



# AUSTRALIAN ANIMAL PROTECTION LAW JOURNAL

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# A note from the Editor

## Wide-ranging coverage

This issue exemplifies the width of issues that can arise in animal protection law.

The potential availability of various tax concessions to animal protection organizations is considered by Celeste Black

Tara Ward highlights the inadequacies of the regulatory framework ostensibly in place to protect Australian wildlife after the killing of a captive population of more than 500 kangaroos on Department of Defence land in the Australian Capital Territory last year.

Brett Salter explores the legal status of animals in Australia's first colonial courts. Alex Bruce considers the treatment of animals in Trade Practices Act cases and suggests radical improvement. Expatriate Associate professor Amanda Whitfort reports on animal welfare laws in Hong Kong, as a useful comparison with some Australasian positions.

And the Book Reviews section notes two important animal law publications published recently in Australia and New Zealand.

## In confidence

In 2008, the Australian Animal Protection Law Journal (AAPLJ) became Australia's first peer-reviewed journal devoted entirely to the law relating to animals. It did so with the generous support of Voiceless, the fund for animals, and through the unremunerated labours of an elite group of anonymous peer reviewers.

Rigorous peer reviewing of articles submitted for publication is essential to the authority of any serious law journal. The question for this editor is whether the identity of the peers who are doing the assessing should be kept confidential or made public?

The interests of a transparent and accountable process are pitted against the interests of candour that allow peer reviewers to make frank comments without fear of prejudicing their professional position in relation to the peers they are reviewing.

A consultative review board has been suggested as a kind of quality assurance/accountability mechanism providing some recognition for those helping out in the process of establishing a journal to provide

“some much needed scrutiny of how the law currently fails to protect against animal abuse”.<sup>1</sup>

The editor of the AAPLJ invites and encourages further debate from readers on this most important aspect of its publication

## **Financial support**

While gratefully acknowledging the generous contribution of Voiceless, the fund for animals, in 2008-09, the Australian Animal Protection Law Journal will frankly be reliant upon varying levels of financial support in these early years of becoming established as a dynamic forum for discussion of issues affecting the lives of non-human animals.

Any person or organisation wishing to subscribe to the AAPLJ or become a Friend (and receive volumes for two years) or Patron (and receive volumes for as long as it continues to be economically viable) should contact the Editor through [mancyj@gmail.com](mailto:mancyj@gmail.com) for further information.

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<sup>1</sup>Peter Sankoff, “Turn up the dialogue”, [2008] APPLJ 6.

# Tax Concessions and Animal Protection Organisations: Benefits and Barriers

Celeste M Black\*

## I. Introduction

Much of the Federal Government's support for non-profit groups in Australia takes the form of indirect assistance through tax concessions rather than direct support through funding. These so-called "tax expenditures", which result from the Government not taxing amounts which would otherwise be taxable, have been estimated by Treasury, with the most recent figures showing \$950m in value for deductions for donations to charities and in the range of \$100m - \$1,000m in value for the tax exemptions available to charitable entities.<sup>2</sup>

Like other types of non-profit groups, animal protection organisations may be entitled to the benefits of these concessions if the technical eligibility requirements are met. That said, the barriers to obtaining endorsement for these concessions must also be appreciated. This paper will analyse the various tax concessions provided in the legislation which may be relevant for animal protection organisations and highlight the limitations on access to these concessions, both those explicit in the legislation and those which arise from the manner in which the concession system is administered.

This paper focuses on two particular endorsement processes: endorsement as a tax concession charity and endorsement as a deductible gift recipient. A tax concession charity is not only entitled to an income tax exemption but may be also entitled to a Fringe Benefits Tax (FBT) exemption or rebate and Goods and Services Tax (GST) concessions. The potential value of these concessions comes from the

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Any opinions expressed herein are entirely the author's own.

<sup>2</sup> Treasury, *Tax Expenditures Statement 2007*, available at:

<http://www.treasury.gov.au/contentitem.asp?NavId=&ContentID=1333>. Category A66 covers tax deductible gifts and for 2008/09 the estimate of tax forgone is \$950m. The value of the tax exemption for charities (category B22) is significantly more difficult to estimate given the limitations on available data but Treasury puts it in the range of \$100m to \$1,000m for 2008/09.

effective reduction in operating costs which flow from the concessions. On the other hand, endorsement as a deductible gift recipient (DGR) has the potential to both increase the flow of donations and legitimise the activities of the organisation in the eyes of the public.

## II. Tax concession charities

### A. Benefits of endorsement

Various tax concessions are made available to charitable organisations and funds which meet particular criteria. A non-profit organisation, such as an animal protection organisation, which meets the criteria of a “charitable institution” or which has set up a “charitable fund” may be entitled to the following concessions:

- Income tax exemption;
- FBT exemption or rebate; and
- GST charity concessions.

#### *The income tax exemption*

Pursuant to the *Income Tax Assessment Act 1997* (hereinafter the Tax Act) certain non-profit entities are exempt from income tax with respect to their income which might otherwise be assessable.<sup>3</sup> The legislation provides a list of eligible entity types which includes charitable institutions and funds established in Australia for public charitable purposes by will or instrument of trust.<sup>4</sup> To qualify for the exemption, an institution must also meet certain requirements as to its connections with Australia, physical presence and activities, referred to as the “physical presence in Australia test.”<sup>5</sup> Importantly, the Tax Act requires that for both types of the entities, they must be endorsed by the Commissioner of Taxation.<sup>6</sup>

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<sup>3</sup> *Income Tax Assessment Act 1997* (Cth) (hereinafter “ITAA 1997”) s 50-1 “The total \*ordinary income and \*statutory income of the entities covered by the following tables is exempt from income tax. In some cases, the exemption is subject to special conditions.” The Australian Taxation Office has issued a guide to assist non-profit groups in interpreting the application of these various exemptions. See ATO, *Income tax guide for non-profit organisations* (NAT 7967) (2007) available on the ATO website at: [http://www.ato.gov.au/content/downloads/Nat7967\\_3\\_2007.pdf](http://www.ato.gov.au/content/downloads/Nat7967_3_2007.pdf)

<sup>4</sup> *ITAA 1997* s 50-5, items 1.1 and 1.5B. There is an additional category of tax exempt funds called “income tax exempt funds” which includes funds established by will or instrument of trust which are not charitable but which are established solely to distribute funds to deductible gift recipients. *ITAA 1997* s 50-20.

<sup>5</sup> *ITAA 1997* s 50-50. See also ATO, *Gift Pack, Guide for deductible gift recipients and donors* (NAT 3132) (2007) pp 28-29.

<sup>6</sup> *ITAA 1997* s 50-52 (charitable institutions and funds). The general requirements for endorsement are provided in *ITAA97* ss50-105 and 50-110. The Commissioner is required to endorse an entity as exempt if the entity is entitled to the endorsement

Critical to the endorsement process is the requirement that the entity be established for charitable purposes and it is through the interpretation of the term “charitable” that the various endorsement criteria have developed. The income tax exemption applies to all income derived by the endorsed entity, even where the entity carries on commercial activities. The extent to which an entity may carry on such commercial activities and still be entitled to endorsement as a tax-exempt charity is the subject of the currently pending *Word Investment* case.<sup>7</sup> In that case, the Commissioner of Taxation has maintained that a charitable institution may only carry on commercial activities which are incidental or ancillary to its charitable activities. This can be contrasted to the situation where, in addition to charitable activities, an independent commercial activity is carried on by the entity but for the purpose of applying any profits derived from the activity solely to charitable ends.

### ***FBT exemption or rebate***

Another potential concession for charitable organisations lies within the Fringe Benefits Tax (“FBT”) regime.<sup>8</sup> In contrast to the income tax, the FBT is a tax imposed on employers with respect to benefits provided to employees, where the tax acts effectively as a proxy for the income tax that would otherwise have been payable by the employees.<sup>9</sup> Income tax is not payable by the recipient employee with respect to fringe benefits received. Status as an income tax exempt charity does not prevent the application of the FBT. Instead, there are two potential concessions which may reduce the impact of the FBT, the FBT exemption and the FBT rebate. The FBT exemption allows benefits provided to employees to be exempt from FBT up to a cap<sup>10</sup> and is only available to a limited number of types of entities.<sup>11</sup> An animal protection organisation is unlikely to be eligible for this exemption.

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and has followed the procedure specified in Division 426 in Schedule 1 to the *Taxation Administration Act 1953*. For these purposes, the Australian Taxation Office has created an “Application for endorsement as a tax concession charity or income tax exempt fund”, NAT 10651.

<sup>7</sup> *Commissioner of Taxation v Word Investments Limited* [2007] FCAFC 171. The Commissioner’s appeal of this case to the High Court was heard on 27 August 2008 but the Court has not yet released its judgment.

<sup>8</sup> The fringe benefits tax is imposed by the *Fringe Benefits Tax Act 1986* (Cth) and the calculation and administration of the tax is provided for by the *Fringe Benefits Tax Assessment Act 1986* (Cth) (hereinafter *FBTAA*).

<sup>9</sup> Prior to the introduction of the FBT, the value of these benefits was taxed as employment income derived by the employee. See the former s 26(e) of the *Income Tax Assessment Act 1936* (Cth).

<sup>10</sup> This cap can be either \$30,000 or \$17,000 per employee per FBT year, depending on the type of exempt entity.

<sup>11</sup> The types of eligible entities are public benevolent institutions, health promotion charities, public and non-profit hospitals and public ambulance services.



The FBT rebate is available to those organisations of a type listed in the legislation where this list specifically includes endorsed charitable institutions.<sup>12</sup> The FBT rebate operates to provide a rebate equal to 48% of the gross FBT which would otherwise be payable, subject to a cap.<sup>13</sup> This rebate is said to compensate tax exempt employers for the fact that they are unable to claim a deduction for the FBT paid to which tax-paying employers are otherwise entitled. The effect of this concession is that, up to the specified level, fringe benefits may be provided to employees of charities with significantly reduced levels of FBT.<sup>14</sup>

### ***GST concessions***

The Goods and Services Tax (“GST”) regime also provides a range of concessions for charities. For example, there is a higher turnover threshold before GST registration is required, special treatment exists for fundraising activities, gifts to the charity are not subject to GST and a charity’s non-commercial activities are GST-free.<sup>15</sup> Once again, to claim the concessions, a charity must be endorsed by the Commissioner as a charitable institution or a charitable fund.<sup>16</sup>

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<sup>12</sup> An extensive list of eligible types of employers is provided at *FBTAA* s 65J. It seems likely that an animal protection organisation would only qualify under the “charitable institution” category of sub-s (baa). The endorsement process is specified in *FBTAA* s 123E(1) which links back to the same endorsement process prescribed by the *Taxation Administration Act* which is used for endorsement for the income tax exemption. It may be of interest to note that the rebatable employer list includes non-profit societies, associations and clubs which encourage or promote animal races (para (i)) and those which promote the development of agricultural and pastoral resources (para (l)).

<sup>13</sup> *FBTAA* s 65J(2A). The cap is set at \$30,000 per employee of grossed-up value of fringe benefits. The gross-up mechanism within the FBT is complex but operates to ultimately produce an amount of FBT which, in after-tax cost measures, would be equivalent to the income tax which would have applied had the benefits been provided in cash. The gross-up figures are based on the GST rate (10%) and the top marginal personal income tax rate (currently 46.5%) such that the gross-up figure is 2.0647 for GST-inclusive benefits.

<sup>14</sup> By way of example, a charity may be considering paying an employee an additional \$8333 in salary which, after taking away the income tax which would be due (assume at 40%) would leave the employee with \$5000 in hand. In comparison, the charity could provide fringe benefits worth \$5000 to this employee. The employee is indifferent as between the form of the remuneration. The charity would otherwise be required to pay \$4346 of FBT with respect to this benefit but, if entitled to the rebate, the amount of FBT due is reduced to \$2260. Therefore the total cost to the charity is \$7260 (cost of the fringe benefit plus the FBT) as compared to the cost of the extra salary of \$8333.

<sup>15</sup> The various concessions are located throughout the *A New Tax System (Goods and Services Tax) Act 1999* (Cth). These concessions are described in ATO, *Tax basics for non-profit organisations* (NAT 7966) (2007) ch 3.

<sup>16</sup> *A New Tax System (Goods and Services Tax) Act 1999* (Cth), Div 176. This endorsement process is again that established under the *Taxation Administration Act*.

## B. Qualifying as a charity

### *What is a charitable purpose?*

Endorsement as either a charitable institution or a charitable fund will focus primarily on this test: the entity must be established and maintained for a charitable purpose. This section of the paper will consider those issues which arise from the meaning of “charitable purpose” which are particularly relevant to animal protection organisations. In the case of entities seeking endorsement as a “charitable institution” there may also be an issue as to whether the entity qualifies as an “institution”. Several cases have addressed this issue but it is considered to be outside the scope of this paper to analyse it in detail.<sup>17</sup> However, one important issue which is raised is the distinction between an early stage organisation, operating on a small scale by a group of family members and/or friends, and a later stage organisation with a greater degree of permanence and identity beyond that of the founders, where only the latter stage may be considered an institution.<sup>18</sup>

The term “charity” has developed a detailed technical meaning which goes back to the *Statute of Elizabeth*<sup>19</sup> and the opinion of Lord Macnaghten in *Pemsel’s* case.<sup>20</sup> The Statute of Elizabeth lists various charitable objects and this has been interpreted to include those purposes which are beneficial to the community and are within the “spirit and intendment” of the *Statute of Elizabeth*. Lord Macnaghten listed four principal divisions of charities, being the relief of poverty, advancement of education, the advancement of religion and “other” purposes beneficial to the community.<sup>21</sup> It is this “other purposes beneficial to the community” category into which an animal protection organisation must obviously fall.

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<sup>17</sup> See, for example, *Pamas Foundation Inc v Deputy Federal Commissioner of Taxation* (1992) 23 ATR 189, 92 ATC 4161, and *Christian Enterprises Ltd v Commissioner of Land Tax (NSW)* (1968) 88 WN (Part 2) (NSW) 112.

<sup>18</sup> See also Taxation Ruling TR 2005/21 “Income tax and fringe benefits tax: charities” para 150.

<sup>19</sup> Statute of Charitable Uses Act 1601 (UK) [43 Eliz I c 4].

<sup>20</sup> *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583.

<sup>21</sup> This approach to defining the meaning of “charitable institution” or “charitable object” has been adopted by the Australian courts. For example, see the recent confirmation of this meaning by the High Court in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* [2006] HCA 43 (31 August 2006) and the application of these tests in *Commissioner of Taxation v Word Investments Ltd* [2007] FCAFC 171 (14 November 2007) and *Victorian Women Lawyers’ Association Inc v Commr of Taxation* [2008] FCA 983 (27 June 2008). These same tests have been adopted in the ATO’s tax ruling. See TR 2005/21 para 8-12.

Many purposes in addition to those specifically listed in *Pemsel's* case have been accepted by the courts in Australia and the Australian Taxation Office (the "ATO") as being charitable, including protecting animals. However, what is interesting is that this is based on the implicit link between animal protection and benefits to the human community, rather than on the view that protecting animals for the benefit of the animals themselves can be charitable. This link can find its source in the following statement which was adopted by the House of Lords where the issue was whether a gift to protect animals was charitable:

"A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race. ".<sup>22</sup>

Even more explicitly, Australian courts have held that "a gift for the benefit of animals is not charitable *per se*"<sup>23</sup> where such a gift may be charitable only where benefits to the (human) community can also be shown. This standard is also reflected in recent ATO publications where the following statements are made: "Non-profit organisations that operate for the public benefit to protect, care for, preserve, or study animals, or improve the community's moral feelings towards them, are charities"<sup>24</sup> and "The purpose must be to help animals that are useful to the community or promote humane feelings in people by either caring for or preventing cruelty towards animals. ".<sup>25</sup> However, that said, it is now generally accepted that animal protection and animal welfare are charitable purposes and this is reflected in the ATO's endorsement application which includes animals as an option for the entity's area of main activities and should give an animal protection organisation some confidence that its activities would be considered charitable.

### ***Political purposes?***

It is important to note that political or lobbying purposes are not

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<sup>22</sup> This statement is taken from the case *In re Wedgwood* (1915) 1 Ch 113 (Swinfen Eady LJ) and was quoted in the judgments delivered by Viscount Simon, Lord Simonds and Lord Normand in the House of Lords case *National Anti-Vivisection Society v. Inland Revenue Commissioners* (1948) AC 31. Quoted with approval in *Attorney-General (SA) v Bray* [1964] HCA 3 by Kitto J.

<sup>23</sup> *Murdoch v The Attorney-General* (1992) 1 Tas R 117, 131 per Zeeman J. Quoted with approval in *Perpetual Trustees Ltd v State of Tasmania* [2000] TASSC 68 by Slicer J.

<sup>24</sup> ATO, *Income Tax Guide for Non-profit Organisations* (NAT 7967) p 38.

<sup>25</sup> *TR 2005/21* para 218.

considered to be charitable purposes.<sup>26</sup> This view can be traced back to the dictum of Lord Parker in *Bowman v Secular Society* where he stated, in essence, that a political purpose cannot be charitable as the court has no way of determining whether the proposed change to the law will benefit society.<sup>27</sup> However, the existence of a non-charitable purpose will not prevent the organisation from being considered to be charitable provided that the non-charitable purpose is merely ancillary or incidental to the primary, charitable purpose.<sup>28</sup>

As the activities of an animal protection organisation may include activities which could be described as political or lobbying activities, it must be considered in each case whether such activities are merely ancillary or incidental to its main purposes. For example, in one case where an Australian court considered whether an anti-vivisection society and the RSPCA were charities for the purposes of determining the validity of a bequest, the court concluded that the anti-vivisection society was not a charity since its main object was to change existing law to prohibit vivisection and this did not fall within any head of “charity” whether or not the activities were seen as primarily political.<sup>29</sup> In contrast, the RSPCA was accepted as a charity even though one of its objects was to procure legislation as this activity would further its main object of preventing cruelty to animals where this object was held to be charitable due to its influence on “human sentiment and conduct.”<sup>30</sup>

The extent to which an organisation may be involved in activities which could be characterised as “political” whilst still retaining their status as a charity has been recently tested in a number of

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<sup>26</sup> *TR 2005/21* para 18.

<sup>27</sup> *Bowman v Secular Society Ltd* [1917] AC 406 at 442: “A trust for the attainment of political objects has always been held invalid, ... because the Court has no means of judging whether or not a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.” Per Lord Parker. Cited recently in *Victorian Women Lawyers’ Association* at para 127.

<sup>28</sup> *TR 2005/21* para 27. See also para 103 which provides the following: “if the purpose of an institution or fund is charitable, the presence of political or lobbying programs and activities will not detract from this status, provided they are merely incidental to the charitable purpose.”

<sup>29</sup> *Re Inman (deceased)* [1965] VR 238 at 244. See also *National Anti-Vivisection Society v Inland Revenue Commissioners* [1947] 2 All ER 217 where the court suggests that the abolition of vivisection would actually be detrimental to society.

<sup>30</sup> *Re Inman (deceased)* [1965] VR 238 at 242. As a potential indication of the types of activities, on balance, acceptable to the Commissioner, it should be noted that the following entities currently are endorsed as charitable institutions: RSPCA Australia Inc, Animals Australia Inc, Humane Society International Inc and Animal Welfare League NSW.

cases.<sup>31</sup> In the *Aid/Watch* case, which is currently on appeal to the Full Federal Court, the view was taken that Aid/Watch, an organisation which does not itself deliver overseas aid but rather monitors and reports on the process, was not disqualified from being a charity as its activities to influence government policy with respect to the nature, extent and means of delivery of aid were not contrary to the general government policy in favour of aid.<sup>32</sup> However, the following was also stated: “[i]t may be disqualified if its objects and activities, although not overtly political, still place undue emphasis on attempts to influence government, particularly with respect to priorities and methods. The argument against charitable status may be enhanced because of its activist approaches and confrontational methods.”<sup>33</sup> The opinion of the Federal Court on the relevance of this distinction should give organisations clearer guidance as to the nature of and the extent to which political activities may be undertaken whilst still meeting the charitable purpose test.

### III. Deductible gift recipients

#### A. DGR endorsement

Under another division of the Tax Act, certain organisations may receive tax deductible gifts.<sup>34</sup> These organisations, referred to as Deductible Gift Recipients (or “DGRs”), fall into one of two groups: those endorsed by the ATO and those specifically named in the Tax Act. According to recent statistics, 99% of charities obtained DGR status through ATO endorsement.<sup>35</sup>

To be endorsed by the ATO, the organisation must fall within the description of one of the general categories listed in the Tax Act, meet certain other requirements under the tax law (such as a relevant connection with Australia) and apply for endorsement.<sup>36</sup> As will be seen by the discussion below, it is significantly more difficult for most animal protection organisations to obtain DGR status than the tax

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<sup>31</sup> See for example, *Victorian Women Lawyers’ Association Inc v Commr of Taxation* [2008] FCA 983 (27 June 2008) and *Aid/Watch Incorporated and Commissioner of Taxation* [2008] AATA 652 (28 July 2008) (currently being appealed by the Commissioner to the Full Federal Court).

<sup>32</sup> *Aid/Watch*, above note 30, at para 47.

<sup>33</sup> *Aid/Watch*, above note 30, at para 49.

<sup>34</sup> *ITAA 1997*, Division 30.

<sup>35</sup> ATO, *Taxation Statistics 2005/06*, p 98. The total number of DGRs by the year’s end was 24,384. Of that, only 165 were specifically listed.

<sup>36</sup> The relevant form from the ATO is “Application for endorsement as a deductible gift recipient” (NAT 2948).

exemption, unless they provide direct care to animals or focus on wildlife.

