

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

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Introduction

Over the last decade in Australia, the Federal and State governments have approved an annual commercial kill of four to six million kangaroos and wallabies each year.¹ On average three million macropods are actually ‘harvested’/killed.² Around 300,000 young at foot and 800,000 pouch young are either killed or left to die each year as collateral of the commercial industry.³ In addition, up to 200,000 kangaroos and wallabies are killed for non-commercial reasons each year.⁴ A further unknown number are killed without government authorisation. This is the largest land-based slaughter of wildlife in the world.⁵

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

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

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

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

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

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

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

Definitions

The terms surrounding the killing of macropods may be seen as highly subjective. Proponents of the industry may describe the killing as

eng.htm> accessed 14 February 2011.

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

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

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

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

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

The term *'kangaroo'* is sometimes used generically to refer to a number of different species including kangaroos and wallabies. The scientifically correct term is *'macropod'* which refers to Macropodoidea (the whole superfamily). The term kangaroo technically refers to macropods that have an average foot length of greater than 250 mm and

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

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

10 RSPCA Australia, Report 2002, above n 5.

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

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

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

wallabies are macropods that have a smaller average foot length.¹⁴ This paper uses the term macropod for scientific accuracy.

THE LEGAL AND POLICY FRAMEWORK FOR MACROPOD MANAGEMENT

Introduction

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

STATE AND TERRITORY LEGISLATION

Animal protection legislation

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

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

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

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

¹⁶ This is particularly relevant for the duty of care offences. See, for e.g., Prevention of Cruelty to Animals Act 1979 (NSW) s 8; Animal Care and Protection Act 2001 (Qld) s 17; Animal Welfare Act 1985 (SA) s 13(3)(b); Animal

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

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

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

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

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

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

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

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

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

22 Dominique Thiriet, 'Out of the "too hard basket" – Traditional Hunting and Animal Welfare', above n 22, 66.

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

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

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

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

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

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

26 RSPCA Australia, ‘Is there a need to kill kangaroos or wallabies?’ <<http://kb.rspca.org.au/entry/77>> accessed 10 November 2010.

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

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

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

The second element provided in *Ford v Wiley* is whether there is a proportion between the means and the object, and 'the beneficial or useful ends sought to be attained must be reasonably proportionate to the extent of suffering caused, and in no case can substantial suffering be inflicted unless necessity for its infliction can reasonably be said to exist.'³¹ This is a particularly relevant question for the killing of macropods where the ultimate issue becomes whether or not the potential commercial gains outweigh the scale of pain and suffering.³²

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

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

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

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

31 (1889) 23 QBD 203.

32 The Kangaroo Industry Association of Australia has claimed that the industry is worth \$270 million and directly

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

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

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

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

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

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

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

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

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

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

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

Finally, animal protection legislation may ‘operate subject to the application of nature conservation legislation.’⁴³ In Queensland and Victoria the relevant animal protection legislation provides that the cruelty and other offences do not apply to acts or omissions made in accordance with the nature conservation legislation.⁴⁴ Thus, where macropods are killed in Queensland and Victoria in accordance with the relevant licences, there is no scope for the animal protection legislation to operate with regard to these animals. The following section focuses upon the State and Territory nature conservation legislation and to what extent this legislation provides for the welfare of these animals.

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

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

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

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

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

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

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

Nature conservation legislation

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

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

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

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

46 There is limited information about rates of compliance with these reporting requirements. However, there are
indications that there are problems with compliance. For example, the NSW Kangaroo Management Plan Annual
Report for 2009 revealed that 86 penalty infringement notices were issued to harvesters who failed to submit returns:
Department of Environment, Climate Change and Water, 2009 Annual Report: New South Wales Commercial
Kangaroo Harvest Management Plan 2007-2011, <
<http://www.environment.nsw.gov.au/resources/nature/KMPAnnualReport2009.pdf>> accessed 21 February 2011, 18.

47 Department of Environment and Climate Change NSW, Handbook for Kangaroo Harvesters
<<http://www.environment.nsw.gov.au/resources/nature/08413hbkanharvesters.pdf>> accessed 2 November 2010.

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

Table 1: State and Territory Nature Conservation Legislation

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

48 The Department of Sustainability and Environment has stated that 'Commercial harvesting of wild kangaroos is not permitted in Victoria and it is government policy not to develop a commercial kangaroo industry.' Department of Sustainability and Environment, Fact Sheet: Management of large kangaroos in Victoria: Harvesting of wild kangaroos for commercial purposes, <
[http://www.dpi.vic.gov.au/CA256F310024B628/0/1FF00B883E79CE72CA2574C0000BAAE3/\\$File/Fact+sheet+-+commercial+industry.pdf](http://www.dpi.vic.gov.au/CA256F310024B628/0/1FF00B883E79CE72CA2574C0000BAAE3/$File/Fact+sheet+-+commercial+industry.pdf)> accessed 21 February 2011.

