Animal law

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HOT TOPICS
LEGAL ISSUES IN PLAIN LANGUAGE

This is the seventy fourth issue in the series Hot Topics: legal issues in plain language, published by the Legal Information Access Centre (LIAC). Hot Topics aims to give an accessible introduction to an area of law that is the subject of change or public debate.

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Our Relationship with Animals

“Easter Sunday is probably not the best day to tell my daughters about the work the government is doing in rabbit control.”

The above tweet by Tony Burke (then the Federal Minister for Agriculture) illustrates the ambivalent relationship humans have with non-human animals. While there is evidence that our attitudes to animals vary according to gender, species and other factors, it is the perceived usefulness of animals in human society that probably most dictates our response.

A rabbit, for example, may be treated as a ‘pet’ in the family home but considered a ‘pest’ or a laboratory specimen in other contexts. The law makes similar distinctions. A person who harms a pet rabbit may be prosecuted for animal cruelty while a person who harms the same species in the course of research or ‘feral’ animal control may be engaging in conduct that is legally sanctioned. Yet, as Tony Burke’s statement makes plain, this difference is not readily acknowledged.

Despite our ambivalence, research in Australia and similar countries indicates a ‘widespread belief’ in the importance of animal welfare and an emotional engagement with the topic. Research also suggests, however, that knowledge is superficial and based on faulty assumptions about animal protection legislation, particularly in the context of some uses, such as research and testing. Even in the case of the animals that we closely relate to, our knowledge of animal welfare issues may be limited. According to the Australian Companion Animal Council, an estimated 63% of Australian households have pets, such as cats, dogs, birds and fish, but public awareness of the welfare of these species is often influenced by media reporting, which tends to focus on sensational incidents of animal cruelty and overlook the broader issues.

HOW ANIMALS ARE USED

Our attitudes towards animals are inseparable from their status as a human resource. According to a prominent US animal lawyer, Steven Wise, ‘the use of non-human animal products is so diverse and widespread that it is impossible to live in modern society and not support the non-human animal industry directly’.

First, and most obviously, the majority of people eat the flesh of various species, as well as consuming their products, such as milk and eggs.

Secondly, the bodies of animals are used in an enormous variety of other ways that are much less obvious. For example, the blood, fat, collagen and intestines of a...
slaughtered cow may find their way into products as diverse as fertilisers, dyes, crayons, soap, contraceptives, pie crusts, paper, racquet strings and many more.  

Animals are also used for a variety of other purposes, including entertainment and sport, hunting and exhibitions. In addition, large numbers of animals are subjected to research, while many others are culled when their numbers and/or location result in their designation as pests. Clearly, these uses have consequences for the animals, both in terms of their life span and their general welfare.

**LEGAL STATUS OF ANIMALS**

Reflecting and reinforcing the view of animals as human resources is the legal status of animals as property. According to *Halsbury’s Laws of Australia*, “[d]omestic animals, like other personal and moveable chattels, are the subject of absolute property.” This is the position both at common law (law made by judges) and in statute law (law made by parliaments). Many statutes specifically include animals in the definition of ‘goods’, for example, the *Fair Trading Act 1987* (NSW), section 4(1).

Where legislation does not specifically mention animals in the definition of ‘goods’, there has been no reluctance to interpret the term to include them. The NSW Consumer, Trader and Tenancy Tribunal, for example, held that a puppy is properly described as “goods” for the purposes of the *Sale of Goods Act 1923*. This understanding of animals as ‘goods’, that can be bought or sold, is seen every day in newspaper and online advertisements. For example, the Trading Post Online has a category ‘pets’ on its website, on which thousands of animals are advertised for sale in Australia.

Clearly, our relationship with animals is both puzzling and problematic. It is puzzling because we may claim to love animals, or at least to care about their welfare; but our exploitation of them sits uncomfortably with our professed concern. This discrepancy between our stated beliefs about animals and our treatment of them has been described as ‘moral schizophrenia’. Our relationship with animals is problematic because, self-evidently, animals are not the same as goods, despite their status as property. Animals are not cars or computers or any other kind of inanimate thing; they are conscious beings, capable of experiencing both pleasure and pain. Given these paradoxes, it is perhaps surprising that our relationship with animals is largely taken for granted. A brief excursion into history and philosophy may help to explain why this is so.

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The Influence of History

Contemporary Australian attitudes to animals have long-standing origins and can be traced to some of the most influential ideas in the development of Western thought. As far back as pre-Christian times, Aristotle claimed that it was the undeniable truth that all animals were made for man’s benefit.\(^\text{13}\)

Genesis, the first book of the Old Testament, tells us that God created man in his own image, then gave men and women ‘dominion over the fish of the sea, and over the fowl of the air and over every other living thing that moveth upon the earth’.\(^\text{14}\) Many centuries later, St Thomas Aquinas avowed that it is not sinful to kill ‘dumb animals: for by divine providence they are intended for man’s use in the natural order. Hence it is no wrong for man to make use of them, either by killing or in any other way whatever’.\(^\text{15}\)

According to US animal lawyer, Steven Wise, ‘[b]oth the Old and the New Testaments, the apostle Paul, St Augustine, and St Thomas Aquinas stitched into the fabric of Judeo-Christian doctrine the idea that non-human animals had been created for the benefit of humans’.\(^\text{16}\)

The explosion of scientific and philosophical thought in the 17th and 18th centuries did not initially help animals. Rene Descartes, for example, put forward a view of animals as mere machines. Believing that animals lacked immortal souls, Descartes interpreted their cries and struggles when harmed as a mechanical response to stimuli. This view was well-suited to the age as it enabled animals to be freely used for the enormous growth in the field of scientific experimentation at a time when there was no anaesthesia.\(^\text{17}\)

When animal cruelty was rejected, the condemnation was often framed in terms of a public good, rather than as a duty owed directly to animals. Writing in 1780, Immanuel Kant viewed animals as irrational creatures, to be dealt with and disposed of at man’s discretion.\(^\text{18}\) Although Kant considered cruelty to animals to be wrong, this was because it hardened men in their relations with each other, not because animals themselves warranted consideration.\(^\text{19}\)

In the context of the times, the publication of Jeremy Bentham’s *Introduction to the Principles of Morals and Legislation* in 1789 represented a quantum leap in thinking about animals. Bentham was an influential English Utilitarian philosopher and lawyer who believed that the interests of non-human animals had ‘been neglected by the insensibility of the ancient jurists’ so that they stood ‘degraded into the class of things’.\(^\text{20}\) In a footnote to these words, Bentham included the following (frequently-quoted) remarks:

> 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 why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, 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


\(^{14}\) Genesis 1:26-28.


\(^{16}\) Wise (see note 8) at p 17.


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?21

[‘Note: ‘villosity’ and ‘termination of the os sacrum’ refer to the characteristic differences of animals, in having fur and a tail.]

Bentham’s ideas with respect to animals were important for more than one reason. First, he gave moral significance to animals in their own right, arguing that their capacity to suffer obliged humans to treat them humanely. Also, by linking his concerns about the welfare of animals with the issue of slavery, Bentham was placing his argument within a broader progressive context. Many of those who worked for the introduction of animal welfare legislation in 19th century England were also concerned with other important social reforms of that era. For example, the first successful legislative attempt to protect animals in the UK was the work of Richard Martin, an English member of parliament, who was also committed to other social reforms, such as freedom for slaves and abolition of the death penalty.22 Known as Martin’s Act, the Cruel Treatment of Cattle Act 1822 (3 Geo. IV c. 71) criminalised cruelty to cattle, sheep and horses and was the forerunner of the Cruelty to Animals Act 1849 (UK) and the Protection of Animals Act 1911 (UK)23 which would form the basis of animal welfare laws in the UK and Australia.

ANIMAL WELFARE

The introduction and refinement of animal welfare legislation in the UK and Australia in the 19th and 20th centuries was an acknowledgment that animals’ capacity to feel pleasure and pain is a relevant criterion for treating them humanely. While it represented a considerable advance in animal protection, legal change did not alter the view of animals as property; nor did it acknowledge that animals might have an interest in their own lives, apart from their interest in not suffering.

