an assurance that the care and use of animals is sanctioned by those with a concern for their welfare and/or rights:

> Essentially the ethics committee system has been put in place to ensure the continuation of the use of animals in research. It serves to ensure that a relatively ‘clean’ image is presented to the public.57

*Animal Liberation* reports that many animal welfare representatives serving on ethics committees are opposed to the use of animals in research. While their presence may help to ensure that animals are protected as much as possible, such protection may be limited by the Code of Practice. Some animal welfare members have reported that AECs are dominated by institutional members and that they were dissatisfied with the way decisions were made on their AEC.

In 1998 a survey of ‘Category C’ members was conducted by Animals Australia. The responses received revealed that:

- half stated that ‘researchers failed to adequately answer the most crucial questions on the proposal forms, particularly those dealing with justification for the research and the availability of alternatives or refinements’;
- half the respondents indicated that they had experienced ‘animosity or aggression from researchers on the AEC during decision making’; and
- many respondents indicated that ‘pressure is brought to bear on them to go with the status quo’.

*Animal Liberation* observes that a member of the public might be led to believe that animal experimentation is very tightly controlled by the Code, that only highly valuable and ‘justified’ research is permitted, and that alternatives to animals are used at every opportunity. It argues, however, that AECs are failing to ensure that this is the case.

*Animal Liberation (SA)* reports on its website that three out of four Animal Liberation members on AECs in South Australia resigned after making their dissatisfaction known over a long period of time. Some animal welfare members in other states have similar complaints:58

> Researchers use the system to deflect criticism. They want the public to believe that all experiments must be acceptable because they have been approved by an AEC. Not only that, an AEC with animal welfare members! The reality is:

- Animal welfare members are always outnumbered on committees, so that even if they object to experiments they will be outvoted;
- Ethics Committees rarely discuss ethics, or whether an experiment is worth doing, or whether it justifies the suffering caused to animals.

Because of the way committees are set up, they are biased towards accepting proposals. It is not surprising that very few proposals are ever rejected, or that little or no pressure is put on researchers/teachers to justify their use of animals.

*Animal Liberation* reports that:

- While the Code provides that AECs have to weigh the value of a study against the suffering caused to animals, this is rarely done. Some researchers believe that all research is inherently valuable, and there is a general acceptance that proposals to use animals are valid. Apart from such beliefs, there are many proposals to get through at meetings, and there isn’t enough time to consider the value of each one.

According to the Code of Practice, animals may be used only when they are essential, and alternatives to animals must be used wherever possible. However, AECs don’t require investigators to demonstrate how they went about looking for alternatives, what they found, and why these alternatives were rejected. In the section of a proposal asking what alternatives there are, researchers can still get away with just saying ‘None available’.59

Contrary to the Code of Practice, AECs are approving the use of animals when they are not essential, and when there are suitable alternatives. Obvious examples are in teaching, where animals are still dissected in biology, and rats are trained and then killed in psychology. There are alternatives to harming animals in all teaching areas if there is a will to develop and use them.

Non-technical members of AECs usually don’t have enough knowledge about alternatives, so they can easily be persuaded by the technical members that there are none.

Technical members may have little motivation to look for alternatives and/or have a vested interest in continuing to use the animal research methods they have developed expertise in over years as this absolves them from having to acquire new skills.

Animal Liberation concludes that ‘AECs largely focus on technical matters, such as which anaesthetic should be used, and in which part of the body injections should be given.’ While these are important questions for the animals involved, AECs are frequently failing to ask the ‘big’ questions that the Code of Practice requires:

- Is this project worth doing?
- Could it be done without using animals?60

In his 2012 submission to the NHMRC in relation to the (then proposed) 8th edition of the Code on the Australian code of practice for the care and use of animals for scientific purposes, Dr Dan Lyons stated that:

Self-regulation is reflected in the dominant role of animal research institutions and the ethics committees therein (AECs) in regulating animal experimentation. However it is now accepted across the European Union that AECs are a necessary but not a sufficient aspect of a legitimate regulatory system.

Dr Lyons identified the following concerns:

- Public opinion deems that painful animal research for purely scientific objectives, with no discernible tangible medical benefit, is ethically unacceptable. In other words, the public’s harm-benefit assessment places more weight on animal suffering and less weight on benefits compared with the animal research community.
- Researchers own harm-benefit assessments tend to place unreasonable weight on perceived scientific and commercial benefits and no significant weight on the harms experienced by animals. Researchers may also be overly-optimistic regarding the likelihood of benefits accruing while downplaying animal suffering. As a result, unethical use of animals can occur. This is why independent scrutiny is essential to meet the stated objectives of the Code.
- Effective transparency is essential to ensure the social ethical values are reflected in practice in the evaluation and conduct of experiments. Transparency is essential to democratic accountability.
- In practice, institutional-level AECs will lack the resources and expertise to effectively scrutinise research proposals. State or Federal level expertise is essential to ensure adequate scrutiny of project applications.
- The composition of independent public regulatory bodies needs to reflect wider society and not be dominated by animal research interests.61

---

59 In contrast, before US researchers can get funding from the National Institutes of Health, they have to produce a literature search showing how they looked for alternatives. In other words, they have to produce evidence of which databases they searched, how they went about searching for alternatives, and what they found. There is no such requirement in Australia.


61 Comments on NHMRC Draft Code on the Australian code of practice for the care and use of animals for scientific purposes, Dr Dan Lyons, 2012
See also Helen Rosser, ‘The Problem with ethics committees’ (2006) who observes that while the general public are often misled into believing that ethics committees protect animals from pain and suffering, ‘clearly the existence of legislation, codes of practise and ethics committees can only protect animals to a certain degree but certainly do not guarantee there is no suffering.’

Rosser cites a study by Catharine A Schuppli and David Fraser, ‘Improving the Effectiveness of Research Ethics Committees’ (2005) in which the authors identified the following concerns with animal ethics committees:

- Committee composition creates bias towards institutional/research interests versus interests of animals
- Committee dynamics prevent full participation of members
- Recruitment strategies create bias towards institutional/research interests versus interests of animals
- Motivation for joining is to pursue agendas other than committee mandate
- Excessive workload or inadequate participation for adequate review

Think

1. ‘Under the Code, Australia has developed a strong ethical framework based on a system of ethics committees and supported by effective governance arrangements.’
   Critically reflect upon these observations with reference to the role and function of Animal Ethics Committees.
2. Evaluate the following assertion: ‘Ethics committees do not tend to question the ‘ethics’ underlying experiments, they simply refine experiments. In this way they can be seen to justify experimentation.’
3. Animals Australia asks you if you would be prepared to accept their nomination to be on an institutional Animal Ethics Committee. Evaluate the pros and cons of accepting the offer.

Animal Research Review Panel

In NSW, the Animal Research Review Panel (ARRP) is constituted by Part 2 of the Animal Research Act 1985. It has the following functions (s 9):

- the investigation of matters relating to the conduct of animal research and the supply of animals for use in connection with animal research;
- the investigation and evaluation of the efficacy of the Code of Practice in regulating the conduct of animal research and the supply of animals for use in connection with animal research;
- the investigation of applications and complaints referred to it under this Act.

The Panel consists of 12 members appointed by the Minister (s 6):

- 3 persons nominated by the New South Wales Vice-Chancellors’ Committee
- 1 person nominated by Medicines Australia
- 2 persons nominated by the Royal Society for the Prevention of Cruelty to Animals NSW
- 2 persons nominated by the Animal Societies’ Federation (NSW)
- 1 person nominated by the Minister for Health
- 1 person nominated by the Minister for Education and Training
- 1 person nominated by the Minister for Primary Industries
- 1 officer of the National Parks and Wildlife Service

The 2011–12 Annual Report of the ARRP states:

The Animal Research Review Panel (ARRP) has responsibility for overseeing the effectiveness and efficiency of the legislation, investigating complaints, and evaluating compliance of individuals and

63 Rose and Grant, above n 4.
institutions with the legislation. The constitution, membership and mode of operation of the ARRP are set out in the Act. The 12-member Panel has equal representation from industry, government and animal welfare groups. This allows community involvement in regulating the conduct of animal research in New South Wales. Apart from developing overall policy on animal research issues, the ARRP is closely involved in the administration of the legislation. This is achieved through evaluating applications for accreditation and licences, conducting site visits to assess compliance, and investigating complaints.

Accreditation and licencing

The Animal Research Act 1985 requires that all applications for accreditation and animal supply licences be referred to the ARRP for consideration. There are two components in the assessment of applicants by the ARRP:

- consideration of a written application to determine whether the applicant is complying with fundamental requirements of the legislation;
- evaluation of the applicant at a site inspection.

The recommendations of the ARRP are referred to the Director-General of NSW Department of Primary Industries, who has statutory authority for the issue of accreditation and licences and for imposing, altering or removing conditions of accreditation or licence. Accreditation and licences are usually issued subject to standard conditions that a site inspection must be satisfactory and that the Director-General of NSW Department of Primary Industries must be advised of changes to the membership of the Animal Ethics Committee.

Tests involving animals

Chemical and pharmaceutical testing

The therapeutic goods regime in Australia requires that a range of pharmaceutical and over the counter agents must undergo toxicity trials on animals prior to being tested on humans. Similarly, the assessment of industrial, agricultural and veterinary chemicals will in most cases require toxicity testing on animals. The therapeutic goods regime in Australia has adopted European Union guidelines to assist sponsors in assessing the type and depth of information needed to support an application for registration under the Therapeutic Goods Act 1989 (Cth). See OECD Guidelines for the Testing of Chemicals.

Government regulations in most countries require some animal-based toxicity testing as a condition for the importation or sale of pesticides, industrial chemicals, drugs and vaccines, genetically manipulated foods, and some consumer products. Depending on the substance in question, its likely toxicity, and the degree of anticipated human or environmental exposure, as many as 50 separate animal-poisoning studies may be required.

Examples (Extracts)

Single Dose Toxicity Directive 75/318/EEC

- Single-dose toxicity tests must be conducted on at least two mammalian species of known strain using equal numbers of both sexes. Rodents such as the mouse, rat and hamster are suitable for the qualitative study of toxic signs and the quantitative determination of the approximate lethal dose. If no difference in response is observed between the animals of the two sexes of the first rodent species, then only animals of one sex need be used in the other acute toxicity studies. Toxic signs should also be observed and recorded in detail for each animal used in the case of other mammals.

65 <http://www.oecd.org/env/ehs/testing/oecdguidelinesforthetestingofchemicals.htm>
• Animals should be observed at regular intervals and all signs of toxicity and the time of their first occurrence and their severity, duration and progression recorded. The time and mode of any death should be documented, any signs of toxicity should be presented separately for each animal. Observation should usually be for 14 days, but should continue so long as signs of toxicity are apparent, eg progressive loss of weight or inhibition of growth.

• All animals surviving to the end of the study and all animals dying during the period of observation should be subjected to autopsy experience in the strain of animal used.

Repeated Dose Toxicity Directive 75/318/EEC
Repeated dose toxicity studies shall be carried out in two species of mammals, one of which must be a non-rodent. The use of one species is acceptable if it has been unequivocally demonstrated that other available species are irrelevant as models for human safety assessment.

Detection of Toxicity to Reproduction for Medicinal Products Directive 75/318/EEC
• The animals used must be well defined with respect to their health, fertility, fecundity, prevalence of abnormalities, embryo foetal deaths and the consistency they display from study to study. Within and between studies animals should be of comparable age, weight and parity at the start; the easiest way to fulfil these certain criteria is to use animals that are young, mature adults at the time of mating with the females being virgin. For all the rarest events (such as malformations, abortions, total litter loss), evaluation of between 16 to 20 litters for rodents and rabbits tends to provide a degree of consistency between studies. … To allow for natural wastage, the starting group size … must be larger.

• Terminal sacrifice: Females may be sacrificed at any point after mid pregnancy. Males may be sacrificed at any time after mating but it is advisable to ensure successful induction of pregnancy before taking such an irrevocable step.

• Females: When exposure of the females ceases at implantation, termination of females between days 13–15 of pregnancy in general is adequate to assess effects on fertility or reproductive function, eg to differentiate between implantation and reabsorption sites. In general, for detection of adverse effects, it is not thought necessary, in a fertility study, to sacrifice females at day 20/21 of pregnancy in order to gain information on late embryo loss, foetal death, and structural abnormalities.

• Males: It would be advisable to delay sacrifice of the males until the outcome of mating is known. In the event of an equivocal result, males could be mated with untreated females to ascertain their fertility or infertility. The males … may also be used for evaluation of toxicity to the male reproductive system if dosing is continued beyond mating and sacrifice delayed.

Cosmetic testing
To be marketed as a cosmetic in Australia, a product must meet the definition of a cosmetic in the Industrial Chemicals (Notification and Assessment) Act 1989 and any requirements of the Cosmetics Standard 2007, if applicable. The definition of a cosmetic includes:

A substance or preparation intended for placement in contact with any external part of the human body, including: the mucous membranes of the oral cavity and the teeth; with a view to: altering the odours of the body; or changing its appearance; or cleansing it; or maintaining it in good condition; or perfuming it; or protecting it; but does not include a therapeutic good within the meaning of the Therapeutic Goods Act, 1989. Ingredients used in cosmetics and toiletries, including perfumes and fragrances, may be classed as industrial chemicals. This includes ingredients found in finished products - whether sold to the consumer or used in (for example) hair and beauty salons. It also includes those cosmetic ingredients referred to as ‘natural’ ingredients or substances, such as oils, extracts and essences of plants.

Most cosmetic testing is focused on eyes and skin. A test known as the ‘Draize test’ is performed almost exclusively on albino rabbits because they are cheap, docile, and are not equipped with tear ducts to wash away the chemicals. During the test the rabbits are immobilised in a stock with only their head protruding and a solid or liquid is placed in the lower lid of one eye of the rabbit; substances vary from mascara to aftershave and even oven cleaner. The rabbit’s eyes are clipped open and observed at intervals of 1, 24, 48, 72 and 168 hours … During this test, anesthesia is rarely used. Reactions
include inflammation, ulceration, rupture of the eyeball, corrosion and bleeding. Some of these studies continue for weeks.

Skin corrosion tests use rabbits to test for irreversible damage to skin by different products. It involves the bare, shaved back of a rabbit or guinea pig where substances are applied to be tested. Redness, swelling, inflammation, skin cracking and ulceration are recorded over a one or two week. While there are no laws in Australia which require the use of animal testing for cosmetics and there are alternatives available which produce reliable and accurate data, the testing of cosmetic products on animals continues to be the standard method in the ‘personal care’ industry. The cosmetic industry (makeup, skin care, soaps, shampoo, toothpastes, sunscreens, perfumes and deodorants as well as consumer products like dishwashing and laundry liquids or powders, insect repellents, pesticides and sprays) is a highly lucrative one which is resistant to change. Cosmetic companies usually contract out their testing to specialised labs, which are commercial enterprises in their own right.

The European Union’s 7th Amendment to the Cosmetic Directive prohibits the use of live animals in the testing of cosmetics and the import of any cosmetic product which has been tested on animals. The Directive puts an end to animal testing by imposing bans on:

- testing finished cosmetic products and ingredients on animals (testing ban);
- marketing finished cosmetic products which have been tested on animals or which contain ingredients that have been tested on animals (marketing ban).

The testing ban on finished cosmetic products applied since 11 September 2004, whereas the testing ban on ingredients or combinations of ingredients applied progressively as alternative methods were validated and adopted. A complete ban on the testing of cosmetic ingredients on animals commenced in the EU in March 2013.

Alternatives to research involving animals

Animal advocates argue that many alternatives to the use of animals have been developed, particularly in toxicity testing and teaching, and that studies of systems in cell culture provide many opportunities of substitution for animal experiments.

The British Union for the Abolition of Vivisection (BUAV) argues that the failure to use alternatives is too often caused by inertia, lack of funding, and reluctance to deviate from established methods. BUAV argues that there is a huge range of non-animal research techniques that, as well as being a more humane approach to science, can also be cheaper, quicker and more effective. These include cell, tissue and organ culture; micro-organisms such as bacteria; molecular research; studies with post-mortem tissues; sophisticated imaging and analysis, population studies (epidemiology) and clinical research with human volunteers.

The use of alternatives BUAV states, must be rewarded and encouraged to ensure that the transition to alternatives is not impeded:

[T]he human genome has now been cloned, which means that researchers can work with human proteins expressed in immortal cell lines, which can be grown in large quantities in the laboratory. This means that researchers no longer have the excuse that animal experiments are the only available option to research human disease and cellular function. By working on human proteins, researchers can acquire knowledge which is directly relevant to human function. Equally importantly, where the disease concerned has a genetic basis, researchers can work on the ‘faulty’ protein which is produced as a result of the ‘fault’ in the gene concerned and which causes the disease. Because the structure of the gene is known, the ‘faulty’ human proteins can be studied without the need to use animals.

---

67 See ‘Draize Eye Irritancy Test’ <http://stoptestinghouseholdproductsonanimals.com/info/draizetest>
68 <http://ec.europa.eu/consumers/sectors/cosmetics/animal-testing/>
69 British Union for the Abolition of Vivisection: <http://www.buav.org/humanescience/keycriticisms>
The following alternatives to animal research have been identified by the BUAV:

- **Quantitative Structure/Activity Relationship programs:** These are computer programs which can predict the toxicity of new chemicals or drugs based on their similarity to more established compounds.

- **Silicon chip technology:** Allows rapid identification of genes whose activity changes in response to certain diseases and drugs. Can help identify both whether a drug or chemical is going to be therapeutic or harmful.

- **Cell cultures:** Almost every type of human cell can be grown in culture, although the cells behave more simplistically than in the living body. Cellular systems have been central to key research into cancers, sepsis, kidney disease and AIDS, and are routinely used in chemical safety testing, vaccine production, drug development and to diagnose disease.

- **Human tissues:** Both healthy and diseased tissues can be donated from human volunteers after biopsies, surgery or death. Blood or urine samples can also be easily taken. Post-mortem brain tissue has provided important leads to understanding brain regeneration and the effects of MS. One important alternative is the Reconstituted Human Epidermis (RHE) skin model. These used reconstituted human skin derived from donated, unwanted skin from cosmetic surgery. The models are used to test the likely irritancy of chemicals and cosmetics to the skin. One model has recently been shown to be more effective than the original rabbit Draize skin test which it replaces.

- **Volunteer studies:** Examples of this include Magnetic Resonance Imaging (MRI) which generates detailed pictures of the brain and, when used in conjunction with other techniques, can identify the location of specific brain activities, and micro dosing which involves giving very tiny doses of a chemical compound to human volunteers in order to monitor where it goes in the body.

- **Population research:** Studying illnesses in human populations to understand the roles of genes, lifestyle, diet and occupation, has had a tremendous impact on saving lives, especially from cancer and heart disease.

Despite the existence of such alternatives, their adoption by investigators has been slow, BUAV suggests because of:

- inadequate funding for alternatives development;
- lack of political will to make non-animal research a priority;
- reluctance of animal researchers to find alternatives because they view animal tests as ‘traditional’;
- the conservative approach of regulatory authorities that still insist on animal experiments even when there is a proven non-animal method available and even in use;
- the process of test method validation can take many years (typically 9–11 years) before a non-animal method is accepted for use as a complete replacement to animal tests.

PETA claims that not only are non-animal technologies more humane but they also produce scientifically valid data. PETA identifies the following examples of non-animal test methods that have been scientifically validated and/or accepted by one or more world governments:

- **EPISKIN™ and EpiDerm™,** models made up of cultures of human skin cells, which have been validated and accepted around the world as total replacements for rabbit skin-corrosion studies;
- The cell-based 3T3 neutral red uptake phototoxicity test, which has become a widely accepted alternative to the use of guinea pigs and mice to assess sunlight-induced skin irritation;
- The embryonic stem cell test for embryotoxicity, which uses cells obtained from mice to detect chemicals that have the potential to cause the malformation of developing embryo;
- The use of human skin tissue to measure the rate at which chemicals are absorbed through the skin.

---

70 <http://www.peta.org/issues/Animals-Used-for-Experimentation/government-required-animal-testing-overview.aspx>
**International initiatives**

Katrina Sharman has noted that ‘while the diversity of laws, cultures, traditions and religions inhibits the international harmonisation of animal research laws to some degree, certain principles have emerged which seek to define the responsibilities of researchers and institutions that carry out animal research.’ The development of these principles, Sharman says, has been facilitated by the burgeoning field of animal health and welfare and the globalisation of animal research. Although there is not yet an international treaty or declaration which sets out the principles for the use of animals in research, Sharman identifies a number of ‘best practice’ standards appearing in international, regional and national legislative instruments and guidelines.71

The BUAV notes, however, that in many countries, such as Japan or the USA, there is no legislative requirement obliging researchers to use alternatives. So in those countries there is nothing to prevent researchers from continuing to conduct cruel animal experiments even if a non-animal replacement is widely available.

In other countries, such as the UK and the rest of the European Union, there is provision in the law to say that if an alternative method exists, it is against the law for the Government to continue licencing the traditional animal method.

European law states that where a non-animal alternative is available, the animal test equivalent must not be performed. Article 7.2 of EU Directive 86/609/EC states that:

> An experiment [animal] shall not be performed if another scientifically satisfactory method of obtaining the result sought, not entailing the use of an animal, is reasonably and practically available.

Article 23.1 states that EU governments should promote non-animal alternatives:

> The Commission and Member States should encourage research into the development and validation of alternative techniques, which could provide the same level of information as that obtained in experiments using animals but which involve fewer animals or which entail less painful procedures.

However, BUAV states that there are a number of issues with this: The legal obligation to use alternatives where available relies on those alternatives being officially seen to be available, and that in itself is a long and complex process. Once a non-animal method has been developed, it is then required to go through a formal validation process to demonstrate that the method is reliable, relevant and repeatable. This validation usually includes development, trial, further development, further trial and assessment, all of which can take many years, particularly if funding is tight, which it invariably is for non-animal research.

In addition, even though EU legislation dictates that animals must not be used when alternative methods are available, in practice enforcement of this is very weak and punishments for researchers who disobey the law are usually minimal.

**Acceptance in Europe**

In the EU, validation is conducted by the European Centre for the Validation of Alternative Methods (ECVAM) and if a method is successful it will be considered an officially validated method.72 Although the non-animal method has gone through validation (a process that BUAV notes most animal tests have never had to go through), that doesn’t necessarily mean that it will be considered ready as a replacement method. National governments, individual EU Member States for example, are free to accept ECVAM validation as sufficient in order to discontinue licensing an animal test within their national borders if they so wish. However, more usually a further layer of acceptance is considered necessary and that involves acceptance at OECD level.


72 <http://ihcp.jrc.ec.europa.eu/our_labs/eurl-ecvam>
Acceptance internationally

The Organisation for Economic Co-operation & Development (OECD) sets and reviews the international test guidelines for all OECD countries around the world. Many countries will insist on waiting for an OECD panel to officially accept the validated non-animal method before they will consider it a replacement method. Obtaining OECD acceptance can in itself take a number of years. So whilst a non-animal method may be technically available relatively early on, because it has to go through such a lengthy validation and acceptance process, it can take many years before it is officially considered available to replace its equivalent animal test. That means that animals will continue to suffer in labs even though a suitable non-animal test could replace them.

Epilogue: An animal’s story

The following extract is from a 2000 address by Steven Wise:

Jerom’s story

Jerom died on February 13, 1996, ten days shy of his fourteenth birthday. The teenager was dull, bloated, depressed, sapped, anemic, and plagued by diarrhea. He had not played in fresh air for eleven years. As a thirty month-old infant, he had been intentionally infected with HIV virus SF2. At the age of four, he had been infected with another HIV strain, LAV-1. A month short of five, he was infected with yet a third strain, NDK. Throughout the Iran-Contra hearings, almost to the brink of the Gulf War, he sat in the small, windowless, cinder-block Infectious Disease Building. Then he was moved a short distance to a large, windowless, gray concrete box, one of eleven bleak steel-and-concrete cells 9 feet by 11 feet by 8.5 feet. Throughout the war and into Bill Clinton’s campaign for a second term as president, he languished in his cell. This was the Chimpanzee Infectious Disease Building. It stood in the Yerkes Regional Primate Research Center near grassy tree-lined Emory University, minutes from the bustle of downtown Atlanta, Georgia.

Entrance to the chimpanzee cell room was through a tiny, cramped, and dirty anteroom bursting with supplies from ceiling to floor. Inside, five cells lined the left wall of the cell room, six lined the right. The front and ceiling of each cell were a checkerboard of steel bars, criss-crossed in three inch squares. The rear wall was the same gray concrete. A sliding door was set into the eight-inch-thick concrete walls. Each door was punctured by a one-inch-hold, through which a chimpanzee could catch a glimpse of his neighbors. Each cell was flushed by a red rubber fire hose twice a day and was regularly scrubbed with deck brushes and disinfected with chemicals. Incandescent bulbs hanging from the dropped ceiling provided the only light. Sometimes the cold overstrained the box’s inadequate heating units, and the temperature would sink below 50°F.

Although Jerom lived alone in his cell for the last four months of his life, others were nearby. Twelve other chimpanzees—Buster, Manuel, Arctica, Betsie, Joye, Sara, Nathan, Marc, Jonah, Roberta, Hallie, and Tika—filled the bleak living quarters, each with access to two of the cells. But none of them had any regular sense of changes in the weather or the turn of the seasons. None of them knew whether it was day or night. Each slowly rotted in that humid and sunless gray concrete box. Nearly all had been intentionally infected with HIV. Just five months before Jerom died of AIDS born of an amalgam of two of the three HIV strains injected into his blood, Nathan was injected with 40 ml of Jerom’s HIV infected blood. Nathan’s level of CD4 cells, the white blood cells that HIV destroys, has plummeted. He will probably sicken and die.

Topic summary

This topic has provided an overview of the regulatory regime governing the use of animals in research and experimentation in Australia. It has identified key provisions of applicable federal and NSW legislation, the Australian Code of Practice for the Care and use of Animals for Scientific Purposes and the role of Animal Ethics Committees. It has also investigated a number of ethical issues relating to the use of animals in research, including the reasons most often relied upon by the scientific community to justify the use of animals in research. A number of the deficiencies associated with these justifications have been identified, causing us to challenge some of the core assumptions investigators employ to enable the continued use of animals in research. Finally, this topic has considered some alternatives to the use of animals in research and some international initiatives directed at phasing out experimentation, testing and research using animals.

Topic 7

Wild animals and animals in the wild

Objectives

At the completion of this topic students will be able to:

- describe and critically reflect upon the legal status of wild animals;
- describe the legal regulatory frameworks in NSW and the Commonwealth relating to native and wild animals;
- describe the international framework governing trade in wild animal species;
- identify and critically evaluate some of the tensions between wild animal protection and environmental protection;
- describe and critically assess the legal framework governing the management of ‘feral’ and ‘pest’ and ‘invasive’ species of animals in Australia;
- describe and critically evaluate federal Codes of Practice and the NSW Plan of Management in relation to the commercial harvesting of kangaroos and wallabies in Australia.

Textbook


Webcast 7.1

Keely Broom, ‘Hunted by Land and Sea’, Voiceless 2012 lecture series, (15.48min)
<http://www.voiceless.org.au/the-issues/kangaroos>
Introduction

This topic begins with a consideration of the legal status of wild animals. All legal systems have property rules in relation to wild animals. Roman law, followed with some modifications by English law, held that wild animals belonged to no one until they were captured. Once captured, the animal belonged to its captor unless the animal escaped and returned to its ‘natural liberty’. The capture of fish and ‘game’ species is now regulated by most legal systems, many of which hold that such animals belong to the state unless and until they are captured in a manner conforming with the applicable regulatory scheme.

So although until the point of capture, wild animals are not regarded as ‘property’ in the same way that domesticated animals (both companion and farmed) and captive animals are, their freedoms are subject to a regulatory scheme which enables them to be lawfully captured or killed. It is at this juncture that the status of wild animals as ‘free beings’ changes to that of property and consequently, objects for human exploitation.

As noted by Born Free:

Countless wild animals are displaced by urban sprawl and habitat fragmentation which may lead to conflicts between people and wildlife. Real or perceived conflicts between people and wildlife, coupled with human fear, biases, or a lack of knowledge about humane approaches to solving such conflicts, results in millions of animals being needlessly killed each year. Some of the ways in which wild animals are abused or exploited by humans include sport and trophy hunting, commercial and recreational fur trapping, ‘nuisance’ wildlife control, and lethal predator control. The ‘nuisance’ wildlife control industry is lucrative, growing, and largely unregulated with little accountability or even basic humane animal care and treatment standards. Wild animals are also exploited in the exotic ‘pet’ trade, the fur trade, and the entertainment industry.1

This topic will consider the central elements of the regulatory schemes relating to the protection and exploitation of animals in the wild with particular reference to NSW, Commonwealth and International initiatives. In doing so, the often uneasy tension between environmental protection, wildlife ‘management’ and animal protection will be explored. In particular, we will consider the extent to which wild animals lack protective status under Australian environmental law regimes, with particular reference to the laws regulating macropods (kangaroos and wallabies).

Property and wild animals

Common law antecedents

In previous topics we have learned that domesticated and captive animals are, by law, regarded as the property of their human ‘owners’. The legal rules governing the status of wild animals were initially developed at common law which provided that wild animals in their natural habitats are owned by no one. Under the ‘capture rule’, property rights and acquisition of title in wild animals were acquired only through physical possession.