Alternatively, a DGR may be listed by name in the Tax Act, where such a listing requires an amendment to the Tax Act to be passed by Parliament. Listed DGRs are included in the Tax Act by being added to the tables which accompany the general descriptions. As one might imagine, this is inherently a highly political process and one for which no guidelines have been provided. Each listing is decided on a case by case basis.

## **B. Endorsement by the ATO**

The process by which an organisation may seek endorsement as a DGR is described in various ATO publications.<sup>37</sup> As a preliminary matter, the organisation must fall within one of the DGR general categories as described in the Tax Act. The Tax Act may also, in some instances, provide additional criteria which must be met by organisations seeking endorsement in one of the general categories of DGRs.

Difficulties may arise where the activities of an organisation would appear to fall within the description of more than one category. Whether activities outside of the ‘qualifying’ activities are allowed will vary from one category to another. In such a case, it may be more appropriate to establish a separate fund which can receive donations with respect to that ‘qualifying’ activity only. By way of example, in the case of *Healthy Cities Illawarra*, the charitable organisation was seeking to be endorsed in the health category.<sup>38</sup> Although its various activities were beneficial to the community generally, the organisation could not show that the *principal* activity was disease prevention and therefore did not succeed in objecting to the ATO’s decision that it was not entitled to endorsement. In the case of an animal protection organisation, a number of categories could be considered.

### ***Welfare and Rights – Direct care***

The most obvious category which an animal protection organisation could potentially fit within is the “welfare and rights” category.<sup>39</sup> Recent amendments to the general categories table inserted a reference

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<sup>37</sup> For example, see the ATO guide *GiftPack*, above note 4.

<sup>38</sup> *Healthy Cities Illawarra Inc and Commissioner of Taxation* [2006] AATA 522. The significant issue addressed in the decision was whether disease prevention included injury prevention, where it was concluded that it did not. Therefore, given the wide range of activities undertaken by the organisation, it was more difficult to argue a principal activity of disease prevention.

<sup>39</sup> *ITAA 1997* s 30-45.

to animal welfare groups but that extension is rather strictly drawn and only applies where the principal activity of the charitable institution involves the direct care and/or rehabilitation of animals (but not only native wildlife).<sup>40</sup> (Those organisations which care for only native wildlife may seek endorsement under the environment category.) The listing requires that the institution's principal activity is providing short-term direct care to animals that have been lost or mistreated or are without owners and/or rehabilitating orphaned, sick or injured animals that have been lost or mistreated or are without owners.

When these amendments were originally proposed in 2005, Voiceless (a non-profit fund for animals) prepared a detailed submission, suggesting that, though the proposals were a step in the right direction, they were unduly restrictive.<sup>41</sup> These concerns would appear to have been well founded given interpretation of these requirements by the ATO.<sup>42</sup> For example, in the view of the ATO, to be mistreated it is not sufficient that the animal is suffering from illness or injury – the illness or injury must have resulted from the mistreatment. This does not seem to take into account that failure to seek veterinary care for illness or injury could itself be a case of mistreatment. Another example is the emphasis on the concession only being made available for short-term care. For example, the view is taken by the ATO that ongoing care for animals which have been rehabilitated or who have recovered from illness or injury will not qualify, only the care given during the rehabilitation phase qualifies. One might query the practicality (not to mention the necessity from a policy perspective) of applying such a distinction.

An alternative which has been tested is the characterisation of an animal welfare organisation as a public benevolent institution (“PBI”) where classification as a PBI would also qualify an organisation for the welfare and rights list. In *FCT v RSPCA Qld Inc*, the Court of Appeal (Queensland) considered whether the RSPCA should be considered a PBI.<sup>43</sup> The majority concluded that the RSPCA was not a PBI. Even were it accepted that the activities of the RSPCA were ultimately directed at or indirectly benefitted human beings and therefore the public, the RSPCA would not be a PBI as it did not provide relief for the needy or underprivileged (the traditional tests for PBI status).<sup>44</sup> It

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<sup>40</sup> Item 4.1.6 of *ITAA 1997* s 30-45(1). See *GiftPack*, above note 4, pp 39-41 for the ATO's interpretation of the standards dictated by this sub-category.

<sup>41</sup> Voiceless, *Deductible Gift Recipients & Animal Protection Organisations – A Submission by Voiceless for Amendments to the Income Tax Assessment Act 1997* (28 November 2005).

<sup>42</sup> See *GiftPack*, above note 4, pp 39-41.

<sup>43</sup> *FCT v RSPCA Qld Inc* (1992) 23 ATR 582, 92 ATC 4441.

<sup>44</sup> *FCT v RSPCA Qld Inc* (1992) 23 ATR at 592. See also *Taxation Ruling TR 2003/5* especially para 38. The traditional test requires that that the organisation seek to

should be noted however that the various RSPCA groups within Australia, including that of Queensland, are now specifically listed in the Tax Act under welfare and rights.

### ***The Environment***

An alternative category which an animal protection organisation may consider is the Environment.<sup>45</sup> The general category of recipients are public funds established and maintained by environmental organisations which are on the Register of Environmental Organisations maintained by the Environment Secretary. The principal purpose of the organisation must be the protection or enhancement of the natural environment or a significant aspect of the natural environment or the provision of information or education or the carrying on of research in relation thereto.<sup>46</sup>

The Register of Environmental Organisations is administered by the Department of the Environment, Water, Heritage and the Arts (the “Department”) in consultation with the Tax Office. The Department has issued guidelines (release date of 2003) for organisations seeking entry onto the Register.<sup>47</sup> In section 2, the Guidelines provide the Department’s interpretation of the requisite principal purpose of the organisation. It is emphasised that the environmental purpose must be the *principal* purpose of the organisation. It also concludes that the use of the term “natural environment” is to distinguish the natural environment from built, cultural or historic environments, thereby including wildlife but excluding zoos.<sup>48</sup>

Although there may be arguments that the term “environment” should be broadly interpreted to include all animals,<sup>49</sup> it appears that it is the view of the Department that the additional inclusion of the term “natural” in the Tax Act restricts the meaning to only wildlife, rather than animals generally. As a result, it would seem difficult for an animal protection organisation to be included on the Register unless its activities principally relate to wild animals.

### ***Other DGR Categories***

There are various other DGR categories which could be considered by

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relieve poverty, sickness, suffering, distress, misfortune, disability or helplessness.

<sup>45</sup> *ITAA 1997* s 30-55.

<sup>46</sup> *ITAA 1997* s 30-265.

<sup>47</sup> See <http://www.environment.gov.au/tax/reo/guidelines/pubs/reo-guide-2007.pdf>

<sup>48</sup> Department of the Environment, Water, Heritage and the Arts, *Register of Environmental Organisation Guidelines* (2003) at p 9.

<sup>49</sup> See the comments of Gray ACJ in *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* [2007] FCA 1535, para 64.



an animal protection organisation where the ability to meet the criteria of the category will turn on the specific activities of the organisation. However, in most cases, the DGR category is fairly strictly defined and it may be difficult to characterise the activities of the organisation in the requisite way. For example, although some animal protection organisations undertake community education activities, the education category<sup>50</sup> requires that an education recipient be a specified type of educational institution (such as a public university) or a public fund set up for a particular, listed purpose, such as providing religious education in government schools. Education regarding animal welfare issues does not appear to fit within the listed general categories.

### **C. Specific Listing**

The other avenue by which an organisation may obtain DGR status is through specific listing in the Tax Act. There are two types of entities which may be listed: prescribed private funds and others. Prescribed private funds are listed by name in Schedule 3 of the Income Tax Assessment Regulations 1997. As a general matter, the fund must be established under a will or instrument of trust and must be operated solely for providing benefits to other DGRs. Foundations are added to this list through the government gazette.

Other DGRs listed by name are incorporated into the schedules of the Tax Act through legislative amendment which must be approved by Parliament. Details of the process or requirements for listing are not provided in any ATO publications.<sup>51</sup> Each specifically listed DGR must fit within a category with the exception of the “other” category which presumably picks up those organisations which do not otherwise fit neatly within one of the more specified categories. The amendments will often be part of a larger Bill that includes various amendments to the Tax Act and the new DGRs as a schedule to the Bill.<sup>52</sup>

### **IV. Conclusions**

While a number of tax concessions are potentially available to animal protection organisations, and these tax concessions can be of significant value, the endorsement criteria which have developed and are applied by the Courts and the ATO may act as a barrier to many organisations. Although animal welfare and protection is now generally accepted as a charitable purpose, an organisation seeking tax exempt

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<sup>50</sup> *ITAA 1997* s 30-25.

<sup>51</sup> Neither the *Giftpack* nor NAT 8443 (the relevant ATO factsheet) provide any guidance on these matters.

<sup>52</sup> See, eg, Schedule 9 to Act No 164 of 1997 (*Tax Law Amendment (2007 Measures No 5) Act 2007*).

status may be denied that status if it is significantly engaged in political activities. Of potentially greater value is DGR status due to its potential to enhance the flow of funds into an organisation. However, as shown above, endorsement as a DGR is far more restricted and would generally only be available to organisations providing direct care to animals and those concerned with wildlife conservation. Although specific listing is also an option, it is suggested that this avenue is a difficult one due to its highly political and public nature.

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# Fences, Boundaries, and Jurisdictions: Canberra's kangaroo 'cull' and the law<sup>1</sup>

Tara Ward \*

In Australia, populations of wild kangaroos sometimes find themselves trapped behind various types of fences. These captive populations can live within the enclosed area for many years. Often, however, the consequences for the kangaroos are tragic, as was the case in 2008 when the Department of Defence ordered that a captive population of several hundred Eastern Grey Kangaroos on its land in the Australian Capital Territory be 'culled'. Despite kangaroos having suffered such a fate on Defence land before,<sup>2</sup> and notwithstanding that millions of kangaroos are shot each year for commercial purposes alone,<sup>3</sup> the killing of the 514 kangaroos on this particular tract of Defence land created a storm of protest locally and internationally.<sup>4</sup> It also laid bare the inadequacies of the regulatory framework that is ostensibly in place to protect our wildlife.

This paper examines the controversial killing of the Canberra kangaroos and the particular legal and jurisdictional issues raised by Defence's attempts to deal with kangaroos trapped on land situated within an Australian Territory. It suggests that although the Department of Defence had advocated a non-lethal solution to the 'problem' of the enclosed kangaroo population in Canberra, the complexities of the legal 'protection' framework may have made a lethal solution inevitable. It

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1 I would like to thank Catherine Ford for her invaluable help with the research for this paper.

2 See 'Wallaby cull at NT Air Force base' AM – 29 March 2008, ABC: [www.abc.net.au/am/content/2008/s2202517.htm](http://www.abc.net.au/am/content/2008/s2202517.htm); and Department of Defence, 'Interim Kangaroo Cull at Puckapunyal Ends' Media Release, 4 July 2002, MSPA331/02: [www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=1675](http://www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=1675).

3 2,986,470 kangaroos were killed under the commercial harvest quota for 2007 according to the Department of the Environment, Water, Heritage and the Arts website: [www.environment.gov.au/biodiversity/trade-use/wild-harvest/kangaroo/quota/2007.html](http://www.environment.gov.au/biodiversity/trade-use/wild-harvest/kangaroo/quota/2007.html) [3 December 2008].

4 See for example Squires, N, 'Kangaroo cull starts despite Paul McCartney protest' [Telegraph.co.uk](http://Telegraph.co.uk) 19 May 2008 [www.telegraph.co.uk/news/1987821/Kangaroo-cull-starts-despite-Paul-McCartney-protest.html](http://www.telegraph.co.uk/news/1987821/Kangaroo-cull-starts-despite-Paul-McCartney-protest.html); and Markson, S, 'Japan's outrage at kangaroo cull,' [The Daily Telegraph](http://The Daily Telegraph), 16 March 2008: [www.news.com.au/story/0,23599,23384169-401,00.html](http://www.news.com.au/story/0,23599,23384169-401,00.html).

also echoes many calls for an improvement in the way we treat our national icon, especially when it is enclosed behind fences.<sup>5</sup>

## Background

While the actual ‘removal’ of the Canberra kangaroos was completed in less than two weeks, the events that led to their removal began several years earlier. It is necessary to piece together those events to understand what happened and when, and also to illustrate why it can be so difficult to protect wildlife in Australia.

As can be seen from the timeline below, ‘managing’ five to six hundred kangaroos behind fences on 115 hectares of Defence land in the middle of suburban Canberra demanded cooperation between three separate governments, and potentially involved at least five different types of wildlife licences regulated by two statutes in two separate jurisdictions.

### *Timeline of the case of the Canberra kangaroos*

- 13 May 2007: The media reports plans by the Department of Defence (Defence) to cull approximately 400 kangaroos enclosed behind fences on a site known as the Belconnen Naval Transmission Station (BNTS) in the Australian Capital Territory (the ACT).<sup>6</sup>
- 31 May 2007: Wildcare, a non-profit wildlife organisation registered in NSW and based in Queanbeyan (on the border with the ACT), meets with Defence and the ACT Government to promote consideration of an alternative non-lethal plan for the management of the BNTS kangaroo population.<sup>7</sup>
- 20 June 2007: The Conservator of Flora and Fauna in the ACT approves licences for Defence to dart and euthanize the BNTS kangaroos.<sup>8</sup>
- 21 June 2007: The CEO of RSPCA (ACT) publicly calls for the kangaroos to be culled before the end of July 2007.<sup>9</sup>

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<sup>5</sup> See ‘Kangaroos again the losers in Canberra,’ Animals Australia, 20 May 2008:

[www.animalsaustralia.org/media/press\\_releases.php?release=99](http://www.animalsaustralia.org/media/press_releases.php?release=99).

<sup>6</sup> Watts, B ‘Plan for three days of death’ Canberra Times, 13 May 2007: [www.canberratimes.com.au/news/local/news/general/plan-for-three-days-of-death/236657.aspx?storypage=0](http://www.canberratimes.com.au/news/local/news/general/plan-for-three-days-of-death/236657.aspx?storypage=0).

<sup>7</sup> Wildcare ‘Wildcare developing non-lethal plan for Defence kangaroos’ 31 May 2007: [www.wildcare.com.au/media/WildcareMedia\\_31May07.doc](http://www.wildcare.com.au/media/WildcareMedia_31May07.doc).

<sup>8</sup> Territory and Municipal Services ACT (TAMS) ‘Issuing of Kangaroo Culling License’ MR145/0607, 20 June 2007:

[www.tams.act.gov.au/\\_data/assets/pdf\\_file/0012/60222/Issuing\\_of\\_Kangaroo\\_Culling\\_License.pdf](http://www.tams.act.gov.au/_data/assets/pdf_file/0012/60222/Issuing_of_Kangaroo_Culling_License.pdf).

<sup>9</sup> SSAA Media Monitoring, ABC 666 Canberra, Breakfast, 21/06/2007 8:36am:

- 5 July 2007: Defence defers any decision to cull the BNTS kangaroos.<sup>10</sup>
- August 2007: Defence convenes an independent expert panel to assess the environmental impact of the kangaroo population at BNTS. The panel's key recommendations include 'reduc[ing] the population by 400' by translocating 'as many as possible'.<sup>11</sup>
- 28 September 2007: Defence tenders for a specialist contractor to implement the panel's recommendations.<sup>12</sup>
- 15 November 2007: The Chief Minister of the ACT directs the ACT Commissioner for Sustainability and the Environment to investigate the native grasslands on the BNTS site. The Commissioner convenes an expert panel.<sup>13</sup>
- 20 December 2007: The kangaroo population on the BNTS site is reported as approximately 588.<sup>14</sup>
- Early 2008: Defence contracts an environmental consultancy firm to carry out a management program in relation to the kangaroos on the BNTS site, including translocation, darting and euthanizing if required, and fertility control.<sup>15</sup>
- 26 February 2008: In the report to the ACT Government by the Commissioner for Sustainability and the Environment, the expert panel recommends the kangaroos on the site be euthanized by lethal injection.<sup>16</sup>
- 27 February 2008: Defence announces that ACT Government policy does not allow 'exporting' Eastern Grey Kangaroos and that therefore an application to translocate the BNTS kangaroos would not be approved. The Department's contractor is directed to stop work on translocation applications and to start preparing for a cull.<sup>17</sup>

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[www.ssaa.org.au/newssaa/mediamonitor/june07/210607abc666canberra0836.html](http://www.ssaa.org.au/newssaa/mediamonitor/june07/210607abc666canberra0836.html).

10 Wildcare 'Wildcare presents a non-lethal alternative proposal for kangaroos on Defence properties' 6 July 2007: [www.wildcare.com.au/media/WildcareMedia\\_06Jul07.pdf](http://www.wildcare.com.au/media/WildcareMedia_06Jul07.pdf).

11 Department of Defence 'Kangaroo Management at Defence Sites in the ACT' CPA 341/07, 28 September 2007: [www.defence.gov.au/media/2007/ACFE84.DOC](http://www.defence.gov.au/media/2007/ACFE84.DOC).

12 Ibid.

13 Cooper, M (2008i), Report on Belconnen Naval Transmission Station (BNTS) Site as part of the Investigations into ACT Lowlands Grasslands Office of the Commissioner for Sustainability and the Environment ACT, 26 February 2008.

14 Ibid, p10.

15 Wildcare 'Wildcare perspective on the BNTS kangaroo debate' Media Release 28 March 2008 [www.wildcare.com.au/mediareleases.html](http://www.wildcare.com.au/mediareleases.html); Department of Defence 'Kangaroo cull at Belconnen' MSPA 145/08, 23 May 2008: [www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=7763](http://www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=7763)

16 Cooper, M (2008i), op.cit, Attachment G, Panel Recommendation 3.

17 Department of Defence 'Defence Proposes Trial Kangaroo Management Program' MSPA 80/08, 31 March 2008: [www.defence.gov.au/media/departmentaltpl.cfm?CurrentId=7548](http://www.defence.gov.au/media/departmentaltpl.cfm?CurrentId=7548).

- 26 March 2008: The NSW Department of Environment and Climate Change states it would be prepared to consider a proposal to translocate the kangaroos.<sup>18</sup>
- 31 March 2008: Defence announces it has requested approval from the ACT Government to undertake a scientific trial including translocation; the cull is officially put on hold.<sup>19</sup>
- 11 April 2008: The Defence Minister orders the Department to start negotiations with the ACT Government over export licences needed to relocate the kangaroos.<sup>20</sup>
- 16 May 2008: Defence abandons plans for a scientific trial of translocation, and announces the cull is back on. The process to kill ‘about 400’ kangaroos begins almost immediately, with fences erected on the site that evening to channel the animals towards the killing pens.<sup>21</sup>
- 20 May 2008: The cull is in full swing. Defence establishes a public information line for members of the public seeking information about the ‘management of kangaroos’ at the BNTS site.<sup>22</sup>
- 2 June 2008: The ‘cull’ finishes after 514 kangaroos have been darted with tranquillisers then euthanized by an injection of sodium pentobarbitone. Carcasses are removed and disposed of at another Defence site nearby.<sup>23</sup> A small number of kangaroos are kept alive as part of a kangaroo fertility research project which has used kangaroos on the BNTS site since 2005.<sup>24</sup>

Ultimately what unfolded at the BNTS site was not a ‘cull’ in its specific scientific meaning of a selective killing of inferior, aged, or diseased animals.<sup>25</sup> As almost all the kangaroos were killed, the term ‘kill’ will henceforth be used to refer to the removal of the kangaroos from the BNTS site in May 2008. This term represents the most accurate, but value neutral, way of describing the events that are the

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18 Cooper, M (2008ii), ‘Addendum Report to the BNTS report’ Office of the Commissioner for Sustainability and the Environment, 28 March 2008: [www.envcomm.act.gov.au/investigations\\_and\\_consultation/investigation/belconnen2#body](http://www.envcomm.act.gov.au/investigations_and_consultation/investigation/belconnen2#body).

19 Department of Defence ‘Kangaroo Management at Belconnen Naval Transmitting Station’ MSPA 136/08, 16 May 2008: [www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=7731](http://www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=7731).

20 ‘Defence ACT in talks over problem roos’ ABC news, 11 April 2007: [www.abc.net.au/news/stories/2008/04/11/2214102.htm](http://www.abc.net.au/news/stories/2008/04/11/2214102.htm).

21 Department of Defence ‘Defence Proposes Trial Kangaroo Management Program’ MSPA 80/08, 31 March 2008: [www.defence.gov.au/media/departmentalpl.cfm?CurrentId=7548](http://www.defence.gov.au/media/departmentalpl.cfm?CurrentId=7548); McLennan, D and E Kretowicz ‘Belconnen kangaroo cull back on again’ Canberra Times, 17 May 2008: [www.canberratimes.com.au/news/local/news/general/belconnen-kangaroo-cull-back-on-again/772086.aspx](http://www.canberratimes.com.au/news/local/news/general/belconnen-kangaroo-cull-back-on-again/772086.aspx).

22 Department of Defence ‘Public Information Line for Kangaroo Management at Belconnen Defence Site’ MSPA 140/08, 20 May 2008: [www.defence.gov.au/media/AlertTpl.cfm?CurrentId=7740](http://www.defence.gov.au/media/AlertTpl.cfm?CurrentId=7740).

23 Cardwell, S ‘Canberra roo cull ends with 514 dead’ Herald Sun, 2 June 2008: [www.news.com.au/heraldsun/story/0,21985,23799532-5005961,00.html](http://www.news.com.au/heraldsun/story/0,21985,23799532-5005961,00.html).