Current Australian animal protection laws are based on the same animal welfare principles. Starting from the premise that the institutional use of animals is morally legitimate, the ‘primary aim of welfare supporters is to abolish “unnecessary” suffering within the accepted paradigms of the animals’ use’.24 This approach clearly condemns gratuitous cruelty but leaves unanswered the question: when is animal suffering ‘necessary’? Some critics of the animal welfare approach argue that the property status of animals means that their interests in not suffering will always be sacrificed when in competition with human interests or desires.25

The position of the Australian Animal Welfare Strategy (AAWS), launched by the federal government in 2005, is that animals may be used for human purposes provided they are treated humanely. While the AAWS states that animals have intrinsic value, it also affirms their importance as a source of food, fibre and other products and the key role of animal industries ‘in maintaining the nation’s economic well-being’.26 Many animal protection groups also adopt an animal welfare approach. Although their policies may differ in some respects from the

21. As above.
23. As above, at p 58. For a detailed historical account of the development of animal welfare legislation in Britain see Animal welfare law in Britain: regulation and responsibility, M Radford, 2001, Oxford University Press.
25. See, for example, Francione, note 12.
The Australian Animal Welfare Strategy (AAWS) was endorsed by the Primary Industries Ministerial Council in 2004 and published in 2005. While the scope of AAWS is broad it does not aim to transform the existing animal welfare framework but to ‘promote and refine’ it. This framework is described as ‘strong’, with ‘contemporary and comprehensive animal welfare legislation and enforcement’ and national codes of practice that ‘provide a sound basis for the humane and responsible use and treatment of animals’ (p 26).

According to AAWS (p 10), its goals are to achieve:
> an enhanced national approach to animal welfare;
> sustainable improvements in animal welfare; and
> improved understanding of animal welfare through effective communication, education and training.

These goals are to be achieved through a National Implementation Strategy and action plans in relation to six categories of animals:
> livestock/production animals
> animals in the wild
> companion animals
> animals in research and teaching
> animals used for work, sport, recreation or on display
> aquatic animals

Some of the Strategy’s activities are likely to have some positive impact on animal welfare, for example the development of consistent national standards and educational initiatives, such as the conference held in 2008.

More broadly, however, AAWS is open to the criticism that it does not challenge the contradictions of the existing regulatory framework, in particular the different treatment of animals according to their use, despite their shared sentiency.29

Grounded in rights theory, but based on utilitarianism, a philosophy that looks to the consequences of action to determine what is morally right, Singer’s version of utilitarianism takes into account individual preferences, and favours the outcome that maximises satisfaction after preferences have been grouped together and considered as a whole.28 Animals are entitled to equal consideration in this process, because:

[i]f a being suffers there can be no moral justification for refusing to take that suffering into consideration. No matter what the nature of the being, the principle of equality requires that its suffering be counted equally with the like suffering – insofar as rough comparisons can be made – of any other being.27

Application of this principle does not mean that animals must receive equal or identical treatment to humans; rather, as Singer notes, ‘[e]qual consideration for different beings may lead to different treatment and different rights.’31 Nor does it mean that animals can never be used for human purposes. It would, however, make animal suffering in the pursuit of human ends considerably harder to justify and impact radically on our present treatment of animals.

28. White (see note 19) at p 89.
30. Singer (see note 17) at p 8.
31. Singer (see note 17) at p 2.
ANIMAL RIGHTS

Another alternative approach to animal protection is based on the moral right to be treated in a way that does not contradict an individual’s inherent value. A leading exponent of animal rights, the US philosopher Tom Regan, believes that, like humans, most animals have a value, unrelated to their utility, because they are the ‘subject-of-a-life’. By this, Regan means that the individual’s life is characterised by features such as desires, perception, memory, a sense of the future, emotions and preferences. The inherent value attached to having a life attracts an equal right to respectful treatment, not as an act of kindness, but as an act of justice.

In many instances, application of a rights-based approach to animal protection would have the same effect as Singer’s version of utilitarianism, despite the different reasoning on which the theories are based. Ultimately, however, a rights-based approach opposes all forms of animal exploitation while a utilitarian approach might countenance the use of animals if justified by the consequences, provided that the animals’ interests had been equally considered in the balancing process.

OTHER APPROACHES

More recently, these approaches have been challenged and refined through the work of other commentators. For example, American legal academic, Martha Nussbaum, bases animal protection on justice, not compassion, but draws inspiration from a sense of wonder at the complexity of animal lives. The result is an extension of the ‘capabilities approach’ that aims to allow animals to live flourishing lives according to their different capabilities. Another rich framework for theorising about animal protection has emerged from the work of feminists. One approach, for example, is based on sympathy and compassion, not as a sentimental response, but as part of a political ethic of care with respect to animals.

All of these different ways of thinking about the relationship between humans and other animals are much more complex than can be presented here. There are also other theories that have not been touched on. However, the fact that these areas are now the subject of detailed discussion in the academic literature in Australia and overseas is a sign of the seriousness of the contemporary debate about animals.

34. As above at p 280.
35. ‘Beyond “compassion and humanity”; justice for nonhuman animals’, M Nussbaum in Sunstein and Nussbaum, see note 9, at pp 299-306.
36. As above.
37. For a summary of different approaches see for example, White (note 19), at p 79.
Australian Regulatory Framework

History tells us that animal protection laws are informed by a set of assumptions about the relationship between humans and other animals. These assumptions may be easier to identify with the perspective of history but similar ideas also underpin the current regulatory regime.

Although there are some differences in State and Territory laws, the regulation of animal welfare in Australia has a number of common features that impede animal welfare:

1. The relevant laws provide very different levels of protection according to the function and context of the animals.
2. There is a heavy reliance on codes of practice, standards and guidelines made by non-parliamentary bodies.
3. The principal interests of these bodies, and the government departments that typically administer the relevant laws, are not animal welfare but agriculture and industry.
4. Uniquely to animal welfare, the law is enforced primarily by charitable organisations.
5. Despite the sentience of animals, our use of them is largely hidden from public view, and the operation of the laws that regulate this use lacks transparency.

NEW SOUTH WALES LAW

Animal welfare in Australia is primarily a matter for State law, so its scope is examined in detail here by reference to the legal and regulatory framework in NSW. Each of the five features mentioned above is considered in the context of the principal NSW laws, with brief reference to other States to illustrate some of the jurisdictional differences.

Prevention of Cruelty to Animals Act 1979 (NSW)

The Prevention of Cruelty to Animals Act 1979 (POCTAA) is the principal animal welfare statute in NSW. It incorporates the following definition of ‘animal’ in section 4:

(a) a member of a vertebrate species including any:
   (i) amphibian, or
   (ii) bird, or
   (iii) fish, or
   (iv) mammal (other than a human being), or
   (v) reptile, or
(b) a crustacean but only when at a building or place (such as a restaurant) where food is prepared or offered for consumption by retail sale in the building or place.

(Note: This definition is broader than in some other Australian jurisdictions. For example, the Animal Welfare Act 1985 (SA), s 3 excludes fish.)

The Act’s ‘objects’, set out in section 3, are:

(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.

The Act creates general offences of cruelty and aggravated cruelty, as well as a range of specific offences, for example failure to provide food, water or shelter, to give effect to these ‘objects’. In combination with a reasonably broad definition of ‘animals’ and an objects clause expressed exclusively in terms of their welfare, POCTAA appears to give considerable protection to animals.

On a closer examination, however, the Act is heavily qualified. First, an ‘act of cruelty’ is defined in s 4(2) to include:

any act or omission as a consequence of which the animal is unreasonably, unnecessarily or unjustifiably:

(a) beaten, kicked, killed, 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.

In other words, POCTAA does not prohibit any cruelty to animals but only cruelty that is unreasonable, unnecessary or unjustifiable. This immediately begs the question: when is cruelty reasonable, necessary or justifiable for the purposes of the Act? The ambiguity of this requirement is complicated by similar references in other parts of the legislation, such as the various defences contained in section 24. These defences are notable for two reasons.

1. The accused must satisfy the court that the specified act has been committed ‘in a manner that inflicted no unnecessary pain upon the animal’. This reinforces the idea that cruelty is permissible when it is necessary.

2. The defences in conjunction with other provisions of the legislation effectively exempt large numbers of animals from POCTAA’s reach, as discussed in the following sections.

A further complication is the lack of reported case law to provide guidance on the interpretation of these provisions. The position is similar throughout Australia. This is partly due to the relatively small number of animal cruelty prosecutions, especially in relation to farmed animals. In addition, matters that are prosecuted are usually dealt with by magistrates courts (Local Courts in NSW); where decisions are appealed, it is commonly in relation to sentencing. Those appeal cases that involve the interpretation of the law often concern the meaning of the phrase ‘person in charge’ rather than grappling with the central ambiguity surrounding ‘unnecessary’ cruelty.