In Yanner v Eaton the High Court said (per Gleeson CJ, Gaudron, Kirby and Hayne JJ):

At common law, wild animals were the subject of only the most limited property rights. At common law there could be no ‘absolute property’, but only ‘qualified property’ in fire, light, air, water and wild animals. An action for trespass or conversion would lie against a person taking wild animals that had been tamed, or a person taking young wild animals born on the land and not yet old enough to fly or run away, and a land owner had the exclusive right to hunt, take and kill wild animals on his own land. Otherwise no person had property in a wild animal.2

In the same case Gummow J observed:

The common law divides animals into two categories, harmless or domestic (mansuetae naturae) and those which are dangerous or wild by nature (ferae naturae). The distinction is significant. Ferae naturae, such as estuarine crocodiles which are dangerous and wild by nature, are reduced to property

---

at common law when killed or for so long as they have been taken or tamed by the person claiming title. … [T]his qualified property right per industriam ceases if the creatures regain their natural liberty. Further, the owner of a fee simple, who has not licensed the right to hunt, take or kill ferae naturae, has a qualified property ratione soli in them for the time being while they are on that owner’s land. In contrast, mansuetae naturae found on a fee simple are owned by the landowner. Equally, a person who keeps a dangerous animal may be liable in negligence for damage done, or injury inflicted, by the animal without proof of scienter. Wright also noted a corollary that ‘trespass or theft cannot at common law be committed of living animals ferae naturae unless they are tame or confined’.\footnote{Yanner v Eaton [1999] HCA 53; (1999) 201 CLR 351 per Gummow at [80].}

In general, ownership rights in relation to ‘captive’ wild animals end when the animal escapes or is released into the wild. However, the common law held that if a captive wild animal is tamed so that it has the habit of returning from the wild to its captor, it remains the property of the captor.

In \textit{Geer v Connecticut} 161 U.S. 519 (1896) the Supreme Court of United States stated that:

\begin{quote}
Animals ferae naturae, or wild animals, are those that cannot be completely domesticated. A degree of force or skill is necessary to maintain control over them. Gaining possession is a means of obtaining title to, or ownership of, wild animals.

Generally an owner of land has the right to capture or kill a wild animal on her property and upon doing so, the animal is regarded as belonging to that individual because she owns the soil. The traditional legal principle has been that one who tames a wild animal is regarded as its owner provided it appears to exhibit animus revertendi, or the intent to return to the owner’s domicile. Conversely when a captured wild animal escapes and returns to its natural habitat without any apparent intent to return to the captor’s domicile, the captor forfeits all personal property right and the animal may be captured by anyone.
\end{quote}

Citing Roman law, the Court noted that things were classified into ‘public’ and ‘common’. The latter embraced animals ferae naturae, which, having no ‘owner’, were considered as belonging in common to all the citizens of the State:

\begin{quote}
There are things which we acquire the dominion of, as by the law of nature, which the light of natural reason causes every man to see, and others we acquire by the civil law, that is to say, by methods which belong to the government. As the law of nature is more ancient, because it took birth with the human race, it is proper to speak first of the latter. Thus, all the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them …. Because that which belongs to nobody is acquired by the natural law by the person who first possesses it. We do not distinguish the acquisition of these wild beasts and birds by whether one has captured them on his own property or on the property of another; but he who wishes to enter into the property of another to hunt can be readily prevented if the owner knows his purpose to do so.\footnote{Digest, Book 41, Tit. 1, De Adquir. Rer. Dom, cited in \textit{Geer v Connecticut} 161 U.S. 519 (1896).}.
\end{quote}

In England, by contrast, the common law held that the owner of land was in ‘constructive possession’ of wild animals on the land. American law, that landowners possessed no rights in relation to wild animals on their land, was, however, subject to the laws of trespass. Because a landowner is entitled to bar hunters and others from trespassing on his or her land, a landowner in the US, subject to applicable regulatory regimes, has exclusive rights to capture and/or hunt wild animals on their land.

Forms of ‘qualified’ ownership of wild animals can arise in the following ways:

- **Tame and reclaimed wild animals**: Where a person lawfully takes, tames, or reclaims a living wild animal, they can acquire qualified ownership in the wild animal. Once a wild animal has been acquired in this manner the wild animal becomes the property of the person who has taken, tamed or reclaimed them. The animal remains in the ownership of that person until it is released or it escapes and reverts back to the wild and has no intention of returning to the person. Examples of animals falling within this category include wild animals kept by a sanctuary and wild animals kept by a zoo.

- **Hunting rights**: If a land owner has an exclusive right to hunt, take and kill wild animals, on their land s/he is regarded as being the qualified owner of such animals while they remain on their land.

- **Dead wild animals**: When a wild animal dies or is killed the owner of the land on which the animal died or was killed becomes the legal owner of the animal, unless shooting or sporting rights have been granted to another person, in which case that person becomes the owner. A trespasser or poacher who kills a wild animal will not acquire legal ownership of the animal.
The economics of wildlife regulation

Dean Lueck observes that in relation to wildlife, present-day American and English law differ sharply. His thesis is that legal institutions have operated to maximise the net value of wild animals as ‘resources’ and that private, legal, and political forces have given rise to regulatory regimes that vary in ways consistent with wealth maximisation. This, he suggests may explain the disparity in American and English law. He notes that by the mid-nineteenth century, English law explicitly recognised that wildlife ownership rested principally with landowners but that during this same period, the law in the United States followed a quite different course. The fundamental legal doctrine in relation to wild animals in the United States is that States, and in some cases the federal government, not landowners, own ‘wildlife stocks’. However, Lueck notes:

In the United States today federal authority dominates state authority in many cases; in other cases private authority dominates. In truth, the ownership of wildlife and its many attributes is spread across many parties, both public and private. And even the law now recognises no single authority as ‘owning’ wildlife.5

The regulation of wildlife, then, is governed by a combination of private contracts and public regulations. Most often, private landowners control access rights, and government agencies regulate hunting and other uses. In economic terms, Lucke suggests, these rights may be seen to create a perceived property right in the underlying ‘resource’, an interest in some respects akin to ownership, a though collective in nature.

For example, fishing has for many centuries been regarded as a common right of all citizens, subject to any legislative restriction. More recently, however, the recognition of the overexploitation of fisheries has seen an increase in regulatory regimes designed to limit the exploitation of this ‘natural resource’. Initially, these rights involved an authority from the state to access a fishery. Over time these rights became recognised as property taking the form of area licenses and transferable quotas which may be traded, the subject of trusts and dealings with them taxed, much like any other form of property.

Because English law is the major source for Australian law, it is perhaps curious that ‘rights’ to wild animals in Australia more closely parallel those in the United States and Canada that those in Great Britain. In Australia, state and federal agencies regulate most wildlife populations within their boundaries, and private landowners do not ‘own’ the wild animals which inhabit their land.6 We will consider in detail the regulatory regimes governing wild animals in Australia later in this topic.

Wild and domesticated animals

For the purpose of describing the rights of ownership of animals, the English common law divided animals into two classes, those which are the subject of absolute ownership (domitae naturae or mansuetae naturae) and those which are the subject of a limited property right (ferae naturae).

Domitae naturae consists of populations of animals such as cattle, sheep, pigs, horses, dogs, and cats. As a class domitae naturae are generally tame and capable of living around humans. These are also animals generally regarded as ‘useful’ to humans, and over which humans affect a level of subjugation or control. Generally the law recognises that a person may absolutely own an animal that is a member of a species that has had a long association with humans, or that are continually exploited in a recognised manner other than by hunting.7 The division ferae naturae encompasses all other animals.

It appears that whether an animal is considered by law to be ‘wild’ or ‘domesticated’ will depend both upon a species approach and also whether the individual animal or animals are in human possession and control. See:

- a pet raccoon was held to be a ferae naturae: Andrew v Kilgour (1910) 13 W.L.R. 608;
- a fully tamed circus elephant was held to be ferae naturae: Behrens v. Bertram Mills Circus Ltd. [1957] 2 Q.B. 1;

7 The advent of patented transgenic animals in some jurisdictions raises some interesting issues in relation to property rights to animals. Generally, patent laws grant the owner of the patent the exclusive right to use, sell, or dispose of a product. It may include a patented animal or an animal with a patented gene. Accordingly, obtaining a patent based on some novel aspect of a fish to be released may enable the patent holder to maintain property rights in that released fish.
camels were held to be *mansuetae naturae*: McQuaker v. Goddard [1940] 1 K.B.;

bucking bulls used in rodeos were held to be *mansuetae naturae*: Smith v Capella State High School Parents and Citizens Association and Ors [2004] QSC 034;

fish and birds were held to be *ferae naturae*: Griffiths v Northern Territory of Australia [2009] FCA 903; De Rose v State of South Australia [2002] FCA 1342; R v Turner (No 15) [2001] TASSC 114;

wild dogs, including dingos, which attacked sheep were held to be *ferae naturae*: Stockwell v State of Victoria [2001] VSC 497;

a dangerous ‘domesticated’ dog was held to be *mansuetae naturae*: Zappia v Allsop [1994] NSWCA 355;

wild rabbits were held to be *ferae naturae*: Pratt v Young (1952) 69 WN(NSW) 214;

pigeons and bees, ‘in the possession or control of a person’ were held to be *mansuetae naturae*: Stockwell v State of Victoria [2001] VSC 497;

crocodiles were held to be *ferae naturae*: Yanner v Eaton (1999) 201 CLR 351.

**State interests in animals *ferae naturae***

In *Commonwealth v Agway Inc.*, the Pennsylvania Superior Court was called upon to determine the interests of the Commonwealth of Pennsylvania in relation to wild fish in French Creek.8 In this case the state of Pennsylvania brought a suit in trespass to recover damages for the value of fish killed as a result of pollution of a creek in the state. The complaint alleged that the discharge of chemicals into the creek caused the death of some 12,000 fish and 60,000 minnows, all such fish being ‘in a state of freedom’ in the inland waters of the state.

At first instance the court dismissed the complaint on the grounds that the state did not have a property interest in such *ferae naturae* that would support a suit in trespass for damages. The issue on appeal was whether the state had a property interest in fish in a state of freedom, the invasion of which would support such an action. The Court affirmed the decision at first instance, agreeing that the state of Pennsylvania had no property interest in the fish. In the course of its judgment, the Superior Court observed:

> Fish running wild in the streams of a state or nation are *ferae naturae*. They are not the subject of property until they are reduced to possession, and, if alive, property in them exists only so long as possession continues. The Commonwealth does not allege a property interest by way of possession of the fish. Instead, it admits the fish were in a state of freedom in Pennsylvania waters, but asserts that it has a property interest either as sovereign or proprietor in all wild game and fish in the Commonwealth sufficient to allow its recovery of damages.

Neither this court nor the court below nor the Commonwealth has discovered any case which has held that a state has such a property interest in *ferae naturae* that would support a suit in trespass for damages. To support its position the Commonwealth relies on cases involving the validity of regulatory measures enacted by states to preserve and protect wild game, and argues that since such cases refer to wild game as the property of the state, it follows that the state also ‘owns’ wild game for purposes of a suit in trespass.

Game and fish in a wild state often have been described as the property of the state, but an examination of the cases demonstrates that the interest of the state is that of a sovereign, not an owner. Thus in *Commonwealth v Papsone*, 44 Pa. Superior Ct. 128 (1910) ... although this court referred to wild animals as the property of the sovereign, the case itself involved only the validity of hunting regulations and the holding was based solely on the sovereign power of the state to regulate and prohibit hunting and did not depend on any state property rights in the wild game.

... 

Likewise in *Geer v Connecticut* (1896), in holding that Connecticut could prohibit the transportation of any killed game beyond the state the court based its decision on the power of the state to regulate the acquisition of title by an individual. Both cases demonstrate the exercise of the sovereign power and not the assertion of proprietary rights of the state.

In two instances the United States Supreme Court has referred to state ownership of wild game with some skepticism. In *Missouri v Holland* (1920), Justice Holmes said of the proposition that states own

---

wild game: ‘To put the claim of the state upon title is to lean upon a slender reed. Wild birds are not in
the possession of anyone; and possession is the beginning of ownership.’

In Toomer v Witsell (1948) the Supreme Court … said there: ‘The whole ownership theory, in fact, is now
generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a
state have power to preserve and regulate the exploitation of an important resource.’ …

Regardless of the terminology historically applied, we deal here with a power of the state to preserve
and control a natural resource for the enjoyment of all citizens. The Commonwealth has the power
for the common good to determine when, by whom and under what conditions fish running wild
may be captured and thus owned and the power to control the resale and transportation of such fish
thereby qualifying the ownership of the captor. It has this power as a result of its sovereignty over the
land and the people. But it is not the owner of the fish as it is of its lands and buildings so as to support
a civil action for damages resulting from the destruction of those fish which have not been reduced to
possession.

Think

1. The AAWS defines ‘animals in the wild’ as wild animals that are air breathing vertebrates
   that are not dependent on humans for their survival.”9

   The NHMRC Code for the care and use of animals for scientific purposes (8th ed) defines
   ‘wildlife’ as ‘free-living animals of native or introduced species, including those that are
   captive bred and those captured from free-living populations.’

   Does the distinction between ‘animals in the wild’ and ‘wildlife’ have practical consequences
   in terms of animal welfare? With reference to the AAWS definition, does a simple dichotomy
   between animals in the wild and animals which depend on humans for their survival
   adequately describe the range of settings in which ‘wild’ animals may be located?

2. In Chapter 10 of the textbook, Dominique Thiriet suggests that ‘the unique legal status
   of wild animals has not been particularly helpful to protect them from exploitation and
   suffering’ and that ‘the ecological value of native animals and their crucial contribution to
   the biodiversity of ecosystems, is no guarantee either.’ What may explain the relative lack of
   legal protection afforded to wild animals?

3. Thiriet argues that ‘if wild animals are not protected when they themselves constitute a
   resource with economic potential, they are unlikely to fare well when they hinder other
   economic interests.’

   What ‘economic interests’ may be hindered by wild animals?

4. Explain why the legal status of wild animals is more complicated than that for domesticated
   animals.

5. In what ways does the law distinguish between ‘pest’ or ‘feral’ animals and ‘wild’ animals
   and what are some of the legal consequences of such a distinction?

6. Consider the language used to describe types of wild animals found in legislation, ie ‘fauna’,
   ‘native animals’, ‘wildlife’, ‘game animals’ and ‘feral animals’. What, if any, is the legal
   significance of the different descriptors of wild animal?

7. Is the distinction often made between ‘native’ and ‘introduced’ wild species a helpful one?
   Why or why not? What are some of the legal consequences of such a distinction?

8. What did the High Court in Yanner v Eaton (1999) 201 CLR 351 decide in relation to the
   Crown’s interest in wild animals?

---

Regulation of wild animal welfare and conservation in Australia

New South Wales

Legislation
The following Acts and Regulations are relevant to the protection and management of wild animals in New South Wales:

- National Parks and Wildlife Act 1974
- National Parks and Wildlife Regulation 2009
- Threatened Species Conservation Act 1995
- Threatened Species Conservation Regulation 2010
- Game and Feral Animal Control Act 2002
- Game and Feral Animal Control Regulation 2004

Code of Practice, Management Plans and Standard Operating Procedures
The following NSW Department of Environment and Heritage Codes of Practice, Policies and Management Plans have application to native fauna in the State:

- Code of Practice for Injured, Sick and Orphaned Protected Fauna (2011)
- Code of Practice for Injured, Sick and Orphaned Flying-foxes (2012)
- Code of Practice for Injured, Sick and Orphaned Koalas (2011)
- Code of Practice for the Private Keeping of Reptiles (2013)
- Rehabilitation of Protected Fauna Policy (2010)
- Commercial Trade of Protected Fauna Policy (2013)
- Policy on the translocation of threatened fauna in NSW (2001)
- Flying-fox camp management policy (2007)
- Threatened species assessment guidelines (2007)

National Parks and Wildlife Act 1974 (NSW)
Native mammals, birds, reptiles and amphibians are afforded some protection in NSW under the National Parks and Wildlife Act 1974 (NPW Act) and the National Parks and Wildlife Regulations 2009. Subject to some exceptions (see below) all native animals living in NSW national parks and reserves are legally protected under the National Parks and Wildlife Act.

Once an animal is listed as a threatened species in NSW; that is as ‘vulnerable or endangered’, their protection is governed by the Threatened Species Act 1995 (NSW). The Commonwealth also has jurisdiction in relation to the threatened and endangered species under the Environment Protection and Biodiversity Conservation Act 1999 (Cth). (See below).

Section 92 of the NPW Act provides that the Director-General of the NSW Department of Environment and Heritage is the authority for the protection and care of fauna in NSW. In practice, this work is carried out by the National Parks and Wildlife Service.

The NPW Act provides that all fauna are protected except for those which are listed in Schedule 11 as ‘unprotected fauna’. Unprotected fauna are: bears, lions, dogs, moles, hedgehogs, cloven hoofed animals, horses, donkeys, apes, monkeys, elephants, hares, rabbits and Indian Palm Squirrels. These non-native unprotected animals may be afforded some legal protection under other legislation, including:
• Prevention of Cruelty to Animals Act 1979
• Companion Animals Act 1998
• Non-Indigenous Animals Act 1987
• Exhibited Animals Protection Act 1986
• Deer Act 2006
• Game and Feral Animal Control Act 2002

The NPW Act creates a number of offences designed to protect native animals and also a broad range of ‘lawful justifications’:

**Offences**

- It is an offence to harm protected fauna: s 98 (2). This includes harm by using a substance, an animal, a gun, net or trap.
- It is an offence to buy, sell or possess protected fauna unless one has a licence to do so: s 101.11
- An NPWS officer can give a direction to someone to stop any activity that is causing or might cause distress to native animals unless the activity is licenced or approved: s 99A.
- An authorised officer can give a direction to someone who is lawfully keeping a native animal in confinement in relation to food, drink and shelter: s 102.

**Defences which permit harm to native animals**

There are a broad range of defences that may be relied upon if charged with harming protected animals.

Section 98(3) and (4) of the NPW Act provides that a person shall not be convicted of an offence arising under sub-s (2) if the person proves that the act constituting the offence was done:

- under and in accordance with or by virtue of the authority conferred by a general licence under s 120, an occupier’s licence under s 121, a commercial fauna harvester’s licence under s 123, an emu licence under se 125A, a scientific licence under s 132C or a licence under Part 6 of the Threatened Species Conservation Act 1995; or
- in pursuance of a duty imposed on the person by or under any Act.

Section 98(4) provides that an offence is not committed:

- if the act constituting the offence was authorised by, and done in accordance with, a conservation agreement;
- if the act constituting the offence was authorised by, and done in accordance with, a management agreement under Part 7 of the Threatened Species Conservation Act 1995.

Section 98(5) provides that there is no offence under sub-s (2) in relation to things which are essential for the carrying out of:

- development in accordance with a development consent within the meaning of the Environmental Planning and Assessment Act 1979.

Section 98(6) provides that there is no offence is the act was done in the course of an activity that would constitute a defence under s 118G.

Section 118G provides that it is a defence if the accused proves that the act constituting the alleged offence was any of the following activities:

- they were carrying out an activity permitted under the Native Vegetation Act 2003, such as clearing non-protected regrowth, continuing an existing farming activity or engaging in sustainable grazing; or
- they were carrying out a ‘routine agricultural activity’, including, constructing dams, fences, stockyards and farm roads, removing noxious weeds, controlling noxious animals, collecting firewood (but not for commercial purposes), lopping native vegetation for stock fodder; and
- Traditional Aboriginal cultural activities.

---

In March 2013 the NSW government overturned a ban on the sale of reptiles in pet stores. Under the new policy, licenses for pet shop owners and prospective reptile owners will be available through the National Parks and Wildlife Service. See: <http://www.birdkeeper.com.au/_blog/Reptile_Ravings/post/NSW_Government_Approves_Sale_of_Reptiles_in_Pet_Stores/>
Enforcement

The NSW Department of Environment and Heritage is responsible for enforcing the provisions of the NPW Act. The legislation can be enforced through criminal prosecutions which may result in a fine or imprisonment. Only a person authorised by the Director-General of the DEH or a police officer can bring a prosecution for an offence against a native animal or protected native plant: s 191. In most cases, however, the DEH will use its other enforcement powers including the issue of penalty notices, warning letters, stop work orders and interim protection orders before commencing a prosecution:

- An authorised officer can issue a stop work order if the Director-General thinks that an activity is, or is about to be, carried out that is likely to significantly affect protected fauna or native plants: s 91AA. A stop work order cannot be issued if the activity is already authorised under another Act, such as by a development consent, licence or a major infrastructure project: s 91AA(3), (4).
- After making a stop work order, the Director-General must consult with the person proposing to take the action to determine whether the activity can be modified. If satisfactory arrangements cannot be made to protect the environment, the Director-General must recommend that the Environment Minister make an interim protection order: s 91EE.
- The Environment Minister can make an interim protection order over land containing native animals and native plants, but only after receiving a recommendation to do so from the Director-General: s 91A. An interim protection order can prohibit someone from doing things, such as damaging the habitat of a native animal. An interim protection order has effect for up to 2 years, unless revoked earlier: s 91D, 91E.
- It is an offence not to comply with an interim protection order: maximum penalty corporation $1.1 million, and individual: $110,000: s 91G.
- An owner or occupier of land subject to an interim protection order can appeal against the order to the Land and Environment Court within 60 days of receiving the order: s 91H; Land and Environment Court Act 1979.
- The Land and Environment Court can issue an injunction to stop an activity that is causing harm to a native animal or a protected native plant. It can also make a declaration that an offence provision has been breached.
- Any person can bring proceedings to remedy or restrain a breach of the NPW Act: s 193.

Wildlife licences

Licences are issued by the NPWS. A wildlife licence is required from the NPWS to do any of the following things in relation to native animals:12

- harm, keep, exhibit or sell native animals: s 120 general licence;
- keep native animals as pets: s 120 general licence;
- collect native animals to sell: s 123, commercial fauna harvester’s licence;
- move native animals from NSW across State or Territory borders: s 106;
- import and export fauna: s 126;
- liberate an animal within NSW: s 127 licence to liberate.

Under a 132C of the NPW Act a licence is required to undertake an activity for scientific, educational or conservation purposes that is likely to result in the following:

- harm to any protected fauna, or to an animal that is a threatened species or is part of an endangered population or an endangered ecological community;
- damage to a habitat of a threatened species, an endangered population or an endangered ecological community.

The following commercial operations are not permitted without a licence:

- Harming animals for sale: s 103
- Exhibiting protected animals: s 107

• Being a fauna dealer requires a fauna dealer’s licence: s 124
• Being a skin dealer requires a skin dealer’s licence: s 125
• Being an emu breeder requires an emu licence: s 125A

Marine mammals

Marine mammals (whales, dolphins and seals) are governed by two different legislative regimes depending on where they are found:

- NSW coastal waters (within 3 nautical miles of the coast): marine mammals are protected under the NPW Act and the NPW Regulation 2009.
- Commonwealth waters (from 3 nautical miles, and up to 200 nautical miles): Marine mammals (excluding seals) are protected under the Environment Protection and Biodiversity Conservation Act 1999 (Cth).13
- If the species of marine mammal is also listed as threatened, then it will also be protected under the Threatened Species Conservation Act 1995 (NSW).14

Section 112A of the NPW Act establishes a Marine Mammals Advisory Committee whose function are to advise the Environment Minister on marine mammal protection, strandings of marine mammals, plans of management, and any other matter referred to it by the Minister.

The NPW Act contains detailed provisions relating to approaching and interfering with marine mammals: See s 112G NPWA and Part 6 Division 3 NPW Regulation.

Threatened Species Conservation Act 1995

In NSW, the protection and management of biodiversity and threatened species is governed by the Threatened Species Conservation Act 1995. The Department of Environment and Heritage has responsibility for administering TSC Act, which is concerned to protect terrestrial threatened species, populations and ecological communities. The Act, through Part 8A of the National Parks and Wildlife Act 1974 prohibits the harming, picking, possessing, buying or selling of individual threatened species. The Act also contain prohibition against the damage of their habitat and contains provisions to protect endangered populations and threatened ecological communities. DEH maintains public registers where information can be found about what areas have been declared as critical habitat, and details of processed and pending applications for s 91 licences issued under the TSC Act.15

The Department regards consultation with landholders, conservation groups, agencies, local councils and the general community as integral to arresting biodiversity loss. For this reason, provisions for consultation and co-operation are key elements of the TSC Act.

The protection of threatened fish and marine vegetation is the responsibility of the Department of Trade and Investment.16

Think

For what reasons do you think that the Department of Environment and Heritage is responsible for protecting threatened terrestrial animals while the Department of Trade and Investment is responsible for threatened fish and marine vegetation?

14 In NSW, the following marine mammals are listed as threatened: Endangered: Dugong, Blue Whale; Vulnerable: New Zealand Fur-seal, Australian Fur-seal, Sperm Whale, Humpback Whale, Southern Right Whale.
15 Section 91 of the TSC Act provides that the Director-General may grant a licence authorising a person to take action likely to result in (a) harm to any animal that is of, or is part of, a threatened species, population or ecological community, (b) the picking of any plant that is of, or is part of, a threatened species, population or ecological community, (c) damage to critical habitat and/or (d) damage to habitat of a threatened species, population or ecological community. A licence to authorise any of these actions may be issued only (a) for the welfare of an animal, or (b) if there is a threat to life or property.
16 See Fisheries Management Act 1994 (NSW).
The objects of the *TSC Act* are set out in s 3 of the *Act*:
- to conserve biological diversity and promote sustainable development;
- to prevent the extinction of native plants and animals;
- to protect habitat that is critical to the survival of endangered species;
- to eliminate or manage threats to biodiversity;
- to properly assess the impact of development on threatened species;
- to encourage co-operative management in the conservation of threatened species.

**Habitat protection**

Habitat loss, fragmentation and degradation are a significant cause of species loss. To conserve biodiversity the *Act* is directed towards the protection of listed habitats of species, populations and ecological communities. The *Act* provides means to improve degraded environments, protect areas of high conservation value and areas critical to the survival of threatened species.

**Species recovery and threat abatement**

Developing strategies to tackle biodiversity loss requires the identification and understanding of the processes that lead to the extinction of species, populations and ecological communities. For this reason, listing species, populations and ecological communities is a central purpose of the *TSC Act*. Listing decisions are made by the independent NSW Scientific Committee and must be made in accordance with the criteria set out in the *Threatened Species Conservation Regulation 2010*.

The *Act* also provides for the preparation of a Threatened Species Priorities Action Statement which outlines actions to recover species and manage threats. It also requires that developments likely to have a significant effect on threatened species prepare a Species Impact Statement (SIS). The *Act* adopts a multi-species or ecosystem approach to threatened species recovery. It provides for threatened species considerations to be fully integrated within the strategic planning and development control processes of the *Environmental Planning and Assessment Act 1979* and natural resource management legislation such as the *Native Vegetation Act 2003*.

**Enforcement**

- Threatened species legislation is enforced by DEH officers authorised by the Director-General, such as National Parks and Wildlife rangers. Police officers are also authorised to enforce threatened species legislation: cl 3 *TSC Regulation*.
- Authorised officers have powers to identify, locate, obtain, or secure evidence relating to suspected offences under the *Act*. The decision to prosecute offenders is discretionary. Factors that influence the decision to prosecute include the value of the prosecution as a deterrent to other offenders, the availability of evidence and the level of impact on the species, population or ecological community. As with the *NPW Act*, DEH will consider alternatives to prosecutions such as penalty notices, stop work orders, interim protection orders, warning letters or any combination of these.
- If a person is convicted of a threatened species offence, they face criminal penalties of up to $220,000 or two years in prison, or both. In addition, if the case involves harming an animal or picking a plant that is, or is part of, an endangered species, population or ecological community, additional penalties of up to $11,000 apply to each animal or whole plant that was harmed or picked: s 118A *NPW Act*. See also s 206 *NPW Act*.
- If a person is convicted of a threatened species offence the court may order a person to rehabilitate or mitigate the damage caused to habitat as a result of the offence. The court may also order the offender to provide security to ensure the rehabilitation or mitigation order is carried out: ss 198–205 *NPW Act*.
- The *Act* provides for a number of exceptions and defences to prosecution. For example, developments that are undertaken in accordance with a development consent issued under the *Environmental Planning and Assessment Act 1979* are exempt from the prohibitions. Routine agricultural management activities authorised under the *Native Vegetation Act 2003* and some other activities may also be exempt: s 118G *NPW Act*. 
• The Land and Environment Court may order an injunction to stop an activity that is causing harm or imminent harm to a threatened species, population, ecological community or their habitat.

• The Minister for Climate Change and the Environment may make an interim protection order for a period of up to two years over an area of land that has natural, scientific or cultural significance. The Minister may also make an interim protection order on land where the Director-General of DEH intends to exercise functions relating to threatened species or declared critical habitat: See Part 6A Division 2 NPW Act.

• The Director-General of DEH may make a stop work order for a period of 40 days if an action is being, or is about to be carried out that would harm a threatened species, population or ecological community or their habitat: See Part 6A Division 1 NPW Act.

• A penalty infringement notice is a means of dealing with less serious offences or minor breaches of licences issued under the legislation. Penalty notices give an offender the option of paying a penalty and not having the matter heard in courts. Penalty notices of $500 for an individual and $1,000 for a corporation may be issued for offences relating to vulnerable species and $1,500 for an individual and $3,000 for a corporation for all other threatened species offences.

Think

In Chapter 10 of the textbook, Dominique Thiriet suggests that the legal systems of Australia ‘fail to meaningfully protect wild animals’ and that the protection of wild animals in Australasia is subject to overriding human interests. Identify ways in which National Parks and Wildlife Act 1974 (NSW) and the Threatened Species Conservation Act 1995 (NSW) subject the welfare and protection of wild animals to overriding human interests.

