

Problems with current animal protection – Sentient animals slipping through the net...

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The protection of the vulnerable is a key tenet of human society and the basis of functioning communities. Whether those in need of protection are children, disabled, impoverished or oppressed humans, or animals, a value measure of a civilisation is the degree to which their rights and welfare are protected by laws and other community structures. Australians look back now at our forefathers' treatment of indigenous Australians during the 19th century and at the commercial whaling industry even well into the 20th century as practices we now abhor. We probably all feel we are a more enlightened community.

That Australian's care about animal welfare is reflected in the results of a survey conducted for the pig and egg industry by Professor Grahame Coleman of Monash University. 60% of respondents agreed with the statement that "welfare of animals is a major concern", while 71% agreed that "farm animal welfare is an important consideration".¹ Similar concerns were expressed by respondents in a recent survey conducted for the Department of Agriculture, Fisheries and Forestry.²

It is very likely therefore that most Australians believe that Australian law protects animals from cruelty. Indeed if the average Australian was presented with the stated commitment of the Federal Government's Australian Animal Welfare Strategy (AAWS) 'to ensure high standards of animal welfare', they may believe we already have a sound base from which to further improve animal welfare. This paper will examine the soundness of that base and will identify and review the gaps in Australian law which not only permit but entrench cruelty to large numbers of animals. Of particular concern

1 See G Coleman (2007) Public perceptions of animal pain and animal welfare in *Australian Animal Welfare Strategy Science Summit on Pain and Pain Management, May 2007 – Proceedings* (at http://www.daff.gov.au/_data/assets/pdf_file/0006/299103/grahame-coleman.pdf)

2 TNS Social Research (2006) *Attitudes towards animal welfare*

is that the cruel practices concerned occur mostly in the intensive animal industries usually hidden from public scrutiny, or to feral and other 'forgotten' classes of animals.

Australia's state-based animal welfare laws appear to reflect community beliefs that animal welfare is important and animal cruelty unacceptable. Breaches of that legislation can result in large fines – up to \$75,000 in Queensland and imprisonment for terms of up to 5 years (in Western Australia). The legislation in most States allows 'banning' orders, which prohibit some people from owning or handling animals once convicted of cruelty. This could reasonably be compared to sanctions for violent offenders and child predators, though it should be said that magistrates often impose sentences and fines far less than the sentences which could be imposed.

However, closer examination of existing State legislation shows that whole categories of animals, usually based on the type of human use rather than their ability to suffer, have no legislative protection from cruel practices. Some examples of 'legalised cruelty' follow.

Unwanted or abundant wild animals are treated differently under the different animal protection laws. For example, in Queensland there is an exemption from the cruelty provisions of its relatively modern *Animal Care and Protection Act 2001* (Section 42) for acts done to control 'feral' or 'pest' animals where the act is done in a way '*that causes the animal as little pain as is reasonable...*' Such a statement (and similar in other States) means that many exceptionally cruel practices have been permitted to continue, primarily because words such as 'reasonable' and 'usual' have been used, and existing cruel practices have been accepted as normal.

A recent review³ of Codes of Practice relating to population control (killing) of unwanted or abundant introduced wild animals has identified some of the worst methods and determined them to be 'unacceptable'. These include:

- Use of unmodified, serrated-edged, steel jaw traps,
- Strychnine baiting for fox and dog control,
- Chloropicrin fumigation of warrens for rabbit control,
- Warfarin baiting for pig control; and
- Yellow phosphorous (CSSP) baiting for pig control.

3 T Sharp & G Saunders (2004) *Development of a model code of practice and standard operating procedures for the humane capture, handling or destruction of feral animals in Australia* (see <http://www.environment.gov.au/biodiversity/invasive/publications/humane-control/pubs/40595-final-report>)

Yet these methods continue to be used today, as they have for decades, despite the terrible suffering they inflict. For example, warfarin may take up to 14 days after ingestion to kill the pig, inflicting severe pain for several days; yellow phosphorus burns the stomach of the pig to kill it. These revolting practices continue despite the existence of less cruel methods. A current plan – boosted by the AAWS-generated focus – is for these ‘unacceptable’ methods to be banned by the end of 2009. Even when and if they are banned, other methods will continue to be used, (such as 1080 poison baiting), which would be illegal if used against domestic animals.