**Farmed animals**

Farmed animals receive very little protection under POCTAA. First, many of the defences in section 24 relate to various practices performed on stock animals. For example, section 24(1)(a)(ii) effectively allows pigs under two months of age or cattle, sheep or goats less than six months of age to be castrated without using anaesthetic. Although this and other procedures must be carried out ‘in a manner that inflicted no unnecessary pain’, this provision has not been taken to require anaesthesia.

Secondly, stock animals (other than horses) are exempted from section 9 of POCTAA. This section is critical because it makes it an offence to confine animals without providing adequate exercise. In combination with a broad definition of stock animal in s 4, this exemption effectively sanctions the routine confinement of hens in battery cages and female pigs in stalls for some or all of their lives. This issue is explored more fully below in relation to codes of practice. The lack of protection for farmed animals is mirrored in other Australian jurisdictions, although the precise manner in which the law achieves this is not always the same.

The defences under section 24 also effectively exempt other conduct in relation to production animals from the protection of POCTAA, for example destroying an animal for the purpose of producing human food, provided it is done ‘in a manner that inflicted no unnecessary pain’: s 24(1)(b)(ii). Apart from the uncertain meaning of the term ‘unnecessary’ in this context, there are insufficient resources to ensure adequate enforcement of the Act, as discussed on page 15. In addition, section 24(1)(c) provides a defence against prosecution for a cruelty offence where the relevant act or omission was done in the course of destroying an animal in accordance with the precepts of the Jewish religion or any other religion prescribed by the regulations. In the case of this defence, there is no qualifying requirement of ‘unnecessary pain’.

**Companion animals**

Companion animals receive considerably more protection under POCTAA than farmed animals but there remain complex welfare issues that the Act fails to address. A prime example is the uncontrolled breeding of companion animals such as cats, dogs and rabbits. A discussion paper produced by the RSPCA in 2010 illustrates the extent and gravity of this issue in relation to puppy farms, describing the associated welfare problems as ‘horrific’. Major problems associated with puppy farms include close confinement, constant breeding, lack of proper care and failure to socialise animals. There is also a huge emotional toll on staff and volunteers involved in these cases. Enforcement of the law is difficult, with the RSPCA noting a high rate of repeat offending among puppy farm operators, regardless of whether or not they are prosecuted. These difficulties are exacerbated by the lack of funds available for enforcement of animal welfare generally.

A further complication is the lack of regulation governing the advertising and sale of animals and the ease of online purchase. In addition to pet shops, the internet is a primary vehicle for disposing of animals. In 2008, the independent MP, Clover Moore, introduced the Animals (Regulation of Sale) Bill 2008 (NSW). The Bill aimed to reduce the mass breeding and impulse purchase of dogs and cats by banning their sale in pet shops and markets, and otherwise restricting advertising for their sale. Both the NSW Government and Opposition failed to support this initiative. Around the same time,

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39. Cao (see note 22) at p 130.
revised versions of the codes of practice for pet shops and breeders were published. While these codes incorporate standards whose breach is an offence, for example a minimum age for sale, there appears to have been no increase in resources to enforce their provisions. In any case, the codes do not address the broader problem of the oversupply of animals.

Unwanted animals also result from a failure to have pets desexed. Abandoned or neglected undesexed animals also contribute to the proliferation of unwanted animals, as well as causing problems for other animals and the environment.

There is no legal requirement in NSW that a companion animal be desexed before sale; nor any onus on a purchaser to do this. Under the Companion Animals Regulation 2008 there is a reduced fee for registration of a desexed animal, but the effectiveness of this measure as an incentive is unknown. It also assumes that owners comply with the registration requirements under the Companion Animals Act 1998 (NSW).

Meanwhile, during 2008-09 in Australia, the RSPCA alone euthanased 61,580 dogs and cats, plus thousands of other animals such as guinea pigs and rabbits.42

Animals in the wild

As well as their impact on farmed animals, exemptions and defences in POCTAA reflect the lesser priority in animal welfare terms given to some animals living in a non-domesticated state. For example, although section 15 makes it an offence to poison an animal, only domestic animals are included in its scope. While POCTAA offers some protection, for example the prohibition on the use of steel-jawed traps, the killing of wild animals is envisaged by s 24(1)(b)(i). This section makes it a defence to a cruelty prosecution if the relevant act or omission is related to hunting, shooting, snaring, trapping, catching or capturing an animal, in a manner that inflicted no unnecessary pain.

The hunting of native animals for non-recreational purposes is governed by the National Parks and Wildlife Act 1974 (NSW).43 This Act and other environmental legislation offer some protection to wild animals, but the extent depends on whether the animals are introduced or native species, and on their conservation status. The combination of animal welfare and conservation legislation create:

a clear hierarchy of protection against cruelty and suffering caused by hunting. According to this hierarchy, native species of high conservation status are fully protected (in theory at least) against killing and harm. Native species of lower conservation status are protected to a varying degree. Finally, introduced species are less likely to be protected against harm whilst their killing is encouraged, if not mandatory.44

The hunting of non-native animals for sport or recreation is regulated by the Game and Feral Animal Control Act 2002 (NSW) through a system of licensing. A condition of the licence is compliance with a set of standards that include animal welfare provisions. Not all hunting, however, requires a licence; where the standards do apply, they are very difficult to enforce in practice. Although the Game and Feral Animal Control Act, s 6 states that nothing in that Act affects the operation of POCTAA, as previously noted, the operation of POCTAA is limited. While recreational hunting is sometimes promoted as a means of reducing the environmental impact of unwanted animals, others maintain that ‘the goals of recreational hunting and those of feral animal control often conflict.’45

Apart from the Game and Feral Animal Control Act, the management of animals considered ‘feral’ or ‘pests’ is

43. ‘Recreational hunting – regulation and animal welfare concerns’ D Thiriet, in Sankoff and White, (see note 19) at pp 259, 272-3.
44. As above at p 270.
regulated through various NSW and Commonwealth laws, for example the Threatened Species Conservation Act 1995 (NSW) which authorises the preparation of ‘threat abatement plans’ to manage ‘key threatening processes’. These processes are defined in Schedule 3 to include competition and grazing by feral European rabbits, competition and habitat degradation by feral goats, environmental degradation caused by feral deer, invasion and establishment of the cane toad, and predation by European red foxes, feral cats and feral pigs.

Although some animals pose severe problems for the environment, as well as for other animals, they are sentient creatures nonetheless. However, a combination of inadequate legislation and poor and unenforceable codes has allowed the ‘use of an impressive range of cruel practices in the name of “pest control”’.46 This application of different standards to the control of ‘feral’ animals or ‘pests’ is inconsistent with a moral obligation based on the capacity to suffer.

Awareness of the inadequacy of the existing legal framework has seen some developments in this field. For example, as part of the Australian Animal Welfare Strategy the Vertebrate Pest Research Unit of the NSW Department of Primary Industries has produced a national model that allows different control methods to be assessed for their degree of humaneness.47 New Codes of Practice and Standard Operating Procedures for the control of various ‘pest’ and ‘feral’ animals have been developed. In 2007, representatives from all the Commonwealth, State and Territory governments agreed to phase out control methods identified as ‘not acceptable’.48 These matters are due to be considered by the Primary Industries Ministerial Council in November 2010.49 If endorsed by that body, the new Codes and Procedures, as well as the ban on certain methods, will still need to be adopted by State and Territory legislation, and their ultimate legal force will depend on how this is done. All of this is likely to take considerable time. Even with a ban on some methods of control, others will remain which cause animal suffering but which are considered ‘conditionally acceptable’, for example, poisoning with sodium monofluoroacetate (1080).

**Animals used for research**

It is a defence to any proceedings for an animal cruelty offence (under POCTAA or the regulations) if the relevant conduct was carried out in accordance with the provisions of the Animal Research Act 1985 (ARA); see POCTAA, s 24(1)(c). Inspectors appointed to enforce POCTAA cannot exercise their powers in relation to animal research carried out in accordance with the ARA unless they are also appointed as an inspector under that legislation; see POCTAA, s 24D(3).