Commonwealth

Environment Protection and Biodiversity Conservation Act 1999

The Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) is the Australian Government’s central piece of environmental legislation. It provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places defined in the Act as matters of national environmental significance.17

Specifically, the EPBC Act aims to:

• conserve Australia’s biodiversity;
• protect biodiversity internationally by controlling the international movement of wildlife;
• provide a streamlined environmental assessment and approvals process where matters of national environmental significance are involved;
• protect our world and national heritage;
• promote ecologically sustainable development.

The EPBC Act applies in relation to:

• World Heritage: ss 12–15A
• National Heritage: ss 15B–15C
• Internationally important wetlands: ss 16–17B
• Listed threatened species and communities: ss 18–19
• Listed migratory species: ss 20–20B
• Protection from nuclear action: ss 21–22A
• The marine environment: ss 23–24A
• The Great Barrier Reef: ss 24B–24C

17 For a detailed overview of the EPBC Act, see: <http://www.environment.gov.au/epbc/index.html>
The *EPBC Act* contains an extensive regime for the conservation of biodiversity including provisions dealing with:

- listing of nationally threatened species and ecological communities, migratory species and marine species;
- preparing conservation advice and/or national recovery plans and wildlife conservation plans for listed species and additional protection for listed species in Commonwealth areas;
- identifying key threatening processes and the threat abatement plans for such processes;
- invasive species;
- import and export of plants, wildlife and products derived from wildlife;
- establishment of the Australian Whale Sanctuary in Australia’s exclusive economic zone.

**Enforcement**

The Department of Sustainability, Environment, Water, Population and Communities (DSEWPC) regulates international movement of wildlife and wildlife products for all species except cetaceans under Part 13A of the *Act*.

The Department works with State and Territory wildlife authorities, the Australian Customs Service, the Australian Federal Police, wildlife authorities of other member countries of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) to coordinate intelligence and resources to combat illegal wildlife trade activities.

The Australian Customs and Border Protection Service have power to seize wildlife and wildlife products that have been imported or exported in contravention of the *EPBC Act*. In addition to the Customs Service, the Australian Federal Police and quarantine officers are ex officio inspectors under the *EPBC Act*.

Part 17 of the *EPBC Act* details the provisions for enforcement. Authorised officers under the *Act* have powers to board vessels and access premises, conduct searches, make arrests, and obtain information from individuals suspected of involvement in the commission of an offence against the *Act* or Regulations.

**The international movement of wildlife**

The international movement of wildlife and wildlife products for commercial purposes is regulated under the *EPBC Act*. Commercial trade in specimens derived from regulated native species, CITES listed species or the import of regulated live plants and animals for commercial purposes may be allowed provided the specimens have been derived from an approved source. Companies that trade commercially in wildlife or wildlife products must ensure that they can demonstrate that their products have been derived from an approved source or are exempt from the provisions of the *Act*.

The export of live native amphibians, reptiles, birds and mammals for commercial purposes is prohibited although these may be eligible for export for non-commercial purposes.

The *Act* provides that export of specimens derived from a ‘regulated native species’ for commercial purposes may occur only if it is derived from one of these sources:

- Approved captive breeding programs
- Approved artificial propagation programs
- Approved aquaculture programs
- Approved wildlife trade operations
- Approved wildlife trade management plans
- Accredited wildlife trade management plans

Travellers returning to Australia with ‘souvenir items’ containing wildlife products involving CITES listed species may be penalised and items seized if Australian requirements for import of that species have not been met or there is inadequate information to indicate that the specimen was legally exported from its country of origin.

Enforcement officers also have power in relation to the prevention of wildlife smuggling. Where such attempts involve live animals, they often involve inhumane practices. Subjecting an animal to cruel treatment under these circumstances is an offence punishable by imprisonment for up to two years. The
EPBC Act requires that all live animals be shipped in a manner that minimises the risk of injury, any adverse impacts on its health and cruel treatment of the animal.

See in particular s 303GP(1) which provides that a person is guilty of an offence if:

- the person exports or imports a live animal in a manner that subjects the animal to cruel treatment; and
- the person knows that, or is reckless as to whether, the export or import subjects the animal to cruel treatment; and
- the animal is a CITES specimen; and
- the person contravenes s 303CC or 303CD in relation to the export or import of the animal.

Section 303GP(2) provides that a person is guilty of an offence if:

- the person exports a live animal in a manner that subjects the animal to cruel treatment; and
- the person knows that, or is reckless as to whether, the export subjects the animal to cruel treatment; and
- the animal is a regulated native specimen; and
- the person contravenes s 303DD in relation to the export of the animal.

Section 303GP(3) provides that a person is guilty of an offence if:

- the person imports a live animal in a manner that subjects the animal to cruel treatment; and
- the person knows that, or is reckless as to whether, the import subjects the animal to cruel treatment; and
- the animal is a regulated live specimen; and
- the person contravenes s 303EK in relation to the import of the animal.

Each of these offences carries a penalty of imprisonment for 2 years.

Steven White observes that the anti-cruelty standard in s 303GP is a broad one. The cruelty standard adopted by the Commonwealth here, he suggests, is ‘worth reflecting on since it is notably different to the standards adopted in the live export of farmed animals, and those applicable under State and Territory legislation and codes of practice’. White notes that, unlike other legislation, s 303GP contains no qualification on the nature of cruelty which is prohibited, such as ‘no unnecessary suffering’, and that no specific defence to acting in a cruel manner is provided. This means, White suggests, that the Commonwealth, like the States and Territories, applies different standards to different categories of sentient animals. He says that, ‘in this case, endangered animals and native animals are regarded as more deserving of protection from cruelty than farmed animals.’

1. As noted in Topic 5, the law makes a distinction between standards applicable to the treatment of companion and farmed animals. White argues that, if sentiency is the basis on which prohibition of cruelty is justified, there is no rational moral or scientific explanation for why export farmed animals should be subject to a lower standard of protection than that afforded to imported or exported wildlife.

What do you think might account for the differential standards applied to the protection of farmed animals and those applied to imported or exported wildlife?

2. Deborah Cao (Animal Law in Australia and New Zealand, Lawbook Co, 2010) suggests that, with the exception of the provisions relating to wildlife trade in Part 13A of the Act, the EPBC Act and associated regulations ‘impinge on animal welfare in an incidental way’. In what ways does the ‘species-based conservation ethic’ of the Act render animal welfare ‘incidental’?

---


The group compiled an inventory of existing animal welfare arrangements ‘as a first step in progressing the welfare of all animals in the wild’. Its tasks were to define the sector, identify its priorities and develop a value statement.

Priorities identified for animals in the wild sector were:

- to encourage all Australians to be aware of, and have commitment to, the welfare of animals in the wild;
- to consider the best possible outcomes for wild animals in ten, twenty and more years and plan to achieve those goals;
- to ensure the welfare of animals in the wild is core business of the Primary Industries Ministerial Council and the Council of Australian Governments;
- to ensure that legislative inconsistencies between jurisdictions are removed;
- the establishment of nationally accepted and enforceable Codes of Practice and Standard Operating Procedures for the ‘humane and feasible’ control of: vertebrate pest animals; ‘overabundant’ native animal species; native animals, both within and affected by, programs relating to the rehabilitation, relocation and reintroduction to the wild of native species;
- the establishment of policies which reinforce community understanding and responsibility through compliance, education and enforcement;
- to ensure there is secure, ongoing research and development that enhances welfare for animals in the wild, including innovation in tools, techniques and delivery of practical management and control measures;
- to support sustainable land use planning and management that accommodates the needs of wildlife and addresses wild animal welfare;
- to identify and develop responses to future threats, for example global warming and continuing urban development;
- to develop contingency planning for episodic events and creeping disasters such as floods and droughts;
- to ensure wildlife tourism and similar ventures promote wild animal welfare.

The Group identified four major risks for the animals in the wild sector and the Australian Animal Welfare Strategy:

- currently there are no nationally supported or agreed Codes of Practice for vertebrate pest animal control;
- a lack of continuing, dedicated resources and expertise to undertake basic and applied research and to implement programs for animals in the wild;
- general public ignorance and/or apathy regarding the welfare of animals in the wild;
- Australian jurisdictions often act independently and could resist a perceived ‘national takeover’ of their roles by the Australian Animal Welfare Strategy.

Other important considerations for the animals in the wild sector identified in the Report are:

- as a unifying concept, all measures must be humane and consider the animal’s welfare. This requires consistent cross agency, industry and public support;
- the need to have quantifiable, positive and long term outcomes, especially regarding the extent and suitability of habitats for native animal populations;
- the need to engage high level support and prioritise funding to research and remedy major gaps in the information available for this sector;

there is a lack of standards and performance measures for protecting the welfare of animals in the wild, including the effects of reintroductions and translocations of native animals and the effects of feeding wildlife;

• to encourage an increasingly more humane and sustainable relationship of indigenous people with wild animals. Opportunities exist for co-management of wild animal resources and activities;

• the need to identify and engage all of the numerous stakeholders in this sector;

• the need to engage community support and provide ready access to information on the management of native and pest animals;

• the need to effectively deal with community perceptions of wild animal interventions that can have adverse implications for necessary management and control measures;

• some tasks have been found to be repetitive, both within and across sectors. Consultancies are required to address the quantity and quality of information.

Think

Consider the ‘four major risks’ for animals in the wild identified by the Wild Animals Welfare Group. In what ways will addressing these risks contribute to improved welfare protections for animals in the wild?

International

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

The global commercialisation of wild animals is a multi-billion dollar industry and can result in extreme animal cruelty and serious population declines. Born Free USA notes that law enforcement officials have declared that illegal wildlife trade is second only to the illegal drug trade in terms of profitability. Animals affected by this trade include exotic birds, primates, reptiles, and other species traded as ‘pets’; bears, tigers, and rhinos, who are among the species coveted for their body parts, organs, and products made from them; and elephants that are hunted for their tusks and shipped live to zoos around the world. The demand created by the global marketplace for some products has had a devastating effect on the wild populations of certain animal species, some of which have been hunted or harvested to the point of extreme endangerment or extinction. These effects have been exacerbated by increased global demand, driven by population growth, and ever-improving transport and communication technologies.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was drafted in 1973 in response to the decline in wild populations of many animal and plant species as a result of unregulated international trade. CITES entered into force on 1 July 1975 and became enforceable under Australian law on 27 October 1976.

Since its entry into force in 1975, CITES has set out to protect species of conservation concern from over-exploitation due to international trade. To fulfil this goal, CITES takes a precautionary approach by protecting species even if trade is not currently threatening them. Appendix I to the Convention includes species ‘threatened with extinction which are or may be affected by trade.’ The Convention further protects species that are not yet threatened but may become so unless trade is strictly regulated by placing them in Appendix II. Once listed in the Appendices, CITES operates to prevent over-exploitation due to trade by directing parties to the Convention to issue permits before trade in listed species may occur. For Appendix I species, importing States must prohibit trade for primarily commercial purposes. In addition, trade is prohibited for Appendix I and II species, unless the exporting State determines that the export will not be detrimental to the survival of the species, that is, it makes a ‘non-detriment’ finding.

CITES now has 175 Parties representing both rich and poor States with widely varying degrees of financial and institutional capacity. The CITES Appendices have also grown to more than 34,000 species, including approximately 5,000 species of animals. Implementing CITES is challenging, since in addition to making

'commercial purposes' and 'non-detriment' findings, the Parties must devote resources to enforcement. Adequate enforcement includes the capacity to uncover illegal trade, confiscate illegally traded specimens, arrest illegal traders and impose penalties for that trade. Parties must also compile and submit trade statistics to allow verification of imports from and exports to other countries.

Every signatory to CITES is required to designate a management authority responsible for administering CITES in that nation. The management authority has particular responsibility for issuing permits, compliance, enforcement and reporting matters. The work of the management authority is supported by a scientific authority. A major function of the scientific authority is to determine whether exports would be detrimental to the survival of the species, before the management authority permits their export.

In Australia, both the management and scientific authorities are located within the Department of Sustainability, Environment, Population and Communities. In relation to its obligations under the Convention, the DSEPC states that:

The regulation of international exports and imports of wildlife and wildlife products is an important element of effective nature conservation.

In addition to protecting native species, the Australian Government reinforces the efforts of other countries to protect their wildlife by regulating trade in those species identified under the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

As well as contributing to the international cooperative conservation effort, these controls also complement the wildlife conservation efforts of Australian States and Territories.

The international movement of wildlife and wildlife products is regulated under Part 13A of the Environment Protection and Biodiversity Conservation Act 1999 for all wildlife, including cetaceans. The Act regulates the:

- export of Australian native species other than those identified as exempt;
- export and import of species included in the Appendices to CITES; and
- import of live plants and animals that (if they became established in Australia) could adversely affect native species or their habitats.

Commercial export of regulated wildlife and wildlife products may occur only where the specimens have been derived from an approved source: a captive breeding program, artificial propagation program, aquaculture program, wildlife trade management operation, or wildlife management plan. CITES Appendix II species that are declared specimens may only be imported commercially if they have been artificially propagated or bred in captivity or if the operation from which they were sourced is has been approved as a Commercial Import Program.

Regulated wildlife may also be exported or imported if it is for an eligible non-commercial purpose. Eligible non-commercial purposes include research, education, exhibition, conservation breeding or propagation, a household pet, a personal item or for a travelling exhibition.22

While the object and purpose of CITES is to prevent the overexploitation of species due to trade, it has been suggested that some interest groups have been actively working to ensure that implementation of CITES facilitates and promotes legal wildlife trade.23

Professors Erica Thorson and Chris Wold suggest that:

[As more developing countries have joined CITES, fissures have arisen among parties and advocates over the best lens through which to implement CITES’ technical provisions and over setting CITES’ strategic vision. Some Parties argue that CITES, which limits trade in valuable parts and derivatives of listed species, including commercially valuable species, must evolve to recognize the role that international markets can play in conservation by ensuring that wildlife has economic value. These Parties believe that effective conservation depends on increasing the value of wildlife to make wildlife conservation economically competitive with other uses of habitat. Trade in specimens of wildlife may increase the value of wildlife and incentivize community-based conservation. These Parties and other advocates insist that conservation thus requires the development of international markets for wildlife.

References:


products and that CITES Parties must collectively facilitate and promote legal, sustainable wildlife trade.

Others have criticised these views as straying beyond the core mission of CITES. These Parties and advocates claim that policies concerning land tenure, socio-economic development, and poverty reduction are of obvious importance, but perhaps not critical to the operation of CITES and its goal to prevent over-exploitation due to trade. They argue that CITES is a narrow treaty and that it is clear about the means through which it intends to ensure conservation—that is, strict regulation of international trade—and that developing markets for wildlife or facilitate trade in wildlife runs counter to the very nature of CITES. They argue that many species are at risk due to international trade and that short-term monetary gains too often jeopardise the long-term objectives of the Convention.24

Thorson and Wold review the ways in which this ‘sustainable use debate’ has manifested itself within CITES in an attempt to identify the Convention’s core mission. They note that efforts to move the Convention’s goals towards facilitating legal trade have had a lasting impact on the CITES agenda.

While the Convention’s premise is to prevent the over-exploitation of species due to international trade, it specifically recognises a number of exemptions designed to reduce pressure on wild populations including a captive breeding exemption, and an identification of circumstances in which international trade may not be detrimental. Thorson and Wold contend, however, that unless strictly construed and well-managed, the exemptions could become ‘dangerous loopholes’. The permit regime and exemptions, they argue, mean that compliance is essential to effectively preventing the over-exploitation of species due to international trade. They note, however, that the effectiveness of existing compliance mechanisms, such as the imposition of trade suspensions, is under threat and that this undermines the Convention’s core objectives.

Think

While the international regulation of wild animals is based on sustainable population numbers of species, it has little to say in relation to animal protection for its own sake. Live animals are traded as pets, livestock and zoo exhibits … Non-live parts and derivatives are found in clothing and accessories, foodstuffs, complementary medicines and furniture.

With reference to the CITES permit system and exemptions relating to commercial trade in animal species, consider whether the Convention has as its central purpose the protection of animal welfare.

Introduced wild animals

Environmental, human habitat and economic imperatives have all contributed to the least protected status of introduced wild animals.25 The protections afforded to non-native wild animals in Australia are even more limited than those provided to native wild animals. Even under animal welfare legislation, so called ‘feral’, ‘invasive’ and ‘pest’ animals are not well protected. As we have seen, s 24(1)(b) of the Prevention of Cruelty to Animals Act 1979 (NSW) provides a defence to, or exemption from, cruelty offences where the animal concerned is a ‘pest’ or ‘feral’ animal, and the relevant act is ‘necessary’ or ‘reasonable’. Similarly, the serious animal cruelty offence contained in s 530 of the Crimes Act 1900 (NSW) does not apply to ‘pest’ animals. In addition, nature conservation legislation and various land management regimes, such as the Rural Land Protection Act 1989 (NSW) provide little welfare protection for these types of animals. But as we will see,, not only do introduced wild animals lack in welfare protection; so too do some native animals, most notably, kangaroos and wallabies. Considered by some environmentalists and by many in

24 ‘Stop Funding CITES – They are part of the problem and not the solution’ <http://www.change.org/petitions/stop-funding-cites-they-are-part-of-the-problem-and-not-the-solution>
25 Steven White (‘Animals in the Wild, Animals Welfare and the Law’ in Peter Sankoff and Steven White, Animal Law in Australasia: A New Dialogue (2009) The Federation Press, Australia, 252) notes that the economic impact of ‘pest’ animals on agricultural production has been estimated to be about $373.9 million per annum. He also notes that the total value of farm and fishery production was $34.8 billion in 2005–6. Thus, the economic impact of ‘pest’ animals on agriculture is approximately 1.07 per cent of the total value of agriculture in any given year.
the agricultural sector to be ‘pest’ animals in need of culling, nearly 150,000 kangaroos were ‘harvested’ in Australia during 2010. Later in this topic we will consider the regulatory framework governing the harvesting of kangaroos and wallabies and some of the welfare concerns of animal advocates relating to the strategic culling of macropods for commercial and noncommercial purposes.

The following is from Animals Australia, ‘Introduced Animals Fact Sheet’.26

### Introduced wild animals

The word ‘feral’ is incorrectly used. In fact, ‘feral’ simply means wild. It therefore accurately refers to native as well as non-native animals. However, it also has overtones of ‘savage’ and ‘brutal’. ‘Pest’, ‘noxious’ and ‘vermin’ are similarly emotionally loaded words which have no place in a sound and scientific discussion of these issues.

‘Invasive’ is also frequently misused. It refers to a capacity, shared by all species, including species in their native habitats, to, in certain circumstances, take over niches from other species. The circumstances which can cause a species to become invasive may result from introducing it to a foreign environment, or they may equally result from simply changing an environment in ways which favour one species at the expense of other species. For example, as land is cleared (bulldozed) for housing all along the Eastern coast of Australia, native and non-native former inhabitants of bush land either die or move (invade) into surrounding habitat and cause overcrowding for the resources available.

The use of the word ‘invasive’ to describe a species, as though invasiveness were an attribute of the animal or the plant, rather than a consequence of altering an environment, is therefore misleading and unscientific.

A variety of methods are used to kill these animals, including traps, poisons, gassing, shooting and intentional infection with disease. All these methods may inflict extreme suffering on the target animals (and sometimes also on non-target animals). Despite this, since most of these animals are prolific breeders, the above methods achieve at best a very temporary reduction in the population. Sudden large-scale reductions in the populations of these species sometimes even lead to a substantially increased population within a very short period (weeks or months), because the extra food available to the survivors enables more prolific breeding and survival of offspring.

### The Ecological Issue

Contrary to popular assumption, there is very little research, and virtually no data supporting the view that naturalised species (successful in their new environment) are having significant impact on the Australian environment. The listing of foxes, cats, goats, pigs, rabbits and, most recently, rats on certain offshore islands, as ‘key threatening process’ under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) was made despite this lack of evidence and despite the fact that many well-proven human pressures on the environment are more damaging than naturalised animals but are not recognised as key threatening processes. There is also virtually no research into the positive role of introduced species in ecosystems once they have become naturalised, or the ecological consequences of removing them.

What research does show is that no naturalised animal is, on its own, a problem for the mainland Australian environment. Wherever natural ecosystems have been destroyed or modified, naturalised species tend to proliferate. Wherever natural systems have been left intact, naturalised animals have either failed to survive, or else their overall ecological impact appears to be negligible.

### The Agricultural Issue

In Australia, because of geographical, ecological and climatic factors, agriculture has been particularly destructive. Human competition with other animals using this fragile landscape has been extremely fierce. Rabbits in particular, along with native animals such as kangaroos, ducks and parrots, have been routinely subjected to killing on a massive scale.

### ‘Good’ and ‘bad’ animals?

So-called ‘feral’ or ‘pest’ animals are no different in their ability to feel pain and to suffer than any other animal, yet because these animals often come into conflict with agricultural interests they may be treated in an inhumane manner and are often exempted from legislative protection. This has meant that they may be treated with little regard to independent assessment – ethical, ecological, biological, economic – of the justification for lethal control.

Animals Australia argues that lethal control methods are often ineffective and that despite the armoury of lethal control techniques, there is very little monitoring of the effectiveness of lethal control, either in reducing populations, or in terms of the stated objectives of protecting the environment.

Lethal control is ineffective, Animals Australia argues, because established animal species tend to maintain stable populations, subject to fluctuations in food supply and other extreme events. The majority of wild born young animals of all species die without reaching maturity, usually taken by predators, or starved out by competition with more successful members of the population. Most naturalised animals are prolific.
breeders, so that the recovery of their populations following control action is likely to be particularly rapid. What this means for animal control programs is that killing animals as a way of controlling them is essentially futile. Unless it is possible to reach every individual, a fast breeding species will quickly breed up to refill the niches that lethal control has emptied. Additionally, killing animals actively strengthens the population over time. It selects for individuals who are clever or fast or strong enough to thwart efforts to kill them. These individuals pass those faster, smarter, stronger genes, as well as their experiential knowledge, on to their offspring.  

Thiriet suggests that perhaps the best way to protect the welfare of introduced animals will occur when the implementation of control programs is subject to three precedent conditions:

- that the targeted animals are independently proven to cause damage and need to be controlled;
- that the proposed control program is independently proven to be effective and species specific; and
- that alternative non-lethal methods have been tried and failed.

For a discussion of the lethal methods of control used on invasive species, such as poison baits, yellow phosphorus, fumigants, trapping, shooting and introduced diseases, and the effects which these control methods have on animals and the effects of non-lethal methods of control, such as harbour destruction, natural and unnatural barriers and fertility control see: <http://www.animalsaustralia.org/factsheets/introduced_wild_animals.php>

In a 2007 article Dominique Thiriet focuses her attention on the plight of introduced wild animals, arguing that negative community attitudes contribute to legalised acts of cruelty against ‘unpopular’ animals. She then considers whether inhumane and cruel killing practices can be justified by arguments based on environmental imperatives.

As Thiriet observes:

> The justification for control programs is based on economic and environmental grounds. Introduced animals are alleged to cause damage to agricultural interests through damage to crops, competition for pasture with, and predation on, farm animals, as well as potential introduction and/or spread of diseases. They are also blamed for environmental damage such as soil erosion, stream turbidity, competition for habitat and shelter with, and predation on, native animals. In addition, they are believed to have social impact, including social and psychological effects on primary producers and their families. It is alleged that the damage caused by the 11 major introduced species totals $720 million annually. Ironically, millions of introduced wild animals are eradicated each year so as to allow other introduced animals such as cattle and sheep the opportunity to graze unimpeded the fragile Australian soils, or to protect introduced crops. Yet grazing and cropping are well-recognised causes of serious environmental damage.

The treatment of introduced wild animals and ‘invasive’ native animals has often been one of antagonism. The use of toxin 1080, (sodium monofluoroacetate) which was routinely used in Australia since the 1950’s is known to cause severe suffering to animals. The use of 1080 poison baiting has now been discontinued in a number of Australian states. The gassing of rabbits and baiting of pigs are also both known to cause severe suffering. Aerial shooting of wild horses, goats and camels, ground shooting with firearms or bows and arrows of wild pigs, deer and cats has also been shown to cause severe suffering in the absence of a ‘humane kill’. The use of poisons, traps and shooting of introduced animals may also cause the death of otherwise ‘protected’ native wild species.

---

27 Animals Australia, ‘Introduced Animals Fact Sheet’ Introduced wild animals <http://www.animalsaustralia.org/factsheets/introduced_wild_animals.php>
New South Wales

New South Wales and the other States and Territories have developed a range of strategies to deal with wild introduced animal species. In New South Wales, the Department of Primary Industries and the Department of Environment and Heritage both have responsibility for ‘pest’ animal management and have produced the following strategies, guidelines and Codes of Practice:

- Vertébrate Pest Control Manual (2012)31
- Humane Pest Animal Control: Code of Practice and Standard Operating procedures:32 (currently under review)
- Biology, Ecology and Management of Vertebrate Pests in NSW (2013)33
- A Model for Assessing the Relative Humanness of Pest Animal Control Methods34
- NSW Wild Dog Management Strategy 2012–201535
- Regional Pest Management Strategies: 2012–1736
- Invasive Species Plan 2008–201537

The most significant vertebrate pest animals identified by the Department of Environment and Heritage are cane toads, feral cats, feral deer, feral goats, feral horses, feral pigs, foxes, rabbits and wild dogs.38

Codes of Practice and Standard Operating Procedures, the NSW Department of Primary Industry claims, ‘meets the pressing need for pest animal control methods which are humane, target specific, cost-effective and safe for humans to use.’39

The DPI states that:

In Australia, pest animals cause enormous damage and risks to the environment, native biodiversity, agricultural industries, and public health … These procedures are intended for anyone engaged in pest animal control, from land managers through to pest animal control officers and researchers. They will allow uniform implementation of techniques and training for proficiency in pest animal control, and will address community expectations and regulatory requirements. At the same time, the procedures reflect common sense and can be applied across the many diverse situations and environments where they are needed.40

The introduction to the Model Code of Practice for the Humane Control of Feral Pigs states that:

There is a growing expectation that animal suffering associated with pest management be minimised. This should occur regardless of the status given to a particular pest species or the extent of damage or impact created by that pest. While the ecological and economic rationales for the control of pests such as the feral pig are frequently documented, little attention has been paid to the development of an ethical framework in which these pests are controlled. An ethical approach to pest control includes the recognition of and attention to the welfare of all animals affected directly or indirectly by control programs. Ensuring such approaches are uniformly applied as management practices requires the development of agreed Standard Operating Procedures (SOPs) for pest animal control. These SOPs are written in a way that describes the procedures involved for each control technique as applied to each of the major pest animal species. While SOPs address animal welfare issues applicable to each technique, a Code of Practice (COP) is also required that bring together these procedures into a document which also specifies humane control strategies and their implementation. COPs encompass all aspects of controlling a pest animal species. This includes aspects of best practice principles, relevant biological

information, guidance on choosing the most humane and appropriate control technique and how to most effectively implement management programs.\footnote{Trudy Sharp and Glen Saunders, \textit{Model Code of Practice For The Humane Control of Feral Pigs}, NSW Department of Primary Industries <http://www.environment.gov.au/biodiversity/invasive/publications/pubs/cop-feral-pigs.pdf>}

While the Code states that 'an ethical approach to pest control includes the recognition of and attention to the welfare of all animals affected directly or indirectly by control programs, in a 2004 report Sharp and Saunders noted that:\footnote{T Sharp and G Saunders (2004) \textit{Development of a model code of practice and standard operating procedures for the humane capture, handling or destruction of feral animals in Australia} <http://www.environment.gov.au/biodiversity/invasive/publications/pubs/40595-final-report.pdf>}

- While an ideal vertebrate pest control method should be humane, target specific, efficient, cost-effective and safe for humans to use, current approaches to feral animal control tend to focus primarily on lethality to the pest and cost-effectiveness, whilst humaneness receives little attention.
- The review of existing pest animal control methods revealed that they do not adequately address the issues of humaneness and impact on target and non-target animals.
- The existing codes of practice relating to pest animal control are inadequate. They cover only a small range of species and most do not contain sufficient information to be adopted as national standards for pest animal control.
- There are some methods where SOPs have been written, that are considered to be unacceptable on animal welfare grounds eg use of strychnine on leg-hold traps for wild dogs; using dogs for flushing out feral pigs; and blasting of rabbit warrens. However for most of the situations where these techniques are used there are no alternative methods of control available.
- There are a large number of animal welfare concerns, inconsistencies, anomalies and gaps in knowledge, including:
  - Different methods are used in different states.
  - Disparate welfare standards for the control of different species.
  - Although SOP’s recommend the most humane way to conduct the control methods, this may not necessarily correspond with ‘approved label’ instructions.
  - There are still many inconsistencies between states with regard to the use of Toxin 1080.
  - Research into a humane alternative to strychnine is needed.
  - A system of reporting non-target poisoning incidents needs to be established.
  - While it is more humane to receive a large dose of anticoagulant and die relatively quickly than to receive smaller doses over a period of time, current pindone baiting methods for rabbits recommend the use of smaller doses, because it is more effective.
  - The sensitivity to pindone of key non-target species (eg bandicoots, macropods, quolls) has not been fully assessed. Also, the effect of secondary poisoning on populations of birds of prey is not fully known.
  - It is recommended that inhalant agents not be used alone for euthanasia in animals less than 16 weeks of age. However, fumigation of fox cubs with carbon monoxide is currently occurring at much younger ages than this.
  - Dogging of feral pigs is very controversial and needs to be addressed.
  - Non-target poisoning would be reduced if meat baits were not used with 1080 for poisoning of feral pigs.
  - Behavioural observations of poisoned animals are required to assess many of the poisons currently used.
  - Much of the information we have on poisons is quite old and the research/observations has not been conducted under field conditions or only applies to one group of animals.
  - With the poisoning methods, should we be recommending that monitoring is performed to detect animals that show signs of sub-lethal intoxication, so that they can be humanely killed?
  - Inappropriate firearms are currently being used to cull feral deer.
• Are the poisons (esp. the long acting ones like anticoagulants) used for vertebrate pest control excreted in the milk of lactating females? Do dependent young get a dose of the poison from the mother or does she die and they are left to die of starvation.