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

		and crops. The Minister may grant a permit for the harvest of a protected species and the sale or use of the carcasses: s60J.
	<i>National Parks and Wildlife (Kangaroo Harvesting) Regulations 2003 (SA)</i>	Part 3 regulates and provides conditions for permits granted under s 60J.
Western Australia	<i>Wildlife Conservation Act 1950 (WA)</i>	Section 16 provides that it is an offence to kill protected fauna without an appropriate licence.
	<i>Wildlife Conservation Regulations 1970 (WA)</i>	Regulation 5 provides for the issue of licences for killing protected fauna where the animals are causing damage to property. Regulation 6 allows for the issue of licences permitting the commercial killing of kangaroos.
Tasmania	<i>Nature Conservation Act 2002 (Tas)</i>	Part 4 provides for the conservation of flora and fauna. Section 30 provides that the Minister may determine open seasons for partly protected wildlife.
	<i>Wildlife Regulations 1999 (Tas)</i>	Under regulations 15 to 17 it is an offence to kill specially protected, protected, or partly protected wildlife without an appropriate permit. Regulation 6 allows for the issuing of licences for the killing of wallabies. Regulation 13 provides for the issue of a permit to kill wildlife in order to prevent destruction of or injury to plants or stock.
Victoria	<i>Wildlife Act 1975 (Vic)</i>	Under sections 41 to 43, it is an offence to kill 'endangered', 'notable' or 'protected wildlife'.
	<i>Wildlife (Game)</i>	Licence and control recreational and

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

Welfare provisions in State & Territory nature conservation legislation

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

Lack of licences to kill joeys under the nature conservation legislation

However, there is a key deficiency in the existing licensing system in that the killing of joeys is not licensed in NSW. This issue has been highlighted by the NSW Young Lawyers Animal Law Committee with relation to commercial killing. Section 123 of the *National Parks and Wildlife Act 1974 (NSW)* states that a commercial fauna harvester's licence may only be granted to 'authoris[e] a person to harm fauna of a species named therein for the purposes of sale.' Regulation 11 of the *Nature Conservation (Wildlife Management) Regulation 2006 (Qld)*

49 Regulation 14(3).

50 Regulation 14(4).

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

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

states that a commercial wildlife harvesting licence 'is to allow a person to harvest protected animals for a commercial purpose.' The NSW Young Lawyers Animal Law Committee argues that shooters holding either of these licences are not permitted to harm or kill joeys unless they are harmed or killed *for the purpose of commercial sale*.⁵³ Joeys cannot be used commercially therefore the licences cannot be used to kill these young macropods. These two states account for more than 75% of all commercial killings.⁵⁴

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

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

This raises the question of whether an actual licence is required to kill these young animals. The complaint lodged by ASK in June 2010 also highlighted this issue (discussed earlier in the context of animal protection legislation). In the complaint, ASK argued that the killing of 228 adult macropods and joeys at Mount Panorama Bathurst (NSW) in September 2009, in order to clear the car racing track was an offence under s98 of the *National Parks and Wildlife Act 1974* (NSW). This was in addition to the claim that the killing breached s4 of the *Prevention of Cruelty to Animals Act 1979* (NSW). The nominated shooter had been provided a licence from the NSW Department of Environment and Climate Change to kill only 140 eastern grey

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

54 Ibid.

kangaroos at Mt Panorama in 2009 under s121 (Occupier's licence) of the *National Parks and Wildlife Act*. However, the documents obtained under the Freedom of Information request revealed that the shooter had killed 228 macropods, 97 females, 43 males and 88 joeys. ASK alleged that the killing of the 88 joeys constituted an offence under ss98 and 133 (conditions of the licence).

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

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

The historical development of the Commonwealth's increasing involvement

Tension between Commonwealth and State governments over wildlife arises from the fact that the Commonwealth does not have a clear legislative power to deal with environmental issues or animals.⁵⁶ Powers given to the Commonwealth Parliament are found in sections 51 and 52 of the Constitution. The Commonwealth Parliament generally relies upon the external affairs power (s51(xxix)), the trade and commerce power (s51(i)) and the quarantine power (s51(ix)) to create laws relating to the environment or animals. The trade and commerce power (s51(i)) provides the Commonwealth Parliament with the power

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

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

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

to legislate with regard to the import and export of wildlife specimens.⁵⁷ A significant proportion of macropod meat and skins are exported to overseas markets, which means that the Commonwealth has an important role to play.