The purpose of the ARA is to protect the welfare of animals used in connection with research by a system of licensing and accreditation of researchers and those who supply animals to them (see section 2A). In combination with the Australian Code of Practice for the Care and Use of Animals for Scientific Purposes (the Scientific Code), incorporated by the Animal Research Regulation, the ARA creates a system of enforced self-regulation. This regime relies heavily on the work of animal ethics committees (AECs), which must be established by the institutions that use animals for scientific purposes. The AECs report to their institution’s governing body and are responsible for approving applications by researchers to use animals and ensuring compliance with the Scientific Code. Where agreement cannot be reached, the decision of the majority prevails. While the AECs must include at least one animal welfare representative and one independent community representative, these categories of membership need only constitute one-third of the committee when there are more than four members.

All other States and the Territories require compliance with the Scientific Code although only NSW has a separate statute dealing with animals in research,50 rather than forming part of the principal animal welfare statute, for example the Animal Care and Protection Act 2001 (Qld).

The Scientific Code incorporates the principles first articulated more than 50 years ago known as the 3Rs:

- **Replacement** – to replace animals with alternative research methods;
- **Reduction** – to reduce the numbers of animals where they are used; and

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49. Email to author from Dominique Thiriet, Member, Wild Animals Working Group, AAWS, 2 August 2010.

50. ‘Scientific Experimentation on Animals’, P Gerber, in Sankoff and White, (see note 19) at p 223.

51. As above at p 213.
Refinement – to minimise their pain, suffering and distress.

In practice, however, it is difficult to determine whether any progress is being made. The Australian Association for Humane Research suggests that animal use is increasing, with estimates (based on the most recent annual data available) that approximately 7.1 million animals were used in research and education in Australia in 2007.\(^{52}\) While most animals were used in observational studies with minor interference, significant numbers suffer other impacts, including major physiological challenges, death as an endpoint and genetic modification.\(^{53}\) A major physiological challenge is where the animal ‘remains conscious for some, or all, of the procedure. There is interference with the animal’s physiological or psychological processes. The challenge causes a moderate or large degree of pain/distress that is not quickly or effectively alleviated.’\(^{54}\)

Exhibited animals

Exhibited animals are governed by a separate statute, the Exhibited Animals Protection Act 1986 (NSW). Section 3 of that Act provides that POCTAA also applies.

The exhibited animals legislation creates a system of approvals for those wanting to operate animal display establishments, including zoos, marine parks and circuses, and incorporates various standards relevant to animal welfare and other matters. By contrast, most other Australian jurisdictions lack a specific statute comprehensively regulating the exhibition of animals, relying instead on various legislative provisions.\(^{55}\)

As part of the push for national consistency in animal welfare regulation, a draft of new Australian Standards and Guidelines for exhibited animals was released for public comment in 2009.\(^{56}\) As well as measures to do with security and human health and safety, the draft covers matters related to animal welfare, such as the size of enclosures, dietary requirements, breeding and euthanasia. According to the draft Standards and Guidelines (p 4), their principal purpose ‘is to define measures that, when implemented, ensure Animals used for Exhibition Purposes are kept securely and in a manner that ensures Animal health and welfare and public safety.’ This goal accepts the legitimacy of keeping animals for exhibition but seeks to develop consistent national standards for doing so. See page 13, for discussion more generally about the standards development process.

Criminal law

In addition to the legislation previously discussed, the Crimes Act 1900 (NSW) contains two animal cruelty offences with harsher maximum penalties than the offences under POCTAA. The Crimes Act makes it an offence to commit a serious act of cruelty on an animal with an intention to inflict severe pain. Also, it is an offence to intentionally kill or seriously injure an animal used for law enforcement. Significantly, however, a person is not criminally liable under section 530 where:

(a) the conduct occurred in accordance with an authority conferred by or under the Animal Research Act 1985 or any other Act or law, or

(b) 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.

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\(^{54}\) As above, at p 33.

\(^{55}\) Cao (see note 22) at p 254.

These provisions are similar to the defences in POCTAA. Their inclusion is an admission by parliament that the nominated activities can involve serious cruelty to animals but are considered acceptable nonetheless.

**Other NSW legislation**

A range of other NSW Acts may affect animal welfare even though this is not their primary object. An example is the Companion Animals Act. Although some of its provisions may benefit animals (for example, the registration and microchipping requirements), the thrust of the legislation is the control and management of companion animals and their impact on the wider community and the environment.

**NATIONAL MODEL CODES OF PRACTICE FOR LIVESTOCK**

Animal welfare regulation in Australia depends heavily on codes of practice. In NSW, POCTAA incorporates codes in two different ways. First, it authorises the adoption by regulation of codes or other guidelines relating to the welfare of farm or companion animals. Currently, eight documents have been adopted in NSW in this way. The codes have been developed at a national level and relate to the welfare of livestock, for example the Model Code of Practice for the Welfare of Animals: Cattle. National codes that have not been adopted in NSW include the Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments.

Compliance with a code of practice adopted in this way is voluntary, with most States and Territories adopting a similar position. There is, however, some incentive to comply with these adopted codes, although the legal position is not the same throughout Australia. In NSW, the legal effect of adopted codes is to make them admissible in proceedings as evidence of compliance, the thrust of the legislation is the control and management of companion animals and their impact on the wider community and the environment.

**AUSTRALIAN STANDARDS AND GUIDELINES**

As part of the Australian Animal Welfare Strategy, the Model Codes of Practice governing livestock are being progressively revised and re-written as national Standards and Guidelines. The aim is for all Australian States and Territories to give legislative effect to these Standards over time to create a set of nationally consistent and enforceable laws in relation to livestock. The Australian Standards and Guidelines for the Welfare of Animals: Land Transport of Livestock were the first Standards developed as part of this process. These Standards were endorsed by the relevant State and Territory Ministers through the Primary Industries Ministerial Council in 2009 but are yet to be implemented. At the time of endorsement, particular concern had been expressed about the provisions in relation to ‘bobby calves’. A by-product of the dairy industry, ‘bobby calves’ are routinely transported to slaughter without their mothers at five days old. Despite the animal welfare concerns, the PIMC noted only that ‘further industry consultation will occur before the standards are given legislative effect.’

**NSW CODES OF PRACTICE**

The need for consistent, enforceable standards has already seen provisions from the national Model Code for the Welfare of Animals – Pigs incorporated in NSW in a way that makes breaching the Code’s mandatory requirements an offence. This was done in 2010 by prescribing commercial piggeries as an animal trade and the Animal Welfare Code of Practice – Commercial Pig Production as the relevant code of practice, under clauses 18-19 and Schedule 2 of the Prevention of Cruelty to Animals (General) Regulation 2006. This is the second way in which Codes are incorporated in NSW. Other Codes prescribed in this way include the Animal Welfare Code of Practice – Animals in Pet Shops (2008) and the Animal Welfare Code of Practice – Breeding Dogs and Cats (2009). Companion animals are considered further on page 8.

**CONFLICT OF INTERESTS**

National consistency and enforceability are important elements of animal welfare regulation but the process of making Codes and Standards is vulnerable to criticism. A major complaint is that the principal interests of the major players in the process conflict with the interests of the wider community and the environment.

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57. These codes are published by the CSIRO and are available at www.publish.csiro.au/nid/22/sid/11.htm See also www.daff.gov.au/animal-plant-health/welfare/model_code_of_practice_for_the_welfare_of_animals
58. S White (see note 29) at p 355.
of animals. According to the Chair of the Victorian Barristers Animal Welfare Panel, codes of practice ‘usually favour the interests of producers over animal welfare where there is a conflict and thus set low welfare thresholds.’ Indeed, model codes were first developed in Australia in the early 1980s as a response from industry to animal welfare criticism of methods of livestock management and animal experimentation.

Like the national Model Codes of Practice on which they are based, the national Standards and Guidelines are made within a complex Federal/State regulatory system dominated by industry bodies and government agricultural agencies. Significantly, the Standards development process is managed by Animal Health Australia (AHA), a not-for-profit public company established by governments and major livestock industry bodies. Its members include, for example, Australian Pork Ltd and the Australian Egg Corporation. The aim of the AHA is to ‘ensure that Australia’s national animal health system delivers a competitive advantage in drafting the initial provisions.’ According to the current Business Plan for developing Standards, the role of industry organisations includes contributing to writing groups and reference groups, while the role of animal welfare organisations is to comment on the drafts of the revised Standards as members of the Reference Group.