• Welfare standards are needed for the transport, handling, slaughter and export of live feral goats. These exist for some other species but there is little detailed, useful information on goats.

• Control methods are often carried out at time of the year when the welfare of animals will be most negatively affected eg trapping of goats at water is most effective during hot/dry periods however this is the time when they will be most affected by heat stress during yarding, transporting etc and is usually when they are kidding. This trade-off between effectiveness of a control technique and animal welfare occurs often in pest animal control programs.

NSW Supplementary Pest Control Program

You will recall that in Topic 4 we considered the recent controversy surrounding the proposed introduction of recreational hunting in NSW National Parks. Also known as the National Parks and Wildlife ‘supplementary pest control program’, the program allows the NPWS to invite community volunteers with training and in safe firearms handling and shooting proficiency, to shoot pest animals in a number of identified national parks in the state. The NPWS states that the program will help the service to extend its existing pest control on national parks and reserves to protect native species and agriculture from the impacts of pest animals.\(^43\)

The pest species being targeted include wild dogs, feral pigs, rabbits, feral goats, deer, feral cats and foxes.

Opponents of the original proposal to open national parks up to amateur shooters argued that the hunting program, which was borne from a deal struck with the NSW Shooters and Fishers Party, was designed to facilitate the sport of hunting on public land, and had little to do with conservation. They argued that no legislative changes were required to continue dealing with pest animal populations in NSW since legislation already existed for integrated pest management programs to be carried out by professionals.

The NSW government’s announcement, on 4 July 2013, to abolish the Game Council and invest authority in the NPWS to administer the program was a response to community concerns that sport, rather than conservation, was a central rationale of the legislative amendments.\(^44\)

Humane killing of feral animals in NSW

The Game and Feral Animal Control Regulation 2004 (NSW) provides in cl 5 that:

An animal being hunted must not be inflicted with unnecessary pain. To achieve the aim of delivering a humane death to the hunted animal:

• it must be targeted so that a humane kill is likely; and

• it must be shot within the reasonably accepted killing range of the firearm and ammunition or bow being used; and

• the firearm and ammunition, bow and arrow, or other thing used must be such as can reasonably be expected to humanely kill an animal of the target species.

Clause 6 provides that ‘if a lactating female is killed, every reasonable effort must be made to locate and humanely kill any dependent young.’

Clause 7 provides that ‘if an animal is wounded, the hunter must take all reasonable steps to locate it, so that it can be killed quickly and humanely.’

Commonwealth initiatives

In 2007 the federal Natural Resource Management Ministerial Council developed the ‘Australian Pest Animal Strategy – A national strategy for the management of vertebrate pest animals in Australia’\(^45\) The Strategy is concerned to ‘improve the consistency and effectiveness of pest animal management legislation across Australia’ and to ‘develop integrated pest animal management plans that are consistent with the principles of the Strategy, at national, state, territory, regional and property levels.’ The Strategy


\(^44\) For a background to the issue, see ‘No Hunting in our National Parks’ <http://nohunting.wildwalks.com/>

is administered by the Australian Biosecurity System for Primary Production and the Environment (AusBIOSEC), which integrates activities with respect to all invasive plants, animals and disease-causing organisms of terrestrial, freshwater and marine environments that impact on primary industries and on natural and built environments.

The strategy is silent in relation to the issue of pest animal welfare in the context of management, control and eradication strategies. The only reference to animal welfare is in ‘key principle’ 10 which states that ‘where there is a choice of methods, there needs to be a balance between efficacy, humaneness, community perception, feasibility and emergency needs.’

The federal Department of Sustainability, Environment, Water, Population and Communities also has jurisdiction relating to ‘feral’ animals, especially those identified as ‘key threatening processes’ under the Environment Protection and Biodiversity Conservation Act 1999.

The Department states that:

The objective for managing the majority of established feral animals is to reduce the damage caused by pest species in the most cost-effective manner. This may involve localised eradication, periodic reduction of feral numbers, sustained reduction of feral numbers, removal of the most destructive individuals or exclusion of feral animals from an area. The damage caused by feral animals also needs to be considered in context with other factors, such as land use, climate, weeds and grazing pressure from domestic stock.

There are a number of control methods available for feral animals. These methods include conventional control techniques and biological control. Conventional control methods for feral animals include trapping, baiting, fencing and shooting.

During the implementation of any feral animal control program the guidelines for humane treatment and removal, should be applied, as well as adhering to animal welfare requirements that apply in each State or Territory (emphasis added).46

Codes of practice and standard operating procedures

Codes of practice and standard operating procedures for the humane capture, handling or destruction of feral animals have been developed ‘to meet the need for pest animal control methods that are humane, target specific, cost-effective and safe for humans to use.’47

Codes of practice provide general information on best practice management, control strategies, species biology and impact, and the humaneness of current control methods.

Standard operating procedures describe management techniques and their application for pest animal species including a discussion of animal welfare impacts for target and non-target species.

Current versions of codes and operating procedures relating to foxes, wild dogs, rabbits, feral pigs, feral cats, feral goats, feral horses, feral donkeys and feral camels are available on the <feral.org.au> website.48

Case study: Aerial shooting

The ‘Model Code of Practice for the Humane Control of Feral Horses’ identifies the following ‘acceptable’ methods of control with regard to humaneness: exclusion fencing, immobilisation and lethal injection and ground shooting. It identifies the following ‘conditionally acceptable’ methods with regard to humaneness: trapping, aerial shooting, fertility control and mustering. ‘Conditionally acceptable’ methods are those that, ‘by the nature of the technique, may not be consistently humane. There may be a period of poor welfare before death’.49

The most cost effective methods of control identified in the CoP are those that have been identified as ‘conditionally acceptable’ in terms of humaneness.

The ‘Standard Operating Procedure Relating to Aerial Shooting of Feral Horses recognises that the humaneness of aerial shooting as a control technique depends on the skill and judgement of both the shooter and the pilot. If properly done, it can be a humane method of destroying feral horses. On the other hand, if done inexpertly, shooting can result in wounding that can cause considerable pain and suffering.’\(^{50}\)

Animal welfare groups believe aerial culling to be an inhumane approach to population control of horses running wild in the Australian outback. They argue that this method has previously been shown to leave a proportion of horses suffering due to non-fatal wounding and the difficulty in killing humanely when firing from a moving vehicle.\(^{51}\)

In *Animal Liberation v Director General of National Parks & Wildlife Service* [2003] NSWSC 457 Animal Liberation sought an interlocutory injunction to restrain the defendant from carrying out aerial shooting of feral goats in a National Park on the grounds that it was likely to cause the goats unnecessary suffering. There was objective and expert evidence that showed that goats shot in a previous shoot on Lord Howe Island had moved considerable distances after having been shot and had died lingering deaths. The Court held that while the purpose for the shooting might be legitimate (environmental protection), the means employed were not. Suffering could be reduced by ground shooting rather than shooting from a helicopter.

---

**Think**

1. Despite the large numbers of animals targeted by control programs each year, little consideration has traditionally been given to the welfare of the animals involved. Articulate some of the reasons for this.

2. A ‘pest animal’ is defined in the *Model Code of Practice for the Humane Control of Feral Pigs* to be:
   
   Any native or introduced, wild or feral, non-human species of animal that is currently troublesome locally, or over a wide area, to one or more persons, either by being a health hazard, a general nuisance, or by destroying food, fibre, or natural resources.

   What assumptions and economic imperatives inform this definition? Does this definition encompass individual ‘nuisance’ animals or does it only apply to entire species?

3. The codes of practice and standard operating procedures relevant to the control of introduced animals have been developed by State and Commonwealth agencies. Whilst one could legitimately expect that these codes and standards will increase the protection of animals against suffering, Dominique Thiriet states that this is not the case. Thiriet argues that ‘the combination of inadequate legislative provisions and unenforceable, weak codes and standards of practice is permitting the use of an impressive range of cruel practices in the name of pest control’.


   Identify ways in which codes and standards have failed to protect introduced wild animals against suffering?

4. How would you prioritise the central concerns of code of practices and standard operating procedures relating to introduced wild animal control in terms of (i) cost efficiency, (ii) effectiveness, (iii) industry protection, (iv) environmental protection and (v) animal welfare?

5. The *Invasive Animals Cooperative Research Centre* is a national research institute funded by the federal government. It is devoted to ‘creating new technologies and integrated strategies to reduce the impact of invasive animals on Australia’s economy, environment, and people.’ The CRC is currently lobbying for the establishment of a permanent and ultimately self-financing national research institute ‘to continue the discovery and delivery of world-leading controls for invasive animals that are humane, cost efficient and ecologically appropriate.’ Such an institute, the CRC states, ‘will avoid exposing Australia’s farmers and land managers

---


\(^{51}\) See [https://www.change.org/petitions/stop-the-aerial-culling-of-waler-horses-on-tempe-downs-station-nt?utm_source=action_alert&utm_medium=email&utm_campaign=25092&alert_id=qIFJAdxhmg_UXmTqplL>&]
to the risk of having inadequate technologies against pest animals to protect our biodiversity assets and long-term food security.\textsuperscript{52}

From an animal welfare perspective, is this an initiative which should be welcomed? Why or why not?

6. Consider the following definitions found in most Codes of Practice relating to the ‘humane control of pest animals’:

**Welfare** – an animals’ state as regards its attempts to cope with its environment. Welfare includes the extent of any difficulty in coping or any failure to cope; it is a characteristic of an individual at a particular time and can range from very good to very poor. Pain and suffering are important aspects of poor welfare, whereas good welfare is present when the nutritional, environmental, health, behavioural and mental needs of animals are met. When welfare is good suffering is absent.

**Humane** – causing the minimum pain, suffering and distress possible. To be humane is to show consideration, empathy and sympathy for an animal, an avoidance of (unnecessary) stress, and the demonstration of compassion and tenderness towards our fellow creatures.

**Humane killing** – a killing where welfare of the animal is not poor just prior to the initiation of the killing procedure and the procedure itself results in insensibility to pain and distress within a few seconds. When carried out properly, the welfare is either not poor at any time or is poor for those few seconds only.

**Best Practice Management** – a structured and consistent approach to the management of vertebrate pests in an attempt to achieve enduring and cost-effective outcomes. ‘Best practice’ is defined as the best practice agreed at a particular time following consideration of scientific information and accumulated experience.

Articulate your responses to these definitions. Can you identify any inconsistencies between the notions of welfare, ‘humaneness’ and ‘best practice management’?

### The tension between animal and environmental protection

Olivia Khoo has considered the relationship between current animal rights and animal welfare positions and the environmental ethic that has gained momentum publicly and officially in the last two to three decades.\textsuperscript{53} Khoo discusses the philosophical underpinnings of the rift between environmentalism and animal liberation, outlines various strategies that have been proposed to bring the two together, and evaluates the success of these strategies.

Khoo notes that most of the scholarship in this area has been produced in a North American context and that while much of this writing is relevant to Australia, it is important to consider the specificity of Australian case studies and approaches.

She suggests that while, in recent years there has been popular and political support in Australia towards a consideration of environmental issues, animal welfare continues to lag behind despite the important link between animal welfare and environmental concerns. If it is considered at all, Khoo argues, animal welfare is often viewed as antagonistic or marginal to environmental matters. With reference to Australian case studies, her article examines the relationship between animal welfare and emerging environmental policies in Australia and asks whether animal welfare can be reconciled with environmental concerns.

\textsuperscript{52} \url{http://www.invasiveanimals.com/}

Think

1. Khoo observes that ‘animal law bridges the gap left by the environmental law movement by challenging our perception of our relationship with non-human animals. The fact that a social movement for the protection of non-feeling and non-suffering natural objects emerged prior to one for the protection of sentient beings is incredibly perplexing’. What reasons might be advanced to explain this alleged neglect of sentient beings in the environmental protection movement?

2. Khoo states that within the environmental protection movement, species are the primary mode of classification, not the individual animal. This distinction between the species and the individual, she says, informs the main point of contention between environmental ethics and animal rights, which is that the former is concerned with ‘wholes’: species, biotic communities and ecosystems, whereas proponents of animal rights are interested in the individual animal. Can ‘species’ and ‘individual’ approaches be reconciled? If so, how? If not, why not? Is there perhaps a ‘middle ground’ here?

3. In 1984 Mark Sagoff stated that: ‘Environmentalists cannot be animal liberationists. Animal liberationists cannot be environmentalists. … Moral obligations to nature cannot be enlightened or explained – one cannot even take the first step – by appealing to the rights of animals.’

Do you agree with Sagoff? Why or why not?

4. Gary Varner has proposed a theory of ‘biocentric individualism’ which suggests that all living beings count. In this schema, he argues, environmentalism and animal rights can be compatible and ‘grounded in the same interests-based moral individualism’.

How might the interests of individual sentient beings be reconciled with the interests of ecosystems?

5. Dale Jamieson asserts that ‘not only is animal liberation an environmental ethic, but animal liberation can also help to empower the environmental movement.’

In what ways can animal liberation movements empower the environmental protection movement?

Activity 7.1

You feel strongly both about environmental protection and animal protection. Develop a strategy to identify common ground between environmental and animal protection concerns in relation to the management of introduced ‘pest’ animals.


56 Dale Jamieson – ‘Is Animal Liberation An Environmental Ethic?’.
Kangaroo harvesting in Australia

Webcast 7.1


Textbook

Chapter 10 – ‘Commercial Exploitation of Native Species’ 228–231

Kangaroos and wallabies are a mammal unique to Australia. Despite their iconic status they have been labelled as ‘pest’ animals due to their numbers and their alleged competition with agricultural interests.

As noted by Voiceless:

The commercial killing of kangaroos in Australia is the largest commercial slaughter of land based sentient beings in the world. The welfare concerns regarding the commercial kangaroo trade are numerous. These welfare concerns include the fact that non-fatal body shots are an unavoidable part of the trade, that joeys are ‘collateral damage’ to the killing of female kangaroos, and that the Codes of Practice which govern the commercial hunt permit barbaric means of ‘euthanasing’ small furless pouch-young and young at foot.

As kangaroos are shot at night when they are most active, the cruelty associated with this slaughter is largely hidden from public scrutiny and there is virtually no means that law enforcement agencies are able to appropriate monitor or enforce compliance with the regulatory framework.

Nichola Donovan notes that:

Over 2.98 million kangaroos were shot and killed for commercial purposes in 2007, and around 70 per cent (or more) were female. When female kangaroos are shot, they can have young either in the pouch or at foot. Joeys remain dependent on their mothers for survival for between 18 months to 3 years. If the shooter does not kill them, dependent young will die of starvation, exposure, dehydration or predation.

According to the Kangaroo Industry Association of Australia, the kangaroo industry generates in excess of $270 million per year in income and employs over 4,000 people.

In addition to large scale commercial and non commercial kangaroo harvesting operations, the killing of native fauna that are normally protected through the provision of licences or destruction permits may be regarded as a right by individual land holders. The killing of kangaroos and wallabies to reduce grazing pressure is afforded often only cursory inspection and surveillance by wildlife authorities. For example, in Victoria requests for kangaroo killing permits may not even involve an on-site inspection, nor follow-up of numbers killed, whilst in Tasmania, farmers may use dogs and shotgun to pursue, wound and kill thousands of native wallabies. In Victoria many areas allow the killing of wombats if they are likely to make holes in

57 Australian Wildlife Protection Council <http://www.awpc.org.au/awpc.php?australian_wildlife_protection_council=7&crm=1> The AWPC has called for a total European Union ban on the trade in all products derived from the commercial slaughter of kangaroos and the adoption of an unconditional prohibition on the imports of kangaroo products, ‘to help save the lives of 440,000 baby kangaroos who die every year’.


59 Nichola Donovan, ‘Challenging the “art of disinformation” in Australian animal law’ Paper delivered at the Australian Law Librarians’ Association Annual Conference, Perth, 19 September 2008. The Australian Wildlife Protection Council estimates that ‘every year some 440,000 baby kangaroos are either clubbed to death or left to starve after their mothers have been killed. <http://www.awpc.org.au/awpc.php?crm=1&australian_wildlife_protection_council=40>

Kangaroo Harvest Management Plans

The Environment Protection and Biodiversity Conservation Act 1999 (Cth) requires the development and approval of ‘wildlife trade management plans’ in order for permits to be issued for the commercial export of wildlife products.61

Kangaroo Management Plans need to be approved by the Federal Minister for Environment as a ‘Wildlife Trade Management Plan’ under the EPBC Act.62 The Act states that the Minister may approve a wildlife trade management plan for a maximum of five years and that such approval must only be given if the Minister is satisfied that:

- the plan is consistent with the objects of Part 13A of the EPBC Act;63
- an assessment of the environmental impacts of the activities of the plan has been undertaken;
- the plan includes management controls directed towards ensuring that the impacts of the activities covered by the plan are ecologically sustainable;
- the activities in the plan are not detrimental to the species to which the plan relates or any relevant ecosystem; and
- the plan includes measures to mitigate, monitor and respond to the environmental impacts of the activity covered by the plan.

In deciding whether to declare a plan, the Minister must also have regard to whether:

- legislation relating to the protection, conservation or management of the specimens to which the plan relates is in force in the State or Territory concerned; and
- the legislation applies throughout the State or Territory concerned; and
- in the opinion of the Minister, the legislation is effective.

Finally, in resolving whether to declare a plan the Minister must also be satisfied that if an animal is killed, it is done in a way that is generally accepted to minimise pain and suffering. As noted above, animal welfare standards for the commercial harvesting of kangaroos are set out in the National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes.

The Department of Agriculture, Fisheries and Forestry states that the Department:

‘Regulates the export of kangaroo meat from Australia to ensure it meets the highest standard of food safety and importing country requirements’ and that ‘the harvest of kangaroos is an ecologically sustainable practice and does not have detrimental impact on either the harvested species or the ecosystems from which they are taken’.64

The following statistics reflect the commercial kangaroo harvest quotas in 2010:

<table>
<thead>
<tr>
<th>State</th>
<th>Macropus rufus (Red Kangaroo)</th>
<th>M. giganteus (Eastern Grey)</th>
<th>M. fuliginosus (Western Grey)</th>
<th>M. robustus (Euro/Wallaroo)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>417,655</td>
<td>546,241</td>
<td>90,634</td>
<td>17,245</td>
<td>1,071,775</td>
</tr>
<tr>
<td>Queensland</td>
<td>887,127</td>
<td>1,068,847</td>
<td>335,849</td>
<td></td>
<td>2,291,823</td>
</tr>
<tr>
<td>SA</td>
<td>199,700</td>
<td>91,300</td>
<td>64,200</td>
<td></td>
<td>355,200</td>
</tr>
<tr>
<td>WA</td>
<td>105,000</td>
<td>200,000</td>
<td></td>
<td></td>
<td>305,000</td>
</tr>
<tr>
<td>Total</td>
<td>1,609,482</td>
<td>1,615,088</td>
<td>381,934</td>
<td>417,294</td>
<td>4,023,798</td>
</tr>
</tbody>
</table>


62 See EPBC Act: Approved wildlife trade management plan: 303FO.

63 The objects of Part 13A of the EPBC Act include: s 303BA (6): ‘to promote the humane treatment of wildlife’.

Commercial kangaroo harvest quotas in 2010

There are two federal Codes of Practice regulating commercial and non-commercial harvesting standards:

- National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes

Compliance with these Codes does not override state and territory animal welfare legislation unless the legislation provides otherwise.

Case Study: Joeys and young-at-foot

The National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes recognises that measures must be taken to prevent the inhumane death of young that cannot survive on their own. Rather than leave the young of slaughtered maternal females to die slow, traumatic deaths, the Code specifies three ‘humane’ methods for killing pouch young and joeys, dependent on their size:

- small hairless young should be killed by a single forceful blow to the base of the skull sufficient to destroy the functional capacity of the brain or by decapitation;
- larger furred pouch young should be killed by a single forceful blow to the base of the skull sufficient to destroy the functional capacity of the brain;
- young at foot should be killed by a single shot to the brain or heart where it can be delivered accurately and in safety.

The following is from the NSW Commercial Harvest Management Plan 2012–2016:

- Shot females must be examined for pouch young and if one is present it must also be killed.
- Decapitation with a sharp instrument in very small hairless young or a properly executed heavy blow to destroy the brain in larger young are effective means of causing sudden and painless death.
- Larger young can also be dispatched humanely by a shot to the brain, where this can be delivered accurately and in safety.

Ben-Ami Dror and Keely Boom state that under ideal conditions 60 per cent of harvested female Eastern Grey female kangaroos are likely to have young at foot. This figure does not include young in pouch. Therefore, they note, a conservative estimate for a harvested female kangaroo with young at foot, still dependent upon their mothers for survival, is 25. Dror and Keely note that some 18 million females were killed between 1994- 2004 and that nearly 4.6 million young at foot, not including pouch young, were left to suffer an inhumane death during that period.

The (then) Department of Environment, Water, Heritage and the Arts acknowledged that: ‘In a female biased population (due to commercial use), with favourable seasonal conditions almost all females will have pouch young.’

In 2002 the RSPCA conducted a survey of the ‘Extent of Compliance with the Requirements of the Code of Practice for the Humane Shooting of Kangaroos’ in which it reviewed the appropriateness of the techniques for dispatching pouch young and young at foot, concluding that there is ‘some question over the appropriateness of the techniques (decapitation and head clubbing) recommended for killing pouch young’ as these methods are likely to involve unacceptable amounts of pain and suffering to the pouch young.

The RSPCA identified concern over a perceived lack of enforcement of the Code through inspections and following up of reports to State agencies.

It also stated that the fate of pouch young and young-at-foot that are orphaned as a result of shooting adult female kangaroos ‘are considered intrinsic to any discussion of the effectiveness of the Code of Practice or the humaneness of kangaroo management techniques in general.’

The RSPCA recommended that:

The only solution which would avoid the potential of cruelty to pouch young would be to avoid shooting females altogether. The RSPCA recommends that research be carried out to examine the potential effects of this policy on the gender balance in local populations, and what factors should be taken into consideration when estimating the survival chances of pouch young. In the short term, the Code of Practice and the appropriate licence should contain a condition that no female kangaroos carrying large pouch young should be shot.

This recommendation was not adopted in subsequent Codes nor was it accepted by the decision of the Administrative Appeal Tribunal in the case of *Wildlife Protection Association of Australia Inc v Minister for the Environment Heritage and the Arts.*

Dror and Keely also note that in an overview of commercial harvesting of kangaroos, a government commissioned report states that most shooters found it difficult to kill larger young because of their size and the hazard of shooting them at close range.

Further, it found that the main method of disposal of large pouch young was by releasing them into the bush, which without their mothers, means that they are likely to die of starvation, dehydration, or predation.

Dror and Keely conclude that while the Codes provides guidelines for the disposal of young at foot, they are both impractical and unenforceable. The net outcome is that inhumane practices remain embedded in the kangaroo harvesting industry, and that large pouch young and young at foot are either clubbed to death or left to fend for themselves once their mothers have been shot.

---

Legal bid to stop killing orphaned joeys
By Noel Towell, Legal Affairs Reporter
17 Mar, 2009

A NSW animal welfare group is taking legal action in a bid to stop the ACT Government killing orphaned kangaroos.

Queanbeyan’s Wildcare group has taken the Government to the Civil and Administrative Tribunal over its decision to revoke the group’s licence to rescue orphaned joeys and take the animals to its sanctuary across the border. Documents tendered to the tribunal show the Government changed its mind over the scheme, citing its longstanding opposition to any removal of eastern grey kangaroos from the territory.

The Government was embroiled in a bitter dispute with animal rights activists last year over its cull of about 200 kangaroos at Belconnen’s Naval Signals Station. Government policy is to kill joeys orphaned after their mothers have died and the RSPCA confirmed yesterday wildlife authorities forced it to destroy any joey healthy or injured brought to the society.

Wildcare negotiated licenses in 2006 with the ACT and NSW Governments to allow it to take up to 35 orphaned joeys from the territory to its Queanbeyan sanctuary, raise them and release them into the wild. Chief Minister Jon Stanhope wrote to Wildcare soon after, congratulating it on the agreement and wishing the group success.

Wildcare estimates it rescued about 32 joeys. But the group conceded to authorities the mortality rate among the rescued animals was high, with only a minority of the young roos surviving to make it back to the wild. Conservator of Flora and Fauna Hamish McNulty wrote to Wildcare last December telling the group the export licence was issued on a trial basis and would not be renewed because taking the joeys over the border was contrary to Government policy.

In a document provided to the tribunal, the conservator wrote that the ACT Flora and Fauna Committee was worried that supporting Wildcare’s scheme might send mixed messages ‘where on the one hand the Government is supporting the rescue and rehabilitation joeys, while on the other hand authorising kangaroo culls on ACT land.’

The tribunal heard the first part of the case yesterday, on the eve of the Government’s release of its new draft kangaroo management strategy.

Wildcare’s representative at the tribunal, Professor Steve Garlick, said the group was keen to have the matter resolved quickly. ‘Every day that goes past, another animal is killed.’

Think

1. Is the ‘National Code of Practice for the Humane Shooting of Kangaroos and Wallabies’ a misnomer?

2. In relation to the commercial harvesting of kangaroos, the federal government stated in 2009 that ‘while Australia’s laws concerning wildlife trade are some of the most stringent in the world, they are not intended to obstruct the sustainable activities of legitimate organisations and individuals. Instead, they have been designed to demonstrate that, when managed effectively, wildlife trade contributes to and is entirely compatible with the objectives of wildlife conservation.’

   In what ways, if any, might wildlife trade ‘contribute’ to wildlife conservation?

3. Scientific data suggests that macropods suffer from what is known as exertional or capture myopathy. This susceptibility causes damage to the cardiac muscle following a period of intense physical activity such as chemical or physical restraint, transport or chase. Death can follow such incidents with the onset of symptoms beginning days or weeks after the initial traumatic event. The clinical signs of capture myopathy include increased heart rate, increased respiratory rate and increased body temperature followed by a stiff gait, muscle tremors and myoglobinuria.

   What, if anything, do the Codes say about restraining, pursuing or chasing kangaroos prior to their ‘dispatch’ by shooting?

**Wildcare Queanbeyan Incorporated v Conservator of Flora and Fauna**  

This case provides a good illustration of the tension between animal welfare and environmental concerns, considered earlier in this topic.

In his judgment, Senior Member of the Australian Capital Territory Civil and Administrative Tribunal, Mr Brian Hatch stated:

- The Applicant is a group based in the Queanbeyan region which cares for native animals. Part of what it does is to care for orphaned young native animals. One species so cared for is the Eastern Grey Kangaroo which is the common grey kangaroo. The Applicant takes charge of orphaned Eastern Grey Kangaroo joeys and raises them to the stage where they can be released into rural areas. The rural areas are properties in New South Wales. The evidence given by the Applicant is that the properties onto which the animals are released are approved of by the New South Wales authorities and is land held by members and supporters of the Applicant. I accept the evidence of Mr. Wilmington that the animals are released appropriately.

- The Eastern Grey Kangaroo is an abundant species and the Applicant does not seek this licence on conservation grounds but on animal welfare grounds [emphasis added]. I accept that the Applicant is genuinely seeking these licences for the purposes of animal welfare.

- After hearing the evidence, it is clear that the Eastern Grey Kangaroo is an abundant species. It is abundant to the extent that large numbers of them are slaughtered in New South Wales and much of that is used for the Commercial Meat Industry. In addition, a certain number are simply culled. The ACT also has a culling program. From the numbers which are slaughtered and culled, it appears to me that the demand for Eastern Grey Kangaroo meat and other products does not keep up with the number of Eastern Grey Kangaroos which are actually killed each year in New South Wales and the ACT. Despite the large numbers of these animals and the fact that an agricultural industry and towns and cities have had to coexist with them for over 200 years, the evidence before me suggests that very little is known scientifically about these animals.

- Part of the evidence in this matter was with respect to where any exported joeys would end up in New South Wales. The Respondent would be concerned if the Eastern Grey Kangaroos were released sufficiently close to the ACT that they could return to the ACT.

- The evidence that was presented was clear to the extent that no expert is really clear what the range of Eastern Grey Kangaroo really is. I accept the evidence of the Applicant, however, that any exported Eastern Grey Kangaroo would be released more than 40 kilometres from the ACT and would therefore, be unlikely to ever return to the ACT.

- The evidence was that hand raised Eastern Grey Kangaroos become adults, particularly older adults which lose the natural timidity of Eastern Grey Kangaroos and may become aggressive towards humans.

- I accept that the best available evidence is that hand rearing an abundance species such as the Eastern Grey Kangaroo serves no purpose [emphasis added].