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

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

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

In 1975, the Australian National Parks and Wildlife Service (ANPWS) was made responsible for wildlife export regulation. The ANPWS was created by the *National Parks and Wildlife Conservation Act 1975* (Cth) which recognised the need for Commonwealth and State Government

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

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

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

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

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

⁶² *Ibid*, 53.

cooperation in wildlife protection.⁶³ This Act was repealed by the *Environmental Reform (Consequential Provisions) Act 1999* (Cth). In 1993, the ANPWS became the Australian Nature Conservation Agency (ANCA). In 1996, the ANCA ceased to exist as an administrative entity and was replaced by Parks Australia as part of Environment Australia within the Department of the Environment and Heritage. Currently, the Department of Sustainability, Environment, Water, Population and Communities is responsible for the approval of exports.

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

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

COMMONWEALTH LEGISLATION

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

The *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') and the *Export Control Act 1982* (Cth) are the most significant Commonwealth statutes relating to macropod management. The EPBC Act aims to provide an overall framework for environmental protection. The *Export Control Act* and its relevant subsidiary legislation provide further requirements for the export of macropod products.⁶⁵

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

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

⁶⁵ For example, the Export Control Act 1982 and the Australian Standard for Construction of Premises Processing Meat

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

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

Welfare provisions in the Commonwealth legislation

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

This 'inadequacy' may have been a reference to the difficulties associated with prosecuting offences under the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* (Cth) which was the

for Human Consumption provide requirements for the construction of game processing establishments.

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

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

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

69 A Hawke, Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Final Report (Commonwealth of Australia, Canberra, December 2009) <<http://www.environment.gov.au/epbc/review/publications/pubs/final-report-12-wildlife-trade.pdf>> accessed 21 February 2011, 223.

previous legislation.⁷⁰ An added problem was that under this previous legislation, it was not necessary for the Minister to consider animal welfare in approving management plans.⁷¹

Under the EPBC Act, the Minister must be satisfied that if an animal is to be killed this will be done in a manner that is generally accepted to minimise pain and suffering and that the method must be known to result in minimal stress and risk of injury to the animal.⁷² Before approving a wildlife trade management plan under s303FO(2), the Minister, among other things, must be satisfied that the welfare requirements found in regulation 9A.05(4) are likely to be complied with.⁷³ Regulations that address the welfare of animals for which the Minister has issued a permit to export or import may be made under section 303GO.⁷⁴

The approved State management trade plans must incorporate the National Codes. In all States that export macropod products (apart from

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

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

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

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

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

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

Tasmania) compliance with the Commercial Code is a condition of licences.⁷⁵

CODES OF PRACTICE FOR THE HUMANE SHOOTING OF KANGAROOS AND WALLABIES

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

Conditions on the method of shooting

The National Codes provide that the primary objective for shooters ‘must be to achieve instantaneous loss of consciousness and rapid death without regaining consciousness.’⁷⁸ It is generally considered that shooting a macropod in the brain will result in a sudden and painless death for the specific animal.⁷⁹ The National Codes provide that certain conditions must be met and if they cannot be met, or where there is any

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

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

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

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

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

doubt about achieving a ‘sudden and humane death’ shooting must not be attempted.⁸⁰

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

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

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

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

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

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

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

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

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

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

88 Ibid.

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

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

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

Conditions on the killing of injured macropods

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

91 See discussion of methodology in *ibid*.

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

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

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

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

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

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

Conditions on the killing of dependent young

A large number of joeys are killed each year as part of the commercial and non-commercial kill. Around 300,000 young at foot and 800,000 pouch young are either killed or left to die each year as collateral of the commercial industry.¹⁰⁰ The National Codes provide that any target female macropods, including injured animals, must be ‘thoroughly examined for pouch young.’¹⁰¹ Where pouch young or young at foot

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

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

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

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

100 Croft, above n 4.

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

are present, these animals must be euthanased in accordance with the methods provided. However, the National Codes prescribe methods of killing joeys which would be considered clear breaches of animal welfare law if committed against a range of other animals.¹⁰²

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

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

The RSPCA's research on the National Codes revealed that shooters often have difficulty catching young at foot.¹⁰⁸ Many of these joeys later die from exposure, starvation or predation.¹⁰⁹ The RSPCA found that even if young at foot are captured by shooters, there is difficulty in killing them.¹¹⁰ The National Codes provide that any dependent young must be shot as soon as possible,¹¹¹ yet it is clear that many joeys

102 Voiceless, above n 10.

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

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

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

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

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

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

109 *Ibid.*

110 *Ibid.*

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

endure death, pain and suffering each year as collateral of the commercial and non-commercial killing.