When finalised, the draft Standards and Guidelines are submitted to the Primary Industries Ministerial Council for endorsement, via the Animal Welfare Working Group (now the Animal Welfare Committee). This Group comprises representatives of Federal, State and Territory governments, the CSIRO and AHA, with attendance by industry group observers ‘where appropriate.’ While government representatives may be drawn from agencies with animal welfare responsibilities, these are typically connected with departments that are industry related. For example, the NSW representatives are from the Animal Welfare Branch of the Division of Primary Industries (DPI), now part of Industry & Investment NSW. Previously the Department of Primary Industries, the DPI acts ‘in partnership with industry and other public sector organisations to foster profitable and sustainable development of primary industries in New South Wales.’ Similarly, the aim of the PIMC is ‘to develop and promote sustainable, innovative and profitable agriculture, fisheries/aquaculture, and food and fibre industries.’

While appropriate to their respective agencies, the above aims are problematic in terms of animal welfare. This is not simply because animal welfare must compete with the articulated agency priorities but because fostering profitable industries may be inconsistent with fundamental welfare principles. This inconsistency is reflected in the content of codes. For example, the Introduction to the current Model Code of Practice for the Welfare of Animals – Domestic Poultry states that ‘the basic requirement for welfare of poultry is a husbandry system appropriate to their physiological and behavioural needs.’ The same Code also recognises, however, that certain behavioural needs, such as the ability to fully stretch, to perch and to lay eggs in a nest cannot be accommodated in current caged housing conditions.

The Code nevertheless sanctions these caged systems, providing a minimum space allowance of only 550 cm² for each bird weighing less than 2.4 kg in cages with three or more laying fowl. This dimension is less than an A4 sheet of paper.

COMMUNITY STANDARDS

Arguably, livestock code provisions are lagging behind community views about animal welfare. This may be illustrated by reference to the recently revised Model Code of Practice for the Welfare of Animals – Pigs published in 2008. A major animal welfare issue in relation to pigs is the common practice of housing sows in small metal stalls. In Australia, these individual stalls are ‘the dominant system for housing sows for all or part of their gestation.’ Under the 2008 Pig Code, the...
maximum time that sows can be confined to stalls is reduced to six weeks but pig producers have until 2017 before this change is required.73

The Australian response on the issue of sow stalls is falling behind developments in some other Western nations, as noted on page 22. It also appears to be lagging behind public sentiment. In July 2010, Coles announced that by 2014 its supermarkets will cease to purchase fresh pork from farms which use sow stalls, stating that it is acting in response to consumer concern about animal welfare.74 This followed the announcement in June 2010 by the Tasmanian Minister for Primary Industries that Tasmania would impose a complete ban on the routine use of sow stalls, with a six week limit to apply from 2014 and the total ban operational from 2017.75

OTHER CODES

Typically, the code development process includes representatives of animal welfare groups but their input is usually outweighed by competing interests. As a result, it is not just codes with respect to farmed animals that are characterised by a conflict of interests. In NSW, codes of practice in relation to prescribed animal trades are written by the Animal Welfare Branch of the DPI in consultation with industry and animal welfare groups. While it is appropriate for all stakeholders to be consulted, the starting point appears to be industry. For example, the Animal Welfare Code of Practice – Animals in Pet Shops cites the Pet Industry Association of Australia first among the organisations consulted in its preparation.76 In relation to the regulation of animals used in research and teaching, the Scientific Code plays a key role, as noted above. This Code was prepared by the National Health and Medical Research Council, the CSIRO and the Australian Vice-Chancellors’ Committee, with representatives from the State and Territory governments and animal welfare groups.77

Enforcing Animal Welfare Law

Laws are only effective if they are adequately enforced. Accordingly, good animal welfare outcomes are dependent on the statutory provisions governing enforcement, the culture of agencies tasked with this responsibility and the government resources that are available.

ENFORCEMENT AGENCIES

In NSW, officers of three different agencies are able to be appointed as inspectors to enforce the provisions of POCTAA: the police, the Department of Primary Industries (DPI) and approved charitable organisations (ACOs). The RSPCA and the Animal Welfare League (AWL) are the two ACOs prescribed by the Minister for Primary Industries for this purpose. In practice, the bulk of the enforcement task under POCTAA falls to the RSPCA. In the other Australian States and the ACT, the RSPCA also plays a major enforcement role, although in some jurisdictions the relevant departments are involved to a greater extent than the DPI is in NSW.

In Queensland, for example, the Department of Primary Industries and Fisheries and the RSPCA have formally agreed that the Department has primary responsibility for enforcing the law in relation to livestock while the RSPCA deals with companion animal issues. No independent statutory authority or separate government agency dedicated to the enforcement of animal welfare laws exists anywhere in Australia.

Outsourcing of the enforcement of a criminal statute to private charitable bodies appears to be unique to the field of animal welfare. It is problematic for several reasons:

1. Enforcement of the criminal law is an exercise of public power. Private bodies are not accountable for their actions in the same way as an agency of the state.

2. Animal welfare organisations are not specialists in criminal procedure.

3. Private charities lack the resources to comprehensively undertake the necessary enforcement activity. While the ACOs receive some government funding, the amount is insignificant compared to the magnitude of the enforcement task. For example, in 2008-09 the NSW RSPCA received a government grant of $424,000 for the work of its inspectorate. In the same year, the cost of that inspectorate is given as $4,995,663.

There are also problems with enforcement of animal welfare by government authorities if, as previously discussed, the relevant agencies have competing priorities and conflicts of interests (see page 13).

In NSW, the Department of Primary Industries (now part of Industry and Investment NSW) administers animal welfare laws but is not actively involved with the enforcement of POCTAA. However, Primary Industries is involved with the enforcement of the Exhibited Animals Protection Act and, in conjunction with the Animal Research Review Panel (ARRP), also deals with complaints under the Animal Research Act. The ARRP is a statutory body responsible for overseeing the effectiveness and efficiency of the legislation, and for evaluating compliance by individuals and institutions.

The 12 members of the ARRP include four animal welfare representatives. Its Annual Reports reveal very few complaints, despite the size of the animal research industry. The reasons for this may be complex, as discussed on page 17. The DPI does not publish information about complaints received or enforcement action taken with respect to exhibited animals.

ENFORCEMENT OPTIONS

Enforcement of POCTAA by approved charitable organisations (ACOs) is mostly triggered by complaints. Australia-wide, the RSPCA investigated 50,765 cruelty complaints in 2008-09. In the same year, RSPCA NSW received 14,030 complaints relating to 19,237...
different animals/issues. The most frequent complaints were in relation to dogs, cats and horses, with failure to provide food and water the most frequently complained about conduct. Complaints were also received by the AWL and some complaints may have been dealt with by the police, particularly in remote or regional areas where the RSPCA may lack resources.

POCTAA provides various enforcement options where a complaint is substantiated. An inspector can issue written directions with respect to an animal’s care (section 24N), and for some offences a penalty notice can be served (see section 33E). A penalty notice attracts a lesser fine than the maximum penalty if a matter proceeds to court. For breaches of the Act and the regulations, the current maximum penalty notice amount is $500 for individuals and $1500 for corporations.

By contrast, the maximum penalty for the general cruelty offences under section 5 is 50 penalty units and/or imprisonment for six months for an individual and 250 penalty units in the case of a corporation. The Crimes (Sentencing Procedure) Act 1999 (NSW) provides that one penalty unit is equal to $110. For section 6, aggravated cruelty, the maximum penalty is 200 penalty units and/or imprisonment for two years for an individual, and 1000 penalty units in the case of a corporation. For most of the other offences in POCTAA, the maximum penalty is 50 penalty units and/or imprisonment for six months for an individual and 250 penalty units in the case of a corporation. Under s 35(3) of POCTAA, offences can be created by regulation but the penalty must not exceed 25 penalty units, except for offences relating to animal trades or laying fowl where a higher maximum penalty can be prescribed.

PROSECUTION AND SENTENCING

Before a person can be liable for the maximum penalties under POCTAA they must be successfully prosecuted. The RSPCA in NSW investigated 13,683 complaints in 2008-09, with 491 charges brought against 105 defendants. Australia-wide (except for the NT), 1827 charges were laid against 267 people, with 259 prosecutions and 202 convictions as a result. The ratio of prosecutions to investigations is low, with the scarcity of resources demanding that prosecution be reserved for those cases with a very high chance of success. Prior to 2007, any person in NSW could institute a prosecution under POCTAA. In that year, however, section 34AA was inserted into the Act to limit authority to prosecute to official bodies, except with the written consent of the government.