- The evidence is clear that the Eastern Grey Kangaroo is an abundant species and the Applicant’s request for a licence is not based on nature conservation grounds but simply on animal welfare grounds [emphasis added]. Based on the evidence of Dr Fletcher that hand raising Eastern Grey Kangaroos could be counterproductive in any event, I do not accept that hand raising an abundant species like the Eastern Grey Kangaroo is necessarily for the welfare of that animal [emphasis added].

Member Hatch concluded that, ‘I agree with the findings of the conservator and can see no basis upon which the licence, as sought, should be granted.’

---

**References**  

Think

1. What values inform the Member’s reasoning?
2. In the absence of animal protection groups being enabled to hand rear the orphaned joeys of harvested females, what ‘alternative’ fate awaits such orphaned joeys? Does the Member’s reasoning address such welfare concerns?

What did the WPAA argue in this case?
Did the Tribunal agree with the Applicant that the killing of kangaroos and joeys in accordance with the national Code of Practice for the Human Shooting of Kangaroos was inhumane? What reasoning informed the Tribunal’s decision?

New South Wales regulatory framework

Under the National Parks and Wildlife Act 1974 (NSW), kangaroos are ‘protected fauna’ and the New South Wales Department of Environment and Conservation is responsible for the ‘protection and care of fauna’. The ‘harvesting’ and ‘utilisation’ of kangaroos in New South Wales is regulated under the Act and the National Parks and Wildlife Regulation 2009 through the issue of various licences and tags.

In 2012 the NSW Department of Environment and Conservation (NSW) developed the NSW Commercial Kangaroo Harvest Management Plan 2012-2016 with the stated aim of ‘maintaining viable populations of these kangaroos throughout their ranges, in accordance with the principles of ecologically sustainable development.’

The Management Plan relates to the commercial harvest of the following macropod species within New South Wales:

- red kangaroo (Macropus rufus);
- eastern grey kangaroo (Macropus giganteus);
- western grey kangaroo (Macropus fuliginosus); and
- wallaroo (Macropus robustus).

The primary goal, as stated in the plan is to:

[E]nsure that the commercial harvest of kangaroos is ecologically sustainable. This will be achieved through the application of the best available scientific knowledge, best practice management and monitoring of outcomes to ensure the viability of kangaroo populations is not compromised by any action undertaken in accordance with this plan.

The aims of the New South Wales KMP management plan are to:

- Manage the utilisation of kangaroo species in accordance with the provisions of the NPW Act and Regulation, New South Wales Government policies, the National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes and this management plan.
- Promote improved animal welfare outcomes and ensure that the commercial harvest of kangaroos under this plan is carried out in accordance with the National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes.
- Promote greater understanding of the program through informed public and private sector participation in management of the commercial utilisation of kangaroos.
- Monitor the kangaroo industry to ensure compliance with this management plan, licence conditions, the requirements of the NPW Act and Regulation and the National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes.
- Monitor kangaroo populations and set commercial quotas to ensure kangaroos are utilised in accordance with the goal of the management plan.

Undertake regular reporting and a final program review in consultation with affected community and stakeholders to ensure that the management is fully informed and to ensure outcomes remain consistent with the goal of the management plan.

Promote adaptive management experiments and studies using historical data from kangaroo industry returns and population data to improve our understanding of kangaroos and their interaction with environmental, social and economic systems. Facilitate research into other aspects of kangaroo ecology and/or harvest management as required to fill knowledge gaps.

Key provisions:

The Plan provides for three types of licences for shooting kangaroos in NSW:

- Occupier’s licence: Issued under s 121 of the National Parks and Wildlife Act 1974 authorising the holder to kill, or to permit a person holding a trapper’s licence issued under s 123, to kill, a specified number of kangaroos on the occupier’s lands. The licence also authorises the sale of kangaroos taken under the authority of the licence only to licensed fauna dealers.

- Trapper’s licence: Issued under s 123 of the National Parks and Wildlife Act 1974 authorising the holder to kill kangaroos for the purposes of sale.

- Fauna Dealer’s licence: Issued under s 124 of the National Parks and Wildlife Act 1974 authorising the holder to buy or sell kangaroos as a fauna dealer.

The Plan also sets out the requirements in relation to ‘humane killing’ and the minimum specifications for firearms and ammunition used in harvesting operations. It provides that:

When shooting a kangaroo the primary objective must be to achieve instantaneous loss of consciousness and rapid death without regaining consciousness. For the purposes of this Code, this is regarded as a sudden and painless death. Commonsense is required to assess the prevailing conditions. Where the conditions are such as to raise doubts about achieving a sudden and painless kill, shooting must not be attempted.

The Plan recognises, however, that:

No matter how carefully the shooter aims, some kangaroos will not be killed outright. Wounded kangaroos must be dispatched as quickly and humanely as possible. When killing a wounded animal a brain shot may be impractical. For example, the accurate placement of a shot in the brain may require capture and restraint of the animal; this would increase suffering and be inconsistent with the objective of sudden and painless death. In such circumstances a heart shot may be the most humane means of dispatch. In some special circumstances, where a wounded kangaroo is encountered, it may not be practicable to shoot the animal, as at a practical range the acceptable points of aim may be obscured, and at a close range the use of a high powered rifle may be unsafe. In these special circumstances a heavy blow to the skull to destroy the brain may be the most appropriate and humane means of dispatch.

Prior to its release, the NSW government invited submissions on its Draft Commercial Kangaroo Harvest Management Plan 2012-2016. The Society for Kangaroos submitted that:

The NSW Draft Commercial Kangaroo Harvest Management Plan 2012-2016 has failed to address animal cruelty within the kangaroo industry. The way in which joeys are killed and orphaned by the industry has been identified by the RSPCA and the government’s own report as a significant animal welfare issue requiring urgent attention. However the government has ignored this in it’s new plan, instead opting to promote animal cruelty.

Despite RSPCA recommendations, there has been no change in the proportion of females shot by the industry since this report was released, and in 2010 the NSW government authorised the slaughter of well over 100,000 female kangaroos in NSW by the kangaroo industry. This would have resulted in the cruel death of tens of thousands of at-foot and pouch joeys in NSW alone.

Despite this requirement, the Australian public, including it’s indigenous people, have been kept in the dark about the commercial slaughter of kangaroos in Australia, and have never been given the opportunity to have input into it’s approval, and that includes the new kangaroo management plan.”
Legal Challenges to State and Territory Management Plans

The Australian Society of Kangaroos v the ACT Conservator of Flora and Fauna, ACT Civil and Administrative Tribunal, 10 July 2013 (unreported). 77

In June 2013 the ACT Conservator of Flora and Fauna announced plans to kill 1,455 eastern grey kangaroos in seven nominated reserves. The ACT’s planned slaughter was delayed when the Victorian-based Australian Society for Kangaroos (ASK) won a last minute stay to commence legal proceedings in the ACT Civil and Administrative Tribunal.

ASK claimed that figures used by the government to justify population management were grossly exaggerated and therefore challenged the decision by the Conservator to issue licences to cull the 1,455 kangaroos.

On 10 July, the Tribunal handed down its decision to allow 1,244 kangaroos to be killed by the end of July. As the Tribunal is yet to issue a written judgment, it is unclear exactly why the Tribunal reduced the slaughter by 211 animals.

During the delivery of the judgement, it was said that the scientific reasoning of the government was preferred to that of Mr Mjadwesch and the decision was based on the consideration that kangaroos can rapidly repopulate following a mass kill. The reduction in numbers, which seems inconsistent with the Tribunal’s reasoning, has been speculated to be an act to simply ‘throw the applicants a bone’.

In a last minute legal bid, ASK filed for interim orders with the aim to temporarily suspend the shooting. On Friday, 12 July the application was dismissed.

In the following cases the Applicants, representing various animal protection organisations, challenged kangaroo management plans under the Wildlife Protection (Regulation of Exports and Imports) Act 1982, and subsequently the Environment Protection and Biodiversity Protection Act 1999. 78

Re Fund of Animals Ltd and Minister of Arts, Heritage and Environment; Queensland Grain Growers Association; United Graziers’ Association of Queensland; Cattlemen’s Union of Australia; Graziers and Professional Kangaroo Shooters Association [1986] AATA 151 79

This was an application under paragraph 80(1)(a) of the Wildlife Protection (Regulation of Exports and Imports) Act 1982 for the review of a decision by the Minister of State for Arts, Heritage and Environment declaring, pursuant to sub-s 10(1) of that Act, a management program entitled ‘Kangaroo Conservation and Management in Queensland’ to be an approved management program for the purposes of that Act. (Note that Act has since been repealed and the provisions concerning the approval of management plans are now contained in the Environment Protection and Biodiversity Protection Act 1999).

In the course of its reasoning the Administrative Appeals Tribunal stated:

• While the parties joined were, because of the damage caused by kangaroos to crops, pastures and fencing, concerned that the commercial culling of kangaroos in Queensland should continue on a substantial scale, it should be made clear at the outset that the applicant did not at any stage suggest that commercial culling should, in principle, be discontinued. The emphasis of the applicant’s submission was on the needs which it perceived for more information and better monitoring.

• There are three major components of the relationship between people and kangaroos in Australia. First, kangaroos are a major pest for the farming community. Secondly, a substantial kangaroo harvesting industry produces meat and skins for both domestic and export markets. Thirdly, not only in Australia, but in other parts of the world, kangaroos are seen as a significant, and in symbolic terms perhaps the most significant, native Australian animal. As to this, it can be assumed that no-one actually wishes to see any of the species concerned become extinct; and there

---

77 See Voiceless, ‘Tribunal grants licence to cull’ <https://www.voiceless.org.au/content/animal-law-spotlight-tribunal-grants-licence-cull> Voiceless has called the Tribunal’s decision ‘disappointing’ and states that the deemed scientific and economic rationale for the mass slaughter of kangaroos is not sufficiently substantiated by evidence: ‘The message the Tribunal has sent to the community is concerning: that the mass slaughter of sentient life forms is sometimes appropriate. This message is entirely at odds with the animal protection movement.’

78 On 10 July 2013 the ACT Civil and Administrative Tribunal approved licences for kangaroos to be culled at seven sites in the ACT. But the tribunal ruled that only 1244 kangaroos could be shot – 211 fewer than originally approved by the Conservator of Flora and Fauna. See: <http://www.canberratimes.com.au/act-news/activists-vow-to-disrupt-shooting-as-roo-cull-approved-by-tribunal-20130710-2ppeg.html>

are certainly people who abhor the killing of any kangaroos at all. Most Australians would probably have feelings lying somewhere between these two extremes.

- In the present case a number of significant discrepancies between the management program as approved and published, and the management program actually being carried out in Queensland, manifested themselves towards and after the conclusion of the hearing. It became apparent to the Tribunal that (i) the number of tags issued to shooters in Queensland in 1985 was substantially higher than the quota which was approved and (ii) the program is being controlled by the provision of quotas for dealers, not, as implied in the management program, by the issue to shooters of tags to the total of the approved quota.

- [The discrepancies … are such that we have been forced to the conclusion that the management program which was approved by the Minister on 16 October 1985 and gazetted on 30 October 1985 was not the management program which was being carried out in Queensland at that date. Nor was it a program which was ‘proposed to be carried out’ … Thus it fell within none of the three heads of management program which s 10 empowers the Minister to approve. That being so, the Minister had no power to approve it, and his purported approval was ineffective. The decision under review will be set aside because it was made beyond power.

- We trust that our decision will have the effect that in future both Commonwealth and State authorities will take more care to ensure that the Wildlife Act is implemented in accordance with its provisions, and in a manner which is therefore likely to achieve its objects … ‘to strengthen arrangements for the protection of Australia’s animals and plants and world wildlife generally, by improving the effectiveness of our import and export controls.’

- It is of little use for Australia to point proudly to legislation on the statute book intended to have that effect, if the controls imposed by the legislation are not implemented according to their tenor, with the result that the arrangements for protection of wildlife are in fact not strengthened at all. If the making by the applicant of the present application for review results in the effective implementation of the Wildlife Act in the future, then the applicant may well feel satisfied with the achievement of bringing to public notice the defects in the administration of the Wildlife Act to date, at least in the context of Queensland kangaroos.

Wildlife Protection Association of Australia Inc & Ors and Minister for the Environment and Heritage & Anor [2003] AATA 236

This was an application for review of a decision of the Minister for the Environment and Heritage pursuant to s 10(1) of the Wildlife Protection (Regulation of Exports and Imports) Act 1982 to declare the New South Wales Kangaroo Management Program 2002–2006 to be an approved Management Program for the purposes of that Act. (Note that Act has since been repealed and the provisions concerning the approval of management plans are now contained in the Environment Protection and Biodiversity Protection Act 1999).

The questions raised by the Applicants and determined by the Tribunal were:

- whether there is sufficient information available to the Designated Authority, concerning the biology and ecology of kangaroos such as to enable the Designated Authority to evaluate the management plan;
- whether the Designated Authority has held discussions with all relevant bodies (in this case, the New South Wales National Parks and Wildlife Service);
- whether the Management Program contains measures to ensure that the taking of the kangaroos in the wild under the Management Program will be carried out so as to maintain kangaroos in a manner that is not likely to cause irreversible changes, or have long-term deleterious effects on the kangaroos or their habitat;
- whether the Management Program provides for adequate monitoring and assessment of the effects of taking kangaroos;
- whether the Management Program provides for a response to changes in kangaroo populations and habitats, and to changes in the knowledge and understanding of the biology and ecology of kangaroos; and
- whether the Management Program is consistent with the object of the Act, namely ‘to comply with the obligations of Australia under the Convention (Convention on International Trade in endangered
species of wild fauna and flora (Cites)) and otherwise to further the protection and conservation of the wild fauna and flora of Australia and of other countries’.

The Tribunal found against the Applicant on all these issues. In the course of its extremely ‘legalistic’ reasoning, the Tribunal stated:

- It is true that the Management Program proposes the same plan for four different species. The Applicants say that this feature is detrimental to it. Each species they contend should be the subject of individual consideration. There is no statutory support for this position. As has been earlier indicated the declaration of a management program is dependent upon the decision maker being satisfied as to compliance with specified prerequisites and only those prerequisites. We do not consider that a relevant issue can arise in relation to a consideration not so identified. There is not a statutory or regulatory requirement to differentiate between species. If anything this aspect would be one that could be raised by way of comments on a draft proposal. The Management Program is in respect of four named species only. It does not purport to be a management program for kangaroos as a whole in New South Wales. The declaration by the Minister and the Management Program itself specifically limit its application to ‘The Utilisation of Four Kangaroo Species in NSW’. The WP Act places no requirement on the Minister to make a declaration in respect of kangaroos at large or indeed in relation to any particular species.

- The Applicants argue that there is no provision in the Management Program for the commercial and aesthetic needs for kangaroos such as eco-tourism. Neither the WP Act nor the Regulations are concerned with a comparison between economic uses of and for kangaroos. The question whether more money might be derived from eco-tourism if the Management Program was curtailed is irrelevant. Equally irrelevant is the true economic value of the activities carried out under the Management Program. The Tribunal observes that while alternative uses of kangaroos might be a matter worthy of consideration in general terms it is not one with which the Tribunal can be concerned, the present inquiry as aforesaid is limited by the WP Act and the Regulations.

- The Applicants maintain that the Code of Practice for the Humane Shooting of Kangaroos is deficient as it does not cover the treatment of ex-pouch young, leading to unnecessary cruelty to these animals. In addition it was said that there is minimal monitoring of the Code. Both of these aspects may be the subject of legitimate animal welfare concern but the only question posed by s 10B(IB) of the WP Act, is whether there is effective legislation relating to the protection, conservation or management of kangaroos – and that criterion does not relate to or bring into question humane or otherwise treatment of particular animals.

- The third question, posed by s 10(IB)(c)-(e) of the WP Act, is whether there is ‘effective’ legislation in force in New South Wales relating to the protection, conservation or management of the animals that are the subject of the Management Program. Having in mind the above considerations the Tribunal is satisfied that there is effective legislation in force in New South Wales relating to the protection, conservation or management of the four species of kangaroos that are the subject of the Management Program.

- The fourth question, posed by s 10(2) of the WP Act and Regulation 5(1)(a), is whether there is sufficient information concerning the biology and ecology of each species intended to be subject to the Management Program to evaluate a management program for that species. The Tribunal is satisfied that it is unlikely that the Management Program will impact on the genetic structure of the four species. The evidence leads the Tribunal to the view that there has been, and continues to be considerable research into kangaroo populations the same revealing, very broadly speaking, that kangaroos are remarkably resilient, even in times of drought and harvesting. There is sufficient information concerning the biology and ecology of each of the 4 species to allow the Tribunal to evaluate the Management Program.

- The fifth question posed by s 10(2) of the WP Act and Regulation 5(1)(c), is whether the Designated Authority has held discussions with all ‘relevant bodies’. The Tribunal finds that the Designated Authority held discussions with all relevant bodies, in accordance with s 10(2) of the WP Act and Regulation 5(1)(c).

- The sixth question, posed by s 10(2) of the WP Act and Regulation 5(1)(d), is whether the Management Program contains measures to ensure that the taking of kangaroos in the wild, under the Management Program will be carried out so as to maintain the species or sub-species in a manner that is not likely to cause irreversible changes to, or have long-term deleterious effects on, the relevant species or sub-species, or its habitat.
• The Applicants submitted that ecological sustainability and commercial viability are ‘strange bedfellows’. The Respondents maintains that the two concepts are not incompatible but have a ‘symbiotic relationship’. If the kangaroo population was not ecologically sustainable, the use of kangaroos as a resource would not be commercially viable. A commercial use of the resource that ensures the resource’s ecological sustainability will be viable beyond the short-term. As mentioned at the outset many of the concerns which the Applicants have in relation to the Management Program are simply not matters which the Tribunal can take into account. The Tribunal is bound to consider only those matters referred to in the legislation and the Regulations. While the Tribunal regards the Applicants’ concern for the environment to be both legitimate and sincere those considerations in the context of this application are outside of the relevant statutory provisions.

Wildlife Protection Association of Australia Inc and Minister for Environment and Heritage and Ors [2004] AATA 1383

In this case the Applicants challenged a decision of the Minister declaring the following Plans to be approved Wildlife Trade Management Plans for the purposes of s 303FO(2) of the Environment Protection and Biodiversity Conservation Act 1999:

• The Macropod Conservation and Management Plan (SA);
• The Wildlife Trade Management Plan for Export – Commercially Harvested Macropods 2003–2007 (Qld);
• The Red Kangaroo Management Plan 2003–2007 (WA);

The Tribunal noted that the Applicants submissions were argued on a ‘generic’ rather than a Plan specific basis ‘essentially on the basis of animal welfare’. Counsel for the Applicant referred the Tribunal to s 303BA(1) of the EPBC Act. One of the objects of the EPBC Act, stated at s 303BA(1)(e) is ‘to promote the humane treatment of wildlife’. It was also argued by the Applicants that the Code of Practice for the Humane Shooting of Kangaroos is not being complied with because:

• The licensing of kangaroo shooters does not adequately comply with the Code.
• Monitoring of the Code is inadequate to ensure compliance. Even if this were not the case, the Code is inadequate for its stated purpose, particularly in respect of young kangaroos.
• As young kangaroos are not part of the quota and not subject to the Plans, any killing of young kangaroos is contrary to the terms of a licence which permits the taking of kangaroos for sale. The legislation of each State makes it an offence to kill kangaroos generally as kangaroos are a protected species.

In the course of its reasoning the Tribunal stated:

• Submission that the Code is inadequate, especially in respect of the killing and the locating and killing of young kangaroos:

After careful consideration of the evidence, the Tribunal is satisfied that the Code adequately and humanly addresses the welfare issues in relation to kangaroos being killed for sale, and that it dictates the manner in which in-pouch joeys are to be dispatched in a manner, which, in the circumstances, is as humane as can be expected. In coming to this view the Tribunal does not doubt that some of the Applicant’s witnesses may have observed the implementation of the Code’s directives in a less than satisfactory manner. That does not mean, in the Tribunal’s view, that the Code and the conduct it prescribes is inadequate.

• Submission that killing of young kangaroos is contrary to the terms of a licence:

The Tribunal does not accept this contention. There is licensing in each State which permits some kangaroos to be killed, the killing of which would otherwise be prohibited. Each State makes it a condition of the issuing of its licences that the Code is complied with. The Code requires that joeys be dispatched in a certain way. In making the issue of licences subject to the Code, the killing of those joeys becomes part of the licensed arrangement.

• Compliance with the Code:

The evidence before the Tribunal was to the effect that all States have adopted, or are moving to adopt, a rigorous licensing process which requires shooting accuracy and a knowledge of the Code.
Failure to comply with the Code should result in prosecutions and loss of licence. On the basis of the evidence tendered before it the Tribunal is of the view that the licensing provisions in each Plan enhance the likelihood of adherence to the welfare issues prescribed by the Code.

- **Assessment of environmental impact:**

  On the basis of the evidence before it … the Tribunal is satisfied in respect of each of the matters specified in s 303FO(3) of the *EPBC Act*. Consideration of the criteria referred to in s 303FO(4) supports approval of each management Plan. On the evidence before it, the Tribunal is satisfied, in relation to each of the Plans, that the prerequisites to approval specified in s 303FO(3) of the EPBC Act have been complied with.

Although not factors necessarily to be considered in arriving at our conclusion on the evidence to affirm the decision under review, we are mindful, as no doubt is the Respondent, of the general animal welfare concerns expressed by and on behalf of the Applicant. These concerns arise from the emotionally charged environment where an animal which is not only a national symbol, present on our Coat of Arms, but is also associated with a recognised need to preserve our indigenous marsupials for our own benefit and that of future generations. We are satisfied that the management plans seek to achieve these ends consistent with the commercial viability of the animal processing industry.

**Wildlife Protection Association of Australia Inc. and Minister for the Environment, Heritage and the Arts and Director-General of the Department of Environment and Climate Change (NSW) [2008] AATA 71782**

In this case the Applicant sought a review of the Minister’s decision pursuant to s 303FO(2) of the *Environment Protection and Biodiversity Conservation Act 1999* that the ‘New South Wales Commercial Kangaroo Harvest Management Plan 2007–2011’ was an *approved wildlife trade management plan* as that expression is used in Part 13A of the *EPBC Act*.

The Plan deals with four species of kangaroo – the red kangaroo (*Macropus rufus*), the western grey kangaroo (*Macropus fuliginosus*), the eastern grey kangaroo (*Macropus giganteus*) and the wallaroo (*Macropus robustus erubescens* and *Macropus robustus robustus*).

The Applicant submitted that:

- the Plan fails to satisfy the requirements of ecological sustainability;
- the Plan fails to satisfy the requirements for the conservation of biodiversity;
- the Plan fails to satisfy the requirements of humane treatment of kangaroos;
- the Plan fails to satisfy that kangaroos will be killed in a way that is generally accepted as minimising pain and suffering;
- the Plan fails to satisfy the requirements relating to mitigation, monitoring and response to environmental impact;
- the Plan fails to satisfy the requirement for assessment of environmental impacts;
- the Plan is not consistent with the precautionary principle.

The Applicant was unsuccessful in relation to each of its submissions. In the course of its reasoning, the Tribunal stated:

- The principal provisions of the *NPW Act* and its *Regulations* … sets up a comprehensive regime for the protection, conservation and management of wildlife including the kangaroos subject of the Plan. The Association did not suggest that the matters in s 303FO(4) were not made out and we are satisfied that they are, that is, we are satisfied that there is effective legislation for the protection, conservation and management of kangaroos that applies throughout New South Wales.

- It may be accepted that there will, nonetheless, be instances where instantaneous death by brain shot is not achieved. It may, as well, be accepted that in these instances there is a period of suffering by the wounded animal and that in an even smaller number of cases animals will be wounded but mobile and unable to be dispatched by the trapper and may suffer a lingering death. But those instances, whilst unfortunate, do not detract from our conclusion that the Plan does all that can be done to promote the humane treatment of wildlife. Any management plan that involves the commercial killing of free-ranging animals will involve a risk that perfection will not always 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.

- The Code was considered by the Tribunal, differently constituted, in *Re Wildlife Protection Association of Australian Inc and Minister for the Environment and Heritage*. The Minister relied upon the conclusions of the Tribunal in that case as demonstrating ‘general acceptance’ of the Plan as minimizing pain and suffering. The Association objected to the tender of the Reasons for Decision of the Tribunal and we reserved our decision on its admissibility. Having considered the matter we are of the view that the earlier Reasons, given after a contested hearing, are admissible to demonstrate a level of general acceptance of the Code as minimising pain and suffering. We overrule the Association’s objection. On that basis we have regard to the earlier conclusion of the Tribunal that the Code: ‘adequately and humanely addresses the welfare issues in relation to kangaroos being killed for sale, and that it dictates the manner in which in-pouch joeys are to be dispatched in a manner, which, in the circumstances, is as humane as can be expected.’ These matters satisfy us that under the Plan kangaroos will be killed in a way that is generally accepted as minimising pain and suffering.

Think

With reference to the reasoning of the Tribunal in each of the cases considered above, articulate why you think that the Applicants’ arguments failed in each of the applications for review.

**Government sanctioned cruelty?**

The following claims in relation to commercial kangaroo harvesting have been made by the Australian Wildlife Protection Council:

**Inhumane practices:**

- The Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes is not linked to the *Prevention of Cruelty to Animals Act* and is legally unenforceable.
- Contrary to public perception, the RSPCA does NOT monitor or police cruelty to commercially killed kangaroos.
- The kangaroo killing industry is a brutally cruel industry which is impossible to police effectively
- The nature and methods of slaughter are ‘barbaric and inhumane’. Each night thousands of animals are butchered, many are maimed, the young in pouch are cruelly dispatched and the young at foot are left to fend for themselves.

**Population and welfare issues**

- The Code and Management Plans fails to acknowledge different and specific needs of the four commercially killed species and ‘manage’ them as one.
- ‘Guesstimates’ are employed to estimate kangaroo populations.
- Commercial harvesting manipulates kangaroo populations for artificial results to benefit the kangaroo industry.
- The Code and Management Plans disregard the biological and social needs of kangaroos.
- Populations of kangaroos are being reduced to alarming levels in many regions and the species is subjected to ever increasing kill quotas.
- Commercial killing has put insupportable pressure on Red kangaroos which now threatens the species. Today they are being killed at a rate three times higher than they are reproducing.

Economic and environmental issues

- Kangaroo shooters and the government have ignored studies which suggest that kangaroos do not compete with cattle and sheep.
- Kangaroos, now declared a ‘resource’, are slaughtered to accommodate destructive agricultural practices.
- Kangaroos do not degrade and destroy the environment. The soft padded feet and long tail of the kangaroo are integral to the ecological health of the land as regenerators of native grasses. It is destructive agricultural practices on marginal land that are proving to be unsustainable.
- The ecological and economic value of wildlife nature-based tourism is being ignored.

For further resources relating to kangaroo protection and welfare see the following publications from THINNK: The Think Tank for Kangaroos:

- ‘The ends and means of the commercial kangaroo industry: an ecological, legal and comparative analysis’
- ‘Shooting our Wildlife: An analysis of the law and policy governing the killing of kangaroos’
- ‘Kangaroo Court. Enforcement of the law governing commercial kangaroo killing’

Activity 7.2

The Natural Resources Management Ministerial Council is calling for submissions on the Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes. You are keen to submit some recommendations. Choose 5 issues in the Code and write your recommendations together with reasons for your recommendations.

Traditional hunting

Section 211 of the Native Title Act 1993 (Cth) exempts native title holders from State licensing schemes relating to the hunting of native fauna if it can be demonstrated that their native title rights have not been extinguished.

Issues of traditional indigenous rights and animal protection are complex and contested and these are issues which will not be pursued here.

A recent controversy concerns the hunting of dugongs. Thiriet and Smith observe that notwithstanding traditional hunting rights:

- Both the Commonwealth and the States have the power to regulate the killing of dugongs to ensure its sustainability. In addition, the States can regulate hunting to ensure it is conducted humanely. Yet these powers have not been exercised in a meaningful way.
- Pre-European contact, Indigenous Australians would only have been able to hunt small numbers of dugongs – because it was arduous to do so in dugout canoes. Nowadays, with boats equipped with outboard motors, hunters go faster and further out to sea and are capable of killing the animals in larger numbers.

If this is an area that interests you, you may like to read the following articles relating to indigenous hunting of dugong in the Northern Territory, Torres Strait and Queensland:

- Dominique Thiriet and Rebecca Smith, ‘In the name of culture: dugong hunting is simply cruel’, 8 April 2013
- ‘Irwin wants end to hunting of dugongs, turtles by Aborigines’, 3 March 2013

---

84 <http://thinkkangaroos.uts.edu.au/>
85 Dominique Thiriet and Rebecca Smith, ‘In the name of culture: dugong hunting is simply cruel’, 8 April 2013 <http://theconversation.com/in-the-name-of-culture-dugong-hunting-is-simply-cruel-12463>
86 <http://theconversation.com/in-the-name-of-culture-dugong-hunting-is-simply-cruel-12463>
Wildlife research

In Topic 6 we considered the use of animals in experimentation and research. While many of the issues there were considered in relation to animals bred for use in laboratory settings, it is also the case that wild animals may be the subject of research, and that the processes of capture, handling, sedation, measurement, transport, identification and specimen taking may be harmful to wild animals and subject them to considerable levels of stress.

Wildlife studies can involve a diverse range of activities, including observation of animals’ behaviours in their native habitats or the laboratory; capture and release in the field; sampling of blood, body fluids and tissues; recording of physiological or behavioural responses to changing environmental or social conditions; and breeding in captive environments. In both the field and the laboratory, animals may experience a range of potential physiological and psychological stressors. Studies may also involve the manipulation of habitat and social groupings and the alteration of predator–prey relationships, reducing an animal’s ability to control and make choices about its situation. Further, investigations into methods to control feral animals may involve the use of baits or other means to kill animals.