24 McLennan, D ‘Kangaroos cost nearly \$1000 each to kill’ Canberra Times, 4 June 2008.

25 Kangaroos Report by the Select Committee on Animal Welfare 1988, Commonwealth of Australia, AGPS Canberra, p5.

subject of this paper. The question remains, however, as to why the kangaroos had to be killed in order to be removed from the site.

### **Why was a lethal solution adopted?**

All players involved in this case agreed that the kangaroos had to be removed from the BNTS site, yet opinions varied as to why. While seemingly at odds with each other, the main reasons given to justify the removal of the kangaroos included the need to protect native grasslands and threatened species on the site from overgrazing by the kangaroos, and the need to prevent the kangaroos themselves from starving.<sup>26</sup>

Neither of these reasons is, of course, a justification for killing the kangaroos. At most, they are reasons why the kangaroos should have been moved. Even on that basis, however, neither reason is entirely compelling. In its assessment of the kangaroos in August 2007, the Department of Defence's own expert panel reported that there was 'no current evidence of starvation.'<sup>27</sup> A local wildlife organisation with specialist knowledge of kangaroos confirmed in March 2008 that the kangaroos 'are not and never were starving.'<sup>28</sup>

If the kangaroos were not starving, then perhaps there is some credence in the claim that they were overgrazing the endangered native grasses (the 'Ginninderra peppergrass'<sup>29</sup>) and thereby jeopardising the chances of survival of the two threatened animal species on the site (the Golden Sun Moth<sup>30</sup> and the Perunga Grasshopper<sup>31</sup>). Yet 'kangaroo grazing' is

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26 See for example Cooper, M (2008i); Cardwell, S, op.cit; RSPCA (ACT) 'Kangaroos – The Facts. Unravelling the Issues':

[www.rspca-act.org.au/pages/page153.asp](http://www.rspca-act.org.au/pages/page153.asp), TAMS 'Kangaroo Culling on Defence Lands – Fact

Sheet':

[www.tams.act.gov.au/data/assets/pdf\\_file/0006/56823/Kangaroo\\_Culling\\_on\\_Defence\\_Lands.pdf](http://www.tams.act.gov.au/data/assets/pdf_file/0006/56823/Kangaroo_Culling_on_Defence_Lands.pdf).

27 Department of Defence, Expert Panel Assessment 'Management of Kangaroo-related Environmental and Animal Welfare Issues' August 2007, p10 [army.gov.au/publications/kangaroo\\_assessment.pdf](http://army.gov.au/publications/kangaroo_assessment.pdf); see also Wildcare 'What's all the fuss about' 12 August 2007: [www.wildcare.com.au/mediareleases.html](http://www.wildcare.com.au/mediareleases.html)

28 Wildcare, 'An Open Letter to the People of Canberra from Wildcare to Correct Misinformation about the Belconnen Kangaroo Translocation Project' Canberra Times, 8 March 2008: [www.wildcare.com.au/media/WildcareMedia\\_08Mar08.pdf](http://www.wildcare.com.au/media/WildcareMedia_08Mar08.pdf). Wildcare is the only wildlife organisation in the region with kangaroo expertise, as the ACT Government does not allow the rehabilitation of Eastern Grey Kangaroos within its jurisdiction: see Recommendation 17 in ACT Kangaroo Advisory Committee, 'Living with Eastern Grey Kangaroos in the ACT – Public Land' Third Report to the Minister for the Environment, Land and Planning, October 1997. Licences issued to wildlife carers in the ACT, including to the local RSPCA, reflect this policy in the conditions imposed on the licence.

29 Ginninderra peppergrass is listed on the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) List of Threatened Flora as 'vulnerable': [www.environment.gov.au/cgi-](http://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl?wanted=flora#FLORA_VULNERABLE)

[bin/sprat/public/publicthreatenedlist.pl?wanted=flora#FLORA\\_VULNERABLE](http://bin/sprat/public/publicthreatenedlist.pl?wanted=flora#FLORA_VULNERABLE)

30 The Golden Sun Moth is listed on the EPBC Act List of Threatened Fauna as 'critically endangered':

[www.environment.gov.au/cgi-](http://www.environment.gov.au/cgi-)

[bin/sprat/public/publicthreatenedlist.pl?wanted=fauna#OTHER%20ANIMALS\\_CRITICALLY%20ENDANGERED](http://bin/sprat/public/publicthreatenedlist.pl?wanted=fauna#OTHER%20ANIMALS_CRITICALLY%20ENDANGERED).

31 The Perunga Grasshopper has been declared a 'vulnerable species' under the Nature Conservation Act 1980 (ACT):

not listed as a threat in the relevant information regarding the threatened flora or fauna species.<sup>32</sup> Moreover, even if the threatened status of the grasslands<sup>33</sup> had originally been a compelling argument for the removal of the kangaroos, this line of argument was devalued by subsequent events. In the first place, the four-wheel drive and other motor vehicles used in the herding and killing process turned the site into a 'dust bowl'.<sup>34</sup> Then, four months after the kangaroos were removed, reports emerged that the site is heavily affected by contamination arising from 'underground fuel storage tanks, contaminated soil, landfill and chemical stores,' and that remediation of the site may involve removing several hundred square metres of topsoil and replanting the area.<sup>35</sup> As a final irony, the Department of Defence ultimately plans to transfer the site to the ACT Government so it can be used for residential and recreational purposes. In fact, the main point of the Department's recently completed Remediation Action Plan for the site is to ensure it is 'safe for housing before it is disposed of.'<sup>36</sup>

As a disturbing indictment of our attitude of the expendability of 'abundant' wildlife in Australia, arguments for removing the kangaroos were in some cases simply assumed to be arguments for killing the kangaroos. For example, several federal government ministers who considered that the kangaroos were responsible for the deteriorating state of the grasslands automatically assumed that the kangaroos should be killed.<sup>37</sup> Such an attitude towards our native wildlife may help explain why Australia has one of the world's worst records for slaughtering wildlife.<sup>38</sup>

Others, however, accepted that while the kangaroos should be removed,

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[www.tams.act.gov.au/\\_\\_data/assets/pdf\\_file/0009/58662/Perunga\\_Grasshopper.pdf](http://www.tams.act.gov.au/__data/assets/pdf_file/0009/58662/Perunga_Grasshopper.pdf)

32 For the Ginninderra Pepperpress, see its Recovery Plan:

[www.environment.gov.au/biodiversity/threatened/publications/recovery/1-ginninderrense/conservation.html#threats](http://www.environment.gov.au/biodiversity/threatened/publications/recovery/1-ginninderrense/conservation.html#threats). Note that the Plan lists 'kangaroo grazing' as a 'key component' of its management.

33 The Grasslands are listed as an endangered ecological community under the EPBC Act: [www.environment.gov.au/cgi-bin/sprat/public/publicshowcommunity.pl?id=14&status=Endangered](http://www.environment.gov.au/cgi-bin/sprat/public/publicshowcommunity.pl?id=14&status=Endangered).

34 A graphic written and pictorial account of the kill is available at: [www.kangarooives.com](http://www.kangarooives.com). This website has been placed in the archives of the National Library of Australia.

35 The Hon. Dr Mike Kelly, Parliamentary Secretary to the Minister for Defence, 'Remediation of the Belconnen Naval Transmission Station' PARLSEC43/08, 27 September 2008: [www.minister.defence.gov.au/Kellytpl.cfm?CurrentId=8270](http://www.minister.defence.gov.au/Kellytpl.cfm?CurrentId=8270) and Beeby, R, 'City tip in line for tonnes of toxic soil' Canberra Times, 30 September 2008: [www.canberratimes.com.au/news/local/news/general/city-tip-in-line-for-tonnes-of-toxic-soil/1320912.aspx](http://www.canberratimes.com.au/news/local/news/general/city-tip-in-line-for-tonnes-of-toxic-soil/1320912.aspx).

36 The Hon. Dr Mike Kelly, *ibid*, emphasis added.

37 See statements by Stephen Smith and Peter Garrett in 'Cruel or necessary evil' The Age, 20 May 2008: [www.theage.com.au/articles/2008/05/30/1211654321584.html?page=fullpage#contentSwap2](http://www.theage.com.au/articles/2008/05/30/1211654321584.html?page=fullpage#contentSwap2).

38 This aspect of Australia's wildlife record was already observed in the 1980s: Erlich, P and A The Causes and Consequences of the Disappearance of Species, New York, 1981. See also [www.awpc.org.au/newsite/kangaroos/kangaroos.html](http://www.awpc.org.au/newsite/kangaroos/kangaroos.html), [www.kangaroo-protection-coalition.com/nswaatappeal2008.html](http://www.kangaroo-protection-coalition.com/nswaatappeal2008.html), [www.animalsaustralia.org/issues/kangaroo\\_shooting.php](http://www.animalsaustralia.org/issues/kangaroo_shooting.php), and [www.voiceless.org.au/About\\_Us/Voiceless\\_in\\_Print\\_2006/Taking\\_a\\_stand\\_for\\_all\\_animals.html](http://www.voiceless.org.au/About_Us/Voiceless_in_Print_2006/Taking_a_stand_for_all_animals.html).



the non-lethal solution of translocating them should at least be considered. Translocation had long been the Department of Defence's preferred solution, and for the most part the Department pursued this option in various forms up until the last minute when it made its final decision to reject it in favour of a 'cull'. Its immediate rationale for rejecting the translocation research project was that it was too costly.<sup>39</sup> The Department's 'rough estimate' of the cost of the research project was \$3.5 million, and it claimed the Federal Government withdrew its support for a translocation research project as it did not consider it 'to be a cost effective use of taxpayers' money.'<sup>40</sup> The 'costs' argument cannot have been the sole reason for rejecting translocation in favour of killing the kangaroos. Many animal protection and wildlife organisations offered to translocate the kangaroos for far less than the \$3.5 million quoted for the scientific translocation project.<sup>41</sup> Some groups with extensive experience in rehabilitating and translocating kangaroos even offered to move them for free.<sup>42</sup> Another explanation was that there were no suitable sites to release the kangaroos. Yet animal organisations had offered large areas of private land suitable for the 'soft release' (involving appropriate containment and slow release) of the kangaroos.<sup>43</sup>

The ACT Government also claimed it was against its policy to translocate 'abundant species like Eastern Grey Kangaroos' in the ACT.<sup>44</sup> The ACT Government publicly states, however, that it is aware of the need for animal welfare standards to be able to change to reflect new knowledge and changing community expectations.<sup>45</sup> The ACT Government, conflating longevity and appropriateness,<sup>46</sup> nevertheless clings to this decade-old policy regarding the translocation of Eastern Grey Kangaroos at the risk, it could be suggested, of applying it

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39 Department of Defence 'Kangaroo management at Belconnen Naval Transmitting Station' Op.cit. This media release was issued on 16 May 2008, the day on which the cull process began.

40 Ibid.

41 Budget Estimates, Senate Standing Committee on Foreign Affairs, Defence and Trade 4 June 2008: [www.aph.gov.au/hansard/senate/committee/S10871.pdf](http://www.aph.gov.au/hansard/senate/committee/S10871.pdf). When asked about the costs of simply translocating the kangaroos, as opposed to the scientific trial, the Defence Secretary replied that he did not think the Department had done 'anything like an accurate estimation of what a translocation would cost' (p70).

42 Wildcare, 'An Open Letter to the People of Canberra from Wildcare to Correct Misinformation about the Belconnen Kangaroo Translocation Project' Op.cit.

43 Wildcare 'The kangaroo population at the Belconnen Naval Transmitting Station. A preliminary proposal to the Department of Defence for non-lethal interventions consistent with a whole-of-ecosystem environmental plan' July 2007: [www.wildcare.com.au/media/Wildcare\\_Proposal\\_Summary.pdf](http://www.wildcare.com.au/media/Wildcare_Proposal_Summary.pdf).

44 Recommendation 5 in ACT Kangaroo Advisory Committee, op.cit; and TAMS 'Kangaroo culling on Defence lands – Fact sheet' [www.tams.act.gov.au/\\_data/assets/pdf\\_file/0006/56823/Kangaroo\\_Culling\\_on\\_Defence\\_Lands.pdf](http://www.tams.act.gov.au/_data/assets/pdf_file/0006/56823/Kangaroo_Culling_on_Defence_Lands.pdf).

45 TAMS 'Animal Welfare – Government Responsibilities' at [www.tams.act.gov.au/live/pets/animalwelfare/animalwelfare-governmentresponsibilities](http://www.tams.act.gov.au/live/pets/animalwelfare/animalwelfare-governmentresponsibilities)

46 See Animal Liberation ACT, A Critique of the Final Report of the 'Expert' Panel on the BNTS Grasslands, 2008, p5: [www.al-act.org/files/Animal\\_Liberation\\_Grassland\\_Critique.doc](http://www.al-act.org/files/Animal_Liberation_Grassland_Critique.doc).

inflexibly without regard to the merits of each particular case.<sup>47</sup>

Another argument against translocation was that it was less humane than killing the animals. The principle proponents of this view were the RSPCA (ACT) and the Commissioner for Sustainability and the Environment ACT's Expert Panel (which included the CEO of the RSPCA).<sup>48</sup> Yet the method ultimately used to kill the kangaroos was far from the most humane method of destruction, even according to those who advocated a lethal solution. In its Final Report, the expert panel would have preferred a number of more humane ways of killing the kangaroos, but it concluded that they would not be appropriate in the particular circumstances of the BNTS case. Shooting, the 'most humane lethal method of removing kangaroos,' was not considered acceptable by the Australian Federal Police because of 'public safety concerns' (due to the proximity of the BNTS site to residential areas).<sup>49</sup> The panel therefore considered euthanasia by lethal injection as the 'next best method of lethal removal'.<sup>50</sup> It acknowledged that the potential for injuries and associated stress inherent in this method could be reduced by using 'a more passive means' of approaching and tranquillising the kangaroos such as 'free range darting' rather than herding them into pens (which is how the tranquillisation process was ultimately carried out).<sup>51</sup> Again, however, the Panel considered it was unlikely that this method would be appropriate at the BNTS site.<sup>52</sup> Other 'experts' agreed that darting followed by lethal injection is not a humane way of dealing with animals at high density, because 'darting them is much more likely to go wrong and cause injury and maim animals rather than a lethal [gun]shot from a trained marksman.'<sup>53</sup> Ultimately, even those in favour of killing the BNTS kangaroos had to admit that the chosen method of killing the animals was at best 'the most humane method suitable for the BNTS site'.<sup>54</sup> This is a far lower standard than simply 'the most humane method,' and seriously undermines any claim that killing the animals was 'more humane' than moving them.

As none of the arguments used to justify killing rather than moving the BNTS kangaroos is particularly compelling, it is tempting to suggest

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47 The inflexible application of policy when exercising a discretionary power is an 'improper exercise' of that power under the Administrative Decisions (Judicial Review) Act 1989 (ACT): s5(2)(f).

48 Cooper, M (2008i), *op.cit.* Note that the Panel's first argument for not translocating the kangaroos was that it was against current ACT Government policy: p8.

49 *Ibid.*, p9.

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

53 'Kangaroo cull in Canberra – experts react' Australian Science Media Centre website, 25 March 2008: [www.aussmc.org/KangarooCull.php](http://www.aussmc.org/KangarooCull.php).

54 Cooper, M (2008i), *op.cit.*, Attachment G, Panel Recommendation No.3.

that the legal framework itself was at least partly responsible for the final, and lethal, outcome. In fact, the killing of the BNTS kangaroos highlighted what many in the wildlife protection sector have known for a long time: that Australia's regulatory environment governing wildlife is overly complex and ultimately inadequate.

### **Characteristics of the animal welfare regulatory framework governing the BNTS kangaroos**

Those wishing to protect the lives of Australia's wildlife from exploitation and indiscriminate killing are well aware of the considerable obstacles in their way. Significant confusion about where the responsibility for making decisions lies, and which laws and policy apply, makes it extremely difficult to seek interim relief, or to take action against perceived acts of cruelty in the 'management' of the animals. If we needed to be reminded of this lamentable situation, the BNTS case highlighted many of the flaws inherent in our regulatory environment regarding wildlife, especially the complexities of the legal framework, the potentially large number of organisations and individuals involved, and the confusion over jurisdictions.

### **Licence requirements**

The *Nature Conservation Act 1992* (ACT) sets out the main licence requirements for controlling kangaroos in the ACT. Killing kangaroos (the main form of 'control' of Eastern Grey Kangaroos in the ACT)<sup>55</sup> requires permits to capture (if required) and to kill.<sup>56</sup> In the unlikely event that a proposal to move kangaroos interstate were to be approved, a further licence would be required to 'export' them from the ACT.<sup>57</sup> Decisions regarding wildlife licences are made by the Conservator of Flora and Fauna,<sup>58</sup> appointed under the *Nature Conservation Act 1992*.<sup>59</sup>

As various proposals were made during the BNTS case to translocate many or all of the kangaroos to NSW, licences for 'importing' wildlife into NSW and for 'liberating' (ie releasing) them in NSW, would have been required under the *National Parks and Wildlife Act 1974* (NSW).<sup>60</sup> While ACT policy regarding the translocation of Eastern Grey Kangaroos is that they should not be moved, NSW has guidelines

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<sup>55</sup> Due to the longstanding government policy in the ACT that rescued Eastern Grey Kangaroos cannot be kept for longer than 48 hours, and that Eastern Grey Kangaroos must not be translocated, they are usually euthanized.

<sup>56</sup> Sections 44-45, *Nature Conservation Act 1992* (ACT).

<sup>57</sup> Section 48, *Nature Conservation Act 1992* (ACT).

<sup>58</sup> Section 103, *Nature Conservation Act 1992* (ACT).

<sup>59</sup> Section 7, *Nature Conservation Act 1992* (ACT).

<sup>60</sup> Sections 106 and 109, *National Parks and Wildlife Act 1974* (NSW).

regarding the translocation of ‘threatened fauna’.<sup>61</sup> The guidelines apply equally to all species,<sup>62</sup> and set out principles of when they should be translocated. It does not recommend against the translocation of Eastern Grey Kangaroos.

As is evident, a translocation proposal similar to those made in relation to the BNTS kangaroos would require significant cooperation between the various players. As the owner of the land in the BNTS case, the Commonwealth Government had to negotiate with the ACT and NSW governments about suitable relocation sites and the various requirements under their respective laws and policies. While the relevant NSW authority had indicated it would be prepared to consider a translocation proposal,<sup>63</sup> the ACT Government steadfastly refused to countenance any form of translocation, even one where the kangaroos would be leaving the ACT. Therefore, despite the practical benefits of the scientifically monitored translocation proposed by the Department of Defence,<sup>64</sup> and despite translocations being possible under both NSW and ACT law and under NSW policy, the Department of Defence was left with ‘no option but to euthanize the kangaroos.’<sup>65</sup> It seems that the sheer complexity and unworkability of the governing framework sealed the fate of the BNTS kangaroos much more than issues such as costs, the lack of suitable release sites, or matters of animal welfare.

### **Possible interim relief and administrative review of decisions in the BNTS case**

The complexity of the regulatory framework governing wildlife, and general confusion over who is responsible for what and under which law, can inhibit attempts by individuals or animal protection organisations to seek injunctive relief or review of relevant decisions. The *Nature Conservation Act* 1980 (ACT) allows for parties other than ‘the

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61 NSW National parks and Wildlife Service, ‘Policy for the translocation of threatened fauna in NSW’ Policy and Procedure Statement No 9, Department of Environment and Climate Change (NSW), October 2001: [www.environment.nsw.gov.au/resources/nature/policyFaunaTranslocation.pdf](http://www.environment.nsw.gov.au/resources/nature/policyFaunaTranslocation.pdf).

62 ‘Policy on the translocation of threatened fauna in NSW – February 2005’, Department of Environment and Climate Change (NSW) website:

[www.environment.nsw.gov.au/policiesandguidelines/FaunaTranslocationPolicy.htm](http://www.environment.nsw.gov.au/policiesandguidelines/FaunaTranslocationPolicy.htm)

63 Cooper, M (2008ii), op.cit, Attachment C.

64 Not only would the translocation have avoided killing the animals, but the Secretary of Defence stated in Senate Estimates on 4 June 2008 that: ‘Under translocation, we would have picked up the kangaroos and moved them to another site. The trial would have been scientifically monitored, it would have thrown up information available to Defence but also to scientists about the utility of moving kangaroos in those numbers under those circumstances.’ Hansard, op.cit.

65 Ibid. See also Beeby, R, ‘Roo cull back on: Defence blocked’ Canberra Times, 4 March 2008: ‘The president of the late Steve Irwin’s Queensland-based Wildlife Protection Association, Pat O’Brien, ... flew from Queensland to Canberra last Friday to meet senior Defence officials, who had previously told him they wanted to discuss details of the proposed relocation operation. “I got the impression they had run into a brick wall, because instead of discussing the translocation, the bureaucrat I met with kept saying there wasn’t much Defence could do if the ACT wouldn’t issue the permits.”’

conservator' to apply to the ACT Supreme Court for 'injunctive' or 'interim' orders in certain limited circumstances, and provided it is necessary 'for the protection or conservation of native animals'.<sup>66</sup>

Applications can be made to the ACT Administrative Appeals Tribunal<sup>67</sup> for review of a decision by the Conservator to grant or refuse to grant a licence under the *Nature Conservation Act 1980* (ACT).<sup>68</sup> Under the *Administrative Appeals Tribunal Act 1989* (ACT), the application can be made by or on behalf of any person, including the Commonwealth, 'whose interests are affected by the decision.'<sup>69</sup> An organisation's interests will be taken to be affected by a decision 'if the decision relates to a matter included in the objects or purposes of the organisation.'<sup>70</sup>

In practice, however, while there may be scope for seeking interim relief or review of critical decisions made in cases such as the BNTS 'cull', the actual circumstances of the BNTS case made any such action virtually impossible. After months, if not years, of prevaricating on the issue, and after publicly rejecting the idea of killing the kangaroos in favour of translocating them, the Department of Defence announced its definitive decision late on a Friday afternoon just hours before preparations for the kill began in earnest.<sup>71</sup> Individuals and animal protection organisations were left with little option but to observe the kill from the 'safe' side of the fences, and to document any perceived incidents of cruelty in the hope that action would be brought against the perpetrators by the appropriate authorities under the relevant anti-cruelty legislation.