Under POCTAA, the most frequent penalty imposed by the courts is a fine, even for those convicted of aggravated cruelty. For example, from 2001-2007, of the 1164 people whose principal offence was a conviction under POCTAA, approximately 62% received a fine as their principal penalty and approximately 2% were imprisoned. Where a fine is imposed, the amount usually falls considerably under the maximum. For example, in relation to all principal offences under POCTAA where the main penalty was a fine, the average amount in 2007 was $738. In relation to aggravated cruelty as the principal offence, the average amount of the fines in 2007 was $976.

The low ratio of prosecutions to complaints, and arguably inadequate penalties for those who are convicted, are not just features of NSW law but apply generally throughout Australia and New Zealand. These characteristics suggest that animal cruelty is viewed differently to other violent criminal conduct, despite both the serious consequences for animals, and the link between deliberate cruelty to animals and other forms of human violence. As a New Zealand lawyer argues, there’s ‘a sense in which existing sentencing practice treats animal cruelty as a purely regulatory offence, rather than locating it in its proper context on a continuum of other forms of violent and antisocial behaviour (for which fine-only penalties would not be the norm).’

PROHIBITION ORDERS

A useful mechanism for protecting animals is the power of a court to make further orders where a person has been convicted of a cruelty offence. Under s 31 of POCTAA, the court can prohibit a convicted person from acquiring or possessing any animals for a specified period. A person who fails to comply with a section 31 order is liable to a penalty of 25 penalty units. Prohibition orders are not available where no conviction has been recorded by the court, even where a charge has been proven. Like some, but not all, Australian jurisdictions, s 31AA of POCTAA provides for recognition of similar orders made in another State or Territory. This means that a person in NSW who fails to comply with one of these interstate prohibition orders has also committed an offence.

83. RSPCA (see note 80) at p 49.
84. RSPCA Australia (see note 82) at Table 5.
85. White (see note 29) at p 554.
87. As above, pp 21-23.
88. ‘Animal Cruelty Sentencing in Australia and New Zealand’, A Markham, in Sankoff and White, (see note 19) at p 289.
89. As above at p 303.
90. As above.
ROUTINE INSPECTIONS

The power to conduct routine inspections of commercial premises is vital to animal welfare, both because of the huge numbers of animals involved and the fact that the activity happens on private property, away from the public gaze. In some parts of Australia, the law only allows entry to these premises without a search warrant if an inspector believes on reasonable grounds that urgent action is required. By contrast, in NSW, s 24G of POCTAA appears to provide for routine inspections of commercial premises. This is different to the NSW law with respect to dwellings. In these cases, s 24E only permits entry without the occupier’s consent, or a search warrant, if the inspector believes on reasonable grounds that an animal has suffered significant harm, is at significant risk of injury or requires immediate veterinary treatment and entry is necessary to prevent further harm.

In practice, however, the power to conduct routine inspections of commercial premises is limited by the available resources, with only 55 routine inspections carried out by the RSPCA in 2008-09 in NSW. The premises visited represent a mere fraction of animal businesses in NSW. As already noted, animal welfare law is significantly reliant on codes of practice as a regulatory tool in relation to livestock and animal trades. Apart from any criticism about their content, the value of codes is limited without the resources to monitor compliance. This is an issue in relation to companion animals, as well as farmed animals, see companion animals on page 8.

TRANSPARENCY

Given that the use of animals for human purposes largely happens behind closed doors, it might be expected that the law would operate with a very high level of visibility. In fact, as the example of exhibited animals suggests (see page 15), very little information is readily available to the general public about the way animal welfare laws work in practice. This presents a major problem in trying to assess whether animal welfare laws are meeting their stated aims.

For example, the tiny number of complaints about animals used in research could indicate an effective regulatory regime, with very high levels of compliance. Alternatively, it could be due to the difficulty of making complaints within a closed system and a culture that puts the interests of science and industry first. Animal ethics committees (AECs) are required by the Scientific Code to ensure that the use of animals for scientific purposes is justified. Although they are a crucial element in the regulatory framework, they face various obstacles in their role. The problems include the composition of AECs and institutional pressures to approve research. Yet the decisions of the AECs are confidential, as are the annual reports they are required to submit to the research institutions. In the case of some research institutions, even the full membership of AECs is not revealed, while the location of animal holding facilities is kept secret. Reports of investigations conducted by the ARRP are not publicly released. Although the ARRP Annual Reports provide some examples of the methods used to implement the 3Rs (see page 10), there is no comprehensive evaluation of the extent to which these goals are actually being achieved.

While more information is available with respect to POCTAA, there are still important gaps. Data on the enforcement of POCTAA is limited. The NSW Bureau of Crime Statistics and Research does not list animal cruelty offences separately, or hold data on prohibition orders made by the courts. Only basic statistical data is included in the RSPCA NSW Annual Reports. More generally, POCTAA (section 34A) refers to ministerial consultation with the Animal Welfare Advisory Council and some NSW Codes of Practice refer to endorsement by this body, but there is no publicly-available information about its membership.

It is also difficult to obtain information where the work of other agencies intersects with animal welfare and/or enforcement is spread across different authorities. For example, under NSW food safety legislation, various standards are prescribed with respect to the production of meat, and these standards include animal welfare matters in relation to abattoirs. It is not easy to find details about the enforcement of these standards, despite the fact that the nature of the work of abattoirs makes the need for transparency especially acute. In the UK, Europe and the United States awareness of significant welfare issues in slaughterhouses has led to calls for all abattoirs to be monitored by CCTV.

92. RSPCA Australia (see note 82) Table 5.
94. Boom and Ellis (see note 86) at p 29.
95. See, for example, ‘RSPCA wants CCTV in all abattoirs’, 25 February 2010; go to http://uk.reuters.com and type ‘cctv and abattoirs’ into the search box.
Australia has a federal system of government in which the Commonwealth can only legislate where the Constitution provides specific law-making power. Where the Commonwealth is granted legislative power, it is usually concurrent, that is, shared with the States. This means that both the States and the Commonwealth can pass laws with respect to many of the same matters, subject to the proviso in s 109. This section states that where a State law is inconsistent with a Commonwealth law the latter prevails and the State law is invalid to the extent of the inconsistency.

A NATIONAL APPROACH?

Apart from fisheries, there is no specific Commonwealth legislative power with respect to animals in the Constitution. This does not necessarily mean that the Commonwealth cannot have a legislative role, as other heads of power, such as the interstate and overseas trade and commerce power, the external affairs power and the corporations power, are likely to be sufficient to support national animal welfare legislation. An attempt at a national approach was made by Andrew Bartlett, then a Senator for the Australian Democrats, with the introduction of the National Animal Welfare Bill into the Senate in 2005. The Bill aimed to provide a consistent national approach to animal welfare and to establish a statutory authority to enforce its provisions.

The Bill was referred to the Senate Rural and Regional Affairs and Transport Legislation Committee for consideration of its provisions. Although the Committee's Report acknowledged that the majority of the public submissions had advocated more responsible and humane treatment of animals, it recommended that the Bill not proceed. No reasons for this conclusion were provided, other than the statement that:

all levels of government in Australia, industry groups and research bodies are working together through the current mechanism provided by the Australian Animal Welfare Strategy to improve the welfare of all animals in Australia. In the committee's view, the strategy provides the best approach to achieve improvements in this field.96

In a dissenting report, the Australian Democrats and Greens Senators made the following points:
> there is inconsistent interpretation and enforcement of animal welfare laws around Australia;
> the RSPCA is in an invidious position as a law enforcer when not resourced for this role;
> there is evidence of a direct link between animal cruelty and violence towards humans; and
> Australia's approach involves 'selective morality' in that it condemns cruelty to whales while ignoring or accepting cruelty to other animals to maintain profitable industries.97

SPECIFIC COMMONWEALTH LAWS

Although lacking a general legislative role, the Commonwealth has both a direct and indirect role in regulating animal welfare. Its indirect role was considered previously in relation to Standards and Codes of Practice, see page 12. The direct Commonwealth role is illustrated here using the examples of the regulation of the live export trade and federal environmental legislation.

Live animal export

In 1985, the Senate Select Committee on Animal Welfare released a report on the export of live sheep from Australia. Among the general conclusions, the Committee noted that 'if a decision were to be made on the future of the trade purely on animal welfare grounds, there is enough evidence to stop the trade. The trade is, in many respects, inimical to good animal welfare' [inimical means ‘harmful in effect’ or ‘hostile’].98 For this reason, the Committee recommended that a long-term solution be sought in the form of substituting...