Field studies may involve observing animals, but will often include capture with a trap or net, measurements of such things as bodyweight and size, and the collection of specimens such as hair, saliva, blood or stomach contents. Before being released, the animals may be identified by a tag or marker or have a tracking device fitted. These procedures may necessitate the sedation or anaesthetisation of the animals. In these types of studies, animals are not usually transported from where they are captured, but there may be circumstances in which animals are taken to a field laboratory and held for some days before release. Some field studies may involve killing animals to obtain biological specimens. Laboratory studies may involve animals that have been captured in the wild, transported to the laboratory and held for the period of the study, or animals from a captive breeding program.

Wildlife and field techniques: Research Code

Sections 3.3.33 – 3.3.44 of the *Australian code of practice for the care and use of animals for scientific purposes* contains provisions relating to field techniques for wildlife used in research. Those sections provide:

**General considerations**

The wellbeing of wildlife must be supported and safeguarded by:

(i) using methods, techniques and equipment that:

(a) are appropriate for the species and the situation, and the purpose and aims of the project or activity;

(b) minimise the risk of transmission of disease, and direct and indirect disturbance to the habitat;

(ii) avoiding or minimising harm, including pain and distress:

(a) to target and non-target species;

(b) to dependent young;

(c) from indirect effects arising from impact on the habitat and environment.

**Capture and handling**

To minimise the risk of injury or stress-induced disease, procedures for the capture and handling of wildlife must include:

(i) the involvement of a sufficient number of competent people to restrain animals in a quiet environment and prevent injury to animals and handlers;


(ii) chemical restraint (e.g. sedatives) where appropriate, if the period of handling is likely to cause harm, including pain and distress, to animals;

(iii) restraint and handling of animals for the minimum time needed to achieve the purpose and aims of the project or activity;

(iv) making provisions for captured animals that are ill or injured, including treatment of pain and distress.

**Use of traps**

If trapping is used to capture wildlife, the wellbeing of both target and non-target animals must be considered by:

(i) selecting a trap that is suited to the species and the circumstances, and designed to ensure protection of trapped animals from injury, predators, parasites and environmental extremes;

(ii) monitoring traps to minimise the time animals will spend in traps, and to avoid or minimise adverse impacts on trapped animals;

(iii) minimising the number of days of continuous trapping within an area, and removing or deactivating traps that are not in use or are no longer required;

(iv) minimising the potential adverse impact caused by disrupting social structure, and adverse impacts on dependent young (e.g. by avoiding trapping in the breeding season);

(v) minimising the numbers of non-target species that are trapped, and implementing a management plan for captured non-target species to ensure their wellbeing or ensure that they are humanely killed.

Wet pitfall traps must not be used to capture vertebrate animals. If wet pitfall traps are used to capture invertebrates, they must be managed and monitored to minimise the inadvertent capture of vertebrates, including by locating the trap where vertebrate entry is unlikely and using the smallest possible trap diameter.

**Transport, holding and release**

If animals are to be held in captivity, the duration must be minimised and consistent with the purpose and aims of the project or activity. If animals are to be released, all possible steps must be taken to avoid their becoming habituated to human activity.

Procedures for any release of wildlife must ensure that:

(i) release occurs at the site of capture, unless otherwise approved by the AEC;

(ii) the timing of release coincides with the period of usual activity for the species, unless safety of the animals is assured by other means, such as release into appropriate cover;

(iii) animals are protected from injury and predation at the time of their release;

(iv) animals that have been sedated or anaesthetised have recovered to full consciousness before their release. During their recovery, animals should be held in an appropriate area where they can maintain normal body temperature and are protected from injury and predation.

**Tracking the movement of wildlife**

When devices are used to track the movement of wildlife, the weight, design and positioning of attached devices must minimise interference with the normal survival requirements of the animal.

**Interference activities**

Interference activities such as call playback, spotlighting, tiling, rock turning, investigating a nest box and disturbing nest sites must be conducted in a manner that minimises any risk to the wellbeing of the wildlife.

**Voucher specimens**

Alternatives to collecting animals as voucher specimens (e.g. tissue samples, digital photography) must be considered, where appropriate. When animals are collected as voucher specimens:

(i) the number taken must be the minimum required for identification or to establish distribution;

(ii) the specimens must be appropriately documented and lodged with an institution that manages a publicly accessible reference collection.
Studies involving vertebrate pest animals

The principles of the Code must be applied equally to animals that are considered to be pests. Captive feral and pest species must be killed humanely unless the aims of a project require their release, or the study involves death as an endpoint.

Nature documentaries

In addition to the use of wild animals for scientific research, there is a burgeoning industry in 'nature documentaries'. It is perhaps ironic that a seemingly benign form of popular entertainment, one intended to appeal to 'nature lovers' may be the cause of distress to the animals being approached, observed, and recorded for entertainment, and indeed, financial purposes.

Dr Brett Mills from the University of East Anglia argues that while wildlife programmes can play a vital role in engaging citizens in environmental debates, in order to 'do good' they must inevitably deny many species the right to privacy.91 His study analyses the ‘making of’ documentaries that accompanied the BBC wildlife series Nature’s Great Events (2009). Exploring the debates on ethics, animal welfare and rights and human rights, Dr Mills suggests that animals have a right to privacy – one which has become a challenge for production teams who use new forms of technology to overcome species’ desire not to be seen.

Dr Mills observes:

The aim of the research is to encourage debate, especially within the contemporary environmental context where it is now commonplace for us to question the impact of human movement and behaviour around the globe. In addition, though, perhaps there is an argument for some species, in some circumstances, not to be filmed. At the moment it seems that such arguments are never put forward.

This is an important debate for two reasons. Firstly, wildlife documentaries are usually seen as important pieces of public service broadcasting, and it’s therefore worth us thinking about the ethical contexts within which such productions exist. Secondly, such documentaries are the key way in which many people ‘encounter’ a range of species from all over the globe, and so they therefore contribute to how we think about other species and human/animal interactions. By exploring what wildlife documentaries do, and how they do it, I hope to contribute to environmental debates at a time when the global effects of human behaviour are rightly under scrutiny.

At the heart of the documentary project is the necessity for animals to be seen. Dr Mills suggests that this raises a series of ethical concerns, but these seem to be sidelined in the moral debates surrounding wildlife documentaries. He argues that there is an assumption that animals have no right to privacy, and that production crews have no need to determine whether animals consent to being filmed:

Unlike human activities, a distinction of the public and the private is not made in the animal world. There are many activities which animals engage in which are common to wildlife documentary stories but which are rendered extremely private in the human realm; mating, giving birth, and dying are recurring characteristics in nature documentaries, but the human version of these activities remains largely absent from broadcasting.

Dr Mills states that while it might seem odd to claim that animals might have a right to privacy since privacy, as it is commonly understood, is a culturally human concept. The key idea is to think about animals in terms of the public/private distinction. While we can never really know if animals are giving consent, they often engage in forms of behaviour which suggest they’d rather not encounter humans, and perhaps this equates with a desire for privacy:

The question constantly posed by wildlife documentaries is how animals should be filmed: they never ask whether animals should be filmed at all.

Dr Mills suggests that animal activities which might equate with human notions of the ‘private’ are treated in a way which suggests the public/private distinction does not hold. For example, animals in burrows and nests have constructed a living space which equates with the human concept of the home, and commonly do this in locations which are, by their very nature hidden, often for practical purposes:

---

Human notions of privacy which rest on ideas of location or activity are ignored in terms of animals. It doesn’t matter what an animal does, or where it does it, it will be deemed fair game for the documentary.

Dr Mills observes that ethical issues relating to privacy and consent are assumed be only applicable to humans. The ethical standards applying to wildlife programmes are, he says, predominately predicated on a ‘contract with the viewer’ which is prioritised over the rights of animals. In doing so, ‘an assumption is made about the differences between humans and animals, which have been at the heart of debates over animal rights and the ethical treatment of animals for millennia’.

Think

Dr Mills argues that the environmental and educational aspects of wildlife documentaries ‘trump’ ethical concerns about animals’ privacy and that: ‘It is an impressive piece of ethical manipulation, whereby privacy, so enshrined within the concepts of rights for humans, becomes a ‘realm’ which documentary makers can enter, justifying their actions as ones for the benefit of the very species whose rights are being moralised away.’

What do you think of Dr Mills’ arguments? Should wild animals have a ‘right’ to privacy? Do the educational and entertainment value of nature documentaries render animal interests secondary to those of humans?

Topic summary

This topic has considered a wide range of issues relating to animals in the wild. We have learned that Australian law regards wild animals as ‘unowned’ until such time as they are under the effective control of, or are killed, by a human. Beginning with the premise that, in most cases, wild animals are afforded less welfare protection than other types of animals, the topic has investigated and critically reflected upon NSW, Commonwealth and international legal regulatory frameworks relating to wild animals. The topic has also explored and evaluated some of the tensions between wild animal protection and environmental protection and has identified a need for environmental and animal advocates to work cooperatively to develop a framework which will serve the interests both of environmental and animal protection.

This topic has also assessed the legal frameworks governing the management of introduced animals with particular reference to animal protection concerns and has critically evaluated Codes of Practice and Plans of Management in relation to the commercial harvesting of kangaroos in Australia with particular reference to the welfare of joeys and juveniles.

Finally this topic has briefly considered some of the issues relating to traditional hunting and wildlife research.
Objectives

At the completion of this topic students will be able to:

- identify strategies, both from within and external to law, which may be employed by animal advocates to protect and promote the interests of animals;
- explain the principles relating to the law of standing in the field of animal advocacy and identify the limitations of these principles;
- describe ways in which animal advocates may contribute to law reform to protect and promote the interests of animals.

Textbook

Chapter 15 – Sue Kedgley, ‘Why It Is Difficult to Make Meaningful Progress in Animal Welfare Law Reform’

Podcast 8.1

<http://mpegmedia.abc.net.au/rn/podcast/2009/12/lrt_20091222_0830.mp>
Introduction: Advocating for animals

This topic will explore issues and strategies relating to animal advocacy and law reform. Since animals do not possess standing to seek legal remedies and are unable to advocate for themselves, we will consider some of the strategies which might be employed by advocates in order to protect the interests and wellbeing of animal ‘clients’. We will also explore ways in which animal advocates may act to facilitate changes to the law in order to benefit animals.

As we saw in Topic 1, existing law relating to animals is largely a reflection of society’s ethical and moral regard for animals: abstract concerns having concrete consequences. As Tracy-Lynne Geyson and Steven White suggest, to the extent that prevailing law permits harm to animals in circumstances which do not stand up to ethical scrutiny, we have a responsibility to challenge the adequacy of that law.1

As we have seen from previous topics, the law affecting animals operates at local, state, national and international levels and embraces aspects of both public and private law. The animals which are affected by law include individuals, species and populations of wild animals, farmed animals, companion animals, animals in research establishments and other captive animals. Because of this, the capacity of lawyers and others to act as advocates for animals in such a diverse range of contexts is wide reaching. As Geyson and White note, the legal profession has been playing an increasingly important role in addressing the interests of animals.

Some examples:

• Barristers in Victoria and New South Wales have formed specialist animal welfare panels, and lent their time and expertise to assisting with animal law-related cases.
• In Queensland, BLEATS (Brisbane Lawyers Educating and Advocating for Tougher Sentences) has established a panel of barristers and solicitors prepared to work pro bono to assist RSPCA Queensland with prosecutions under the Animal Care and Protection Act 2001 (Qld). BLEATS is also raising the awareness of magistrates about the significance of animal welfare, and the need for fairer sentencing outcomes in line with increased penalties for animal cruelty.
• Community-based legal organisations have also been established, such as Lawyers for Animals in Victoria, the Animal Welfare Community Legal Centre in Tasmania, the Animal Law Education Project (ALEP) at the Northern Rivers Community Legal Centre and an Animal Law clinic at Fitzroy Legal Centre in Melbourne.
• The NSW Law Society Young Lawyers Animal Law Committee is a specialist committee that advocates for legal change toward animal protection. It has hundreds of members made up of law students and legal practitioners interested in animal protection. 2
• Voiceless, the animal protection institute, has played a key role in promoting animal law issues within the legal community, including through its annual grants program which has funded a wide range of animal law projects.
• A number of private legal firms have also begun to specialise in animal law and to provide pro bon advice on animal law matters.

In addition to taking on test cases in animal law and bringing local cases in the courts, there are other opportunities for animal lawyers to further the interests of animals:

• protect the right and civil liberties of people to protest for animals peacefully;
• encourage prosecutions of violations of animal cruelty or neglect, by collecting and recording evidence and supplying it to police and/or RSPCA;
• provide legal advice about animal law to the public, animal humane societies and other organisations;
• improve, reform and strengthen animal law legislation;
• ensure that animal laws are enforced and are interpreted as intended;
• educate the public and welfare organisations about animal law;
• take part in consultations, make submissions and monitor legislative developments;

• support campaigns such as the NSW Greens ‘truth in labelling’ campaign;¹
• publish scholarly articles in journals of animal law;
• disseminate information about animal law through professional seminars and media channels;
• plan animal law conferences and workshops and the training of students in animal law.

Geyson and White also identify the important role of lawyers in seeking reform of the law both directly, through litigation which tests the boundaries of existing law, and by providing advice to animal advocacy organisations, in their campaigns to change the law. Lawyers also have a role to play in representing animal advocates who are facing legal action. They observe that:

> It seems likely that the legal profession will continue to become more active in addressing the interests of animals through the legal system. This may result in increased litigation, especially in areas which test the limits of the law. With animal welfare organisations making greater use of pro bono/public interest lawyering there is likely to be increased awareness of animal welfare issues on the part of the legal profession more generally, including magistrates and judges.⁴

**Other types of advocacy**

As Lawyers for Animals observes, however, although animal law reform is desperately needed, you don’t need to be a lawyer to advocate for animals. There are a range of ways to you can take action, from writing a letter or making a phone call, to making a submission on an Act, Regulation, Code or Policy which is under review.⁵

The Animals Australia website provides useful information on ways to be a voice for animals, including:⁶
• how to make compassionate choices;
• fundraising for animals;
• animal action networks;
• campaign strategies;
• turning every day encounters into awareness-raising opportunities;
• education.

See also, the RSPCA’s website ‘Political Animal’. The aim of Political Animal is to highlight the key animal welfare issues that the RSPCA would like the next parliament, be it Federal or State, to deal with. It’s also a gateway for people who share these concerns to help get issues on the legislative agenda.⁷

There are a number of recent publications devoted to animal advocacy and activism. See in particular:
• Ben Isacat, *How to Do Animal Rights … Legally and With Confidence* (2013)⁹

Both Joy and Isacat begin their books with questions:

> The animal liberation movement is growing in size and strength, but so are the industries that exploit animals. These industries have vastly more resources at their disposal than activists do. Given this tremendous power differential, how can activists hope to compete?

> So what is our best attitude for being active for animals? Surely it is always to question what we know, try to understand what we do not know and keep a healthy scepticism about what people tell us. Having

⁴ Above n 1, 26.
⁵ <http://lawyersforanimals.org.au/>
⁶ <http://www.animalsaustralia.org/take_action/>
⁷ <http://www.politicalanimal.org.au/>
⁸ Joy explains how to use strategy to increase the effectiveness of activism for animals. Drawing on diverse movements and sources, she offers tactics based on well-established principles and practices. She also explains how to address the most common problems that weaken the movement, such as dissidence among organizations and activists, inefficient campaigns, wasted resources, and high rates of burnout.
You can listen to Melanie Joy discuss her book in an 3.48 minute audio cast at <http://lanternbooks.com/audio/9781590561362.mp3>
the right attitude demands that we constantly question our beliefs, especially when we think we are right, and never be complacent.

Joy and Isacat agree that while it is not necessary for an animal advocate be a lawyer, it is important that those engaged in animal advocacy are well acquainted with applicable regulatory frameworks. And because of the often divisive nature of issues relating to the exploitation and protection of animals, it is also important that animal advocates be able to communicate effectively and professionally, lest they risk being dismissed as ‘fanatics’ or ‘extremists’. It is also important that animal advocates be familiar with the philosophical contexts and ethical frameworks within which human-animal interactions occur. To this end, this topic will be re-visiting a number of the themes and issues which were introduced in Topic 1.

In addition, this topic will consider:

- using media;
- community education;
- campaigning methods;
- engaging with science;
- causes of action in law and campaigning for legislative change;
- dealing with, and preparing submissions to, government departments (Local, State and Commonwealth);
- consumer protection and education;
- the law of standing in animal advocacy;
- strategic law reform.

The art and language of advocacy

Good advocates tell good stories. An advocate, said Justice Lavine, ‘seeks to persuade and convince the listener that the advocated position is right.’ He suggests that the changed attitudes that result from good advocacy are thus self-induced and are not imposed on the listener from the outside. An effective advocate doesn’t set out to tell a person what they should think or how they should behave, but rather, draws upon the human capacity for imagination, empathy and compassion with a view to engendering shifts in consciousness. In order to do this effectively, advocates needs to understand who or what their audience is and may need to strategically employ language, delivery and presentation in ways which will appeal to that audience. For example, different sets of advocacy skills may be required depending upon whether one is communicating with a government agency, a scientific organisation, agricultural workers, recreational shooters or an animal welfare group. The language advocates use should be accessible to their audience and should endeavour to draw on similarities with their audience rather than dwell on differences. Effective advocates also need to have a good understanding of themselves and how they may be perceived by others so that they are able to draw upon their strengths and identify their weaknesses.

The importance of consciously addressing the concerns of those we seek to persuade cannot be overstated. It is important to have an understanding of an audience’s general political orientation, its particular vested interests, if any, and as far as possible, its attitudes towards animal protection. Such information can often be discerned from the practices engaged in, the decisions which have been made and the reasons advanced for those decisions.

The language that we employ in advocacy is important since it reveals both the implicit and explicit assumptions which inform our arguments. And as we have seen, debates relating to animal protection are, to a large extent ethical ones. However passionately they may feel about an issue, effective advocates should avoid taking an entrenched position and instead should focus on issues.

As Colin Allen suggests:

Participants in ethical debates are generally not as explicit as they need to be about their intended audiences. Arguments are situated, and what is convincing to one audience need not be convincing to others. While members of the general public may find cognitive ethology compelling enough, when the

audience is professional scientific organisations whose members are concerned to preserve the right to experiment on live animals (or the legislators who privilege those professionals in their hearings), the arguments must kick into a different gear, and a different set of skeptical responses must be addressed.11

As <animalethics.org> notes, while there is historical evidence to suggest that direct action and ‘extremism’ may be an effective way to bring about change, it may be more effective to ‘work quietly and politely’ to change attitudes through education and argument and by appealing to peoples’ rationality, compassion and sense of justice:

This is slow work but effective in that it makes for a great and long-lasting change in people’s attitudes and in most wars it is attitudes that must be won.12

In ‘Collaborative Advocacy: Framing the Interests of Animals as a Social Justice Concern’, Elizabeth Ellis discusses some of the issues facing animal advocates in their attempts to publicise and garner support for particular animal campaigns.13 She notes that in a society which privileges the concerns of humans over animals, such advocates are often marginalised by the media, politicians and even other liberation movements as ‘extremists’. At stake, she says, is the very idea of animal advocacy as a legitimate public issue.

Ellis suggests that the ‘enmeshed nature’ of the relationship between human and nonhuman animals has an invidious effect on reform. Specifically because:

- the profits from trading animals and their products generate widespread and very powerful commercial opposition;
- the overwhelming majority of people have grown up taking the exploitation of animals for granted;
- the dominance of the existing cultural paradigm means that those who challenge the idea that the value of animals depends upon their utility to humans bear the stigma and isolation of marginalisation;
- the sheer magnitude of the use and abuse of animals inhibits consciousness-raising.

She concludes, however that ‘the fact that some situations involving animals are extremely complex – usually because of human intervention – is a reason to engage more fully with the issues, not to retreat.’

1. What specific barriers are there to effecting change to the way animals are treated by humans?
2. How might animal advocates respond to suggestions that concern about animals is subordinate to other progressive concerns involving human subjects?
3. Do you think that changes to the law and public attitudes are easier to achieve if concern about animals is framed in terms of ‘welfare’ rather than ‘rights’?
4. ‘People delight in reading about excessive and exceptional human behaviour, and the … news media deluge us with extremisms. Violence gets noticed; quiet initiatives are seldom trumpeted. Whether publicity caused by animal rights extremism is good or bad there is no doubt that it thrusts animal rights into the public conscience. Extreme direct action stirs up controversy, stimulates debate and keeps it alive. When it comes to animal rights you might therefore argue that extremism is good for animals.’ <http://www.animalethics.org.uk/i-ch5–1-terror.html>

Do you agree? Why or why not? What limitations does a lawyer face in relation to engaging in ‘extreme’ behaviour?
5. Deidre Bourke has warned that the use of ‘animal rights’ rhetoric may be counter-productive and may function to marginalise animal advocates. The notion of ‘rights’, she says, is often used with imprecision and results in ‘confused, often contradictory’ messages being

12 <http://www.animalethics.org.uk/i-ch5–1-terror.html>
expressed. Peter Singer, (often wrongly labelled an animal rights advocate) suggests that ‘rights talk’ has become a ‘concession to popular moral rhetoric’.  

**Using the media**

For animal advocates, and change agents generally, the media is a powerful method of communication. As when addressing a particular audience, a good advocate should have a sound understanding of media imperatives, including those of individual journalists, editors and media organisations. A sound appreciation of the readership/listenership of the media outlet is also important.

There are some key skills when engaging with media, including:  

- Have a clear and concise message. Know what others are saying or have said on the issue, so that those messages can be reinforced or contested as the case may be. If the media contacts you, ask them who else they will be interviewing in relation to the issue.
- Professionalism and etiquette. Being in the public eye as an advocate requires a high degree of professionalism and etiquette. This means that you need to be careful in the ways you use language and should employ rational and well reasoned arguments. Avoid attacking another person or organisation even when you or your organisation has been the subject of attack.
- Know when to engage and when to step back. Engaging in a public debate through the media may be detrimental. Deciding when to allow public deliberations to take place without ‘entering the fray’ may be a calculated strategy.
- Inclusive language: Avoid speaking in absolutes which may have the effect of alienating your audience. As we noted earlier, an effective advocate attempts to induce self change in their listeners. For example: ‘Some farming practices raise serious animal welfare concerns’ is preferable to: ‘Farmers engage in cruel animal practices’.

**Dealing with government agencies, industries and businesses**

Often effective legal change requires that we operate within existing legal and political systems. This involves knowing how these systems function and using effective communication skills to influence those working within particular agencies and/or industries. In such cases, it is important that animal advocates be aligned with credible and professional organisations. While there is a role for direct action in the animal protection movement (see below) a submission to government or industry from an organisation that advocates radical change as opposed to law reform, is less likely to be seriously entertained.

For example, the Animal Rights Legal Advocacy Network (ARLAN) in New Zealand has, as one of its stated aims, ‘to enhance the welfare and status of animals by upholding existing statutes, regulations and common law principles; and lobbying for appropriate law reform to allow humans to intervene and provide legal protection for animals.’ [emphasis added]. In Australia, Voiceless the animal protection institute, has a dedicated legal arm which aims to ‘improve legal protection for animals, monitor and enforce laws and facilitate the development of animal law’.

As professionals, animal lawyers have a significant role to play in influencing legislators and government administrators. This may be achieved through lobbying processes, submissions and participating on panels, to name a few.

Similarly, animal lawyers and advocates can play a part in the education of directors, board members and managers of organisations and businesses with a view to the adoption of animal friendly practices in their establishments.

Political lobbying is a democratic process that can give people a say in the polices that affect them. As elected representatives, Members of Parliament are employed to serve their constituents by using their political influence to act upon legitimate concerns. While individuals acting alone can lobby effectively, you may be

---


more effective if you have authoritative associates to lend weight to your cause. Political representatives will be more prepared to respond if they know that an issue has wider support.

In previous topics we have considered Codes of Practice and noted that they are subject to periodic review. This review process typically involves a consultation period where submissions from the public are received and considered.

For guidelines on how to make effective government submissions, see:

- ‘How to Write a Law Reform Submission’, Environmental Defenders Office


Although lobbying is often associated with political representatives, one can also lobby persons or organisations that have access to policy makers and legislators. One can also lobby institutions and businesses whose activities affect animals or who have the power to change practices which negatively impact upon animals. While representatives of private organisations, unlike political representatives, are not obliged to assist you, they may respond in order to attract positive publicity or to deflect criticism.

Consider the following campaigns listed below. With reference to what you now know about the jurisdictional and regulatory frameworks governing such activities:

- identify the person and/or organisation and/or government agency you would approach with a view to achieving your desired outcomes
- identify your specific campaign objective (e.g., changing the law, changing processes relating to how animals are kept or used, changing practices and/or attitudes)
- identify the methods you will use to persuade the person, agency and/or organisation (e.g., personal meeting, telephone, letters, committee meeting, organising a public forum, using news media, preparing submissions, etc)
  i. to prohibit toxicity testing of substances on animals
  ii. to change the law to prohibit the live export of animals
  iii. to ban inhumane snares used by animal trappers
  iv. to persuade your supermarket to change its policy on selling factory farmed produce, such as eggs and broilers
  v. to persuade your work canteen to ban factory-farmed food and provide more choices for vegetarians
  vi. to introduce stiffer and more appropriate penalties for animal cruelty offences
  vii. to change the law in relation to how cattle are managed at slaughter establishments
  viii. to propose new laws to regulate ‘backyard’ animal breeders, or ‘puppy and kitten farms’
  ix. to make illegal the keeping of exotic animals as pets
  x. to persuade restaurants in your area to provide free range chicken and free range egg items on their menus.

Chapter 15 – Sue Kedgley, ‘Why It Is Difficult to Make Meaningful Progress in Animal Welfare Law Reform’
In this chapter, Sue Kedgley, a member of the New Zealand Parliament for 12 years, discusses why, despite years of campaigning and strong public support for better welfare laws for animals, few positive changes have been made.

**Think**

1. For what reasons does Sue Kedgley suggest that successive governments and most political parties are reluctant to give priority to animal welfare reform?
2. How do political initiatives, such as Kedgley’s, contribute to increased public awareness of animal welfare issues?
3. What role does the media play in bringing political and public attention to animal welfare issues?
4. What conflicts of interests does Kedgley identify between government departments, industry concerns and animal welfare initiatives?
5. What political reasons exist for ‘upholding the status quo’ relating to animal welfare?

**Animal cruelty prosecutions**

Under anti-cruelty legislation such as the *Prevention of Cruelty to Animals Act*, private individuals and organisations (other than ‘approved charitable organisations’,) do not have the capacity to initiate animal cruelty prosecutions.

In 2007 s 34AA was introduced into the NSW Act following the passage of the *Prevention of Cruelty to Animals Amendment (Prosecutions) Act 2007*. That section provides:

1) Proceedings for an offence against this Act or the regulations may be instituted only by:
   (a) an approved charitable organisation; or
   (b) an inspector within the meaning of Division 2 of Part 2A, other than a police officer; or
   (c) a police officer; or
   (d) the Minister or the Director-General; or
   (e) a person with the written consent of the Minister or that Director-General; or
   (f) any other person or body prescribed by the regulations for the purpose of this section.

‘Approved charitable organisation’ is defined as:

(a) the Royal Society for the Prevention of Cruelty to Animals, New South Wales, and
(b) any other organisation or association which has as one of its objects the promotion of the welfare of, or the prevention of cruelty to, animals, or any class of animals, and which is a non-profit organisation having as one of its objects a charitable, benevolent, philanthropic or patriotic purpose.

In Australia, the RSPCA prosecutes the majority of animal cruelty matters under applicable anti-cruelty legislation in each jurisdiction. Its role is to:

• review the evidence in the case files submitted by inspectors;
• work with inspectors to resolve evidential or legal issues concerning cases;
• make the decision whether or not to prosecute;
• instruct independent solicitors and barristers where necessary to further advise and present cases at court.

For a prosecution to proceed, the RSPCA must be satisfied of the following:

*Evidential test:* Is there sufficient evidence to provide a realistic prospect of conviction against each defendant and on each charge?

*Public interest test:* Where there is enough evidence, is it in the public interest to prosecute?
Relevant cases:
Pearson v Janlin Circuses Pty Ltd [2002] NSWSC 1118: Animal Liberation successfully brought an action under the pre-2007 open standing provisions of the PoCtAA (NSW)\(^*\)

Young v Wright (December 2011):
A Magistrate dismissed proceedings initiated by a private individual against the NSW President of the RSPCA, Peter Wright, alleging animal cruelty for lack of jurisdiction. Under s 34AA of the Prevention of Cruelty to Animals Act 1979, private prosecutions can only be instituted by a person with the written consent of the Primary Industries Minister or the Director General. The Magistrate dismissed the matter since the Minister refused her consent advising the complainant, Gary Young, to take his complaint to either the RSPCA, the Animal Welfare League or the police.\(^{17}\)

**Think**

Law enforcement agencies cannot always be relied upon to enforce anti-cruelty statutes. In the absence of such enforcement, what can animal advocacy groups do to enforce anti-cruelty statues?

**Standing**

If corporations can be persons in the eyes of law, if ships can be persons in the eyes of the law, then the law should be able to figure out something for animals.\(^{18}\)

Standing refers to the capacity of individuals to bring legal proceedings when they are not personally affected by the law or regulations complained of. While there no identifiable test for standing in Australia for public interest groups such as animal protection advocates, in determining whether or not a group should be accorded standing, the Australian courts tend to take the following considerations into account.