Nevertheless, despite numerous accounts and video footage posted on websites suggesting that there were such incidents,<sup>72</sup> no such action was taken. In considering why nothing was done, especially given the notoriety of the BNTS case and the perceived severity of the incidents, it again seems that confusion about the legal framework may have been

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66 Sections 92-94 in Part 9 'Injunctive orders'. The Supreme Court can order applicants to give security for costs: s96.

67 Since the time of writing, the Administrative Appeals Tribunal ACT has been replaced by the ACT Civil and Administrative Tribunal (ACAT). The establishment of the new Tribunal resulted in consequential changes to the Nature Conservation Act 1980 (ACT). Applications for review of a decision to grant a licence to kill a native animal can now be made to the ACAT by an entity that has interests affected by the licence, or by any other person whose interests are affected by the decision (Nature Conservation Act 1980: s116 and item 7 in Schedule 1). The ACT Civil and Administrative Tribunal Act 2008 (ACT) states that a body has interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the body (s22Q).

68 Section 114.

69 Section 25(1), Administrative Appeals Tribunal Act 1989 (ACT).

70 Section 25(2), Administrative Appeals Tribunal Act 1989 (ACT).

71 Department of Defence 'Kangaroo Management at Belconnen Naval Transmitting Station' op.cit, and McLennan, D and E Kretowicz, op.cit.

72 See for example the photojournalistic record of the killing at [www.kangaroolives.com](http://www.kangaroolives.com).

at least partly to blame. Uncertainty over which guidelines on killing kangaroos should apply, and which animal welfare laws, if any, should govern the actions of the kill was inevitable in the circumstances of the BNTS case. Perhaps the biggest source of confusion in episodes involving the ‘control’ of kangaroos behind Commonwealth fences is the question of overlap between jurisdictions. The BNTS case was no exception as the land on which the events unfolded is situated in the middle of suburban Canberra, but is owned by the Commonwealth (the Department of Defence). The legal intricacies of situations such as the BNTS case need to be clarified. Such cases are certain to occur again.<sup>73</sup>

## The animal welfare framework

A common assumption in situations such as the BNTS case is that the local animal welfare legislation does not apply when wildlife is killed on Commonwealth land,<sup>74</sup> which would mean that no legislation would apply as there is no Commonwealth animal welfare legislation. This ‘anomaly’ is of course part of a much larger ‘constitutional quagmire’ regarding the application of State and Territory law to Commonwealth places,<sup>75</sup> and as such cannot be discussed here in detail. In general, however, cases such as the BNTS ‘cull’ do not involve issues of ‘inconsistency’ between local and Commonwealth law because there is no Commonwealth law that directly regulates animal welfare.<sup>76</sup> And while the Commonwealth may not be able to be prosecuted for animal cruelty,<sup>77</sup> it is unlikely that anti-cruelty legislation would not apply to the Commonwealth by virtue of an implied Commonwealth immunity.<sup>78</sup>

The general approach to determining whether a State or Territory law

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73 For example, further lethal action has been proposed in relation to the population of wallabies at the Tindal Air Base in the Northern Territory: The Hon. Dr Mike Kelly, Parliamentary Secretary to the Minister for Defence, ‘Increased Wallaby Management Activities at RAAF Tindal’ PARLSEC63/08, 2 December 2008 [www.minister.defence.gov.au/kellytpl.cfm?CurrentId=8546](http://www.minister.defence.gov.au/kellytpl.cfm?CurrentId=8546). Even in Canberra, a second population of Eastern Grey Kangaroos on defence land at the Majura Training Base is under threat of ‘control’ by euthanasia: ABC News ‘Future of second roo population uncertain’ 3 June 2008 [www.abc.net.au/news/stories/2008/06/03/2263149.htm](http://www.abc.net.au/news/stories/2008/06/03/2263149.htm).

74 On the day the killings actually started the CEO of RSPCA (ACT) stated that ‘[I]legally we have no jurisdiction, so the Department of Defence are doing the right thing by even allowing our inspectors on site.’ (‘Darting roos still best option: RSPCA’ *Sydney Morning Herald*, 20 May: [news.smh.com.au/national/darting-roos-still-best-option-rspca-20080520-2g7d.html](http://news.smh.com.au/national/darting-roos-still-best-option-rspca-20080520-2g7d.html)).

75 Lee, RJ, ‘Applicability of State Laws to Commonwealth Land and Activities,’ [2002] UWSLRev 3. Note that the Commonwealth Places (Application of Laws) Act 1970 (Cth) deals with State laws: s4(1).

76 There is no direct ‘head of power’ in s51 of the Constitution that allows the Commonwealth to legislate in relation to animal welfare. Note also that the ‘inconsistency of laws’ provision in the Constitution (s109) deals with State laws.

77 Note that the Animal Care and Protection Act 2001 (Qld) expressly includes this exemption (s5(2)).

78 National bodies such as the National Consultative Committee on Animal Welfare (NCCAW) have long stated their view that animal welfare legislation should bind the Crown. See for example its ‘Revised Position Statement - April 1997’: Each Australian state and territory government should enact legislation, under the *Animal Welfare Act* or equivalent, to prevent cruelty to animals ... The Act should define grades of cruelty to an animal and be binding on the Crown.

applies to the Commonwealth is to consider whether any such law is intended 'to bind the Crown' in right of the Commonwealth.<sup>79</sup> Interestingly, all anti-cruelty statutes in Australia except the ACT statute are expressed to apply to the Crown.<sup>80</sup> The Queensland statute is the most explicit. It states that 'this Act binds all persons, including the State and, to the extent the legislative power of the Parliament permits, the Commonwealth and the other States' (s5(1)).<sup>81</sup>

The situation is just as confusing when considering which policy guidelines or Code of Practice dealing with 'destroying' kangaroos should apply where the animals are killed on Commonwealth land. While there is a Commonwealth Code, it only covers shooting kangaroos for non-commercial purposes.<sup>82</sup> In the BNTS case, however, the kangaroos were not shot – they were darted with tranquillisers then euthanized by lethal injection. The ACT Code of Practice for the Humane Destruction of Kangaroos is in many ways broader in scope than the Commonwealth Code.<sup>83</sup> The ACT Code sets out minimum requirements for capturing kangaroos in order to kill them, and for killing kangaroos for culling and scientific purposes, and where they may be injured due to road or shooting accidents.<sup>84</sup> It also covers a wider range of 'destruction' methods than the national Code in so far as it deals with lethal injection and poisoning.<sup>85</sup>

## **Compliance and enforcement of animal welfare laws and policies**

According to statements made by the relevant authorities in relation to the BNTS case, the Department of Defence, through its contractor, was responsible for the welfare of the kangaroos during their removal,<sup>86</sup> and the killing of the kangaroos was to comply with the ACT Code of Practice.<sup>87</sup> To ensure compliance, the Department of Defence arranged for RSPCA (ACT) to 'spot check' proceedings.<sup>88</sup> The RSPCA (ACT) has only two full-time inspectors, and they were not present throughout the entire process. Yet the CEO of the local animal welfare organisation

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79 See for example *Commonwealth v Western Australia* [1999] HCA 5.

80 See s35A(1) (NSW), s5 (SA, TAS, QLD & NT), and s4 (VIC, WA).

81 *Animal Care and Protection Act 2001* (QLD).

82 *National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Non-commercial Purposes*, endorsed by the Natural Resource Management Ministerial Council, November 2008.

83 See *Code of Practice for the Humane Destruction of Kangaroos (ACT)*: [www.tams.act.gov.au/live/pets/animalwelfare/animalwelfarestandards-codesofpractice](http://www.tams.act.gov.au/live/pets/animalwelfare/animalwelfarestandards-codesofpractice).

84 *Ibid*, chapters 2-4.

85 *Ibid*, section 3.1.

86 ACT Legislative Assembly, *Debates. Weekly Hansard 7 August 2008*, p3141 (25 June 2008).

87 TAMS 'Kangaroo Culling on Defence Lands – Fact Sheet,' *op.cit*, p3; McLennan, D and E Kretowicz, *op.cit*.

88 ACT Legislative Assembly, *op.cit*.

announced after the killing was completed that he was ‘happy’ with how the cull had been carried out, and that it had been ‘undertaken in the most humane manner possible.’<sup>89</sup> Several members of the general public who monitored the killing from behind the fences had very different views. As mentioned earlier, numerous photos and video images of alleged breaches of the ACT Code and other acts of cruelty committed during the killings have been posted on the Internet.<sup>90</sup> These accounts reveal alleged attempts to herd the kangaroos from the holding pens into the killing pens with security guards as well as four-wheel drives and other motor vehicles. As kangaroos are extremely sensitive to stress, any form of herding for destruction purposes is not recommended by the ACT Code. According to the Code:

*. . . there is a high risk of injury to the animal ... Trapping of the larger kangaroos, such as the Eastern Grey, is impractical even for small confined populations. Trapping is stressful for these kangaroos and includes the risk of leg breakages and capture myopathy causing death. Trapping to enable destruction is not recommended.*<sup>91</sup>

The pictures taken during the BNTS killing process suggest that several kangaroos did crash into fences and each other causing serious injuries.<sup>92</sup> Thus, while scientific data on translocating large numbers of kangaroos was not able to be collected because the Department of Defence was prevented from carrying out its trial, the BNTS case certainly confirmed what was already well known about trapping and herding large populations of kangaroos in order to euthanize them – that it can be an extremely inhumane form of destruction.

While neither the form nor the conduct of the BNTS destruction process seems to have been in accordance with the ACT Code, no action has been brought in relation to the case.<sup>93</sup> This is despite the ACT Code

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89 Cardwell, S. ‘Canberra roo cull ends with 514 dead’ Herald Sun, 2 June 2008:

[www.news.com.au/heraldsun/story/0,21985,23799532-5005961,00.html](http://www.news.com.au/heraldsun/story/0,21985,23799532-5005961,00.html). See also RSPCA (ACT), ‘Kangaroos – The Facts’ op.cit: ‘[t]he cull is being carried out as humanely as possible.’

90 For example [www.kangaroolives.com](http://www.kangaroolives.com), [www.youtube.com/watch?v=SKCA6ecy0Zg](http://www.youtube.com/watch?v=SKCA6ecy0Zg),

<http://edgarcrook.blogspot.com/2008/07/kangaroo-cull-video.html>, and a wildlife carer’s witness statement in author’s possession, 21 May 2008.

91 Emphasis added. ACT Code, op.cit, paragraph 2.1. This recommendation in the ACT Code further undermines the claim that killing the animals by this method was more humane than translocating them.

92 See [www.kangaroolives.com](http://www.kangaroolives.com). See also ACT Legislative Assembly, op.cit, p3142: ‘the number of animals euthanized due to injury is 21.’

93 While the conduct of the actual killing was ignored by the relevant authorities, the activities of the researchers dealing with the BNTS kangaroos involved in the fertility control research did not escape notice. According to correspondence in the author’s possession, informal complaints were made by members of the public to the relevant ethics committee that approved the research and the matter was investigated. Yet when a number of onlookers contacted the Australian Federal Police to report



being enforceable under local anti-cruelty legislation.<sup>94</sup> The BNTS case thus serves as another reminder of the flaws in our animal welfare legal framework, especially where that framework relies on Codes of Practice that are extremely difficult, if not impossible, to enforce.<sup>95</sup>

## Conclusions

The BNTS case made clear that as long as the Department of Defence intends to ‘manage’ kangaroos (or other animals) behind its fences or on its land, it must clarify its animal welfare responsibilities and policies. The Department has adopted a clear position in relation to its obligations under environmental legislation, and has developed a range of policy documents and strategies to improve its environmental performance.<sup>96</sup> Adopting a similar approach in relation to its ‘animal welfare performance’ would not only benefit the animals it ‘manages’, but would enhance the general animal welfare regulatory framework through improved transparency and accountability.

As it was, the Department of Defence played an unusual role in the BNTS case, which in part may explain why the case was so controversial. The Department persisted with its non-lethal proposal to translocate the animals in the face of strong resistance from the local government and, ironically, the local animal welfare organisation. It was also willing to undertake a scientific trial of translocations, which would have vastly increased our understanding of the viability of moving large numbers of wildlife as an alternative to killing them.

Ultimately, however, the attempts to implement a compassionate solution proved impossible in the current regulatory framework governing our wildlife. All too often this framework lets down the wildlife it is supposed to protect – none more so than the BNTS kangaroos who lived behind fences, but who died outside the law.

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alleged breaches of the Animal Welfare Act 1992 (ACT) (all serving AFP officers are authorised as inspectors under that Act), they were advised it was a matter for the RSPCA.

94 Section 20, which sets out the usual exception concerning the inapplicability of an animal welfare offence if the conduct making up the offence is in accordance with an approved Code of Practice (the Code of Practice for the Humane Destruction of Kangaroos was approved under s22 of the Animal Welfare Act 1992 (ACT) in 1994). In this case, aspects of the killing were arguably not in accordance with the Code, and therefore the exception would not apply.

95 The weaknesses of the Code of Practice system have been well documented elsewhere. See for example Senate Rural and Regional Affairs and Transport Committee ‘Adequacy of Wildlife Regulations’ in Commercial Utilisation of Australian Native Wildlife, June 1998, Chapter 6: [www.aph.gov.au/senate/committee/rrat\\_ctte/completed\\_inquiries/1996-99/wild/report/c06.htm](http://www.aph.gov.au/senate/committee/rrat_ctte/completed_inquiries/1996-99/wild/report/c06.htm).

96 See Defence Environmental Management, Department of Defence website [8 December 2008]: [www.defence.gov.au/environment](http://www.defence.gov.au/environment).

# Possess or Protect? Exploring the Legal Status of Animals in Australia's First Colonial Courts:

Brett Salter \*

## Part I, the “unnatural” theft and murder

### Introduction

Between the eighteenth and nineteenth centuries the animal protection movement in England was going through a remarkable period of development. Notable scholars, parliamentarians and jurists including Lord Erskine, Richard Marks, Blackstone, Bentham and Bacon had articulated positions on the legal status of animals. By the third decade of the nineteenth century, the British parliament had passed its first modern era anti animal cruelty legislation.

As these significant developments were taking place in Britain, on the other side of the world, in the infant colony of New South Wales, animals were also appearing as prominent characters throughout Australia's first superior court records. Animals were a feature of daily life in the criminal jurisdiction, in matters involving trade, commerce and throughout the civil jurisdiction. Animals also featured prominently in crucial early cases that considered the limits of British sovereignty and the reception of British law.

The purpose of this paper, written in two parts over two issues, is twofold. The first purpose is to uncloak the unique body of court records, from this earliest period after European colonisation, which define the relationship between animals and the colonial legal system. Despite the prominence of animals in some of the most significant cases in the first 40 years of settlement, the historical relationship between animals and the law in Australia has received very limited attention.<sup>1</sup>

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1 T. Castle and B. Kercher provide a comprehensive chapter of cases involving animals from the later period 1828-1844, but nothing has been written on the first period after settlement. See: T. Castle and B. Kercher (eds), *Dowling's Select Cases 1828 to 1844* (2005) 8-56. In 2009 a new report is being published covering the first forty years after settlement and comprising of many cases examined in this paper: See B. Kercher and B. Salter (eds), *The Kercher Reports: Cases from the Superior Courts of NSW (1788-1827)* (2009) (hereafter “N.S.W. Sel. Cas. (Kercher)”). Most of these cases are also

The second purpose of the paper is to situate the jurisprudence of the early colonial courts in the context of the development of new English ideas. The paper will examine the extent to which the legal status of animals in the colony was understood in terms of possession rather than protection, and whether a “property-based” understanding of the legal status of animals had ramifications for the development of the animal protection movement between 1788 and 1830.

Part 1 below will briefly trace the development of the animal protection movement in Britain during the critical period between the eighteenth and nineteenth centuries. During this same period, the infant legal system of the colony of New South Wales was also beginning to evolve. Part 1 will provide an overview of the earliest years of the colonial courts with specific reference to animal related cases appearing in the Court of Criminal Jurisdiction, Australia’s first criminal court.

## I British Origins and Colonial Beginnings

### a) The evolution of animal protection in the eighteenth and nineteenth centuries

Laws pertaining to animals and animal protection were beginning to emerge in British law at the time of the arrival of the First Fleet at Sydney Cove in January 1788. Indeed, in the century between 1750 and 1850 the animal protection movement in Britain went through a dramatic period of development and featured some of the most significant figures in English jurisprudence. William Nelson’s *Laws Concerning Game*<sup>2</sup>, first published in 1753, gave one of the earliest accounts of the relationship between animals and the law. As the title suggests however, Nelson’s treatise had very little to say on the protection of animals and more on a legal framework for hunting. Reverend Humphrey Primatt’s *A Dissertation on the Duty of Mercy and Sin of Cruelty to Brute Animals*,<sup>3</sup> published in 1776, explicitly considered the legal status of animals. Primatt makes the plea in what must be one of the first treatise of its kind:

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available online at: Decisions of the Superior Courts of NSW available at: [www.law.mq.edu.au/sensw/](http://www.law.mq.edu.au/sensw/) (hereafter “Decisions of the Superior Courts of NSW”).

2 W. Nelson, *The laws concerning game : of hunting, hawking, fishing and fowling, &c. and of forests, chases, parks, warrens, deer, doves, dove-cotes, conies ... together with the forest laws ...* (first pub 1753, available Rare Books, University of Sydney).

3 H. Primatt, *A Dissertation on the Duty of Mercy and Sin of Cruelty to Brute Animals* (first pub 1776; 2007 ed Kessinger Pub Co.). There were other early 18th calls for reform: see for eg John Lawrence, *A Philosophical and Practical Treatise on Horses*, “On the Rights of Beasts,” (1796); Thomas Young, *Essay on Humanity to Animals*, “On Cruelty to Horses,” (1798); Charles Daubeny, *A Sermon on Cruelty to Dumb Animals* (1799).

See that no brute of any kind . . . whether intrusted to thy care, or coming in thy way, suffer thy neglect or abuse. Let no views of profit, no compliance with custom, and no fear of ridicule of the world, ever tempt thee to the least act of cruelty or injustice to any creature whatsoever. But let this be your invariable rule, everywhere, and at all times, to do unto others as, in their condition, you would be done unto. <sup>4</sup>

David Favre, in his brief but comprehensive account of the development of the animal protection movement, identifies utilitarian Jeremy Bentham as a key figure of the eighteenth century to address the legal status of animals. Favre writes of Bentham's Introduction to the Principles of Morals and Legislation (1780)<sup>5</sup>:

it was closely studied at the time by a large number of individuals, some of whom went on to propose legislation for the protection of animals.<sup>6</sup> Bentham argued that there was no reason why animals should not be accorded protection under the law. Bentham pointed out that animals, "on account of their interests having been neglected by the insensibility of the ancient jurists, stand degraded into the class of things". Within a footnote entitled "Interests of the inferior animals improperly neglected in legislation," Bentham argued that the capacity for suffering is the vital characteristic that gives a being the right to legal consideration.<sup>7</sup>

In the early nineteenth century animal protection reform went through a period of significant development and Thomas Erskine was at the forefront of this movement. In 1809 Erskine introduced a Bill into parliament for the prevention of malicious and wanton cruelty to animals. In his address to the House of Lords Erskine commented:

They (animals) are created, indeed, for our use, but not for our abuse. Their freedom and enjoyment, when they cease to be consistent with our just dominions and enjoyment, can be no part of their natures; but whilst they are consistent I say their rights, subservient as they are, ought to be as sacred as our own . . . the

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4 Primatt cited in D. Favre, "Overview of Historical Materials", Animal Legal and Historical Centre (2002) available at: [www.animallaw.info/historical/articles/ovushistory.htm](http://www.animallaw.info/historical/articles/ovushistory.htm) .

5 D. Favre, above n 4.

6 J. Bentham, An introduction to the principles of morals and legislation (printed for pub 1780 first pub 1789; 1982 ed by J. H. Burns, H. L. A. Hart). Chap. 17, § 1, ¶4.

7 Favre claims that the final sentence of the footnote is often used today as a rallying cry for those seeking to promote the cause of animal rights. "The question is not, Can they reason? nor, Can they talk? but Can they suffer."

bill I propose to you, if it shall receive the sanction of Parliament, will not only be an honor to the country, but an era in the history of the world.<sup>8</sup>

The Bill was passed in the House of Lords, but eventually defeated in the Commons. Despite this initial setback, the 1809 Bill was an important gateway to the eventual re-introduction of animal protection legislation into the British Parliament some 13 years later. In June 1822, Irish politician and animal welfare advocate Richard Martin successfully guided the first animal protection bill through parliament: *An Act to Prevent the Cruel and Improper Treatment of Animals*.<sup>9</sup> The landmark legislation provided that it was an offence to:

Wantonly and cruelly beat, abuse, or ill-treat any Horse, Mare, Gelding, Mule, Ass, Ox, Cow, Heifer, Steer, Sheep, or other Cattle

If convicted, the prisoner would “forfeit and pay any Sum not exceeding Five Pounds, not less than Ten Shillings”,<sup>10</sup> and if the convicted refused to pay this fine they could be

committed to the House of Correction or some other Prison within the Jurisdiction within which the Offence shall have been committed, there to be kept without Bail or Mainprize for any Time not exceeding Three Months.<sup>11</sup>

Within 70 years, writing on animals and the law had developed from the rules of game hunting articulated by Nelson, to legislative recognition of animal protection in British law. It is against this extraordinary period of development in the animal rights movement that the relationship between animals and the law in the infant colony of New South Wales can be considered.