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97. As above, at pp 17-19.
refrigerated sheep meat for live exports. Twenty-five years later, the live export trade continues, with 4.1 million live sheep and 857,700 live cattle among the Australian animals exported for slaughter in 2008-09.99

### CASE STUDY: LIVE ANIMAL EXPORT

In 2005, charges were laid against a live export company and its directors for alleged breach of s 19(3) of the Animal Welfare Act 2002 (WA). The charges related to a shipment of live sheep in 2003 from Fremantle to Kuwait. The prosecution followed an investigation by animal advocacy groups that revealed a significant number of dead sheep and others suffering from various injuries and diseases. In an apparent attempt to isolate the proceedings from the broader live export trade, the charges only related to some of the sheep on the vessel.100 The magistrate held that one of the charges, transporting the sheep in a way likely to cause unnecessary harm, was proven beyond reasonable doubt. Despite this finding, she acquitted the defendants, based on s 109 of the Constitution. Although the defendants had breached the Animal Welfare Act, the relevant provision of the State law was invalid because it was inconsistent with the Commonwealth legislative regime regulating the exported sheep under which the exporter was licensed. No appeal from the magistrate’s decision was forthcoming despite the view of some Australian barristers that her reasoning on the s 109 issue was open to challenge.101

WA Department of Local Government and Regional Development v Emanuel Exports Pty Ltd (2008) Perth Magistrates Court (the Al Kuwait case).

The Al Kuwait case involved animal welfare problems associated with the transporting of animals live, especially to distant destinations involving long haul voyages and difficult climatic conditions. Following a number of incidents involving large numbers of mortalities, and the much-publicised case of the Cormo Express, the Federal Government commissioned an inquiry into the live export trade, which resulted in the Keniry Report.102 As a result, the industry is now subject to the Australian Standards for the Export of Livestock (ASEL). These Standards form part of a complex regulatory regime, including the Australian Meat and Livestock Industry Act 1997, the Export Control Act 1982 and other Commonwealth legislation.

Since 2003, livestock mortalities for exports by sea have decreased but significant numbers of animals still do not survive the voyage. For example, of the 3,578,182 sheep exported live during 2009 there were 32,117 mortalities.103 These figures do not take into account suffering that falls short of death. Enforcement is the responsibility of the Australian Quarantine and Inspection Service (AQIS), which is part of the federal Department of Agriculture, Fisheries and Forestry. Once again, this raises issues about conflicts of interest. Analysis of AQIS reports of ‘high mortality voyages’ by Animals Australia indicates that, while the ASEL are commonly breached, AQIS tends to respond by imposing further export conditions rather than sanctions.104

Conditions during the voyage are not the only serious welfare challenges faced by animals exported live. Routinely transported to countries that lack adequate animal welfare laws, many animals experience great suffering and distress post arrival, including rough handling, inappropriate methods of transport in very hot conditions and slaughter without pre-stunning. Public awareness of the conditions animals face has been heightened by video footage obtained by animal advocacy groups and made available on the internet.105

100. Handbook of Australian animal cruelty law, M Caulfield, 2008, Animals Australia, pp 203-204. Also documents the difficulty faced by animal advocacy groups in persuading the relevant authorities to prosecute this matter.
105. See, for example www.animalsaustralia.org/media/videos.php?campaign=2/
In response, the Australian Government has entered into a Memorandum of Understanding with some of the importing countries in relation to various matters, including animal welfare, and has provided funds to help train feedlot, transport and abattoir staff. These initiatives, however, must be seen in the context of the millions of animals exported each year and the fact that the Australian Government has no power to enforce its standards in other nations.

Despite the various initiatives in relation to live export since the Keniry Report, the RSPCA concluded in 2008 that:

There is clearly no basis to the claim, frequently made by both the livestock export industry and the Australian Government, that Australian standards which attempt to regulate this trade are effective in ensuring the welfare of exported livestock. Combined with the frequent mistreatment, poor handling and inhumane slaughter of many of these animals in importing countries, the export of livestock remains a significant and seemingly intractable animal welfare issue.\textsuperscript{106}

The ASEL are regularly revised and the Federal Government has committed more funding for its Live Trade Animal Welfare Partnership. Nevertheless, the severity, complexity and magnitude of the animal welfare problems associated with live export ensure that the trade will continue to be highly contentious.

**Commonwealth environmental legislation**

Another important area where the Commonwealth has a direct legislative role is in relation to the import and export of wild animals/endangered species and their conservation in Australia. A key statute is the *Environmental Protection and Biodiversity Conservation Act 1999* which includes environmental protection, the promotion of ecologically sustainable development and the conservation of biodiversity in its objectives.

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CASE STUDY: SHOOTING KANGAROOS

A licence to kill kangaroos in NSW can be granted under the National Parks and Wildlife Act 1974 (NSW) subject to various conditions, including compliance with the Code of Practice for the Humane Shooting of Kangaroos. This activity is also regulated by the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act).

Under the EPBC Act, the export of kangaroo products must be in accordance with an approved wildlife trade management plan. Before approving a plan, the Minister must be satisfied, among other things, that the plan promotes the humane treatment of wildlife and that any relevant regulatory conditions are likely to be complied with. One relevant condition is that, if the animal is killed, it is done in a way that is generally accepted as minimising pain and suffering.

In December 2006 the then federal Minister for the Environment and Heritage approved the New South Wales Commercial Kangaroo Harvest Management Plan 2007-2011 for the purpose of Part 13A of the EPBC Act. The Wildlife Protection Association of Australia Inc. sought a review of the Minister’s decision in the Administrative Appeals Tribunal. The Association argued that the Code allows inhumane treatment of kangaroos on two counts:

1. when a shooter does not achieve an instantaneous kill and
2. the treatment of joeys.

The Tribunal had to determine whether the NSW Plan, which requires compliance with the Code, promotes the humane treatment of wildlife and whether it is likely that kangaroos are killed in a way that is generally accepted as minimising pain and suffering.

The Tribunal accepted at [50] that not all kangaroos die instantaneously by brain shot and that in these cases a period of suffering ensues. Nevertheless, the Tribunal concluded that ‘the Plan does all that can be done to promote the humane treatment of wildlife.’ The Tribunal reached a similar conclusion with respect to the treatment of orphan joeys. The Tribunal noted at [51] that the relevant Code:

requires the trapper to inspect females to ascertain whether there are in-pouch young. Any found must be dispatched as quickly as possible by a blow to the head or decapitation. In the case of larger young a shot to the head will result in humane death. The concern of the Association is directed particularly to those young at foot that are not able to be killed by the trapper following the killing of the mother. There was no unanimity in the evidence regarding the fate of those joeys ... We need not resolve that issue. Again, it may be accepted that there will be a very small number of instances where young at foot die in this way, but we do not regard that fact, even in combination with the instances where an instantaneous killing of the adult is not possible, as leading to the conclusion that the Plan does not satisfy the object of promoting the humane treatment of wildlife. We are satisfied that it does meet that object.

The Tribunal was also satisfied that kangaroos are killed in a way that is generally accepted as minimising pain and suffering. Citing one of its previous decisions, the Tribunal concluded at [54] 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.

Despite the Tribunal’s decision, animal protection organisations have major welfare concerns about the killing of kangaroos, particularly dependent young, as well as the difficulty of ensuring compliance with Code provisions. These concerns persist despite the endorsement in 2008 of National Codes of Practice for the Humane Shooting of Kangaroos and Wallabies for commercial and non-commercial purposes to replace the Code considered above.