A group must show that:
- it is representative of a significant public concern; and
- it has an established interest in the subject matter of the proceedings.

As we have seen, animals are regarded as property under the law and thus lack the status of ‘legal personhood’ which would enable them to be cited as a party to a legal action. Because of this property status, the law regards animals in much the same way as inanimate items of personal property.\(^{19}\) Individuals and organisations which attempt to bring legal actions on behalf of animals regularly find their suits dismissed due to their lack of standing. The issue of standing is thus of great importance to the protection of animals as it is the ‘threshold’ issue before the merits of a case can be considered.

But as Christine Dorchak observes:

> The belief that animals deserve their day in court is not new. In medieval Europe, animals were often held criminally accountable for their actions, in trials complete with defence counsel and character witnesses. According to E.P. Evans’s 1906 book, The Criminal Prosecution and Capital Punishment of Animals, still the definitive work on the topic, domestic animals were regularly tried for murder, assault, and even, curiously enough, ‘bestiality.’ Pigs were a particular menace, and often publicly hanged – in one case two herds of pigs were condemned as accessories to murder for having egged on three sows.

---


\(^{19}\) For a comprehensive discussion of ‘why animals are treated as objects in western culture’, see Lauren Magnotti ‘Pawing Open the Courthouse Door: Why Animals’ Interests Should Matter’ (2006) 80 St. John’s Law Review 455 [http://www.animallaw.info/articles/arus80stjohnslrev455.htm]
that attacked a young boy. In 1545, in a case that dragged on for several years, the residents of a small French wine-making town brought suit against an infestation of weevils.\(^\text{20}\)

The Animal Legal Defence Fund argues that even where laws exist ostensibly to protect animals, animal advocates frequently lack the ability to assert those protections on an animal’s behalf. In many cases, the ALDF notes, the agency authorised to monitor and enforce those protections is the same agency that spends time and resources working with industries which exploit animals, such as factory farm corporations.\(^\text{21}\)

As you are probably aware, in order for a cause of action to proceed, the party bringing an action must meet the requirements for standing. Courts will not as a rule, entertain ‘generalised grievances’. Current tests for standing require that a party initiating action must have experienced a direct ‘injury’ or special ‘damage’ or have a calculable proprietary interest in the subject matter of the action. In addition, it must be established that the plaintiff’s injury, damage or affected interest is a result of the defendant’ actions. Finally, if the plaintiff is successful on the merits, the court must be satisfied that it is appropriate to award a remedy to redress the plaintiff’s injury, damage or affected interest. While the relief sought in animal abuse cases is generally an injunction to stop the mistreatment of the animals and/or to have the animals removed from the custody of the abusers, current law often requires plaintiffs to generate bases for standing that may be unrelated to the relief sought. As Drake Bennett notes, ‘animal advocates are reduced to forcing their circle of compassion into the square peg of an anthropocentric legal system.’\(^\text{22}\)

As a general rule, plaintiffs are precluded from bringing actions to assert a third party’s legal rights. Thus to argue that an animal has been injured is not usually adequate to establish standing. An exception would be an injury caused by the defendant to an ‘income producing’ animal owned by the plaintiff, in which case the ‘remedy’ awarded relates to the economic loss (injury) suffered by the plaintiff, not to the suffering experienced by the injured animal.

There are three basic requirements for standing:

i. the plaintiff has to have an ‘injury in fact’: some kind of an injury that is caused by the illegal act that is being complained about;

ii. the injury that is being complained about must be fairly traceable to the illegal act that is being complained about;

iii. the third requirement is that the court must be able to redress that injury in some fashion.

In addition, when you are suing under a statute, your claim must be within the zone of interests that the legislature intended the statute to protect.

Clearly these limitations create hurdles to the protection of abused or exploited animals. Since no direct ‘harm’ is committed against the group or individual bringing the action, actions brought to protect the interests of abused animals are frequently dismissed because the plaintiffs are unable to establish standing, that is, a direct injury ‘in fact’.

Lauren Magnotti has noted that while Courts in the U.S. have slowly become more permissive in granting standing to those trying to protect animals, even the most progressive courts directly hold that the standing they grant is not premised on the mistreatment of the animal itself. She cites the example of American Society for the Prevention of Cruelty to Animals v Ringling Bros & Barnum & Bailey Circus\(^\text{23}\) where the court held that the standing of a former circus employee was based largely on his emotional attachment to the elephants that were being abused, not upon any continuing injury to the animal.\(^\text{24}\)

Taimie Bryant argues that the pursuit of ‘legal personhood’ in the form of standing need not result in ‘fruitless attempts’ to prove animals’ similarity to humans. Legal standing for animals, she says, could be considered simply as a pragmatic means of increasing humans’ compliance with human-made laws to protect animals by way of a procedural mechanism that does the least conceptual violence to traditional standing principles. Under this view, injuries ought to be brought to the attention of a court by those who

\(^{20}\) Christine A Dorchak, ‘Legal Standing for Animals’ <http://www.all-creatures.org/articles/ar-legalstanding.html>


\(^{23}\) 317 F.3d 334 (D.C. Cir. 2003)

\(^{24}\) For progress in this case since 2003, see Animal Law Coalition, ‘Judge Dismisses 9 Years of Litigation for Elephants for Lack of Standing’ <http://animallawcoalition.com/judge-dismisses-9-years-of-litigation-for-elephants-for-lack-of-standing/>
are ‘directly injured’ – that is, by those who care that another has been injured. After all, Bryant asks, if animals are the intended beneficiaries of laws that purport to protect them and it is animals themselves who are harmed when those laws are violated, why should a human have to show harm derived from the harm done to an animal? The idea that injured parties should have access to the courts to enforce existing law should, as a matter of logic, Bryant argues, result in recognition of standing for both the human and the animal as to their respective injuries.25

Bryant notes, however, that there are obvious differences between humans’ claiming injury for harms done to an animal and animals’ claiming harm to themselves. She suggests that:

• recognising that the alleged injury really is to the animal, not to the human, correctly identifies the victim and the harm;
• legal standing in the name of the individual that alleges the harm, even if it is an animal, does less conceptual violence to the traditional idea of standing than does expanded legal standing for humans, who would be claiming that they are injured by virtue of injuries to another;
• one might as well attempt a direct route, since expanding existing legal standing for humans to protect animals does not appear to be any easier a prospect than establishing standing for animals.

At the same time, Bryant identifies disadvantages in pursuing direct legal standing for animals. Proceeding with litigation in the name of animal plaintiffs, Bryant suggests, can give rise to fruitless debates about the characteristics of animals that warrant their recognition as ‘persons.’ She concludes that:

Despite its obvious significance, advocates for legal reform to benefit animals differ with respect to whether changing the legal status of animals as the property of humans is necessary, feasible, or good for animals. I argue that one must take care in the shaping and use of legal standing in order to avoid further inscription of the status of animals as property.

Steven Wise suggests that, because of their similarity to humans, the great apes may be the best starting place to establish legal rights for animals.26 ‘The great apes, he argues, should be considered equals with humans in the sense that the rights of apes should be respected no less than those of humans and that court appointed guardians or other organisations should be enabled to protect the legal rights of great apes by bringing suit on their behalf. The Great Ape Project, he asserts, ‘seeks nothing less than full moral and legal ‘personhood’ for great apes.’27

Standing for wild animals

Recently in the United States, Professor Christopher Stone from the University of Southern California School of Law has been engaged in a campaign to save a sea lion currently on ‘death row’ from execution by the National Marine Fisheries Service. The ‘charges’ against the sea lion arise from an amendment to the Marine Mammal Protection Act 1972, which permits the killing of individually identifiable pinnipeds (sea mammals) that are having ‘a significant negative impact on the decline’ of salmon stocks.

Professor Stone’s ‘client’ is ‘C657’, a sea lion that got onto the wrong side of the law by, allegedly eating salmon at the base of the Bonneville Dam spillway in the Pacific Northwest. This, according to the National Marine Fisheries Service is a federal offense, punishable by rifle fire. Stone reports that a dozen sea lions have been killed by lethal injection in recent months for their role in the ‘decline’ of salmon stocks. Stone lost in the lower court, which ruled that sea lions had no standing. The case is now before an Oregon appeals court. In an article published in the Washington Post on 12 June 2010, Stone wrote:

The principle is the right of nonhumans to sue in their own names, with lawyers as their guardians. I believe the facts of C657’s case illustrate the merits of permitting some such suits.

26 Steven M Wise, Rattling the Cage: Toward Legal Rights for Animals (Perseus, 2001).
No one denies that some sea lions, including C657, have figured out that the Bonneville Dam is an ideal spot for lolling about and intercepting salmon heading up the Columbia River. Sea lions have found favourite spots to lie in wait for thousands of years; it is part of the natural order. But to pin the decline of salmon on pinnipeds is simply ludicrous.

First, the National Marine Fisheries Service blames sea lions for eating, in the aggregate, no more than 4 per cent of the run in the ‘worst’ years. The take of fishermen, both commercial and sports, and native tribes dwarfs that. The mortality from hydropower projects and land-use changes is far larger still. If conservation of a healthy salmon run requires reduced ‘budgets’, let it come from, say, sports fishers. The sea lions, here first, have the priority.

Second, the law provides that the individual wrongdoer must have had a significant impact on the decline. The government has interpreted this to authorise the execution of an animal that has been observed eating a single salmon.

We cannot believe that Congress, in legislation dedicated to the preservation of marine mammals, could have intended a rule of ‘one strike and you’re out.’ In fact, the state observation team did not originally cite C657 as having eaten any salmon. C657 made it onto the federally maintained ‘hit list’ only because state observers retroactively, and controversially, attributed to him the single predation of another animal.

C657 (currently reprieved in a Texas aquarium) wants his day in court. More than that, C657 wants to contest humankind’s self-appointed place atop the planet.28

Using the law: Causes of action

Not only does advocating for animals require good communication skills, it also demands creative thinking. This is because the ways in which human societies have historically exploited animals, the utilitarian value of animals to humans, and the ethical privileging of human interests above animal interests has created more obstacles than opportunities.

Dr Ian Robertson observes that in 1906, J Howard Moore estimated it would take up to two centuries for humans to replace ‘human dominion’ with a view which recognises a unity and respect of life. If Moore was right, Robertson suggests, we are about halfway through that process.29

From a historical perspective, Robertson notes, the legal protection of animals is a relatively recent event. Today’s focus on animal welfare is a significant step forward from the time when the views of seventeenth-century philosopher Rene Descartes, who argued that all of animal behaviour could be explained in purely mechanistic terms, set the tone for the widespread abuse of animals.

There is significant evidence of a global shift which acknowledges greater responsibility towards animal protection. Coupled with a growing interest in animal law, Robertson notes, is the increasing use of pressure and advocacy through legal and legislative channels to bring about changes in animal welfare and animal rights.30

A number of creative initiatives have been used by animal advocates in courts in the United States and Australia, including consumer protection laws, misleading and deceptive conduct laws, environmental protection law and taxpayer suits.

See also <http://www.post-gazette.com/pg/10171/1066617–109.stm#ixzz0yKLxBujO>
30 For examples of practical advocacy initiatives in the U.S see Dana Campbell, Legal Advocates’ Manual for Animal Abuse Cases Animal Legal Defense Fund, April 2007. The Manual was written to help attorneys and others become effective advocates for animals while working with their local prosecutors’ offices to ensure animal abuse cases are carefully reviewed and vigorously prosecuted once the investigation is complete. See also The Humane Society of the United States, Resources for Prosecutors. Some law enforcement agencies are now incorporating animal-related questions into their child abuse and domestic violence risk assessment protocols. For example, Santa Clara County, Calif., has amended its Domestic Violence Protocol for Law Enforcement to include information about animal inquiries <http://www.humanesociety.org/issues/abuse_neglect/prosecutors_resources.html>
Creative litigation: PETA style

Tilikum, Katina, Corky, Kasatk, and Ulises, Five Orcas by their next friends, People for the Ethical Treatment of Animals, Inc., Richard O’Barry, Ingrid Visser, Howard Garrrett, Samantha Berg, and Carol Ray v Sea World Parks and Entertainment, Inc.

In 2011, People for the Ethical Treatment of Animals (PETA) three marine-mammal experts and two former orca trainers filed a lawsuit asking a US federal court to declare that five wild-caught orcas forced to perform at SeaWorld were being held as slaves in violation of the 13th Amendment to the U.S. Constitution. The lawsuit named the five orcas as plaintiffs and also sought their release to their natural habitats or seaside sanctuaries. The plaintiffs, their ‘friends’ allege, were being held captive by Sea World at their entertainment facilities in Orlando, Florida, and San Diego, California. PETA spent 18 months preparing the case, which was the first federal court suit seeking constitutional rights for members of an animal species.

The suit was based on the text of the 13th Amendment, which prohibits the condition of slavery without reference to ‘person’ or any particular class of victim:

Neither slavery nor involuntary servitude... shall exist within the United States or any place subject to their jurisdiction.

PETA argued that slavery doesn’t depend upon the species of the slave, any more than it depends upon the race, gender or ethnicity of the slave and that SeaWorld’s attempts to deny [orcas] the protection solely based on their species is the same kind of prejudice used to justify any enslavement.

SeaWorld argued that any effort to extend the 13th Amendment’s protections beyond humans ‘is baseless and … offensive.’ It argued that the orca plaintiffs lacked standing to bring the action and, also, that the ‘next friends’ lacked capacity to bring the action. This is because, Sea World argued:

A plaintiff must show that it has suffered an ‘injury in fact’ that is (i) concrete and particularized and (ii) actual or imminent, not conjectural or hypothetical; that the injury is fairly traceable to the challenged action of the defendant; and that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

On 8 February 2012 U.S. District Judge Jeffrey Miller dismissed the case, writing in his ruling that ‘the only reasonable interpretation of the Thirteenth Amendment’s plain language is that it applies to persons, and not to non-persons such as orcas.’ The judge also raised doubts a court could allow animals to be plaintiffs in a lawsuit, questioning how far the implications of a favourable ruling could reach.

Think

Sea World’s lawyer called the lawsuit ‘a waste of the court’s time and resources’, stating that ‘it defies common sense and goes against 125 years of case law applied to the American constitution’s 13th amendment, which prohibits slavery between humans’ and PETA would have been aware that the chances of its suit succeeding were slim. Do you think that the publicity surrounding the case provided a valuable catalyst for reflection and deliberation about humans’ treatment of animals? See The Australian, ‘PETA files case against Sea World claiming killer whales treated as slaves’ February 07, 2012.31

Podcast 8.1


This podcast is a conversation between ABC journalist Damien Carrick, U.S animal lawyer, Bruce Wagman, Australian animal law expert Steven White and Katrina Sharman, corporate counsel with Voiceless. In it, they discuss some of the ways in which the law may be invoked to protect the interests of animals, including compensation for emotional distress for the loss of a
Think

1. In what ways do traditional causes of action reinforce the status of animals as property?
2. In the absence of effective animal protection laws, laws relating to consumer protection can be a useful cause of action for lawyers. The ‘right to know’ campaign includes the right of consumers to know what they are consuming and what industries they are investing in when they purchase products.
3. How does Katrina Sharman suggest that effective food labelling laws might function operate to change animal farming practices?

Illustrative Australian cases

Consumer protection laws: Illustrative Australian Cases

The Competition and Consumer Act 2010 prohibits conduct by a corporation that is misleading or deceptive, or would be likely to mislead or deceive.

If the overall impression left by an advertisement, promotion, quotation, statement or other representation made by a business creates a misleading impression—such as to the price, value or the quality of any goods and services—then the conduct is likely to breach the law.

The law also says businesses must not make false or misleading claims about the quality, style, model or history of a good or service:

- any person or organisation can complain to the Australian Competition and Consumer Commission;
- if a loss has been suffered as a result of a business’ misleading or deceptive conduct or misrepresentation, there may also be a private right of action under the legislation;
- courts can order damages, injunctions and other orders against businesses found to have engaged in misleading or deceptive conduct.

Australian Competition and Consumer Commission v Pepe’s Ducks Ltd [2013] FCA 57032

The Federal Court has declared that a leading supplier of duck meat products (with approximately 40 per cent market share) has engaged in false, misleading and deceptive conduct under Schedule 2 of the Competition and Consumer Act 2010 (Cth). The company, Pepe’s Ducks Pty Ltd, contravened the Australian Consumer Law by falsely stating that its ducks were grown and raised in ‘open range’ conditions and were ‘grown nature’s way’, when in fact, ducks had been barn raised in large sheds without access to outdoor ‘open range’ conditions and in an environment in which wild ducks do not naturally live. The phrases ‘open range’ and ‘grown nature’s way’ were used extensively by the company from 2004–2012 and 2007–2012 respectively and could be found on product packaging, the company’s website, delivery vehicles, signage and merchandise. In addition, the phrases were often used in conjunction with a cartoon representation depicting a smiling duck in front of green hills and a lake.

In response to the action launched by the ACCC, the Federal Court in Victoria made the following orders by consent:

- an order restraining Pepe’s Ducks from using ‘open range’ or ‘grown nature’s way’ for three years (except in relation to limited wholesale customers until February 2013) and from using the pictorial representation without the words ‘Barn Raised’ placed prominently close to the cartoon;
- an order that the company implement and maintain a trade practices compliance program for three years from 1 February 2013;

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2013/570.html?stem=0&synonyms=0&query=duck%20meat>
an order that the company provide corrective notices to its customers, on its website and business premises; and
an order to pay a pecuniary penalty of $375,000 and $25,000 towards costs incurred by the ACCC.

The ACCC warned that traders who abuse the trust of Australian consumers by making misleading statements expose themselves to enforcement action. The case demonstrates the ACCC’s continued commitment to protecting consumers from misleading statements regarding food production.

*Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4) [2013] FCA 665*

In a landmark decision, the Federal Court handed down its long awaited decision in proceedings brought by the Australian Competition and Consumer Commission (ACCC) against two of Australia’s largest poultry producers, Baiada Poultry Pty Ltd (Baiada) and Bartter Enterprises Pty Limited (Bartter), as well as the Australian Chicken and Meat Federation Inc.

The Federal Court found in favour of the ACCC, claiming that the Respondents had engaged in misleading and deceptive conduct in accordance with the consumer protection legislation. The decision was the culmination of an 18 month legal battle brought by the ACCC and represents a win for the animal protection movement.

The ACCC claimed that the Respondents (which included the owners of Steggles and Lilydale Free Range Chickens), had misled the public by labelling chickens ‘free to roam’ in advertising, packaging and publication materials. The ACCC claimed that the population density of meat chickens raised in barns by Baiada and Bartter did not allow for chickens to roam freely, and that the high number of young chickens in each shed meant that each chicken had a living area of equal to or less than an A4 sheet of paper. The court was told chickens in Baiada and Bartter products were raised in seven sheds between 1000 square metres and 3000 square metres in size and at any one time these sheds held about 30,000 to 40,000 chickens.

In labelling and advertising their products as ‘free to roam’, the ACCC claimed that Baiada and Bartter had:

- engaged in misleading or deceptive conduct, or conduct which is likely to mislead or deceive, in contravention of s 52 of the *Trade Practices Act 1974* (Cth) (the TPA) (in respect of conduct up to 31 December 2010) and s 18 of the Australian Consumer Law (the ACL) (in respect of conduct on and after 1 January 2011);
- made false representations in contravention of s 53(a) of the TPA and s 29(1)(a) of the ACL; and
- engaged in conduct which is liable to mislead the public as to the nature and/or characteristics of the meat chickens raised on their behalf in contravention of s 55 of the TPA and s 33 of the ACL.

By making statements on their website that Baiada and Bartter’s product s were ‘free to roam’, the ACCC claimed that the Association:

- was misleading and deceptive and likely to mislead and deceive in contravention of s 52 the TPA and s 18 of the ACL;
- falsely represented that chickens raised or grown in barns in Australia have had a particular history in contravention of s 53(a) of the TPA and s 29(1)(a) of the ACL; and
- was liable to mislead the public as to the nature and characteristics of chickens raised or grown in barns in Australia in contravention of s 55 of the TPA and s 33 of the ACL.

On 9 July 2013, Federal Court judge Richard Tracey found in favour of the ACCC and held that the Respondents had contravened ss 52 and 53(a) of the TPA. Justice Tracey also found that the ACCC had not successfully made out its allegation of a contravention of s 55 of the TPA.

Justice Tracey considered the natural meaning of ‘free to roam’ when applied to chickens and agreed with the ACCC’s assessment that it means the ‘largely uninhibited ability of the chickens to move around at will in an aimless manner’. Justice Tracey also considered that this phrase would be so understood by a significant number of hypothetical consumers to whom the labels, advertising or websites were directed.

In arriving at his decision, Justice Tracey toured a number of chicken sheds during the trial and CCTVC footage, and found the amount of space for each chicken and their consequent ability to ‘roam freely’ varied significantly at different stages of their life cycle. Justice Tracey stated: ‘The impression of a continuous wall-to-wall sea of birds remained. With few exceptions, each bird was in physical contact with one or more other birds. They were, however, able to and did move as a group.’
In his reasoning, Justice Tracey noted that until the number of chickens were reduced somewhere between
the 33rd and 42nd days of the growth cycle, the chickens were not free to move around the sheds at will
and with a sufficient degree of unimpeded movement to justify the assertion that they were ‘free to roam.

**ACCC v Luv-a-Duck Pty Ltd**

The Australian Competition and Consumer Commission has instituted proceedings in the Federal Court
against Luv-a-Duck Pty Ltd alleging false, misleading and deceptive conduct in relation to the promotion
and supply of its duck meat products.

The ACCC alleges that Luv-a-Duck engaged in false, misleading or deceptive conduct by use of one or more
of following statements on its packaging, website and brochures:

- a statement that its ducks were ‘grown and grain fed in the spacious Victorian Wimmera Wheatlands’,
  and other promotional statements of a similar nature;
- a statement that its ducks were ‘range reared and grain fed’.

The ACCC alleges that the duck meat products sold or offered for sale by Luv-a-Duck were in fact processed
from ducks that did not have substantial access to the outdoors, or access to spacious outdoor conditions.

‘The ACCC’s Compliance and Enforcement Policy lists credence claims as a new priority area, particularly
those in the food industry with the potential to have a significant impact on consumers,’ ACCC
Commissioner Sarah Court said.

‘Consumers must be able to trust that what is on the label is true and accurate. Businesses need to make sure
they are not misleading consumers into paying a premium for products that don’t match the claims made
on the label,’ Ms Court said.

The ACCC is seeking: declarations, injunctions, pecuniary penalties, orders that Luv-a-Duck implement a
trade practices compliance program, orders that Luv-a-Duck publish corrective notices on its website and
business premises and provide a corrective notice to its customers, and costs.

**Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic) [2002] FCA
860**

This case involved a claim for defamation by the applicants (Orion Pet Products and Innotek) and a claim
of misleading and deceptive conduct under s 52 of the Trade Practices Act 1974 (Cth). The respondents
also filed a cross claim for defamation. The applicants, since 1995, manufactured and sold electronic dog
collars for the purpose of training dogs. The products bearing the brand names ‘No-Bark Collar’, ‘Smart
Dog Containment System’, ‘Home Free Containment System’ and ‘Smart Dog Remote Trainer’, produce
an electric shock in response to barking. The applicants claimed that statements made by the respondents
in relation to these collars were false. They claimed that in making them the respondents imputed or
represented that the use of their collars was cruel, that the collars were instruments of torture, that anyone
using them in Victoria would be prosecuted and that they were ineffective and inappropriate as devices for
training dogs. They claimed that as a result of what the respondents said about their products, they sustained
significant loss and damage.

The applicants relied upon four distinct causes of action:

- a claim that the statements constituted misleading or deceptive conduct in contravention of ss 52 and
  53(a) of the Trade Practices Act 1974;
- a claim that these statements amounted to injurious falsehood;
- a claim that these statements were defamatory; and
- a claim that these statements gave rise to a cause of action in negligence.

After considering all the evidence, including a number of public statements made to the media by Kevin
Apostolides, a Senior RSPCA Inspector and Dr Hugh Wirth, President RSPCA (Vic) and qualified veterinary
surgeon, the Court found that:

deceptive>](http://www.accc.gov.au/media-release/accc-institutes-proceedings-against-luv-a-duck-for-false-misleading-and-
deceptive>

Although the applicant succeeded in demonstrating that a number of the statements made by Mr. Apostolides were misleading or deceptive, or false, and that they were made by or on behalf of a trading corporation, it failed to demonstrate that these statements were made ‘in trade or commerce’ as required by the *Trade Practice Act*.

That Mr Apostolides genuinely believed that all of the factual allegations which he made about the collars were true. He believed that dogs had been burned as a result of their use. He also believed that they inflicted a 3,000 volt shock. Although damaging statements to make about the applicant’s products and, although false, they were not made maliciously.

That the comments made by Dr Wirth to a Herald Sun journalist and on radio regarding electronic dog collars were opinion rather than fact. There was no evidence that he exhibited malice. For this reason, the applicant’s claim against the respondents for injurious falsehood failed.

The applicants established that the statements in the Herald Sun article that the collars inflicted 3,000 volt shocks, and that they had burned dogs’ necks were defamatory.

In relation to the defamation action, the RSPCA relied upon the defences of justification, fair comment and qualified privilege. While they failed in the defences of justification and qualified privilege, they succeeded in their ‘fair comment’ defence.

Weinberg J stated:

> In my view, Dr Wirth’s comments regarding the cruelty of electronic dog collars, and his description of them as ‘objects of torture’ do not exceed the bounds of fair comment. The same is true of his opinion that the collars are ineffective, and inappropriate as training devices for dogs. I do not accept [the applicant’s] submission that these comments were ‘clearly based on inaccurate statements of fact’. The terms which Dr Wirth used are broad, and they are certainly emotive. However, they seem to me to fall within the parameters of protected speech, on a matter of public interest, unless actuated by malice. I have already indicated that I can detect no malice in anything said by Dr Wirth.

The Court awarded damages of $85,000 to the applicant for ‘significant harm to its business, reputation and goodwill’. It awarded $30,000 to Dr Wirth to vindicate publicly his reputation and to provide some consolation for his injured feelings. This latter award was as a result of a letter addressed to customers of the applicant in reference to ‘the recent RSPCA ‘slanderous’ media campaign.’ In particular, the letter said:

> Due to lies and innuendos that Dr Hugh Wirth of Victoria’s RSPCA has circulated, Innotek has had to take them to court. On September 12, we won an Injunction against him and the RSPCA in the Federal Court of Melbourne. In ordering the Injunction the Court recognised that the RSPCA had conducted a smear campaign against electronic collars which was false information …

Having regard to the fact that there was no evidence that the RSPCA sustained any pecuniary loss by reason of anything said about it by the cross-respondents, the court did not award damages for either contravention of s 52 of the *Trade Practices Act*, or for defamation.35

### Trade and commerce

*Rural Export & Trading (WA) Pty Ltd v Hahnheuser* [2007] FCA 153536

*Rural Export & Trading (WA) Pty Ltd v Hahnheuser* [2009] FCA 67837

Between the 18th and 19th of November 2003 in Portland WA, Hahnheuser, together with two other members of Animal Liberation, contaminated with rendered pig meat the food and water of thousands of sheep destined for export to the Middle East. Their intention was to prevent the export of the sheep since consumption of pig meat by the sheep would render them unsuitable for export to Muslim countries. They also sought to bring public attention to the plight of animals involved in the live export trade.

The activists informed the government of what they had done and the export permit was cancelled. The applicant brought an action under s 45DB the *Trade Practices Act 1974* (Cth) which provides (ss 1):

35 See also the UK case *McDonald’s Corporation and McDonald’s Restaurants Ltd v Steel and Morris* [1997] EWHC 366 in which McDonalds sued the defendants for defamation. The defendants had published and distributed material that suggested McDonalds supported cruelty by purchasing battery eggs, broiler chickens from factory farms and bacon from pigs housed in sow stalls.


A person must not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

At the time of the alleged contravention, s 45DD(3)(a) of the Trade Practices Act provided relevantly as follows:

A person does not contravene, and is not involved in a contravention of, subsection...45DB(1) by engaging in conduct if … the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection; and engaging in the conduct is not industrial action.

The Court held that the effect of s 45DD(3) is that Mr. Hahnheuser did not contravene, and was not involved in a contravention of, s 45DB(1) of the Trade Practices Act, because he engaged in the relevant conduct with a dominant purpose that was substantially related to environmental protection, and his conduct was not industrial action. Accordingly, neither applicant was successful in establishing contravention of s 45DB(1) by Mr. Hahnheuser.

In his particulars, Mr. Hahnheuser described his dominant purpose as ‘to protect sheep from cruelty and suffering as a result of live transport by ship to, and arrival in, the Middle East and also to increase public awareness and education of the suffering and cruelty suffered by sheep during live transport by ship.’

This aspect of the pleadings raised the question whether the prevention of cruelty to, and the suffering of, animals forms part of environmental protection in s 45DD(3).

In the course of his judgment Gray ACJ stated that:

It is clear that the environment for the purposes of the phrase ‘environmental protection’ in s 45DD(3) of the Trade Practices Act includes sheep generally. It is clear that the environment comprehends living things, including animals, and the conditions under which they live. No reason appears for drawing any distinction between animals that are bred to be farming stock, to be slaughtered for the production of food for humans, and other animals. There is no room for applying the old distinction between animals ferae naturae and animals mansuetae naturae, which was developed by the common law for the purpose of determining whether it was possible to own an animal of a particular species. Farm animals are as much a part of the environment as are wild animals, feral animals and domestic animals. There is no reason why the protection of the conditions in which farm animals are kept should be excluded from the concept of environmental protection.