## **b) Australia’s colonial legal origins:**

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<sup>8</sup> See D. Favre, above n 4; The speech of Lord Erskine, in The House of Peers, on 15th of May, 1809, On the Second Reading of The Bill for Preventing Malicious and Wanton Cruelty To Animals, 274-276.

<sup>9</sup> Act to Prevent the Cruelty and Improper Treatment of Cattle, 1822, July 22. Note that Thomas Wentworth’s Act of 1635 in Ireland, as well as Nathaniel Ward’s contribution to the Massachusetts Body of Liberties of 1641 establishes American and English law against cruelty to animals almost 200 years prior to the passage of Richard Martin’s 1822 Bill to Prevent the Cruel and Improper Treatment of Cattle, but both legislative attempts are relatively unknown. Indeed, there is evidence of ancient Greek law for the protection of animals. Xenocrates for example examines animal protection and Triptolemus, ‘the most ancient of the Athenian legislators...established laws for the Athenians...Honour your parents; Sacrifice to the Gods from the fruits of the earth; Injure not animals.’ Porphyry, *On Abstinence From Animal Food*, “Book the Fourth”.

<sup>10</sup> Act to Prevent the Cruelty and Improper Treatment of Cattle, 1822 [1].

<sup>11</sup> Act to Prevent the Cruelty and Improper Treatment of Cattle, 1822 [1].

Between 1788-1823 the civil and criminal superior courts of New South Wales operated within the confines of English law, whilst facing continual challenges to adapt to the unique circumstances of a penal settlement.<sup>12</sup> Until 1824, there were separate criminal and civil superior courts in N.S.W. The Court of Civil Jurisdiction operated from 1788 until 1814, when it was replaced by the first Supreme Court which was also limited to matters in the civil jurisdiction. That Supreme Court was replaced by another of the same name in 1824. The Court of Criminal Jurisdiction operated from 1788 until it was replaced by the second Supreme Court in 1824.

Until 1824, these courts had jurisdiction over Van Diemen's Land, which did not become a separate colony until 1825. The first Supreme Court hearing in Hobart was not until 1819.<sup>13</sup> The Court of Criminal Jurisdiction did not sit there until 1821.<sup>14</sup> Before then, the parties from Van Diemen's Land had to travel to Sydney for trial, or matters were settled locally. Norfolk Island had its own Court of Criminal Jurisdiction,<sup>15</sup> but the much more populous Van Diemen's Land did not.

The colony's first judges, David Collins (1788-1796) and Richard Atkins (1796-1798; 1800-1809), had no training in law, but by the end of 1823 the chief judicial officers were highly trained barristers.<sup>16</sup> There appears to be little in common between the first superior court decision in Australia, *R v Barsby* on 11 February 1788,<sup>17</sup> and the sophisticated legal arguments in the Supreme Court of New South Wales that commenced proceedings under Chief Justice Francis Forbes in 1824. *Barsby* was heard only a fortnight after the colony commenced, without the aid of any legally trained assistance. Its court records do not show what legal reasoning might have been in operation, if any. Like so many of the early cases, any legal principle underlying the decision must be inferred from its facts and outcome, which are all that we have.

Apart from the early judges having limited legal training in the first years after settlement, operation of the courts was also compromised by

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12 Discussion beyond the scope of this paper but see Kercher and Salter 'Introduction' in N.S.W. Sel. Cas. (Kercher); see D.

Neal, *The rule of law in a penal colony: law and power in early New South Wales* (1991).

13 See *Barker v. Jemott* (1819) N.S.W. Sel. Cas. (Kercher) 619.

14 See *R v Franklin* (1820) N.S.W. Sel. Cas. (Kercher) 664.

15 (1794) 34 Geo. 3, c. 45.

16 Including Ellis Bent (1810-1815), Fredrick Garling (1815-1816) and John Wylde (1816-1824). Richard Dore was Australia's first legally trained Judge Advocate (1798-1800).

17 *R v Barsby* (1788) N.S.W. Sel. Cas. (Kercher) 1. This was an assault case where the prisoner was found guilty and sentenced to 150 lashes.

the lack of authoritative legal texts and law reports. Alex Castles writes in his seminal work *Australian Legal History*:<sup>18</sup>

In the first decade of the nineteenth century some early issues of the *Sydney Gazette* suggest that law books were probably a prized commodity in the colony. One advertiser twice sought copies of Blackstone's *Commentaries*.<sup>19</sup>

Indeed, the law as enshrined in Blackstone carried significant weight in the early years of the Superior Court.<sup>20</sup> Writing in the mid eighteenth century, Blackstone's focus in regard to the legal status of animals was not on animal protection, but the limits of animal possession.<sup>21</sup> One of Blackstone's primary concerns was to draw a distinction in the law between wild and domestic animals. Wild animals were treated as possessions of the sovereign not so much because domestic animals were tractable, but because the King owned the land of the nation and wild animals (like wild plants and flowers, which the King also "owned") were viewed as a feature or accompaniment of the land itself. In addition, selling licenses to hunt and fish provided the King a welcome source of revenue.

Despite the advancements in the legal protection of animals, it was the issue of animal possession, framed by the earlier eighteenth century writings of the likes of Blackstone, which would pre-occupy the courts of N.S.W. in the late eighteenth and early nineteenth century. Although situations of animal cruelty would continually arise in the facts of civil and criminal superior court trials, the protection of the animal was always legally invisible next to the primary issue of animal possession. As will be illustrated below, possession emerged in the cases in three different contexts: possession in regard to criminal behaviour, possession in regard to activities of commerce and some of the most extraordinary cases of the first 40 years of settlement that consider possession of animals in relation to sovereignty. Although animals play a central role in the developing jurisprudence of the colony in terms of criminal law, commerce and sovereignty, their protection against suffering still firmly exists at the periphery of colonial law and in the evolving debates that were occurring in England.

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18 A.C. Castles, *An Australian Legal History* (1982).

19 *Ibid* 382.

20 *Ibid* 383. There are a number of significant cases in the early years citing Blackstone see in particular *Lord, Attorney for Mechan v. Palmer* (1803-1809) N.S.W. Sel. Cas. (Kercher) 288; *R v Macarthur*, (1808) N.S.W. Sel. Cas. (Kercher) 379.

21 See Blackstone, *Commentaries on the laws of England* (1978 Garland Pub ed) Bk. II, Chpt. 25, 388-390; 698-699.

## II CRIMINAL CASES

### a) The Criminal Court: 1788 - 1823

The Court of Criminal Jurisdiction was authorised by imperial statute, (1787) 27 Geo. 3, c.2. The Act permitted the King to establish a Court of Criminal Jurisdiction, to consist of a Judge Advocate and “six officers of his Majesty’s forces by sea or land”. Most of the Judge Advocates were not serving officers, but until the first barrister was appointed to hold the position in 1809, their commissions required them to obey the Governors according to the “rules and disciplines of war”.<sup>22</sup> The Act provided that the court would have jurisdiction over matters which, if occurring within the realm, would have been treason, felony or misdemeanour. Charges were to be in writing and exhibited by the Judge Advocate, witnesses for both sides were to be examined on oath, and decisions were to be by majority rather than necessarily unanimous.<sup>23</sup> Sentences were to be either death (if the offence were capital) or corporal punishment. Capital sentences required concurrence of five members of the court. The court was to be a court of record, and was to “proceed in a more summary way than is used within this realm, according to the known and established laws thereof”.<sup>24</sup>

Criminal trials involving animals appear throughout the Court of Criminal Jurisdiction records between 1788 and 1823. In particular, animal cases emerge a disturbing number of times in the context of “unnatural offences” such as bestiality, but even more prominently in the context of crimes involving stealing or killing cattle.

### b) Unnatural offences against animals

The court records of the new settlement indicate that bestiality was more common before the turn of the 19<sup>th</sup> C. But, the records also show that although the act of bestiality was considered serious, the focus of the charge was on the act itself, and the potential loss to the owner of

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22 A.C. Castles, *Australian Legal History*, above n 18, 48.

23 As to which, see *R v Powell and others* (1799) N.S.W. Sel. Cas. (Kercher) 209.

24 (1787) 27 Geo. 3, c. 2, Preamble. The First Charter provided that punishment by the court was to be in accordance with the laws of England “as nearly as may be”.



the sodomised animal, rather than any notion of wanton cruelty to the animal. In *R v Hyson*, 1796, the first bestiality case record in the archives, the prisoner was charged with committing an unnatural act against a dog. Judge Advocate Collins writes in the minutes:

George Hyson, Labourer, was brought before the Court charged for that he not having the fear of God before his Eyes, but being moved and seduced by the Instigation of the Devil ... in and upon one she Dog, then and there being, feloniously did make an Assault and then and there feloniously, wickedly, diabolically and against the Order of Nature, had a Venereal Affair with the said she Dog, and then and there carnally knew the said she Dog and then and there, feloniously, wickedly and diabolically and against the Order of Nature, did commit and perpetrate that detestable and abominable Crime of Buggery.<sup>25</sup>

Collins was clearly appalled by the crimes with which Hyson was charged, commenting “how unpleasing were the reflections that arose from this catalogue of criminals and their offences! No punishment however exemplary, no reward however great, could operate on the minds of these unthinking people.” A witness gave evidence that he saw the act between the dog and the prisoner, while Hyson claimed that he was just playing with the dog.

Curiously, Hyson was not convicted of the more serious crime of buggery, but the lesser charge of assault – an offence that usually did not attract the death sentence.<sup>26</sup> The conviction was curious because assault was the lesser charge when a person was found not guilty of rape or buggery of another human. With no indictment papers or depositions available, a question that remains unanswered from the trial record is whether Hyson has not been found guilty of assaulting the dog, but guilty of “assaulting” the property of a human owner. If this is the case, it is a startling example of the negligible legal status of animals in the eyes of the colonial courts beyond being the property of humans.

The circumstances of the *Hyson* decision were relatively common: a witness testifying that they saw the act being committed, the prisoner denying the charge, and many immaterial allegations of fact remaining unproven.<sup>27</sup> Another ramification for the bestiality cases was that the sodomised animal would inevitably be killed after an accused was

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<sup>25</sup> *R v Hyson* (1796) N.S.W. Sel. Cas. (Kercher) 139.

<sup>26</sup> *Ibid.* The sentence was “To stand three Times in the Pillory on three [separate] days, and to stand an Hour each Time. To stand the first Time on Saturday the 30th Instant opposite the Provision Store at Sydney, from nine to ten o’Clock”.

<sup>27</sup> See J.F. Nagle, *Collins the Courts and the Colony* (1995) 286.

convicted of the act. In *R v Reece*, 1799, the prisoner was charged for having carnal knowledge with a sow in his home. Two witnesses testified to having seen the act; Reece was convicted of the more serious offence of buggery and sentenced to death.<sup>28</sup> One of many extraordinary, and detailed, issues that arose in the trial was whether the sodomised pig, that was believed to be pregnant at the time of the act, should be killed. Between the act and the trial a litter of eleven pigs were born. Under English law, the litter was also to be condemned. The priority for the Court was not the welfare of the pig and the litter, but the loss that would be sustained by the pig's owner:

But the court taking into consideration the extreme poverty and distress of Patrick Brannagh [the owner of the sow] the prosecutor in this unhappy business who appears unable to sustain a loss so material as the value of said sow which he estimates at £15 sterling and moreover as it appears that the said sow has ferried since the commitment of this unnatural felony and produced a litter of the 11 pigs, also which must be necessarily lost by the condemnation of the said sow.<sup>29</sup>

The court respectfully submitted the owner's case to "his Excellency's humane consideration", recommending remuneration to the owner "as to his Excellency's wisdom and humanity may seem met".

### **c) Stealing cases**

The central issue for the court in *Hyson* and *Reece* above was the loss of property sustained by the human property owner. The colony had a dire shortage of food and therefore animals, such as pigs, were a valuable commodity; so valuable that theft of sheep, horses and cattle were common crimes in the first 40 years of settlement. Branding identified the owner of the animal and many of the superior criminal court trials involving the stealing of cattle turned on evidence of animal branding in order to establish original ownership.

In *R v Tremby and Ors*, 1818, Robert Campbell reported that 73 sheep were absent from his flock. Because of these heavy losses, Campbell made concerted efforts and eventually discovered that Tremby's flock had been recently increased by a number of newly-marked sheep. Another witness Gibson gave evidence stating:

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<sup>28</sup> Reece was executed on 8 February 1799: K. Macnab, Database of Prisoners Sentenced to Death in New South Wales, 1788-1968, unpublished. (Copy supplied to author by Dr Macnab)

cited in N.S.W. Sel. Cas. (Kercher) 153.

<sup>29</sup> *R v Reece* (1799) N.S.W. Sel. Cas. (Kercher) 153.

His own sheep were marked with three parallel lines, but on recovering them they had again been branded with the letter T reversed, (the initial of the prisoners' names), which made four lines; those belonging to Mr Lord were branded with the letter L, but which had awkwardly been converted into a T, and also of course became reversed.<sup>30</sup>

Joseph Tremby, senior, Joseph Tremby, junior, and Connor Shean, denied all knowledge of the charge. James Tremby declared that the sheep were his own property, and that he bought them at different times off various individuals. One verdict was returned of guilty against the Tremby's for receiving sheep knowing them to be stolen – 14 years to Newcastle. Connor Shean was acquitted.

In *R v Smith and Ors*, 1822, a witness lost a heifer in his charge. While looking for the animal, he encountered one Smith with a shovel in his hand. A deposition read:

As soon as Smith left the spot, the witness went towards it, and found the hide of a beast only half covered; that he examined the same, and it turned out to be the skin of the very animal he was in quest of, having the brand M R removed ... for the ends of justice.<sup>31</sup>

Smith and accomplices were found guilty of stealing the heifer from one Mary Reiby and were remanded.<sup>32</sup> In *R v Reagan*, 1823, Cornelius Regan was indicted for having in his possession a steer, the property of Mr James Badgery, knowing it to have been stolen. Mr Badgery had stock in Argyleshire. He was inspecting his cattle and to his surprise discovered a beast with a strange brand, but still was able to recognise the animal to be one of many that had been stolen from his stock. Although Regan told Badgery he had an explanation for the branding, the matter went to trial. Counsel for the prisoner claimed Regan

was entitled to an acquittal, inasmuch, that he was charged with having in his possession certain property knowing the same to have been stolen, whereas it had not yet been proved that the animal was actually stolen; and it was remarkable also, that the beast, said to be stolen, was found in Mr Badgery's own stock.<sup>33</sup>

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30 *R v Tremby and Ors* (1818) Decisions of the Superior Courts of NSW.

31 *R v Smith and Ors* (1822): Decisions of the Superior Courts of NSW.

32 Two of the prisoners Conden and Mullen were pardoned in 1822.

33 *R v Reagan* (1823): Decisions of the Superior Courts of NSW.

Despite evidence limited to the strange branding, the prisoner was adjudged guilty and sentenced to three years transportation.

Receiving cattle under false pretences, where there was no form of branding on the animal, also often resulted in severe penalties for convicted prisoners. In *R v Brown*, 1809 (*No. 2*) the accused claimed he lost some pigs and later found them in the possession of Thomas Kennedy. The prisoner said he obtained them at the Hawkesbury. It appeared afterwards that it was the prisoner at the Bar who impersonated Mr Kennedy – Mr Brown came and claimed the pigs, and they were delivered to him. Brown was found guilty and received 500 lashes. In another deception case, *R v McCabe and Ors*, 1822, Edward McCabe and James Martin were indicted for obtaining 30 sheep, under false pretences, from the flock of Mrs Elizabeth Hassall of Parramatta. The prisoners took an order purporting to be signed by James Smithers, a Sydney butcher, for 30 sheep. Most of the sheep were recovered and the felony was made out with both prisoners being sentenced to seven years transportation.

On rare occasions, the records indicate that stealing cattle resulted in a death sentence. In *R v Haggerty and Ors*, 1822, Michael Haggerty and Thomas Till were charged for sheep stealing; Joseph Cunningham and Samuel Medworth, for cattle stealing; Theophilus Chamberlain, for stealing a mare; William Brewer for stealing a colt; Dominick McIntyre, for sheep stealing; John Davis, for stealing a bullock; and James Francis, for stealing a cow and calf.

His Honor took then into contemplation the similarity of crime (cattle and horses-stealing), upon which all the prisoners had been convicted; and to the youthful expressed a regret that so early they should be drawn into vices that might cut short their very existence at an untimely period; and to the elder criminals his remarks conveyed an awful picture of debasement which it was shuddering to listen to. In the case of Cunningham who had produced *on his own behalf* an account of a considerable property he possessed (as an argument against the necessity of his falling into cattle-stealing), the Judge observed, that this want of necessity to go into crime, however little the plea of necessity itself could be admitted as it respected crime, stood as a proof against his moral inclination as strong as that which had appeared against his character in Court.<sup>34</sup>

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<sup>34</sup> *R v Haggerty and Ors* (1822): Decisions of the Superior Courts of NSW.

Judge Advocate Wylde mitigated the sentence of death to all of the prisoners at the bar to that of transportation for life to Newcastle, with the exception of Thomas Till who received fourteen years. Joseph Risbey, Benjamin Risbey, and Patrick Murphy were not so fortunate in the Hobart trial *R v Risbey and Ors*, 1822. The men were capitally charged, and convicted, with feloniously stealing upwards of 60 sheep, the property of a settler Mr Daniel Stanfield.

The prisoners were of course asked what had become of them; upon which they said, that all were there, that were so on the Monday, except four or five, which they might have lost in driving home. They, however, proceeded to examine the premises, and, in a hollow tree near the house, they found the skeletons of six sheep, covered with sheepskins; in other places they discovered another or so; the skeleton of a sheep with some mutton on it, was also found in the pig-stye, and about the premises quantity of bits of ears and heads of sheep.<sup>35</sup>

#### **d) Killing cattle**

Criminal cases involving the killing of the cattle were also firmly focussed on the loss suffered by the owner rather than the suffering of the animal. Although the penalties in these cases could be particularly severe, there are examples in the trial records where the Criminal Court resisted conviction when there was a lack of substantive evidence. In *R v Crane*, 1822, Henry Crane was fully committed to trial for the “violent suspicion” of feloniously killing and carrying away a heifer.<sup>36</sup> The owner of the heifer, Eleanor Welsh, deposed that her husband reported to her that the heifer had been killed in the calf pen and that “the carcass had been taken away, and the hide and entrails lying in the calf pen, the beast was about 14 months old”. The prosecution claimed that a footprint left at the scene of the crime was that of the primary defendant Henry Crane. Constable George Hoinbridge deposed “the prisoner on leaving the barn being mounted on one of the horses I observed that he had changed his shoes or drawn the nails out of those which he had on”. The prisoners denied the charge, and with no further evidence being admitted, the Court acquitted all prisoners. The records suggest the courts were less tolerant when the owner of the stock was the Government. In *R v Donlan and Condron*, 1809, a witness John Kennedy deposed that he received information that a sheep had been stolen. Kennedy went to the Chief Constable at

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<sup>35</sup> *R v Risbey and Ors* (1822): Decisions of the Superior Courts of NSW.

<sup>36</sup> With accomplices John Brian John Gregg, Thomas Pugh and Peter Fitzpatrick.

Parramatta to get him to search the hut where Pierce Condron was sleeping, and there he found the “fore quarters and the head”. Constable William Beaumont further deposed:

He saw a sheep, and that Pierce Condron killed it, and cut the ears off, and that it belonged to government.<sup>37</sup>

The prisoners denied the charge and due to a lack of evidence were found not guilty. Kennedy deposed that “William Davis brought it there, that he put the mutton into the cart and brought it into Parramatta.” The Davis trial, heard on the same day,<sup>38</sup> concentrated on the Government’s ownership of the sheep and evidence suggesting Davis was seen carrying the sheep to Condron’s hut. The prisoner claimed that he had found the sheep in the bush mangled by dogs, but John Curtis, a Government storekeeper, deposed “that a sheep was missing from the Stock belonging to Government, it did not appear to have been torn by the Native Dogs”. On the basis of this evidence, Davis was found guilty and sentenced to death.<sup>39</sup>

Between 1788 and 1810, superior court records bare no resemblance to modern day law reports. Records are mostly limited to minutes of proceedings, and explicit application of English precedent is rare to find; understandable given that for all but two years of this period the Judge Advocate position was held by former military officers with no legal training and armed with limited legal resources. However, when Governor Macquarie and the highly trained Judge Advocate Ellis Bent arrived in the colony in 1810, in the aftermath of the Bligh coup, case law, particularly in the civil jurisdiction, begins to exhibit a greater degree of formality: citations of English cases and statutes and clearer judicial pronouncements of court procedure.<sup>40</sup>

In the 1817 trial of *R v McFadden*, William McFadden was indicted on a charge of feloniously killing and stealing a heifer in the district of the Nepean, the property of Donald Kennedy. The case provides one of the earliest explicit pronouncements of the English law applicable to the stealing and felonious killing of animals. The record states:

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<sup>37</sup> *R v Donlan and Codron* (1809) N.S.W. Sel. Cas. (Kercher) 415.

<sup>38</sup> *R v Davis* (No. 1) (1809). Decisions of the Superior Courts of NSW.

<sup>39</sup> The Macnab Database records that although Davis was sentenced to death, he was not hanged: K. Macnab, Database, above n29.