107. For discussion and further references see, for example, Cao, (note 22) at pp 243-245 and the report due to be published by THINKK, the Kangaroo Think Tank, University of Technology Sydney on 30 November 2010, Shooting our Wildlife: An analysis of the law and policy governing the killing of kangaroos, K Boom and D Ben-Ami.
International Issues

FREE TRADE

The issues and challenges facing animal welfare law in Australia are very similar to those in other developed countries. A major problem in this regard is the focus on free trade. Australia and other members of the World Trade Organisation (WTO) may require improved animal welfare from their own producers but under the General Agreement on Tariffs and Trade (GATT) cannot impose the same requirements on imported goods. This acts as a disincentive to the elimination of cruel practices because a nation with more humane requirements may be swamped by cheap imports from countries with inferior animal welfare laws. Although the GATT rules arguably provide scope for improved animal protection, they have proved a major hindrance to animal welfare reform.108

The priority given to free trade can also make it difficult to impose stricter animal welfare requirements within Australia, particularly since the adoption of the Mutual Recognition Act 1992 (Cth) by all States and Territories. This Act aims to promote the free movement of goods and service providers throughout the nation. As a result, a State or Territory cannot, for example, ban the sale of eggs from caged hens produced elsewhere in Australia without the agreement of all the other States and Territories. An attempt to outlaw eggs from hens in battery cages in the ACT in 1997 failed for this reason. While the States and Territories remain free to regulate production practices within their own borders, this may be politically difficult because of the perceived economic impact. For example, in response to the Tasmanian government’s move to phase out sow stalls more quickly, Australian Pork Limited claimed that it would ‘put Tasmanian pig producers out of business as more pork is imported from the mainland where stalls would continue to be used.’109

LEGAL CHANGE

Despite the constraints of free trade, changes are occurring. In Europe, for example there are moves to reform the law regarding farmed animals. Installation of new stalls for sows and new battery cages for laying hens is now prohibited in European Union nations, with existing sow stalls to be banned from 2013 and existing battery cages from 2012.110 In the UK, sow stalls have been banned already. Other changes have occurred at a broader level. For example, the Swiss Constitution in 1992 and the German Constitution in 2002 were amended to incorporate reference to animal protection, while recent reform in Austria includes recognition at a constitutional level of the ‘special responsibility of mankind with respect to animals as their fellows’.111 More generally, the World Society for Protection of Animals (WSPA) has an ongoing initiative for the adoption by the United Nations of a Universal Declaration on Animal Welfare. Caution is needed, however, in interpreting these, and similar, developments. Constitutional recognition needs to be backed by the implementation of practical measures, while reforms to intensive farming may be limited. For example, the European Union Directive that bans battery cages for hens, permits the use of ‘enriched cages’ as one alternative. While these cages contain nesting boxes, perches and litter, they provide only 50 cm² more space per hen than the current Australian code.112

ENVIRONMENTAL CONSIDERATIONS

The need to rethink agricultural and industry practices with respect to animals is also under the spotlight for reasons other than their welfare. A major issue is the need for more effective food production and distribution with ‘more than half of the world’s crops used to feed animals not people’.113 Current animal usage also

110. Stevenson (see note 108) at p 311.
111. White (see note 29) at pp 363-4.

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has significant impact on climate change. In 2006, a Report by the United Nations Food and Agriculture Organisation (FAO) stated that:

the livestock sector is a major stressor on many ecosystems and on the planet as a whole. Globally it is one of the largest sources of greenhouse gases and one of the leading causal factors in the loss of biodiversity, while in developed and emerging countries it is perhaps the leading source of water pollution.\textsuperscript{114}

\textbf{A ROLE FOR LAWYERS}

While animals in NSW and Australia receive more protection than in some parts of the world, there are major problems with the current legal and regulatory regime. For some, this reflects the contradiction at the heart of the current model of animal welfare that accepts the routine use of animals for human ends. For others, the problems can be solved by the adoption of more consistent and humane animal welfare provisions, coupled with greater transparency and more stringent and independent law enforcement. Either way, the debate in Australia is only just beginning.

Lawyers are already actively contributing to the rethinking of animal protection issues. Animal law has been established as a discipline for well over a decade in the US, although its emergence in Australia is more recent. The first Animal Law course was taught at the UNSW in 2005 and since then similar courses have been offered in another eight Australian universities.\textsuperscript{115}

There is also a groundswell of legal practitioners with an interest in this field. In NSW, for example, the Animal Law Committee of NSW Young Lawyers holds seminars for lawyers, writes law reform submissions and produces publications for the general community. The Pro Bono Animal Law Service, or PALS@PILCH, is a national referral service being jointly operated by PILCH NSW and PILCH Victoria. Also in Victoria, there is an active Barristers Animal Welfare Panel which offers pro bono legal services. Tasmania is home to the first community legal centre dedicated to animals, and in Queensland, a group of lawyers have formed BLEATS (Brisbane Lawyers Educating and Advocating for Tougher Sentences).

These and other initiatives are increasingly the subject of media attention,\textsuperscript{116} with animal protection also recognised by law reformers as an important new field. In 2008, the President of the Australian Law Reform Commission noted that animal welfare and animal rights have been described as ‘perhaps the next great social justice movement’.\textsuperscript{117} In the words of one US lawyer: ‘I do not think there is a more important issue confronting law and lawyers today than the human treatment of animals.’\textsuperscript{118}

\textsuperscript{115} The Animal Law Toolkit, Voiceless (2009) at p 17.
\textsuperscript{116} See for example ‘This little piggy went to market’, M Duffy, \textit{SMH}, News Review, p 6, August 7-8 2010.
\textsuperscript{117} Reform (2008) 91 at p 2; available at www.austlii.edu.au/au/other/alc/publications/reform/reform91/1.html
Further information

Animal Justice Fund  
www.animaljusticefund.org  
The story of the founding of this organisation was featured on ABC television program Australian Story: Animal farm, 11/10/2010. The fund has been established by Jan Cameron, wealthy previous owner of Kathmandu stores, to campaign for better lives for farm animals.  
www.abc.net.au/austory

Animal Liberation  

Animal Welfare League NSW  

Animals Australia  
www.animalsaustralia.org.au

Australian and NZ Council for the Care of Animals in Research and Teaching  
www.adelaide.edu.au/ANZCCART

Australian Department of Agriculture, Fisheries and Forestry, Animal Welfare  
(also includes Australian Animal Welfare Strategy - AAWS)  

Compassion in World Farming  
www.ciwf.org

Humane Society International  
www.hsi.org.au

Lawyers for Animals  
lawyersforanimals.org.au

Medical Advances Without Animals  

NSW Department of Primary Industries, Animal Welfare  

NSW Young Lawyers, Animal Law Committee  
Website includes the booklet Animal law guide, a guide to day-to-day legal issues affecting pets and pet owners in NSW.

Replace Animals in Australian Testing  
www.uow.edu/arts/research/raat

Royal Society for the Prevention of Cruelty to Animals  
www.rspca.org.au

Voiceless, the Fund for Animals  
www.voiceless.org.au

World Society for the Protection of Animals  
www.wspa.org.au

Pro Bono Animal Law Service (PALS)  
PALS is a legal referral service which links individuals and animal protection organisations with lawyers who are willing to provide free legal services to promote better animal outcomes.

BOOKS


Animal law in Australia and New Zealand, D Cao, with contributions from K Sharman and S White, 2010, Lawbook Co.


Handbook of Australian animal cruelty law, M Caulfield, 2008, Animals Australia.

In defense of animals: the second wave, P Singer (ed), 2006, Blackwell Publishing.


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Current Issues

74 Animal law
Our attitudes towards animals are inseparable from their status as a human resource. We consume meat and other animal products, use animals for entertainment, sport, hunting, exhibitions and scientific research. Animals are considered by the law to be ‘goods’, yet they are living beings which experience fear and pain. This issue explores the position of animals in our legal system and the way the law is responding to pressures for change in the way animals are treated.

73 Young people and crime
Young people are dealt with separately from the adult criminal justice system. However, increasing numbers of young people in NSW are being held on remand in juvenile justice centres. This issue examines the ‘juvenile justice’ system including interaction with police, court, diversionary schemes, bail and remand. Covers issues such as disadvantaged groups, fines and group offending, Timeline of policies and legislation included.

72 Consumer credit
The National Consumer Credit Protection Act takes effect on 1 July 2010. The Commonwealth will now take over regulation of consumer credit from the states and territories. This issue looks at the lead up to this important change, and the implications of the new legislation. Plans for further amendments are discussed and case studies are included.

71 Courts
Provides an overview of Australia’s court system, federal and state, and how it fits within the legal system. It covers the areas dealt with by different courts and tribunals, judges, juries and judicial accountability. Also examines diversionary options and alternative dispute resolution measures, such as MERIT, mediation, youth justice conferencing and circle sentencing.

Other Issues

70 Cyberlaw, 69 International law,
68 Indigenous peoples, 67 Prisoners,
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48 Native title, 46 You and your lawyer,
45 Privacy, 39 Intellectual disability and criminal law, 36 Human genetic information,
34 Voting and elections, 33 Reconciliation
(out of print), 22 A Republic? (out of print).
All other issues have now been withdrawn.

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