Environmental litigation

Standing for advocacy groups may be easier to achieve in litigation involving environment and habitat protection than for litigation to achieve protection for animals. This is because, unlike anti-cruelty laws, many environmental protection statutes in Australia provide for open standing to restrain breaches of the Act. Animal advocates may strategically use this form of review on decisions having adverse effects on animals. See, for example:

- Threatened Species Conservation Act 1995 (NSW): Section 141F provides that ‘any person’ may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the Act or the regulations.
- National Parks and Wildlife Act 1974 (NSW): Section 193 provides that any person can bring proceedings to remedy or restrain a breach of the Act.

At a federal level, administrative law remedies may be available to animal advocacy groups to protect marine mammals, reptiles and fish under the following Acts:

- Environment Protection and Biodiversity Conservation Act 1999
- Antarctic Marine Living Resources Conservation Act 1981
- Antarctic Treaty (Environment Protection) Act 1980

For example, Humane Society International Inc v Kyodo Senpaku Kaisha Ltd (2008) 244 ALR 161 in which the applicant applied under s 475 of the of the Environment Protection and Biodiversity Conservation Act 1999
(Cth) for injunctive relief and declarations in relation to whaling activities undertaken by the respondent in the Australian Whale Sanctuary.

**HSUS v Hudson Valley Foie Gras, LLC (2010)**38

In 2006, the Humane Society of the United States brought a successful lawsuit against Hudson Valley Foie Gras, on the basis that the defendant had violated the *Clean Water Act* by permitting bird faeces to pollute the Mongaup River.

Hudson Valley Foie Gras raises and slaughters ducks to produce the controversial French ‘delicacy’ foie gras. Birds are force-fed an unnatural amount of food through a pipe thrust down their throats until their livers expand to ten or more times their natural size. This process not only results in extreme suffering for the birds, it also produces a significant amount of waste, including manure and slaughter waste. The case alleges that some of this waste has been discharged into the Middle Mongaup River.

Although the Humane Society is an animal protection group rather than an environmental one, they were suing about pollution. This was a strategic gesture insofar as HSUS had no standing to bring a private action against Hudson Valley on behalf of the farm’s poultry. Considering Hudson Valley to be a notorious factory farm and concerned to impede the farm’s operation, the Humane Society availed itself of the private right to sue directly as permitted under the *Clean Water Act*.39

(Postscript: See recent consumer protection litigation against Hudson Valley Foie Gras (‘The Humane Choice’) by the Animal Legal Defence Fund, which claims that the company’s ‘humane choice’ slogan is false and misleading.)40

**R (on the application of Greenpeace) v Secretary of State for the Environment, Food and Rural Affairs**

At an international level, environmental litigation has been employed to protect marine animals. For example, in 2005 Greenpeace made use of the European Union’s *Directive on the conservation of natural habitats and of wild flora and fauna* (Directive 92/43/EC) to challenge the British government’s decision not to ban trawling for sea bass within British territorial waters. In its claim Greenpeace sought ‘judicial review of the failure of the Secretary of State to fulfil Britain’s obligations under the Habitats Directive to ensure that incidental capture and killing of the common dolphin does not have a significant impact on the species.’

Greenpeace argued that the trawling kills over 2,000 dolphins annually in the English Channel and that under the European Union Directive the government was obligated to protect the dolphins. Although the Court recognised the standing of Greenpeace to bring the action, it found that there was there was ‘no substantial scientific basis’ for Greenpeace’s claim that the 12-mile exclusion zone would save dolphins and that the *South-west Territorial Waters (Prohibition of Pair Trawling) Order 2004* was considered to achieve the purpose of conserving fauna associated with a marine or coastal environment, and that the Secretary of State had exercised this power to make the order reasonably.41

Refer also to the International Court of Justice whaling litigation, *Whaling in the Antarctic (Australia v Japan, New Zealand intervening)*, discussed in Topic 2.

---


40 <http://brandprotection.nortonrosefulbright.com/2013/05/HumaneProducersFoieGrasUnableToDuckFalseAdvertisingClaims.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+blogspot%2FdIPRN+%28The+Brand+Protection+Blog%29>

1. Because animals are not legal persons or rights bearing subjects, they lack standing to invoke legal remedies on their own behalf. There are also limitations on the ability of animal activists to initiate legal action on behalf of animals, for example, by representing rabbits in a class action against a cosmetic testing industry.

What legal and philosophical impediments are there to the ability of animal advocates to initiate action on behalf of animal 'clients'?

2. Cassuto, Lovvorn and Meyer observe that ‘the bar is set higher for animal protection advocates. Injury in fact, causation, and redressability are going to be scrutinised a lot more. The problem is that the courts do not really think the injury about which we are talking is a real injury. It is just an emotional subjective preference. It is not the same as somebody losing money.’

If you had to set out to convince a Court that a concern for animal protection is not an ‘emotional subjective preference’, what would your central arguments be?

3. They argue that animal advocates need to be strategic and to ‘figure out how to make whatever injuries we are talking about, be they informational, aesthetic, emotional, or otherwise, sound plausible to a judge trained in looking at commercial litigation’.

Do you agree with the writers that the question of standing comes down to whether the injury you are articulating makes sense in the context of a commercial dispute? Does such an approach further inscribe the property status of animals and preclude advocates from efforts to extend and expand the tests for standing in animal protection contexts?

4. Taimie Bryant asserts that ‘if the result of legal standing is only to further inscribe the property status of animals, we will have done no more than make them participants in their victimisation.’

Do you agree? Why or why not?

5. Critically comment upon the following assertions:

Successfully obtaining legal standing for animals … would create utter chaos in animal industries, which would also badly damage the general economy, much of which depends on the use of animals and animal by-products. Most significantly, on an existential level, the perceived exceptional nature of human life would suffer a body blow through the erasure of one of the clear definitional lines that distinguish people from animals — the belief in human exceptionalism.

6. Compare and critically reflect upon the following statements. Do you agree that conferring standing on animals would ‘force animal industries to their knees’? Why or why not?

What could further the eradication goal more dramatically than allowing domesticated animals to sue their owners in court? The real litigants, of course, would be animal-rights activists — committed true believers who would use the raw power of litigation to force animal industries to their knees. Imagine the chaos: hundreds of animal lawyers, filing thousands of lawsuits, leading to hundreds of thousands of depositions, forcing industries to spend tens of millions of dollars on lawyers and legal costs defending their husbandry. No animal industry would be safe, and many would not survive … With a $100 million organisation backing them, the Humane Society of the United States could effectively cripple small farms with a constant barrage of lawsuits.

Lawyers value their time, and animals have shallow pockets. Lawsuits on behalf of non-humans are therefore unlikely to be frivolous.

---

45 Wesley J Smith, ‘So Three Cows Walk into Court … Animal-rights extremism in the Obama entourage is no joke’, 20 July, 2009 <http://www.weeklystandard.com/Content/Public/Articles/000/000/016/726toxv.asp>
International law reform initiatives

Animal advocates argue that while an ostensible purpose of the law is to protect the vulnerable, this duty is not sufficiently extended to animals. While legal systems throughout the world seek to protect people and their assets, for the most part, animals are unable to have their grievances and afflictions remedied through legal processes. While the status of animals as property limits the legal protections available to them, some animal lawyers argue that animals will attain better protection and appropriate rights without a change in their status as property. Others argue that the only way to protect animals from human mistreatment is to abolish their status as property. While lawyers have appealed to the courts to recognise animals as sentient beings and have pursued law reform to better protect their interests, they have often met with limited success. But many animal advocates argue that this ‘slippery slope’ is a precursor for more fundamental changes to the law. Certainly, recent years have seen an intensifying effort on the part of animal rights activists, legislators, prosecutors, and legal scholars to change the way the law treats animals.

- In 1997 the European Union officially recognised animals as sentient beings and the EU now requires that member states ‘pay full regard’ to animal welfare. Many animal advocates argue, however, that this ruling has not translated into practical legal benefits for animals.
- In 2002 the German constitution gave constitutional rights to animals.
- The European Parliament, recently categorised great apes as ‘beings’ and moved to end the use of all primates in scientific research.
- In the United States animal lawyers have been collecting signatures to petition congress for an Animal Bill of Rights, which would, among other things, give animals ‘the Right to have their interests represented in court and safeguarded by the law of the land.’ Recognising animals as holders of rights would mean that they could sue in their own name and in their own right. While guardians would have to be appointed to speak for these ‘voiceless’ rights-holders, providing animals such a ‘virtual’ voice, animal rights advocates argue, would strengthen the protection they receive under existing laws.
- In the United States, thirty-nine states and the District of Columbia now allow pet owners to endow pet trusts. Prior to such reforms, an owner who wanted to set up care for a pet after his or her death had to will the pet to someone, along with a sum of money for the pet’s care. This legislation made it possible for New York hotel billionaire Leona Helmsley to bequeath $12 million to her Maltese dog, Trouble. While Trouble won’t have a say in how her bequest is spent, her trustee will be obliged to act in Trouble’s best interests, in the same way as for a human heir.
- Estate and divorce lawyers in the U.S. claim to have seen a rise in the number of pet trusts and pet custody disputes. In both, animals are being discussed in legal terms that were previously reserved for children. In a Tennessee case the Court appointed a legal guardian to represent the interests of a dog in a custody dispute.
- Nine states, including Connecticut, Maine, and Vermont, have passed laws in the past two years allowing animals to be protected by restraining orders.
- In some states, veterinarians are now required to report suspicions of animal abuse in the same way pediatricians have to report child abuse.
- Courts are starting to take seriously the claim that pet owners are entitled to compensation for pain and suffering in cases involving the death of an animal.

48 ‘How to Do Animal Rights -And Win the War on Animals’<http://www.animalethics.org.uk/i-ch4–11-animal-lawyer.html>
Citizen’s initiatives

Some states in the U.S. provide for ‘citizens initiatives’. A citizen’s initiative is a proposal of new legislation or constitutional amendment placed before voters by obtaining a certain number of signatures through a petition process. Twenty-four states currently have an initiative process. Eighteen of these states allow initiatives to propose constitutional amendments and twenty-one states allow citizen initiatives to propose statutes. In most of the cases a direct initiative is allowed, meaning that once a sufficient number of signatures have been gathered on conforming petitions, the proposal (constitutional or statutory) is placed on the public ballot for a vote by the people. In some of the cases an indirect initiative is allowed where the proposal first goes before the state legislature, and if approved, is not voted on by the people.\(^5\)

In Florida, citizens are able to amend the state Constitution by introducing ballot initiatives. In November 2002, over 2½ million Floridians (a 55–45 per cent win) voted on a Florida amendment to prohibit the use of pig gestation crates in factory farms. Animal supporters argued that the crates inhibit practically every normal pig behaviour, give rise to crippling foot and leg injuries and produce sores and infections. The Constitution of the State of Florida, Article X, now provides:

Inhumane treatment of animals is a concern of Florida citizens. The people of the State of Florida hereby limit the cruel and inhumane confinement of pigs during pregnancy as provided herein.

(a) It shall be unlawful for any person to confine a pig during pregnancy in an enclosure, or to tether a pig during pregnancy, on a farm in such a way that she is prevented from turning around freely.

After a six year phase-out period, this initiative took effect on November 5, 2008. The ban on gestation crates has worked to discourage the industrial farming of pigs in Florida and sent a powerful message to the pork industry. It also motivated animal welfare advocates across the country, resulting in six states following Florida’s lead. The intensive confinement of pregnant pigs was banned in 2006 in Arizona after a ballot initiative effort. In 2007, the governor of Oregon signed a measure prohibiting gestation crates. In 2008, Colorado’s governor signed into state law a ban on gestation crates and Californians overwhelmingly passed a ballot initiative. In 2009, new laws were enacted in Maine and Michigan which will prohibit gestation crates.\(^5\)

Think

1. Do you think that an Animal Bill of Rights would better protect the interests of animals? Why or why not?
2. Australia lacks the types of processes for citizen’s initiatives which exist in the United States. What other collective public processes might be available to Australians in order to bring about changes to animal welfare laws?

Law reform: Changing law from ‘within’

When we speak of law reform we are speaking of changing the law from within the existing paradigm. While substantive and systemic changes to law are not generally achieved through law reform initiatives, they are one way lawyers can work not only to change aspects of law, but also to affect public consciousness.

But because of the tremendous political and economic power wielded by institutions which use animals, substantive change to profitable industrial practices which exploit animals will not happen easily.

A number of key issues in the law reform debate have already been canvassed in this topic. Animal advocates concerned to change the law affecting animals will frequently be called upon to make strategic decisions relating to the extent to which they are prepared to work within existing legal paradigms. As we have seen, however, the risk of working within existing law may have the result of reinscribing practices which leave undisturbed human dominion over animals. While incremental reform from within law, including the

54 Florida’s historic ban on gestation crates’ <http://www.animalrightsflorida.org/initiative.html>
pursuit of more effective enforcement of existing legal protections for animals may have better prospects of immediate success, it may also mean that animal advocates become unwilling participants in the victimisation and exploitation of animals.

As Geyson and White observe, although animal welfare does not currently rank highly on the agenda of any of the major political parties, this may change as government departments and others are forced to become more publicly accountable, through legal action, for their management of animal welfare issues. On the policy front, there is likely to be a continuation of efforts to bring greater national consistency to the regulation of animal welfare. They note that the significant differences in the regulation of animal welfare across state and territory jurisdictions, is being addressed as part of the Australian Animal Welfare Strategy.55

Advocacy ‘outside’ the Law: Civil disobedience

As noted above, effective legal change often demands that animal advocates operate within existing legal and political systems. As many animal lawyers have noted such strategies may have the effect of ‘reinscribing’ human dominion over animals. For this reason, some animal advocates argue that peaceful forms of civil disobedience may also be an effective way to bring about change.

The following is from ‘How to do Animal Rights and Win the War on Animals’:56

Civil disobedience usually entails non-violent actions, such as marches, demonstrations, strikes, sit-ins or occupation of buildings. Civil disobedience is a form of protest. The reason for being a civil resister or dissenter is to act on your moral right and correct an injustice you perceive. You are trying to reverse or stop some process or make an appeal to correct or revoke a law. You are a dissenter every time you deliberately disobey the law or a demand by government, believing that your action is just and the law or government is unfair or harmful.

Henry David Thoreau (1817 – 1862), American philosopher, naturalist and writer, is often cited as articulating the belief that people have a duty not to take part in a perceived injustice and to resist any government or its agent forcing people to participate. Thoreau asserted that it is the citizen who grants the state its authority and the citizen can oppose unjust authority if compelled by conscience.

Dissenters from all kinds of background, including suffragists, feminists, anti-war demonstrators and nuclear bomb protesters, have engaged in civil disobedience. Among the biggest and best known practitioners of civil disobedience are the Indian Mohandas Gandhi (1869–1948) and the American Martin Luther King jr (1929 – 1968). Gandhi practised civil disobedience as a weapon in his struggle for independence for India from British rule. King fought peacefully for black-American civil rights. Both men were beaten and jailed – even non-violent acts of civil disobedience risk retaliation and verbal or physical attack by opponents and police – but attracted huge numbers of supporters and co-civil rights rebels.

Gandhi outlined some key rules when carrying out civil disobedience.

- Tolerate the anger and assaults of your opponents.
- Do not get angry, insult or retaliate against your opponents.
- Submit to arrest.

---

56 How to Do Animal Rights – And Win the War on Animals <http://www.animalethics.org.uk/i-ch3–2-campaigning.html>
Arguments for and against civil disobedience

<table>
<thead>
<tr>
<th>For</th>
<th>Against</th>
</tr>
</thead>
<tbody>
<tr>
<td>Democracy</td>
<td>Civil disobedience is a democratic activity. Democratic governments hold power by virtue of the individual citizens who elect them and if change is blocked by a government then dissenters can unblock it with an appropriate forms of civil disobedience.</td>
</tr>
<tr>
<td>Regular channels</td>
<td>There is a point when appealing through regular channels becomes futile and delays furthering your cause. In addition, regular channels may be part of the problem.</td>
</tr>
<tr>
<td>Citizenship</td>
<td>This is every reason for challenging what you see as unjust, in order to make your country a better place to live.</td>
</tr>
<tr>
<td>The rule of law</td>
<td>If we do not challenge government and its laws we could slip into oppression and despotism.</td>
</tr>
</tbody>
</table>

Think

Consider the above arguments for and against civil disobedience. Consider where your own sympathies lie and identify reasons for your views.

Direct Action: Trespass and reasonable excuse

*Patricia Ellen Mark & Ors v Gordon Robert Henshaw* [1998] FCA 55657

*Mark and Others v Henshaw* (1998) 155 ALR 118

Trespass actions can be taken against animal activists who trespass on land to obtain access to animals, and because animals are property, against anyone who attempts to rescue animals – trespass to chattels. Actions in trespass can be brought either by an aggrieved plaintiff as an action in tort or it may be a criminal offence prosecuted by the Crown.

In this case, the four appellants entered without permission the premises of Parkwood Eggs during the earlier hours of the morning of 20 October 1995. It was the appellants’ case that they had a ‘reasonable excuse’ to enter because they wished to voice their concerns about the battery hen farming operations that were conducted on the premises and because they were concerned that there were sick, injured and distressed birds in the premises. They were each charged with a breach of sub-s 11(1) of the *Public Order (Protection of Persons and Property) Act 1971* (Cth) which provides that:

A person who, without reasonable excuse, trespasses on premises in a Territory is guilty of an offence, punishable on conviction by a fine not exceeding One hundred dollars or imprisonment for a term not exceeding one month, or both.
The case for the appellants was that they had a reasonable excuse to enter the premises of Parkwood Eggs because the hens were in need of aid and assistance and because they perceived the need to prevent further cruelty to the hens in circumstances where all other avenues available to the appellants had been exhausted. Counsel for the appellants emphasised three factors, each of which, so he argued, justified the appellants’ conduct:

- That the appellants knew that the authorities were not intending to take any action against Parkwood Eggs or with respect to battery hen farming generally – indeed they were threatening to prosecute the appellants.
- That the appellants considered it necessary to establish that the hens were in need of protection and were being treated cruelly.
- That the appellants considered it necessary to establish that what was occurring at Parkwood Eggs amounted to criminal conduct that breached the provisions of the *Animal Welfare Act 1992* (ACT).

The magistrate who heard the charges concluded that each appellant had a reasonable excuse for entering upon the premises and dismissed all charges.

The premises of Parkwood Eggs, according to the findings of the magistrate, comprise seven sheds containing, in all, some 260,000 caged hens. Its operation is said to be the largest of its kind in Australia. Much of the evidence that was adduced before the magistrate was directed to the subject of battery hen operations, the appellants claiming that such operations were cruel and that Parkwood Eggs and similar enterprises engaged in acts of cruelty to hens.

The magistrate found that the appellants were dissatisfied with the manner in which the authorities were reacting to their complaints and concluded that their decision to trespass upon the property of Parkwood Eggs was, ‘to have one proper go at making the point that the law ought not tolerate battery hens’.

When the matter came on for review before Miles CJ in the Supreme Court of the Australian Capital Territory, his Honour concluded that the magistrate had fallen into error. He set aside the orders of the Court below in the following terms:

> The Magistrate's orders of 18 February 1997 dismissing the informations be set aside and, the Court being satisfied that the charges are proved, in lieu thereof makes an order under ss 556A(1) of the *Crimes Act 1900* that, it is inexpedient to inflict any punishment and dismisses the charges.

The appellants appealed the decision to the Federal Court. The Court stated:

> [T]he critical issue in determining whether the appellants entered upon the premises of Parkwood Eggs with a reasonable excuse is not the appellants' beliefs or their state of mind. Whilst those factors are relevant and may afford some assistance to the trier of fact, the final answer will always come from an objective assessment of the particular facts of each case; that assessment requires a consideration of not merely the trespassers' beliefs and state of mind: it requires the application of community standards. In particular, it requires the trier of fact to determine whether the trespassers' conduct is acceptable to the community. Miles CJ accurately pointed to the error that had been made by the magistrate when he said:

> ... if the Magistrate had applied the objective test of the hypothetical ordinary member of the community not to the justification of the defendant’s beliefs, but to the justification of their entry and remaining upon the premises until their arrest, then there would have been a finding that the defendants lacked reasonable excuse for their conduct.

The Federal Court adopted a ‘dominant purpose’ test, stating that the dominant issue in this case was not, as the magistrate thought, whether battery hen farming was cruel. The dominant issue was the correct identification of the reason for the appellants’ entry onto the premises. Obviously, the subject of battery hen farming was relevant to the identification of that reason, but only in an ancillary sense. The Court concluded that:

> It is a clear inference that the dominant purpose of the appellants in entering upon the premises of Parkwood Eggs was to bring as much media and public attention as possible to their activities so that they could thereby better advertise their cause to have battery hen farming abolished.

> [The magistrate] found himself overwhelmed by the evidence that pointed in the one direction – that battery hen farming was cruel and that Parkwood Eggs was guilty of various offences. He found,
therefore, that it was reasonable for the appellants to enter the premises so as to draw attention to the existence of that cruelty. But, with respect, that is not the correct approach. Parkwood Eggs is a citizen, and, like any citizen it is compelled on the one hand to comply with the law, but it is entitled, on the other hand, to expect the protection of the law. In assessing the conduct of these appellants, two factors must be stressed. First, that the battery hen method of operation remains lawful; secondly, despite the magistrate’s personal observation that battery hen farming is cruel and despite his conclusion that there ‘is clear evidence of a breach of each of the above code provisions by the management of Parkwood Eggs’, Parkwood Eggs was not on trial; and under our system of law, it is for the appropriate law enforcement agency to investigate and, if necessary, prosecute lawbreakers. Society cannot afford to allow private citizens, no matter how well-meaning, to assume the role of the law-enforcers.

We have no reason to question the integrity of the four appellants. We are quite sure that they hold genuine beliefs that battery hen farming is cruel. What is more, they are entitled to pursue their cause, vigorously and repetitively. But citizens, in all walks of life, must conduct themselves within the law and according to the law.

... We do not accept that it is reasonable to enter as a demonstrator, upon the premise of another, when the occupant is carrying on a lawful activity of which the trespasser disapproves. To find otherwise would mean that the citizen would not receive the protection of the law to which he or she is entitled. It would mean that any dissident might be at liberty to enter his or her opponents’ premises in pursuit of a cause.

... ‘The inference that may fairly be drawn from the undisputed facts points inexorably to the conclusion that the appellants’ dominant purpose in entering the premises was to advance their cause against battery hen farming. Based on the authorities to which reference has been made that purpose does not amount to a ‘reasonable excuse’.

The Court concluded that the Magistrate’s orders of 18 February 1997 dismissing the informations should be set aside and, being satisfied that the charges are proved, in lieu thereof makes an order under sub-s 556A(1) of the Crimes Act 1900 that, having regard to sub-paras (i), (ii) and (iii) of para 556A(1)(b), it is of the opinion that it is inexpedient to inflict any punishment and dismisses the charges.

The applicants then sought special leave to appeal in the High Court. The Court concluded that the case did not raise an issue suitable for the grant of special leave to appeal.

Think
1. Do you agree with the reasoning of the ACT Supreme Court and the Federal Court that the defence of ‘reasonable excuse’ involves the application of a ‘dominant purpose’ test? Does this approach artificially elevate one of the three identified ‘excuses’ advanced by the appellants at the expense of the other purposes for trespassing on the premises of Parkwood Eggs, ie. the several hours the appellants spent saving chickens and their concerns that action had not been taken against the respondent for breaches of cruelty legislation?
2. This case was decided in 1998. Do you think a Court today might come to a different conclusion? Cite relevant legislation to support your conclusions.

Direct action vs civil disobedience
Motivated by their desire to protect animals, some animal activists, notably in the United States and Britain, have engaged in a range of direct action strategies. While civil disobedience tends to be peaceful and within the law, direct action may involve forms of violence, damage to property and thus cross the line into illegal activity. Clearly lawyers, who are bound by rules of professional conduct and practice, must not only obey the law, they also have to be cautious not to engage in or assist conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.59

In 1992 the American government passed the *Animal Enterprise Protection Act* that applied to anyone who intentionally damaged or caused the loss of any property of an animal enterprise. In 2006 the *Animal Enterprise Terrorism Act* was introduced which provides additional law enforcement tools and protections for research entities targeted by ‘animal rights extremists’. The 2006 Act amended the 1992 Act to include undefined acts of intimidation and harassment that ‘disrupt’ businesses, increased the amount of monetary penalties and length of imprisonment that could be ordered, and extended the definition of ‘animal enterprises’ to include many more enterprises, including animal shelters, pet stores, breeders’ facilities, and furriers’ facilities.

Some law enforcement agencies in the United States, notably the FBI, regard those involved in direct action resulting in property damage as ‘terrorists’. The Animal Liberation Front and the Earth Liberation Front are considered ‘domestic terrorist threats by the FBI. In 2005, the former Australian Agricultural Minister Warren Truss, accused PETA of providing money to these ‘known terrorist organisations’.

The Federation of American Societies for Experimental Biology which helped to pass the *Animal Enterprise Terrorism Act* has compiled a range of resources on ‘animal rights extremism’ including ‘resources for researchers targeted by animal rights extremism’.

**Think**

1. Some direct action proponents argue that terrorism relates to living beings only and that property damage is better characterised as sabotage since one cannot ‘scare’ or ‘terrify’ property.
   Do you think that actions by animal activists which result in damage to property can ever be justified? Why or why not? Provide examples.

2. You are a practicing lawyer and have been approached by members of *Animals 4 Ever*, a militant animal rights organisation which engages in direct action strategies, including trespass and sabotage, such as unauthorised entry onto factory farms and research premises using animals, contamination of the food supply of animals destined for live export so that they are no longer acceptable to the intended purchasers; throwing balloons of red paint at the premises of fashion shows involving the use of animal fur and chaining members to the bull bars of vehicles intended for use in kangaroo culls. The members provide you with details of an intended campaign which involves breaking the law and ask if you will represent any members who may be arrested as a result of their involvement in the campaign.
   What do you say to them?

**Animal advocacy and trauma**

As we reach the end of the final topic in this unit, many students may be feeling bewildered, upset and perhaps traumatised by much of what they have learned. You may be wondering how you can be most effective in applying and/or changing the law in the interests of animals. In the present climate, animal law advocates must be prepared, not infrequently, to come to terms with defeat and disappointment. Indeed the celebration of victories for animal protection and wellbeing may, in the short term, seem few and far between. This is all the more reason that those concerned with animal protection (i) grow in numbers and influence, (ii) remain informed and active, and (iii) persevere despite the setbacks they will inevitably encounter.
Taimie Bryant comments that:

In order to structure their participation in legal processes that affect animals and advocates for animals, it is important to recognise the impact of ‘survivor guilt’ on advocates for animals. ‘Survivor guilt’ in this context is a consequence of trauma experienced by advocates who have witnessed horrific cruelties to animals and yet have been unable to stop those cruelties. Like survivors of the Holocaust or Vietnam combat veterans, many animal advocates carry a strong sense of ‘entrusted responsibility’ that, while guiding their commitments, can distort their ability to participate in legal settings. Mixed with the heavy weight of ‘entrusted responsibility’ is alienation from a broader society that seems oblivious to the harms done to animals and which is actively hostile to the goals of advocacy for animals.65

Bryant examines the notion of ‘survivor guilt’ in the context of advocacy for animals and explores its implications. She identifies a number of legal problems which can arise in the animal advocacy movement, including the inability of animal advocates to participate cooperatively in the legislative process. Another problem she identifies is the significance of some laws for consciousness-raising and advocacy support purposes even though they may have no immediately effective, positive impact on animals. For example, Bryant suggests that proclamations that sentient animals are entitled to be treated as individuals and not as property addresses aspects of survivor guilt that should enable animal advocates to heal and to gain the benefits of cooperation.

In ‘Trauma, Law, and Advocacy for Animals’ Bryant explores these issues further. Drawing on social science and medical literature that documents the traumatic effects of witnessing violence that society has not yet recognised, she outlines the post-traumatic stress that advocates may endure after repeated exposure to legally sanctioned violence against animals and the negative impact on animals and their advocates of the few laws that exist to protect animal welfare. She then proposes areas of legislative reform and legal representation which may counter the effects of this trauma.

She explores the dynamics of advocacy and is able to link a number of radical theoretical stances with concrete legislative proposals. She argues that some forms of legal activism that seem ineffective for helping animals actually increase public activism and understanding of animal suffering, thereby making other forms of legal change more likely. She considers activities in which all animal advocates can become involved and proposes that some forms of legal advocacy will advance the cause of animal protection, and, at the same time, aid in the healing of traumatic exposure to animal suffering.

Her message is that, in spite of the difficulties, we should remain optimistic that the project of animal law is a worthy one.66

Think

1. What specific conditions might contribute to the trauma faced by some animal advocates?
2. How might such trauma be effectively prevented and/or managed?

Topic summary

This topic has identified some issues and strategies relating to animal advocacy and law reform. Specifically, it has identified ways in which animal advocates may engage with legal and political processes with a view to changing practices and attitudes which are inimical to the interests of animals. It has also considered the role of law reform in the animal protection movement and ways in which animal activists may work to facilitate change from outside of existing legal processes. It has also considered the law of standing in advocating for animals, identifying both the prospects and the limitations of these laws.