<sup>40</sup> See for example *R v McNaughton v Connors* (1813) N.S.W. Sel. Cas. (Kercher) 496. This was more so in the civil jurisdiction that went through major amendments in 1814. The Criminal Jurisdiction essentially maintained its military character throughout the 1788-1823 period.

The hide of the slaughtered animal was likewise found near the place where the prisoner had been discovered and apprehended, and was identified to be that of the heifer charged in the indictment. This identity was however not material to the conviction, as by the statutes 14 and 15 Geo. II it is provided, that "if any person shall feloniously drive away, or in any other manner feloniously steal any ox, bull, cow, calf, steer, bullock, heifer, sheep, or lamb; or shall wilfully kill any such with a felonious intent to steal the whole carcass, or any part thereof; or shall assist or aid in committing any such offence, he shall be guilty of felony without benefit of clergy. " <sup>41</sup>

The accused had to prove the heifer was *bona fide* his own property at the time of the killing. Indeed, the case record provides further evidence that local regulation was prioritising ownership of the animal in relation to the right to kill:

Under the operation of the proclamation issued by Government under date the 20th of May, 1812, which *for the security of persons possessing stock* of that description, renders ... slaughtering highly penal, unless by persons duly licensed for the express purpose. <sup>42</sup>

The trial record does not show whether McFadden pleaded guilty or whether he claimed that he owned the heifer. The prosecution led evidence that the prisoner was found near the dead heifer "creeping away from behind a rock upon his hands and knees, to avoid observation" and "several stains of blood" appeared on the prisoner's jacket. McFadden was found guilty. The evidence suggests that the beast was shot, slaughtered and its remains left near McFadden's house – all immaterial facts in terms of the eventual outcome of the case.

*In part 2 of this examination into some of Australia's first cases involving animals, attention turns to the civil jurisdiction and a collection of critical cases that went to the core of British sovereignty. The court records in part 2 follow a similarly sobering tale to the trials considered above. Part 2 will further explore the notion that although animals were central in the development of the law in the new colony, they were noticeably invisible in terms of their personal protection.*

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<sup>41</sup> R v McFadden (1817): Decisions of the Superior Courts of NSW.

<sup>42</sup> Ibid (emphasis added).

# Animals & the Trade Practices Act: The Return of Descartes' Ghost

Ven. Alex Bruce <sup>\*1</sup>

## Introduction

French philosopher Rene Descartes thought animals were little more than inanimate objects without the capacity to think or feel pain. At the time, Descartes was influenced by the prevailing mechanistic conception of the natural world in which phenomena could be explained in simple mechanical terms.

Descartes therefore believed the behaviour of animals did not need to be explained by theories of sentience and consciousness, but their behaviour could be explained by the simple mechanical functioning of their constituent parts:

“that animals do better than humans do, does not prove that they are endowed with mind, for in this case, they would have more reason than any of us, and would surpass us in all other things. It rather shows that they have no reason at all and that it is nature which acts in them according to the disposition of their organs.... .”<sup>2</sup>

The result is that, as Cottingham observes:

“To be able to believe that a dog with a broken paw is not really in pain when it whimpers is quite an extraordinary achievement, even for a philosopher.”<sup>3</sup>

Of course, animals and their interests were never the intended beneficiaries of the *Trade Practices Act 1974* (Cth) (“the Act”). And, to my knowledge, no one has undertaken an evaluation of the Act according to Cartesian philosophy! Nevertheless, the way in which the Act conceptualises animals, and the way in which the Act has been

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1 I would like to thank the anonymous referee for their kind suggestions in the preparation of this article.

2 Rene Descartes, *Discourse on Method and Meditations on First Philosophy*, Wisemam (ed) Yale University Press, 1996.

3 Cottingham, *A Brute to the Brutes? Descartes Treatment of Animals* (1978) 53 *Philosophy* 551.



employed in relation to animals and their interests suggests that Descartes' ghost lingers on.

This article examines the way in which the Act has been utilised by various litigants when the interests of those litigants have involved animals. It suggests that the dominating philosophical influence of the Act is grounded in Cartesian principles, thus making no differentiation in principle or application between animals and other inanimate objects as economic goods.

Accordingly, by examining selected cases, the article demonstrates how there is a fundamental conflict between the economic objectives of the Act in enhancing the welfare of Australians and the recognition of animals as sentient beings with interests that are deserving of recognition and protection. This conflict is fundamental because the Act seeks to achieve the welfare of Australians through the promotion of competitive markets which in turn, are achieved through exploitative economic efficiencies.

When animals are conceptualised as goods to be "efficiently marketed" their interests and welfare are subordinated to the pressures of the market. Without a fundamental re-evaluation of how animals are conceptualised under the Act, the statutory object of enhancing the welfare of Australians will continue to be achieved by subordinating the welfare and interests of animals.

### **The Object of the *Trade Practices Act 1974 (Cth)***

When it was signed into law in October 1974, the Act was intended to be an anti-inflationary measure, designed to ensure that corporations did not employ various forms of market manipulation such as cartelisation to artificially raise and then maintain prices for goods or services above the competitive level.<sup>4</sup>

It wasn't until the conclusion of the *Hilmer Committee* into National Competition Policy that in 1995 the Act was amended to include an objects clause. Thus, section 2 now makes it clear that the object of the Act is to:

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<sup>4</sup> Senator Lionel Murphy, Second Reading Speech, Senate Hansard of 30 July 1974 at 541.

“enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. ”

The High Court has given some indication of what this section means. Justice McHugh in the *Boral* decision stated:

“The Parliament has determined that it is in the interests of consumers that firms be required to compete because competition results in lower prices, better goods and services and increased efficiency. ”<sup>5</sup>

However, competition is also quite ruthless and there is a grim economic “Darwinianism” at work in all capitalist economies. Strong and efficient firms flourish, while weaker and inefficient firms exit the market. Accordingly:

“The purpose of the Act is to promote competition, not to protect the private interests of particular persons or corporations. Competition damages competitors. If the damage is sufficiently serious, competition may eliminate a competitor.”<sup>6</sup>

This idea is reflected in those anti-competitive prohibitions that require conduct to meet a certain “threshold” before that conduct can be said to breach the Act. Many forms of anti-competitive conduct will only breach the Act if there is evidence that the conduct has the effect or likely effect of “substantially lessening competition” in a defined market.<sup>7</sup>

Therefore, even if a single firm is eliminated by conduct such as an exclusive dealing arrangement, the Act will not be breached unless that conduct substantially lessens competition in the market as a whole.<sup>8</sup> Thus, the Full Court of the Federal Court in *ASX Operations Pty Ltd v Pont Data Australia (No 2)* stated:

“In asking whether provisions of the agreement have or would have or would be likely to have the effect...of substantially lessening competition...one looks not so much as the position

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5 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 458.

6 *Ibid* at 411, per Gleeson CJ and Callinan J.

7 Section 45(2)(a)(ii), s 47 (exclusive dealing except third-line forcing) and s 50 (mergers and acquisitions) require that the conduct “substantially lessen competition” in a market before the conduct breaches the Act.

8 *Outboard Marine Australia Pty Ltd v Hecar Investments (No 6) Pty Ltd* (1982) 66 FLR 120.

of particular competitors as to the state or condition constituting the market or markets in question, actually and potentially.”<sup>9</sup>

The welfare of Australians is therefore believed to be increased by the efficient and competitive functioning of *the market as a whole* and not necessarily the competitive health of any single individual competitor.

### **The Welfare of Australians, Not Animals**

If the Act is not intended to benefit individual firms struggling in the market, then it is even less likely that the Act will be interpreted in a way that will benefit animals and their interests. In fact, the cases demonstrate that enhancing the welfare of Australians through the promotion of effective and efficient competition is in opposition to the welfare of animals.

Reflecting the Cartesian understanding of animals as non-sentient automata<sup>10</sup>, section 4 of Act specifically defines animals as “goods”; conceptualising them in the same way that non-sentient objects such as ships, vehicles, trees and minerals are conceptualised.

Since they are defined as goods by the Act, animals are largely viewed as “units of production” within the larger corporate enterprise, to be manipulated as cost-efficiently as possible. And since competition law is predicated on the attainment of productive, allocative and “x-efficiencies”, there is little room for the *a-priori* recognition of animals as sentient beings that have physical and emotional needs and can feel pain.

Thus;

“we believe we can be most efficient by not being emotional. We are a business, not a humane society, and our job is to sell merchandise at a profit. It’s no different from selling paper-clips or refrigerators.”<sup>11</sup>

Animals and their interests are largely considered as incidental to the economic policy objectives of the Act which has rarely been employed to recognise or protect the interests of animals. For the most part, litigation under the Act has involved the protection of corporate interests and those of consumers.

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9 (1991) 27 FCR 460 at 478.

10 See generally Harrison, Descartes on Animals (1992) 42 No 167 The Philosophical Quarterly 219 at 220.

11 Robbins, Diet for a New America 1987, H.J Kramer at 104.

Where a firm's production involves animals or animal products the suffering of those animals is relevant only in so far as that suffering causes economic loss. In this way the Act has been used by those firms to prevent economic injury being inflicted through boycotts or other anti-competitive practices.

However, while animals may not have directly benefited, animals and their interests have played an important role in the development of the Act as a law. Since the Act's early days, cases involving animals have contributed to the development of trade practices jurisprudence. These cases are discussed below and demonstrate how the economic interests of litigants come into conflict with animal interests.

### **The Trade Practices Act at Work**

Broadly speaking, the Act can be conceptually divided into two parts; firstly, those sections that prohibit a variety of anti-competitive conduct and secondly, those sections that provide for consumer protection by prohibiting misleading and deceptive conduct, false representations and providing for actions in respect of unsuitable or unsafe consumer goods or services.

Part IV of the Act prohibits anti-competitive practices such as horizontal and vertical price fixing, misuse of market power, exclusive dealing, primary and secondary boycotts and anti-competitive mergers and acquisitions. Parts IVA, V and VA of the Act prohibit misleading and deceptive conduct, unconscionable conduct, imply terms into consumer contracts and provide for causes of action in respect of unsafe goods or services.

### **Market Definition**

Anti-competitive conduct is said to diminish the welfare of consumers because it distorts the efficient operation of "the market". However many of the prohibitions in part IV of the Act only prohibit conduct if that conduct "substantially lessens competition" within a defined market. Thus market definition is the crucial first step in evaluating the lawfulness of allegedly anti-competitive conduct.

Markets have several dimensions, including product, geographic, functional and temporal dimensions. Each of these dimensions of the market have been considered and explained by the courts and several important cases represent the *locus classicus* of relevant principles.

In relation to the principles involved with geographic market definition the decision of the Full Federal Court in *Australia Meat Holdings Pty Limited v Trade Practices Commission*<sup>12</sup> is often referred to.

Australia Meat Holdings Pty Ltd (“AMH”) owned a number of abattoirs in North Queensland. It purchased cattle from local cattle farmers for slaughter and processing at those abattoirs. It acquired all the issued share capital in Thomas Borthwicks & Sons (Australasia) Ltd which also owned and operated abattoirs in the Northern Queensland towns of Bowen and Mackay.

The Trade Practices Commission (“the TPC”) sought an injunction alleging that the acquisition would result in competition being lessened in “the market” in breach of s50 of the Act.

The TPC was concerned that, once it had control over the abattoirs in North Queensland, AMH would be in a position to dictate pricing and trade terms to the cattle farmers in North Queensland, without being constrained by the competition previously offered by the Borthwick abattoirs. The TPC advanced a market definition described as the “Northern Queensland fat cattle market”.

Tactically, AMH countered this argument by arguing for a wide market definition that included the entire State of Queensland. In this way AMH argued that its acquisition of the Borthwick abattoirs would not inhibit competition because cattle farmers could send their cattle for processing to other privately-owned abattoirs in South Queensland.

Resolution of this issue turned on evidence of the cattle farmers about the suffering experienced by cattle in the process of transporting them to abattoirs. Evidence indicated that during transport, cattle lost weight and bruised easily. The farmers were not concerned about this suffering per se, but rather about its economic effect. The abattoirs paid the farmers based on “clean dressed weight”. Farmers were not paid as much for cattle that had lost weight and whose flesh was bruised.

Accordingly, the evidence was that if AMH controlled the abattoirs in North Queensland and increased the price of their services, farmers would not send cattle for slaughter and processing to abattoirs in South Queensland because the increased bruising and weight loss suffered by the cattle would result in a much lower sale price. Based on this

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<sup>12</sup> (1989) ATPR 40-876.

evidence, the relevant geographic market was correctly defined to be the “North Queensland fat cattle market. ”

During the trial, the Full Court examined extensive evidence concerning the suffering experienced by the cattle. This harm to the cattle demonstrated by this evidence was crucial to the Court’s eventual decision concerning market definition. However, the evidence of suffering was not considered from the context of the interests of the animals themselves.

The suffering was relevant because it diminished the economic value of the cattle as goods to be sold. Only because the farmers lost money per “unit of product” during transportation to South Queensland was the relevant market confined to North Queensland.<sup>13</sup>

## **Secondary Boycotts**

### *The AMIEU Cases*

While many people may not have heard about the Act, they have heard about “secondary boycotts”. That phrase carries a certain emotional weight in a country like Australia which is dependent on the efficient and valuable functioning of its primary industries. Words like “the ACTU”, “union thuggery”, “scab workers” and “picket lines” are also associated with secondary boycotts. It is an emotive and volatile issue.

Since 1977, the Act has included provisions prohibiting the making of and the giving effect to secondary boycotts, principally initiated by trade unions and their member workers, directed at preventing a third party (such as a supplier, contractor or some intermediate service provider) from providing services to the “target” fourth party, usually a manufacturer. Accordingly, a secondary boycott occurs:

“when the parties prevent third parties from dealing with the target. The third party becomes the means by which competition is adversely affected in a market in which the targeted fourth party competes. ”<sup>14</sup>

Since 1977, many cases concerning the secondary boycott provisions have involved animal industries. In particular, the Australasian Meat Industry Employee’s Union (“the AMIEU”) has been associated with

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<sup>13</sup> Ibid at 49,485.

<sup>14</sup> Corones, *Competition Law in Australia*, 2007, 4th ed, Thompson Legal & Regulatory Australia (Lawbook Co) at 265-266.

secondary boycott activity against Tillmanns Butcheries Pty Ltd<sup>15</sup>, Mudginberri Station Pty Ltd<sup>16</sup> and with the Meat and Allied Trades Association of Australia.<sup>17</sup>

None of these cases involved advancing the interests of animals. None of the parties to the secondary boycott was motivated by concern for animals being slaughtered and processed. The AMIEU was concerned with workers' conditions in abattoirs and other meat processing plants.

The Act was therefore used by the relevant corporations to “break” the boycotts in order to continue trading. Protection of income streams derived from the slaughter and processing of animals was the primary reason for instituting the action.

*When Free Speech becomes a Breach of the Trade Practices Act*

Justice Kirby in *Australian Broadcasting Corporation v Lenah Game Meats* said:

“The concerns of a governmental and political character must not be narrowly confined. To do so would be to restrict or inhibit the operation of the representative democracy that is envisaged by the Constitution. Within that democracy, concerns about animal welfare are clearly legitimate matters of public debate across the nation. So are concerns about the export of animals and animal products. Many advances in animal welfare have occurred only because of public debate and political pressure from special interest groups. The activities of such groups have sometimes pricked the conscience of human beings.”<sup>18</sup>

However, it is sometimes a fine line between “public debate and political pressure from interests groups” on one hand, and conduct that breaches the Act on the other. The use of secondary boycott tactics for the express intention of benefiting animals and their interests occurred in 2005 when it was alleged that the animal activist group “People for the Ethical Treatment of Animals” (“PETA”) and others, had targeted the Australian Wool Innovation (“the AWI”) on behalf of Australian woolgrowers’ practice of mulesing sheep.

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<sup>15</sup> *Tillman's Butcheries Pty Ltd v Australasian Meat Industries Employee's Union* (1979) 42 FLR 331.

<sup>16</sup> *Mudginberri Station Pty Ltd v Australasian Meat Industries Employee's Union* (1985) ATPR 40-598.

<sup>17</sup> *Australasian Meat Industries Employee's Union v. Meat and Allied Trades Federation of Australia* (1991) 32 FCR 318.

<sup>18</sup> *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63 at [217-218].

The wool around a sheep's backside accumulates urine and faeces. That accumulation is a breeding ground for blowflies that lay their eggs in the matted area. When the maggots hatch, they burrow under the sheep's skin and begin to feed on them. Mulesing is a procedure in which part of the sheep's posterior area is cut off, thus creating a bald area where wool does not grow. No anaesthetic is used during the procedure and the sheep scream in pain as it is partially skinned alive.

The AWI alleged that PETA and others had implemented an "Australian wool boycott" to stop the overseas sale of wool produced in Australia. It was alleged that PETA and others had used intimidatory tactics against retailers of woollen clothes to prevent those retailers from buying goods from manufacturers using Australian wool.

At the time, the case attracted considerable interest in Australia and internationally. The NSW Council for Civil Liberties issued a media release stating (inter alia):

"This is clearly legitimate political protest action, whether you agree or disagree with their cause. It really is an outrage that the Trade Practices Act is being misused in this manner. This is clearly not what the secondary boycott provisions were designed for. Animal welfare groups, or any other interested party must be able to organise a political boycott without fear of court intervention."<sup>19</sup>

Initially the Court struck out the AWI's Statement of Claim, holding that it had not pleaded the secondary boycott argument correctly.<sup>20</sup> However, the court also granted the AWI leave to re-plead, which it promptly did.

It is interesting to read the press statement of then Chairman of the AWI, Ian McLauchlan, rebutting PETA's concerns with mulesing. Mr McLauchlan said the AWI would: "do whatever is necessary to protect and uphold the reputation of the fibre and the way it is produced."<sup>21</sup>

The emphasis was not on the protection of the sheep so much as the protection of the reputation of the product harvested from the sheep. The welfare of the sheep was relevant only insofar as that welfare influenced the economic benefits associated with wool production.

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<sup>19</sup> NSWCCCL Says PETA must be free to protest without threat of Trade Practices action. Media Release dated 2 December 2004.

<sup>20</sup> Australian Wool Innovation Ltd v Newkirk (2005) ATPR 42-053.

<sup>21</sup> The Unkindest Clip of All, Sydney Morning Herald, March 11 2005.



In June 2007, after three years of litigation, PETA and the AWI reached a mediated resolution to the dispute. Each side quickly claimed victory as the spin-campaign to win over public support started.

AWI claimed to have “won a landmark commitment from PETA to stop threatening global retailers over the practice of mulesing until December 2010”<sup>22</sup> PETA claimed that “animal abusers sue PETA at their peril.”<sup>23</sup>

### *The Empire Strikes Back*

Meanwhile, the (Prime Minister John) Howard Government progressed with its agenda to amend the Act so that Australian industries could more effectively use the secondary boycott provisions to prevent protests.

Introducing the *Trade Practices Amendment (Small Business Protection) Bill 2007*, (“the Bill”), the Treasurer, Mr Peter Costello, stated:

“The Government is going to amend the Trade Practices Act so that the Australian Competition and Consumer Commission can take representative actions – that it can take an action on behalf of all Australian farmers if somebody tries to boycott their wool. An example of this has recently been the group which is trying to organise a boycott of Australian wool because it is protesting about mulesing.”<sup>24</sup>

The Senate Economics Committee that had been tasked with reviewing the Bill, received several submissions concerning the potential chilling effect the amendments might have on legitimate political protests generally, and animal welfare issues particularly. Journalist David Marr wrote that:

“So if you’re asking Australians not to buy lipstick tested on caged rabbits, rugs woven by Pakistani slaves or suits made with mulesed wool, then pray your boycott calls don’t succeed, for the Australian Competition and Consumer Commission is about to be given the power to sue you out of the water if they do ... no free-speech defence is immediately available. You won’t be able to go to court to plead the pros and cons of open-

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<sup>22</sup> PETA Claims Victory in Mulesing Case, Los Angeles Times, June 30 2007.

<sup>23</sup> Ibid.

<sup>24</sup> Mr Peter Costello, February 2007, Bills Digest No 47 2007-08.

range chooks or gentler methods than mulesing to save sheep from fly strike.”<sup>25</sup>

The Bill lapsed following the election loss of the Howard Liberal Government in November 2007. The (Prime Minister Kevin) Rudd Labor Government did not re-introduce the Bill.

Perhaps one reason for not doing so was the decision of the Full Federal Court in *Rural Export & Trading (WA) Pty Ltd v Hahnheuser*<sup>26</sup> in which a live sheep exporter successfully established a breach of the secondary boycott provisions of the Act.

If other animal producers could use the reasoning in *Hahnheuser* then there would be no need for the amendment.

### *Hahnheuser & the Trade Practices Act*

At about the time PETA was agitating the mulesing litigation, Mr Ralph Hahnheuser and his friends broke into a sheep feed lot in Victoria. The sheep were to be exported to the Middle East for slaughter according to Islamic Halal requirements which demand that an animal be conscious when it is slaughtered; by having its throat cut.

The animal then bleeds to death often while hanging upside down. However, Islamic dietary requirements also prohibit the ingestion of foods involving swine or pork and its by-products.

Mr Hahnheuser sought to protest against this practice of slaughter by introducing a ham and water mixture into several feed troughs which fed almost 2000 sheep. The desired effect was that the sheep would be regarded as “contaminated” as not meeting Halal requirements.

The case was instituted by a company, Rural Export & Trading (WA) Pty Ltd (“Rural”), alleging it had suffered loss and damage because Hahnheuser’s conduct breached section 45DB of the Act. That section provides:

“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

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<sup>25</sup> Free Speech? Not While we’re on the Sheep’s Back, David Marr, *The Age*, August 23, 2007.