Conditions for non-commercial killing

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

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

Conclusion

The national codes condone cruelty towards macropods through a number of methods. The killing of joeys is the issue that has attracted the most criticism and concern within Australia and internationally.¹¹⁷ However, this issue is closely followed by concern for macropods that are not killed instantaneously and the separate issues that arise around non-commercial shooting. It is clear that many adult and young macropods experience pain and suffering as a result of current commercial and non-commercial killing. This analysis supports the

112 Non-Commercial Code, 7.

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

114 See Non-Commercial Code.

115 Ibid.

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

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

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

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

February 2011; Voiceless, above n 10.

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

CASE LAW

"We need a Mabo decision for Australia's wild animals, a legal recognition of their special status as original residents of Australia, alongside its original inhabitants."¹¹⁸

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

On macropods not being killed instantaneously, the Tribunal said:

As it seems to us, no system, short of absolute prohibition, could prevent instances where instantaneous death was not achieved. The question is whether the Plan, by accepting that these instances will occur, promotes the humane treatment of kangaroos. We think that it does ... It may be accepted that there will, nonetheless, be instances where instantaneous death by brain shot is not achieved ... Any management plan that involves the commercial killing of free-ranging animals will involve a risk that perfection is not always going to be

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

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

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

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

achieved. What is required it that the Plan achieve as near to perfection as human frailty will permit. We are satisfied that the system of accreditation, licensing, and compliance management achieves that object.¹²²

On cruelty to joeys, the Tribunal said:

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

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

The basis of the decision was that the National Code should seek to provide the best welfare outcomes possible assuming that commercial killing was to continue. Such reasoning ignores the possibility of improved welfare outcomes (e.g. through a male-only kill) or that the welfare outcomes for joeys are just simply unacceptable.¹²⁴

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

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

124 White states that '...if, in the commercial 'harvesting' of kangaroos, it is not possible to avoid slow and/or painful deaths for even a small proportion of animals, the practice of commercial kangaroo hunting and killing per se needs

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

LEGAL REFORM

Australian Animal Welfare Strategy (AAWS)

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

The AAWS process provided a review by Scott which reported on the animal welfare arrangements for animals in the wild.¹²⁹ This report

to be drawn into question, rather than accepting welfare outcomes that 'in the circumstances [are] as humane as can be expected'. Steven White, 'Animals in the wild' in Peter Sankoff and Steven White, above n 17, 257 citing *Re Wildlife Protection Association of Australia Inc and Minister for the Environment and Heritage* [2004] AATA 1383 at [56].

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

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

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

¹²⁸ Cao, above n 44, 101.

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

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

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

Possible Areas for Legal Reform

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

Shooters must administer lethal injection to pouch young and young at foot whose mothers have been killed. After administering the injection the shooter must be certain that the animal is dead ... The shooter must not dispose of the dead pouch joey or young at foot in any manner other than: incineration by fire so that the entire carcass is destroyed or burying the carcass so that the top of the carcass is at least 30cm underground.¹³⁴

This suggestion is problematic. Administering such lethal injections would require a specific skill. If poorly performed, the procedure could cause joeys great pain and suffering. It seems neither practical nor safe

2010.

130 Ibid, 2.

131 Ibid, 13.

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

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

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

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

to supply shooters with large amounts of lethal poisons for use in remote locations, with little or no supervision.

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

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

Cruelty to joeys will probably continue unless the killing of female macropods ceases. In many places, killing young wildlife is considered unacceptable practice, as in the banning of products from Canadian Harp Seals in the US, Mexico, Russia and the European Union.¹³⁸ The NSW Young Lawyers Animal Law Committee and RSPCA support a ban on shooting female macropods.¹³⁹ What ecological ramifications such a ban might have on (e.g.) population structure,¹⁴⁰ or whether it would make the commercial industry unviable are not known .

135 Ibid.

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

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

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

139 The NSW Young Lawyers Animal Law Committee has proposed that 2.3 of the Commercial Code be amended to substitute 'Shooters should avoid shooting female kangaroos where it is obvious that she has a dependant young' with 'Shooters must not shoot female kangaroos.' NSW Young Lawyers Animal Law Committee, above n 54, 11.

140 RSPCA Australia has stated that 'It may be that the only solution which would totally avoid the potential of cruelty to pouch young would be not to shoot females at all, and research is needed to examine the potential effects of such a policy on commercially harvested kangaroo populations.' RSPCA Australia, 'What happens to joeys when female

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

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

CONCLUSION

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

Towards the Legal Protection of Animals