Fish⁴ constitute a huge group of animals that are essentially excluded from protection. For example the animal protection statutes in Queensland, Victoria and Western Australia⁵ exclude commercial fishing (as authorised by the relevant law) from the operation of each of the animal protection laws. In other states and territories there is a *de facto* acceptance of ‘normal’ fishing practices (albeit not expressed in legislation, except in the case of Tasmania).⁶ Note also that fishing outside of State and Territory territorial waters is authorised by the Commonwealth, so that any attempt to apply state or territory animal protection laws in that situation may be prevented.⁷

Welfare issues arise in all aspects of fish use and exploitation, including commercial fishing, recreational fishing and aquaculture. This is not only the case where fish are landed and allowed to die slowly, but also applies where fish are returned to the water damaged through bad handling.

Part of the reason fish do not receive the legal protection from cruelty afforded to other species (particularly mammals) is that they are often not considered able to experience suffering. However, the current scientific consensus is that fish can perceive pain and can suffer: teleost fish possess similar pain receptor to higher vertebrates and fish neural function and behaviour alters in response to noxious stimuli.⁸ Given this, there

4 See the *AAWS Education and Training Stocktake – Aquatic Animals* at http://www.daff.gov.au/_data/assets/pdf_file/0005/617423/aquatic-animals.pdf

5 A stated intention to include welfare provisions in WA’s Fisheries Resources Management Act led to a change to that Act in 2003, but 5 years on the Minister has failed to enact regulations to protect fish.

6 See *A review of current welfare arrangements for finfish in Australia – Final Report* (2006) at http://www.daff.gov.au/_data/assets/pdf_file/0017/152108/aaws_stcoktake_aquatic/pdf

7 By virtue of the effect of section 109 of the Commonwealth *Constitution*

8 See, for example, DM Broom (2007) Cognitive ability and sentience: which aquatic animals should be protected? *Diseases of Aquatic Organisms* 75, 99; VA Braithwaite & FA Huntingford (2004) Fish and welfare: do fish have the capacity for pain perception and suffering? *Animal Welfare* 13 (Supplement 1) 87

is every reason why fish species should be considered in the same way as other species which are afforded protection under the anti-cruelty laws.

'Hunting' and 'harvesting' of wild animals (both native and introduced) also receives special treatment under the various states and territories animal protection legislation, such that these activities, which may involve considerable cruelty, can continue unchecked. It is obvious that killing animals in the wild can involve significant cruelty. Instances include animals not being shot 'cleanly' and being left to die slowly, such as the high wounding rates of waterbirds and wallabies where shotguns are the permitted weapon, and young marsupials being left to starve when their mothers are killed.⁹

Some statutes provide a defence to prosecution where the hunting is done 'in a usual and reasonable manner' and where it does not inflict 'unnecessary' pain.¹⁰ Here again the logic is, if sufficiently large numbers of people want to inflict cruelty on animals, that will be regarded as 'reasonable' or 'necessary'. Hunting in Australia is regulated at the state and territory level by the requirement for the hunter or shooter to have a licence. It is usually the case that the licence has a condition that animals be humanely killed.¹¹ Where that is not expressed in the legislation as such, it is imposed in effect by requiring the killing to be in accordance with a relevant code of practice.¹² However, such Codes then allow cruel practices such as the shooting of moving wallabies with shotguns in the bush in Tasmania.

Farm animals – up to 500 million a year in Australia - are provided with specific exemptions from the cruelty provisions of state and territory animal protection laws. These animals are thereby subjected to cruel husbandry practices without pain relief or to close confinement (and thus severe behavioural restrictions) for much of their productive lives.

The farm animal industry, realising in about 1980 that it was under threat from the increasing public perception that its practices could be regarded as cruel, responded by persuading governments around Australia to enshrine what were said to be 'normal

9 See *Wildlife Protection Association of Australia Inc v Minister for the Environment, Heritage and the Arts (Cth)* Administrative Appeals Tribunal case N535 of 2007 and submissions made by the applicant at <http://www.kangaroo-protection-coalition.com/nswaatappeal2008.html>

10 eg New South Wales, Tasmania

11 For example, licences granted under the New South Wales *Game and Feral Animal Control Act 2002* and its subsidiary legislation

12 For example, kangaroo killing licences issued under the New South Wales *National Parks and Wildlife Act 1974* require compliance with the Commonwealth *Code of Practice for the Humane Shooting of Kangaroos*

husbandry practices' in 'animal welfare codes'. Responsible State Government Ministers have since the early 1980s approved national Model Codes of Practice for the Welfare of Animals¹³ covering a range of species and activities which in effect condone practices in the agriculture industry which would otherwise be unlawful.