<sup>26</sup> [2008] FCAFC 156 (22 August 2008).

commerce involving the movement of goods between Australia and places outside of Australia. ”

However, the facts were complicated because Rural was not actually exporting the sheep. Another company, Samex Australian Meat Co Pty Ltd (“Samex”), had purchased the sheep and was exporting them to the Middle East for yet another corporation, Livestock Transport and Trading (“LTT”), which was owned by the Government of Kuwait. Rural was a wholly owned subsidiary of LTT and Samex was using sheep feed lots managed by Rural.

The directors of Samex thought Rural was its customer (erroneously equating Rural with LTT) when in fact Samex was Rural’s customer. The directors of those companies apparently did not understand who was a customer of whom.<sup>27</sup> Accordingly, at first instance, the Court found it was not Rural who had suffered any loss or damage under the Act, but that it was Samex. Rural was thus found not to be entitled to any damages.<sup>28</sup>

After sorting through the trading relationship between the companies, the court found that Hahnheuser’s conduct had in fact interfered with Samex’s trade.

However, it also found that Hahnheuser could rely on a defence provided by s45DD that states:

“A person does not contravene, and is not involved in a contravention of ... s45DB(1) by engaging in conduct if:

(a) the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection.”

Justice Gray concluded that the phrase “environmental protection” as it appears in s45DB(1):

“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 reason why the protection of the conditions in which farm animals are kept

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<sup>27</sup> Rural Export & Trading (WA) v Hahnheuser [2007] FCA 1535 at [38] and [39].

<sup>28</sup> Ibid.

should be excluded from the concept of environmental protection.”<sup>29</sup>

Justice Gray’s conclusion was reached after an examination of the Senate Debates associated with the introduction of the amendments and in which the term “environment” was considered to have its ordinary and not restricted meaning.<sup>30</sup>

The Full Court upheld an appeal by Rural and Samex and reversed the decision at first instance. The Full Court remitted the matter back to the trial judge for determining the issue of damages for Samex and, derivatively for Rural.

Essentially, after failing to find a dictionary definition of “environmental protection”, the Full Court disaggregated the two words and found dictionary definitions for each. It then joined those separate definitions to reach what it considered to be an appropriate definition of the aggregated concept. That definition was quite narrow:

“The ‘environment’ referred to in the expression ordinarily will be a particular location, thing or habitat in which a particular individual instance or aggregation of flora or fauna or artifice exists. And the ‘protection’ is to preserve the existence and or characteristics of that environment being that location, thing or habitat.”<sup>31</sup>

The Full Court concluded that Mr Hahnheuser did not have the dominant purpose of protection the sheep from the environment of their paddock, but was attempting to protect them from the conditions experienced aboard the ship. For this reason, the Full Court concluded that his activity did not relate to environmental protection.<sup>32</sup>

It is interesting that one of the members of the Full Court was now Chief Justice French of the High Court of Australia.

### **Primary Boycotts – Exclusionary Provisions**

A similar emphasis on animal suffering only in so far as that suffering creates economic difficulties for another party is evidenced in the primary boycott cases.

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<sup>29</sup> Ibid at [64].

<sup>30</sup> Ibid at [63].

<sup>31</sup> Rural Export & Trading (WA) v Hahnheuser [2008] FCAFC 156 at [24].

<sup>32</sup> Ibid at [25] and [26].

In *McCarthy v Australian Rough Riders Association Inc*<sup>33</sup> the court was asked to award an interlocutory injunction restraining the Australian Rough Riders Association Inc (“the ARRA”) from enforcing what was argued to be an exclusionary provision. McCarthy and three other rodeo riders were successful and talented members of the ARRA. In order to increase their income, McCarthy and the others decided to join and then compete in non-ARRA sponsored rodeo competitions.

The ARRA Rules included one permitting it to exclude rodeo riders who had participated in non-ARRA events from competing in ARRA rodeo. In late 1987, the ARRA informed its member clubs that, pursuant to this rule, McCarthy was not eligible to participate in ARRA events because he had joined and participated in non-ARRA rodeos. The ARRA also attempted to impose a fine of \$3000 and require McCarthy to accept a 12-month “good behaviour bond” as a precondition to participating in ARRA rodeos.<sup>34</sup>

The court had little difficulty in finding the existence of an exclusionary provision as defined in s4D of the Act. While the ARRA was not in competition with its member clubs, the clubs themselves were competitive with each other for the acquisition of rodeo riders whose services were considered to be that of an entertainer.<sup>35</sup>

The evil which the Act’s exclusionary provisions seek to eliminate is economic harm to the “target” of the boycott. The interests of the animals were not an issue. What mattered was that McCarthy and the other riders were being prevented from earning an income because the ARRA and its member clubs were boycotting the acquisition of McCarthy’s “entertainment” services.

## **Consumer Protection**

The consumer protection provisions of the Act have also been used by corporations against animal welfare organisations. In *Orion Pet Products Pty Limited v RSPCA (VIC)*<sup>36</sup> the RSPCA was alleged to have engaged in misleading and deceptive conduct in breach of s52 of the Act in criticising electronic dog collars.

Section 52 of the Act simply provides:

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<sup>33</sup> (1988) ATPR 40-836.

<sup>34</sup> *Ibid* at 49,023.

<sup>35</sup> *Ibid* at 49,028 – 49,029.

<sup>36</sup> (2002) ATPR 46-223.

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

Orion Pet Products Pty Limited (“Orion”) manufactured and sold electronic dog collars that were used for discipline and training. The RSPCA (VIC) had been campaigning for the banning of such collars in Victoria. In support of its campaign, the RSPCA published various materials alleging that the collars produced a 3000 volt shock and caused burning, shock, vomiting and severe distress to animals.

Rather than addressing these issues, Orion sued RSPCA, seeking damages as well as orders preventing it from campaigning against the collars. Again, the emphasis of the applicant’s case was not the suffering caused to the dogs, but the extent to which the conduct of the RSPCA might cause pet owners to stop buying collars thus depriving it of an income stream.

Ultimately the case failed and Orion did not obtain the orders it sought.

The case failed because the court held that the RSPCA’s conduct was not “in trade or commerce” as required by s52. This was a crucial finding. For some years, the High Court had been attempting to tighten the scope of s52 of the Act. In *Concrete Constructions (NSW) Pty Ltd v Nelson*<sup>37</sup> the Court drew a distinction between commercial conduct that was *in trade or commerce* on the one hand and commercial conduct *in connection with* trade and commerce on the other.

Only conduct that was “in trade or commerce” fell within the scope of s52 of the Act. Conduct which is “in trade or commerce” refers:

“only to conduct which is itself an aspect or element of activities of transactions which, of their nature, bear a trading or commercial character.”<sup>38</sup>

The court found that the representations about the collars were made by the RSPCA as part of an educational and political campaign to have the electronic collars banned in Victoria. Any connection with the RSPCA’s core commercial activities was therefore considered too tenuous to support a cause of action under s52. <sup>39</sup>

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37 (1990) 169 CLR 594.

38 Ibid at 602.

39 Ibid at [194].

It would be interesting to speculate on how the Full Court's *Hahnheuser* decision might impact on these tactics. If the RSPCA engaged in conduct designed to influence manufacturers of the components of the collars to stop supplying them to the manufacturer, or influenced pet stores or other parties from acquiring the completed electronic dog collars, would they be exposed to action under the secondary boycott provisions of the Act?

Unlike s52 of the Act, the secondary boycott provisions do not require that the conduct alleged to constitute a breach to be "in trade or commerce", which the High Court has attempted to constrain by limiting the application of the section to conduct which of itself bears a trading or commercial character.

## **Conclusions**

The *Trade Practices Act 1974* (Cth) is specifically intended to enhance the welfare of Australians. It does this through prohibiting various forms of anti-competitive and misleading conduct. However, the "welfare" to Australian consumers is predicated on the assumption that competitive markets will produce such benefits. In turn, competitive markets are markets in which corporations display productive, allocative and "x-efficiencies" in the use of goods and services.

As this discussion of case law demonstrates, market-based efficiencies have been generated at the expense of animals and their interests, establishing a fundamental conflict between the welfare of Australian consumer and the welfare of animals.

Consistent with Cartesian philosophical principles, the Act characterises animals as goods that simply form part of corporate assets. Since they are defined as goods by the Act, animals are largely viewed as "units of production" within the larger corporate enterprise, to be manipulated as cost-efficiently as possible.

Without a fundamental re-evaluation of how animals are conceptualised under the Act, viz, as goods to be "efficiently marketed", their interests and welfare will continue to be subordinated to market pressures in pursuit of the statutory object of enhancing the welfare of Australians.

# “Advancing Animal Welfare Laws in Hong Kong”

Amanda Whitfort \* <sup>1</sup>

## Overview

The Hong Kong government has recently committed to updating animal welfare laws in the jurisdiction. Much of the current legislation, which was drafted in the 1930's, is in urgent need of reconsideration in the light of current societal attitudes supporting animal welfare and growing concern for containment of animal related disease. In 2007 an online survey conducted by local activist group “Animal Earth” polled 3,253 Hong Kong residents and found that 97.4% of respondents agreed people who dumped their pets should be punished and 94% said the current penalties for cruelty to animals were too lenient.<sup>2</sup> This was despite the maximum penalty for cruelty being raised to a fine of HK\$200,000 and a maximum of three years imprisonment, only the year before. Accordingly, government has been forced to respond to increasing public concern as to the adequacy of legislation available to address cases of cruelty to animals and review the laws.<sup>3</sup>

The review period commenced at the end of 2007 and was originally intended to take one year. The government department responsible for animal welfare in Hong Kong, The Agriculture, Fisheries and Conservation Department (“AFCD”) set up a consultative group to begin to review the laws and reported its preliminary proposals on 19 February 2008 to the Administration.<sup>4</sup> However, matters raised by members of the Legislative Council during a motion debate held on 16 January 2008<sup>5</sup> highlighted a number of issues which have yet to be addressed adequately by the AFCD and which are not currently the subject of the AFCD's proposals for law reform. Whilst legislative

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<sup>2</sup> ‘Most want tougher action over Animal Abuse: Survey’, South China Morning Post, 14 October 2007.

<sup>3</sup> Report of the Bills Committee on Prevention of Cruelty to Animals (Amendment) Bill 2006, Legislative Council Paper No CB(2) 483/06-07.

<sup>4</sup> Hong Kong Legislative Council Paper No CB (2) 1061/07-08 (01).

<sup>5</sup> Hong Kong Legislative Council Paper No CB (3) 408/07-08.



change on the back of the AFCD's review is yet to be implemented the proposals currently on the table do not address many of the problems faced in protecting the welfare of animals in Hong Kong and, at this time, a comprehensive review of animal welfare legislation in Hong Kong is still outstanding.

There are several ordinances affecting the welfare of animals in Hong Kong. The primary legislation is the *Prevention of Cruelty to Animals Ordinance*, Cap 169, of the Laws of Hong Kong, which includes subsidiary regulations detailing how captive animals should be treated, confined and transported. The Ordinance provides a general prohibition against cruelty to animals and punishment for acts of cruelty.<sup>6</sup> Some further protection for domestic animals is provided in the *Public Health (Animals and Birds) Regulations*, Cap 139B, which regulates the trade in pets. The *Dogs and Cats Regulations*, Cap 167A, prohibit the slaughter of dogs and cats for food, and a recent decision of the Court of Final Appeal provides that the appropriate punishment for slaughtering dogs should be a term of imprisonment.<sup>7</sup> Under the *Rabies Ordinance*, Cap 421, it is an offence to abandon an animal,<sup>8</sup> although prosecutions for this offence are unheard of in Hong Kong courts, as the prosecution finds it too difficult to prove intent.

The general offence of cruelty to animals is provided in section 3(1)(a) of the *Prevention of Cruelty to Animals Ordinance*. The Ordinance applies to all mammals, birds, reptiles, amphibians, fish or other vertebrate or invertebrate, whether wild or tame. Whilst it appears somewhat progressive for invertebrates to be protected under the law the reality remains that prosecutions for cruelty offences are not initiated for this category of animals and their inclusion remains moot.

The test for liability under the Ordinance requires that, generally, there is no need for the prosecution to establish that the alleged offender intended cruelty, his conduct will be judged according to the standards of a reasonable person in the same situation. However, causation of unnecessary pain and suffering to the animal must be proved. At law any suffering is sufficient to establish pain.<sup>9</sup>

On conviction, the Ordinance provides the power, where necessary, to remove animals from their owners where the animal is at risk of further

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7 HKSAR v Lau Lap Kei [2007] 3 HKLRD 273.

8 Section 22(1) Rabies Ordinance, Cap 421, Laws of Hong Kong.

9 West v Harries (1991) 58 A Crim R 86.

cruelty.<sup>10</sup> On conviction, magistrates may remove animals from their legal keepers and require that the animal is given such necessary treatment and care, at the expense of the owner, as is required for its recovery.<sup>11</sup> Any person who acts in contravention of such an order may be fined up to \$200,000 and imprisoned for three years.<sup>12</sup>

The Ordinance also provides that animals kept in confinement or captivity, or in the course of transport, must be provided with sufficient food and constant fresh water. The *Prevention of Cruelty to Animals Regulations* further provide that animals kept in captivity must have adequate shelter from sun/rain, clean, well ventilated and safe places of confinement, free movement, and protection from injury and disease.

## Prosecution

Whilst it may appear that the laws protecting animals in Hong Kong are adequate, in practice one of the major difficulties in pursuing prosecutions for animal cruelty is the categorizing of animal welfare legislation as criminal law. This necessarily requires that any prosecution must establish that the defendant's actions were cruel, beyond any reasonable doubt. Meeting the criminal standard naturally sets a high level of due process protection for the offender, particularly in the current pro-defendant common law climate. This problem is not Hong Kong specific. In New Zealand, offenders have commenced challenging evidence on the basis of alleged human rights abuses by SPCA inspectorate.<sup>13</sup>

Elsewhere there has been some move towards a regulatory structure for enforcement of animal welfare laws, rather than criminal, resulting in what may provide a more effective regime. Where offences are judged on a strict liability basis the problem of establishing *mens rea* can obviously be avoided. With this end in mind, a regulatory regime for animal cruelty prosecutions is currently being considered in Switzerland, New Zealand and parts of Canada, including Quebec.<sup>14</sup>

The introduction of a regulatory regime allows the significant distinction to be drawn between matters of animal welfare and animal

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<sup>10</sup> Section 5(1)(b), Prevention of Cruelty to Animals Ordinance, Cap 169, Laws of Hong Kong.

<sup>11</sup> Section 5(3), Prevention of Cruelty to Animals Ordinance, Cap 169, Laws of Hong Kong.

<sup>12</sup> Section 5(4), Prevention of Cruelty to Animals Ordinance, Cap 169, Laws of Hong Kong.

<sup>13</sup> R v Walker (Unreported, New Zealand Court of Appeal, No 409 of 2003).

<sup>14</sup> Sankoff Peter, 'Five Years of the "New" Animal Welfare Regime: Lessons Learned from New Zealand's Decision to Modernise its Animal Welfare Legislation' (2005) 11 Animal Law Journal 7.

cruelty. As noted by Bloom,<sup>15</sup> breaches of standards should not necessarily expose the offender to criminal liability, where an administrative response would better serve the interests of animal welfare. Where criminal sanctions follow failures to meet minimum standards, the natural inclination of those drafting the legislation is to develop and impose standards that are eminently reachable. There is no incentive to raise the bar.

As stated, on conviction in Hong Kong a magistrate may order the removal of an animal if it is at risk of further cruelty. An offender may be ordered to pay the costs of maintenance and treatment for the animal. However the devil, as always, is in the detail. A loophole in the legislation currently exists whereby the offender may, at any stage, demand the destruction of the animal to avoid paying the maintenance fees.<sup>16</sup> This power is consistent with the common law assumption that as an animal is the property of the owner, it may be killed at his behest.

## **Food Animals**

Animals kept in captivity and undergoing transport in Hong Kong are required under the law to be provided with constant access to clean water, adequate food, and shelter.<sup>17</sup> However, the routine treatment of animals held in live food markets and en route to slaughterhouses belies these legal safeguards.

Most of Hong Kong's meat supply is transported live from the mainland on trucks and special railroad carriage trains, to wet markets and slaughterhouses in Hong Kong. Hong Kong has nearly phased out all live stock farming in the Territory so relies on China's inland provinces, in particular Sichuan, to supply pigs. Many animals transported over long distances through China receive limited supply of food and water. In China there is no legislation protecting either food or companion animals from cruelty. The only animal welfare law enacted in China relates to endangered species. Where water is supplied to animals in transport, it is commonplace for cattle to be force fed with water by having a hose passed down the oesophagus to fill the stomach. Unfortunately Hong Kong regulations on the proper transport of animals can only be enforced after the animals have crossed the border.

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<sup>15</sup> Bloom, G; 'Regulating Animal welfare to promote and protect improved animal welfare outcomes under the Australian Animal Welfare Strategy' (Paper presented at the AAWS International Animal Welfare Conference, Queensland, 1 September 2008).

<sup>16</sup> See above n 11.

<sup>17</sup> Section 8, Prevention of Cruelty to Animals Ordinance, Cap 169, Laws of Hong Kong.

In the case of poultry, repeated outbreaks of Avian flu have left the government with no option but to move to centralized slaughter of chickens. This proposal has not been supported by the Hong Kong public as it will effectively bring to an end to the common practice of buying live birds at wet markets.<sup>18</sup> Wet markets are essentially live food markets. The storage and handling of live chickens in wet markets is not only a welfare concern but has obvious disease implications. Chickens are routinely crammed together in crates, packed and placed one on top of another. When a bird is bought by a customer, it is slaughtered by exsanguination without stunning. This practice whilst overtly cruel, maintains Chinese custom which holds that an animal should not be beheaded at death, as heads signify a good beginning and a good end. As such, despite the legal precedent that where a person begins to kill an animal he must kill it outright,<sup>19</sup> no enforcement action is taken against poultry vendors.

Whilst fish are included in the definition of ‘animal’ under the Ordinance, there are no regulations in place to curb cruelty practised on fish sold in wet markets. Wet markets selling live seafood are common in Hong Kong and may be found on the street or even inside large supermarket chains. It is common practice in wet markets for fish confined in small tanks or buckets to be removed and placed on the chopping block to “flip” for the customer to display their freshness. Frogs and crabs are routinely tied up (frogs in bunches of 3 or 4) and stacked on top of one another in boxes to await purchase. To date no legal challenges have been made to wet market practices despite the apparent “unnecessary suffering” caused to these animals and their inclusion under the legal definition of “animal” found in Cap 169. The *Public Health (Animals and Birds) Ordinance* provides no regulations on humane slaughter methods.

Animal welfare issues, such as these, are often overlooked by the public and the media which has routinely focused on isolated incidents of cruelty to domestic animals. However, if Hong Kong’s animal welfare laws are to be updated to meet even the basic standards set in comparable jurisdictions, updated research is required to evaluate all local legislation affecting animal welfare, not just the overt cruelty laws.

In the Chief Executive of Hong Kong’s 2006-2007 Policy Address, the government committed to reviewing the regulatory framework for poultry and animals for the purpose of enhancing public health and food

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<sup>18</sup> Legislative Council of Hong Kong Paper No. CB(2) 1860/04-05(05).

<sup>19</sup> *R v Ng Yau-fai* (Unreported, Supreme Court of Hong Kong, Roberts CJ, 28 November 1986).

safety.<sup>20</sup> Outside of Hong Kong the link between animal welfare and public health has been clearly established.<sup>21</sup> Within Hong Kong the link has been less considered and animal welfare laws could be better utilised to promote the health of food animals, in turn benefiting public health. To this end Hong Kong's *Public Health Ordinance* and AFCD Codes would benefit from critical evaluation and overhaul.

## **Pet Ownership**

The *Public Health (Animals and Birds) Ordinance* currently regulates the welfare of animals kept by pet shop traders and breeders, however the Ordinance is deficient in failing to include any definition of welfare standards.

Currently the law provides no minimum age for breeding nor cap on the number of litters a bitch may produce per year. In the face of pressure from welfare groups, the government has recently suggested that the introduction of a two bitch maximum for any licensed breeder<sup>22</sup> However, the reality of Hong Kong living arrangements, where registration of dogs may be spread over huge extended families, ensures there can be no effective enforcement of this cap.

In Hong Kong the law currently allows so called "hobby breeders" to trade in animals whilst avoiding tax, business registration and licensing conditions, including inspection of their premises and animals by the AFCD. Thousands of unlicensed puppy mill operations are spread across the northern part of Hong Kong, the New Territories, and the proposed changes to the laws are unlikely to alter this position. The government has refused to close a loophole in the law which allows unlicensed breeders to continue to trade without government intervention as long as they define themselves as 'hobby breeders'.

Cross-border smuggling of puppies from China, where health conditions are poor also spreads disease to Hong Kong. Whilst rabies has been controlled in Hong Kong for a decade there is a real fear that the disease may be brought in from the mainland. In a recent case a huge number of very young puppies were detected after having been smuggled into Hong Kong. All were immediately euthanized, despite

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20 Hong Kong Government Policy Address 2006-2007 at p 40.

21 The OIE has highlighted the need for all countries to invest in better animal welfare systems to protect themselves from natural or bioterrorist threats linked to the reintroduction of infectious animal diseases and zoonoses that they have already succeeded in eliminating, but also to safeguard public health.

22 "Draft Additional Conditions attached to the Animal Traders Licence", paragraph f(iii), issued under section 5(3) of the Public Health (Animals and Birds) (Animal Traders) Regulations Cap 139B, Laws of Hong Kong.

not having been tested for any disease, to ensure any potential risk was contained.

Pet owners also face difficulties in keeping their pets in the high density living arrangement common to Hong Kong. Dogs have been banned in public housing since 2003.<sup>23</sup> The SARS epidemic did not help matters as many people took the view that animals were spreading the disease. In recent years there has been a spate of challenges to the keeping of dogs as pets in private housing as well. A significant number of management companies have sought to oust dogs by enforcing new 'House Rules', determined by the building Owners Committee, which ban the keeping of pets. Once the House rules are changed pet owners face extreme pressure to get rid of their animals or face prosecution by the Owners' Committee.

Last June a dog owner challenged his Owners Committee's ruling in the District Court.<sup>24</sup> In multi apartment housing the House rules are determined by the Incorporated Owners Committee and enforced by the Management Committee but they take their legal enforceability from the Deed of Mutual Covenant. It is the Deed of Mutual Covenant which all owners must sign when they purchase or rent their apartment. In the case against the *Incorporated Owners of Mei Foo* the owner argued that as the Deed itself did not prohibit the keeping of pets, the House Rules could not be amended to prohibit them, despite the majority of owners voting to change the House rules. The District Court agreed and found that as House rules are subsidiary to the Deed of Mutual Covenant they cannot be altered to conflict with the original Deed. The judge stated: 'The DMC guaranteed owners the full right and privilege to the exclusive occupation and enjoyment of their unit...keeping a pet in one's premises is within the right and privilege of the owner/occupant in enjoying his premises.'<sup>25</sup>

## **Stray Animals**

Under the *Rabies Ordinance*, Cap 421, it is an offence to abandon an animal,<sup>26</sup> although, as stated, such prosecutions are unheard of in Hong Kong courts. Every year about 12,000 unwanted dogs are euthanized

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23 Hong Kong Housing Authority Policy on Public Housing, Chapter 21: Marking Scheme for Estate Management Enforcement in Public Housing Estates.

24 *Tsang v Incorporated Owners of Mei Foo Sun Chuen Stage VII*, (Unreported, District Court of Hong Kong, Wong DDJ, 30 September 2008).

25 *Ibid*, at paragraph 67.

26 Section 22(1), *Rabies Ordinance*, Cap 421, Laws of Hong Kong.

by the AFCD in the Territory.<sup>27</sup> Whilst officially the policy of the AFCD is to allow abandoned animals to be adopted the public has no access to the animal holding facilities and unless one of the charity organizations seeking to rescue animals in Hong Kong can find a place for the animal, it can be euthanized within 4 days.<sup>28</sup> This rule, enacted under the *Pounds Ordinance*, ensures that many owned animals that have gone astray are killed before their owners can locate and reclaim them. More than 95% of dogs which enter an AFCD animal management facility will be euthanized. AFCD has reported that between 2002 and 2007, 3,643 dogs and 605 cats were re-homed through their management centres whilst 65,304 dogs and 27,117 cats were destroyed, many for population control purposes.<sup>29</sup>

In a bid to humanely control the feral/stray dog population in Hong Kong, the government has considered, but has yet to implement, a Trap Neuter Return (TNR) program for feral dogs. Hong Kong, like much of Asia, has a large number of unowned dogs living around country parks, villages in outlying areas, construction sites and wandering the city. It would benefit from the introduction of a vaccination and neuter program. These dogs live semi independently of people, receiving only intermittent feeding, at best. They are usually unvaccinated and very rarely neutered. They and their offspring are large contributors to the unwanted dog population in Hong Kong.

The SPCA coordinates 595 cat colony programs across Hong Kong, involving 450 registered carers<sup>30</sup>. Trained volunteers humanely trap street cats and transport them to the SPCA for de-sexing and general medical treatment. Friendly cats are placed in the SPCA's adoption program. Cats found unsuitable for domestication are returned to their original colonies. Volunteers continue to oversee the welfare of those cats returned to the street, providing regular food, water and health monitoring. With this experience the charity has offered to assist the government in implementing a TNR program for dogs. The number of dogs awaiting adoption in Hong Kong has long ago reached breaking point so in this case, where the dogs are found to be healthy and unaggressive, the program would allow the vaccinated and neutered dogs to be returned to the area in which they were caught, thus controlling the population. However, to date government has refused to accept the SPCA's offer to trap, neuter and release the dogs, insisting that if they implement the program the government will hold the SPCA

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27 SPCA Newsletter 'PawPrints' May 2007.

28 Section 4, Pounds Ordinance, Cap 168, Laws of Hong Kong.

29 "Most want tougher action over Animal Abuse: Survey", South China Morning Post, 14 October 2007.

30 SPCA Annual Review 2008. This program has reduced the number of stray cats in Hong Kong by 50% over a three year period.

responsible for the dogs, at law, with the attached liability for their subsequent behaviour, a responsibility no reasonable NGO can accept.

The controversy stems from an interpretation of section 2 of the *Rabies Ordinance*, Cap 421, which defines the ‘keeper’ of an animal as a person who owns the animal, or has it in his possession or custody, or who harbors the animal. The government view is that by performing vaccination and micro chipping procedures on a feral dog, the SPCA will become the animal’s legal keeper. It is important to note however that the definition of ‘keeper’ under the law specifically excludes any person who has possession or custody of the animal for the purpose of examining or vaccinating it.<sup>31</sup> Only an authorized person may vaccinate an animal against rabies,<sup>32</sup> and as evidence of such vaccination, tattoo the ear, tag the collar or microchip the animal.<sup>33</sup> Only then can the dog be licenced. The government appears to have confused the requirement that only vaccinated dogs can be micro chipped and licensed with a legal duty to seek a licence on every vaccination. No licence may be granted for a dog unless it has been vaccinated against rabies within the previous 3 years.<sup>34</sup> However, to obtain a valid keeper’s licence, vaccination must be proven. A person requesting a dog licence must apply for the licence from AFCD, prove the animal has been vaccinated, by having its micro chip number read and pay a prescribed fee.<sup>35</sup> Only then does he become the “keeper” of the animal.

The Ordinance specifically exempts vets who perform vaccinations on animals from becoming “keepers” in order to ensure that unnecessary liability is not thereby incurred in veterinary practice.<sup>36</sup> Although it is possible for a person in practice to become the ‘keeper’ of an animal, without having taken any steps to secure a valid licence,<sup>37</sup> the law clearly does not intend for those who perform medical procedures on animals to be indirectly liable for that animal for ever after. As such the government’s refusal to accept the SPCA’s offer to implement a TNR program for feral dogs in Hong Kong is, at the least, misguided and perhaps disingenuous. In taking such a position government has effectively blocked the implementation of the Trap Neuter Release program for feral dogs in Hong Kong, a program that would make a significant contribution to animal welfare in the Territory.

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31 Section 2, Rabies Ordinance, Cap 421, Laws of Hong Kong.

32 Section 26, Rabies Regulations, Cap 421A, allows only veterinary surgeons to perform rabies vaccinations.

33 Section 27, Rabies Regulations, Cap 421A, Laws of Hong Kong.

34 Section 23, Cap 421A

35 Section 19A, Cap 421A.

36 Section 2, Rabies Ordinance, Cap 421, Laws of Hong Kong.

37 See Halsbury’s Laws of Hong Kong Vol 1 (2), 2008, at paragraph 20.095 where it is stated that a person may become a keeper by owning an animal, or having it in his possession, harboring it, or occupying land or premises on which the animal is kept.



Whilst it is possible this uncooperative attitude results from poor legal advice it appears more likely that AFCD administrative considerations (fear of having to deal with nuisance complaints) are the real reason no effective action has been taken on this matter in over a decade.

## Reform

Whilst public outcry at the low levels of penalties imposed for companion animal cruelty cases has led to an increase in the highest sentence which may be passed under Cap 169, the definition of cruelty has yet to be adequately addressed in Hong Kong. Whilst in jurisdictions such as New Zealand<sup>38</sup> and Australia,<sup>39</sup> minimum standards of care, and duties of ownership, for companion animals are set, such standards are not yet a part of Hong Kong law. Detailed provision for appropriate space, food and exercise are routinely included in legislation in other common law jurisdictions but not in Hong Kong. Failure to provide clean water or suitable shelter for an animal are common offences in Hong Kong, where adequate public education is lacking. Unfortunately, such criminal negligence is currently punishable only by a fine and cannot be prosecuted as an act of cruelty under the *Prevention of Cruelty to Animals Ordinance*, unless the court is able to be satisfied, beyond all reasonable doubt, that the animal has suffered unnecessarily.<sup>40</sup> While Hong Kong continues to provide no minimum welfare standards for animals, its laws remain outdated and out of step with much of the world.

Of course the animal welfare laws in jurisdictions such as Australia and New Zealand are not without fault. In these jurisdictions the introduction of minimum standards in animal husbandry has often acted to the detriment of the animals rather than to their benefit. In Australia compliance with an industry code, setting minimum standards of care for certain types of farm animal, often provides a defence to a cruelty prosecution.<sup>41</sup> In New Zealand, the introduction of a duty of care, (based on the UK model providing the animal with the right to have its core needs met), has also failed to protect farm animals. The *Animal Welfare Act* provides that it is a defence to liability for failing to provide the animal with its core needs if it can be shown that the defendant was

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38 See Animal Welfare Act 1999 (NZ), section 4.

39 See, by way of example, the Animal Welfare Act 1985 (South Australia), section 13.

40 Section 3(1)(b), Prevention of Cruelty to Animals Ordinance, Cap 169, Laws of Hong Kong.

41 See Sharman K, 'Farm Animals and Welfare Law: An Unhappy Union' in Sankoff P and White S (eds), *Animal Law in Australasia* (2009) 35.

in compliance with an established industry code.<sup>42</sup> Codes can thus be used to effectively undermine the higher standards set by the legislation. Legislative reformists in Hong Kong should stay mindful of these deficiencies and ensure the same mistakes are not repeated here.

Hong Kong's animal welfare laws were drafted in the 1930's and the need for change has been recognized. The Hong Kong government has recently proposed amendments to the legislation to better promote animal welfare.<sup>43</sup> The proposals include allowing a new order to be made on conviction which would prohibit persons who have been convicted of cruelty offences from keeping animals. The government also intends to provide powers to government vets to require owners to act immediately to rectify welfare problems. Pet traders will soon be more restricted in their sourcing of dogs, in some cases curtailing the use of unlicensed breeders. Fines for selling unweaned animals will be doubled, to \$100,000, and trade licences will be revocable at the discretion of the AFCD.

However, the proposed amendments simply do not go far enough. Hong Kong's legislation must be fundamentally re-drafted to recognise the serious responsibilities which attach to animal ownership and make those who own animals criminally responsible not just for obvious acts of cruelty but for failure to provide adequate care to their animals. The current animal welfare laws of Hong Kong are lagging woefully behind most civilized jurisdictions. The amendments currently being proposed by government will not significantly address this gap.

Hong Kong needs to review overseas practice and reform its animal welfare model from the current reactive version to a more active framework. Current legislation does little more than set out some broad and often unenforceable prohibitions. Rather, the law should provide that a person commits an offence if he does not take such steps as are reasonable in all the circumstances to ensure that the needs of the animal for which he is responsible are met to the extent required by good practice.<sup>44</sup> Specific cruel and harmful practices compromising animal welfare must be adequately identified and penalized under the law. Changes to the current law are required in four key areas.

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42 See Sankoff P, 'The Welfare Paradigm' in Sankoff P and White S (eds), *Animal Law in Australasia* (2009) 7.

43 Prevention of Cruelty to Animals (Amendment) Bill 2006, Hong Kong Legislative Council Second Reading Speech, 6 December 2006.

44 See by way of example section 9(1) Animal Welfare Act 2006 (UK).

## 1. Minimum Standards of Care

The obligations that owners of animals and those in charge of animals owe must be clearly defined in the Ordinance and enforced. Those in charge of animals must be required to provide minimum standards of care which are detailed within the law. These should include requiring those in charge of animals to provide, at all times, proper food and water, a suitable environment with adequate shelter, protection from pain and suffering and treatment of injury and disease, recognition of any need to be housed with, or apart from, other animals and adequate opportunity to exhibit normal behaviour.<sup>45</sup>

Where these minimum standards of care are breached then, *prima facie*, an offence should be deemed to have been committed under the legislation. Where the potential for a breach of the minimum standards seems likely, owners should be educated to rectify the problem, through the service of improvement notices, a common practice in the UK. Prosecutions should be pursued against owners who refuse to comply with improvement notices and therefore act in breach of the legislation.

## 2. Pro-Active Prosecution

A more pro-active approach must be taken against those who breach minimum welfare standards, with a focus on government pursuing enforcement, education and prosecutions. SPCA inspectors should be appointed, where appropriate, to act as animal welfare investigators with powers of entry, search and seizure.<sup>46</sup> There would be no conflict of interest arising through the SPCA gathering evidence at the investigatory stage as the Hong Kong SPCA does not prosecute animal cruelty cases. Hong Kong AFCD inspectors react to nuisance complaints which relate to animals but do not have the funding, manpower nor expertise to concern themselves with the welfare of animals. SPCA inspectors, who have received appropriate training in law enforcement, should be appointed to act as animal welfare investigators alongside AFCD staff, with the specific task of promoting animal welfare. Such officers could also ensure that cases are properly investigated and the best evidence gathered for referral to the Department of Justice.

Current law only allows orders for the removal of the animal to be made post conviction. But, courts should be permitted to order the disposal, sale, transferral of ownership or destruction of animals whenever such

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<sup>45</sup> See by way of example section 9(2) Animal Welfare Act 2006 (UK)

<sup>46</sup> See by way of example section 28 Animal Welfare Act 1985 (South Australia).

interim orders are deemed necessary to protect the welfare of the animals concerned. Guidelines should be provided in the legislation as to when such orders should be made.

Cap 169 currently permits an animal abuser to require the destruction of his property, a viable animal, to avoid the costs of maintaining its life. There is a government proposal to replace this power with a more limited right which would allow the offender to avoid maintenance expenses by surrendering ownership of the animal to government, but not to require its destruction.

### 3. Adequate Investigative Powers

Animal welfare investigators must be provided with increased entry, search and seizure powers. Where a breach of minimum standards is reasonably suspected, animal welfare investigators should be permitted to step in, before any decision to prosecute is taken, to provide protection for animals whose welfare may be compromised by the breach. It should not be the case that an animal must actually have suffered harm before steps can be taken to protect the animal's welfare. In emergency situations animal welfare investigation officers should be permitted to enter private premises for the purpose of pursuing their duties under the law.<sup>47</sup>

In cases of emergency involving significant suffering, the law must permit animal welfare investigators or veterinary surgeons to euthanize an animal, without the consent of the owner, despite the abrogation of his common law rights.<sup>48</sup>

### 4. Appropriate Penalties

Penalties provided under the legislation must demonstrate that crimes against animals are taken seriously. Legislation should provide not only specific penalties but also sentencing principles or guidelines for judges to observe in passing sentence on animal welfare offenders.<sup>49</sup> Ancillary sentencing powers should include the power to disqualify an offender from owning or being in charge of animals, participating in keeping animals, or from being party to any arrangement under which he is entitled to control or influence the way in which animals are kept, either

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<sup>47</sup> See section 30 Animal Welfare Act 1985 (South Australia).

<sup>48</sup> See section 18(3) and (4) Animal Welfare Act 2006 (UK).

<sup>49</sup> See, by way of example, Magistrates Court Sentencing Guidelines for Animal Cruelty, Sentencing Guidelines Council, UK, effective from 4 August 2008.

permanently or for a specified period.<sup>50</sup> Courts should also have power to cancel or suspend licences and to forfeit equipment used in the commission of offences.<sup>51</sup> Expenses involved in caring for those animals which have been subjected to offences should be recoverable as costs in proceedings.<sup>52</sup>

## **Conclusion**

The most significant problem with the current legislation, however, is the inability and reluctance of the primary government body charged with its enforcement to adequately address animal welfare issues. The Department of Agriculture, Fisheries and Conservation, in its current state, is an inappropriate choice as safeguard for animal welfare. The AFCD has a long history of treating feral animals as a source of public nuisance which must be eradicated. Where the public complains of feral dog noise or faeces, the dogs are rounded up and killed. Where the public sights feral pigs living in rural areas AFCD licensed hunting teams are sent out to track and shoot them. Even when dealing with such relatively straight forward matters as licensing the pet trade, the AFCD seems reluctant to make animal welfare a priority. AFCD committees have allowed the economic interests of those in the pet industry to take precedence over any serious attempt to overhaul breeding regulations for companion animals.

Welfare considerations play a lowly role in the AFCD's strategies for animal management. If animals are to be protected truly in Hong Kong, this most fundamental of problems must be directly addressed.

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<sup>50</sup> See section 34 Animal Welfare Act 2006 (UK).

<sup>51</sup> See section 40 Animal Welfare Act 2006 (UK).

<sup>52</sup> See section 18(13) and section 39 Animal Welfare Act 2006 (UK).

# BOOK REVIEWS

## *Handbook of Australian Animal Cruelty Law*

Malcolm Caulfield

Publisher: Animals Australia

ISBN 978-0-646-50545-9

With the first laws preventing cruelty to animals in Australia enacted 150 years or so ago, it is surprising that it has taken so long for the first book on the matter to be published. Then again, the delay in developing a legal interest in this area simply reflects the lack of desire by the general community to ensure that the laws actually deliver on their promise. The author makes it abundantly clear throughout his book that the current laws and their enforcement mechanisms do little to effectively protect animals from cruelty, particularly in the agribusiness sector, and that they are able to prevent only the most heinous actions against animals. In essence the laws are there to enshrine common practices and provide immunity to those who conduct them - arguably, they benefit humans as much as, if not more so than, the animals. It is no wonder then that the author refers to such laws in the book title as *cruelty*, rather than *anti-cruelty*, laws and that he describes the field as 'a muddled mess of second hand law, poor and amateurish enforcement and a cynical failure by governments and public servants to grasp the nettle of large scale animal cruelty in agribusiness'.

The Handbook presents together information from the nine Australian jurisdictions. The information is meticulously researched and referenced. Australian cruelty cases, as well as offences and adoption of codes of practice in the various jurisdictions are conveniently tabulated. Hence the Handbook will be a marvellous resource for anyone interested in Australian animal cruelty laws, including legal practitioners and animal activists, particularly those with some legal training.

The first three chapters examine historical developments as well as general definitions, principles and instruments of cruelty law. These are particularly useful to put the following chapters in context.

Chapters four, five and six focus on three areas with high levels of cruelty: live export; authorized killing of farm and wild animals; and use of animals for research and teaching.

Chapter seven is a damning indictment of the current enforcement mechanisms for cruelty laws in Australia.

Chapter eight features some interesting case studies. The author's deep understanding of the legal and political background of these cases, in part owing to his close involvement with some of the legal proceedings, makes the reading riveting. One could almost think the case studies were invented to illustrate the many deficiencies of the law....

The author is at his best when he critically comments on the various aspects of the laws and identifies their deficiencies (and he has plenty to choose from). His comments are incisive and his suggestions for reform powerfully convincing. Most chapters are split in two sections: 'summary and overview' and 'the law in detail'. The detailed parts provide a thorough, and dense at times, description of the laws as they apply in all jurisdictions. Although the inadequacy of these laws is obvious to experienced animal lawyers, this may not be so for inexperienced readers. Thus Chapters five and six would benefit from additional commentary, critique and specially concluding remarks, highlighting the salient features, gaps or suggested reform. Naturally such comments would inevitably cover the same ground: the laws lack consistency across borders, are full of exclusions and exemptions, and desperately need reform if they are to meaningfully protect animals from cruelty.

The writing style is sophisticated yet easy to read. Some typographical errors (particularly what appears to be missing spaces between words) are minor for a production of this sort.

The Handbook may help herald a new era of increased awareness of animal law in Australia. It should be compulsory reading for those who naïvely think that animals are well protected in Australia. Thanks to the generosity of its sponsors, students and others with an interest in animal law can obtain a copy free by emailing [sarah@animalsaustralia.org](mailto:sarah@animalsaustralia.org).

– ***Dominique Thiriet***, School of Law, James Cook University

***Animal Law In Australasia - A new dialogue***

Edited by Peter Sankoff & Steven White

Publisher Federation Press

ISBN 9781862877191

“This is a book of scholarship, but it’s also a book of much more,” as the Hon. Michael Kirby AC CMG said at the May 2009 launch. “It’s a book of empirical facts, which buzz around in the brain and which are facts that I don’t believe most Australians know of, and they should know of.”

“The book deals with the theoretical questions that lie at the heart of changing legal attitudes,” Mr Kirby, a former High Court justice, said. “How one changes those attitudes and then changes law, or changes law and stimulates changes of attitudes - which is what happened with the rights of the Aboriginal people to their land - is a question which isn’t ultimately resolved in the book, but it certainly is presented in the chapters for our consideration.”

Note: A “review copy” of this important publication was not received before deadline. A full review will appear in the next issue of the AAPLJ - JM.

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# Australia's first peer-reviewed animal law journal

The *Australian Animal Protection Law Journal* (AAPLJ) is intended to be a vehicle for principled consideration and spirited discussion of the issues of law and fact affecting the lives of non-human animals.

The greatest threat to animals is passivity and ongoing acceptance of the status quo; a status quo most easily maintained through silence.

Concise letters in reply to any of the articles published are always welcomed.

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

## Guidelines for Contributors

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

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

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

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

All material submitted should be marked "Attn: AAPLJ Editor" and may be emailed to [mancyj@gmail.com](mailto:mancyj@gmail.com), preferably in MS Word or Rich Text Format (RFT).

In 2009, issues of the Australian Protection Law Journal will be published in June and December.

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