Those codes were and still are voluntary; compliance with them is not mandatory (except in South Australia).¹⁴ In most States and Territories (i.e. NT, Qld, SA, Vic, WA) compliance with the procedures according to the relevant Code can be a defence to a prosecution for cruelty under the relevant anti-cruelty statute.

Other jurisdictions also find ways to exempt common farming practices from the reach of animal protection law; in New South Wales, Section 9 of the Prevention of Cruelty to Animals Act, relating to confining an animal without providing it with adequate exercise, does not apply to a person in charge of an animal if the animal is a stock animal other than a horse, or an animal of a species which is usually kept in captivity by means of a cage.¹⁵

The introduction of codes of practice was also an inspired public relations move, because it enabled the animal industries to claim that compliance with an agreed Code reflects acceptable practice and results in good animal welfare.¹⁶

So what type of practices do the current farm animal Codes allow? Examples of practices that would otherwise be the subject of a prosecution for cruelty include overcrowding (e.g. broiler chickens kept at about 20 per square metre), the long term confinement of animals which prevents them from exercising (such as sows in stall so small they cannot turn around, hens in conventional battery cages) and many surgical procedures permitted to be performed without any pain relief. These routine surgical mutilations can cause both acute and long term pain and suffering. For example *teeth cutting* of piglets is common in indoor systems (not free range) but '*...it is likely that tooth resection induces severe pain in piglets. ... the pain probably lasts at least up until the fiftieth day of life, when they lose their lacteal teeth*'.¹⁷

13 The majority of the livestock codes are at <http://www.publish.csiro.au/sid/11.htm>

14 Geoff Neumann & Associates (2003) *Review of the Australian Model Codes of Practice for the Welfare of Animals* (commissioned by the federal Department of Agriculture, Forestry and Fisheries), at 3.

15 "stock animal" means an animal which belongs to the class of animals comprising cattle, horses, sheep, goats, deer, pigs, poultry and any other species of animal ...

16 Neumann, at 10

17 *Animal Welfare Journal* (V 13, Issue 1) February 2004

An example of the (eventual) adverse consequences of the unquestioning acceptance of Codes of Practice by agriculture Ministers is the consequent 'permission' for the mulesing of lambs (as described in the sheep Code) to continue unabated for almost 3 decades. This painful practice of cutting the skin from the rear of lambs (over 20 million annually) without pain relief will now be phased out as a direct result of international exposure, community concerns and subsequent wool buyer and retailer boycotts. Our politicians, those who make and amend animal protection laws, played no part in this reform.

An alternate path to this community or buyer pressure on legally permitted cruel practices has recently succeeded in the United States; in a unanimous decision of the New Jersey Supreme Court it has struck down the New Jersey Department of Agriculture's regulations which exempt all routine husbandry practices. The Court ruled that factory farming practices cannot be considered humane simply because they are widely used.¹⁸

It is likely that the new Australian 'Standards and Guidelines' system being designed to replace the Model Codes and develop some enforceable 'Standards' will similarly continue to permit practices (i.e. describe and thus exempt practices) that would otherwise be cruel under state animal welfare legislation.

These inconsistencies and contradictions in Australian animal welfare laws have until recently gone virtually unnoticed, both by the public and in the wider legal community. There is encouraging evidence that this may be about to change. Professor David Weisbrot, President of the Australian Law Reform Commission has said –

'... On their face they [the Codes] look pretty good, (but) they are riddled with exemptions and out clauses and problems of enforcement....'

It's the next great social justice movement that we'll have to encounter over the next some years. I think the way we now look back 40 years ago in Australia where we had the referendum finally beginning to recognise the rights of Aboriginal people, I think in 40 years hence we'll look back at this time and wonder why we were only beginning to become aware of issues about animal

18 Decision report 30/7/08 – see <http://www.njfarmers.org/>

welfare and animal rights".¹⁹

The formation of a number of lawyers groups concerned with animal welfare and increased academic consideration of the obvious deficiencies in legal protection²⁰ in Australia adds to the optimism that change will occur.

However, in the absence of political leadership and the demonstrated lack of proactive animal welfare reforms by farm animal industries, the 'drivers' for animal welfare reform in the near future will be public concern and consumer and or wholesaler/retailer reaction to learning of the unacceptable practices used to produce animal-based products.

Some may regard consumer concern about the welfare of farm animals as a passing fad. There is no evidence this is the case. There is perhaps a parallel with the environmental movement, which a couple of decades ago was seen as the province of hippies and greenies. Environmental advocacy has not only persisted but has become part of mainstream politics because the concern for our natural world was and is well based.

A better educated community is likely to be more receptive to ethical concepts and, with increasing affluence, many consumers are able to afford to pay more for their ethical food choices. This change is in stark contrast to the attitudes of those who grow animals for food and the governments who make and enforce the relevant law. Their response to this trend of increasing awareness of cruelty to animals in the farm industry is essentially one of denial and an entrenched belief that they must go on as before..

Recent work has indicated that consumers are in general concerned about animal welfare. However, there is confusion in the mind of the consumer as to the real state of farm animal welfare.²¹

Groups interested in increasing consumer awareness of cruel practices have burgeoned. Investigations of industrial farming practices and the live export trade -

¹⁹ ABC TV Landline 'Livestock producers face animal welfare challenges' 1 July 2007
<http://www.abc.net.au/landline/content/2006/s1965877.htm>

²⁰ For e.g. the Victorian Barristers for Animal Welfare Panel [<http://www.vicbar.com.au/e.1.12.asp>] and the publication of the first edition of the Australian Animal Protection Law Journal in August 2008.

²¹ 'Particular practices of intensive farming were seen by some as extreme (negative) practices, but these were not seen as normal practice, TNS Social Research (2006) *Attitudes towards animal welfare* (page 14).

almost entirely by non-government organisations - have provided evidence of extensive routine cruel practices. These revelations stimulated public outcry and on some occasions governments have been forced to respond. For example, the revealing footage of conditions in intensive piggeries in the mid 1990s led to a ban on tethering of pregnant pigs. Exposure by Animals Australia of dreadful handling and slaughter of Australian cattle and sheep in Egypt in 2006 and 2007 (but known to the live export industry for at least 5 years) resulted in the Commonwealth government being forced to suspend the export of cattle and sheep to Egypt.

Whilst there has been increasing concern in Australia about particularly farm animal welfare, the most striking examples of change have taken place overseas. For example, the world's largest producer of pigs, Smithfield Foods (US), with 3 times more pigs than the entire Australian pig industry, announced in 2007 that it will completely phase out sow stalls within 10 years, citing pressure from major customers such as McDonald's which were in turn responding to consumer pressure. Similarly the largest Canadian producer of pigs, Maple Leaf Foods Inc, announced it will completely phase out sow stalls within 10 years.

Some of the largest fast food outlets are also changing their requirements of suppliers e.g. Burger King (following McDonalds' lead in the US) announced it will seek to progressively increase the proportion of its pork from producers that do not confine sows in sow stalls, and McDonald's in the UK has been using free-range eggs for the past decade, whilst McDonald's in Belgium recently followed suit.

In Australia the major supermarkets have increased their range of free range meat products. The organic and free range food market is one of the fastest growing sectors, for example, free range egg sales have grown from 5.5% of the market in 2000 to 20.3% of the market in 2006.²² McDonalds Australia states in its Corporate Responsibility Report 2007 that one of its priorities is '*[f]ocusing our animal welfare efforts by working with suppliers to make ongoing improvements in the treatment of laying hens and pigs*'.

Better educated and more affluent consumers are looking for information about animal welfare in relation to the products they consume. Farmers clearly fear such disclosure

22 Australian Egg Corporation - Egg Industry Overview (2006), and the 2000 figure - SCARM Working Group, Synopsis Report on the Review of Layer Hen Housing and Labelling of Eggs in Australia, June 2000

as evidenced by their determination to advise the community that they abide by Codes of Practice, yet fail to provide clear illustration on their websites of the husbandry and housing practices such Codes allow. The non Government animal welfare sector will need to continue to provide full and frank information to ensure that the community and consumers can make informed choices.

In conclusion

Current animal cruelty laws in Australia fail to protect all animals. The exemptions from full protection from cruel practices reflect the biases of a community which has largely been ignorant of the level of sentience of some animals (e.g. fish) and of cruel practices that occur without their knowledge (e.g. feral animal killing and factory farming practices). The level of knowledge within the community is growing and with it comes greater scrutiny of the practices of animal users. Inevitably, cruel practices will be shunned by informed consumers and our politicians will then also be urged to patch up and tighten the current inequitable and inadequate animal protection net.