

## CHAPTER 5

### Authorised Killing

**5.1** It is undoubtedly a feature of Australian anti-cruelty law that killing an animal is not *per se* a cruel act. This is probably a reflection of the law's view of animals as "property". Providing a person is not cruel in doing so, he or she is quite entitled to deal with his or her property (ie an animal owned by them) as they wish – and that includes killing it. This point was considered by the English case of *Patchett v Macdougall*<sup>1</sup> in which a dog had been shot and killed, but where there was no evidence before the court to say anything other than that the dog was killed instantaneously. Thus, the prosecution had not established the appellant had caused the animal to suffer. This position is expressly set out in section 85 of the Western Australian *Animal Welfare Act 2002*, which says that the death of an animal is not sufficient on its own to prove that the relevant person committed the offence with which he or she is charged under the Act.

#### *Slaughter*

**5.2** Killing an animal to turn it into food presents many opportunities to those involved and so inclined to inflict cruelty. Slaughterhouses are not public places. As Gleeson CJ said of the possum slaughterhouse in *ABC v Lenah Game Meats*<sup>2</sup> "like many other lawful animal slaughtering activities, the respondent's activities, if displayed to the public, would cause distress to some viewers." It is trite to say that, given slaughtering takes place behind closed doors, legislatures should be vigilant to ensure that slaughtering is done as humanely as possible.

**5.3** It is not surprising then that many of the early prosecutions in England brought by the Society for the Prevention of Cruelty to Animals involved cruelty in slaughterhouses, most notoriously London's Smithfield.<sup>3</sup> It was commonplace for animals to be driven for hundreds of miles, often unfed, calves were transported with their legs tied together, sheep were killed by whatever way the operators chose and calves were routinely bled to death while conscious.

Is killing an animal *per se* cruel? It seems arguable that if the killing is done humanely it is not cruel and therefore would not in any case be in breach of the cruelty statutes. Indeed, this concept is reflected in the wording of some of the defences or exemptions relating to slaughter in the cruelty statutes.

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1 (1984) SLT 152

2 (2001) 208 CLR 199

3 M Radford (2002) *Animal Welfare Law in Britain* Oxford: Oxford University Press (p43)

There is little consistency across jurisdictions regarding the provisions relating to the welfare of animals before and during the slaughter process. Some jurisdictions mention slaughtering in the relevant animal cruelty legislation. Others deal with it in legislation concerned with meat production and food safety.

### **Commonwealth Legislation**

**5.4** The slaughter of animals for meat for export is governed by the *Export Control Act* 1982 and its subsidiary legislation.<sup>4</sup> The *Export Control (Meat and Meat Products) Orders* 2005 are made under the *Export Control (Orders) Regulations* 1982. It refers to AS4696-2002.<sup>5</sup> The Orders say that: meat for export for food must be prepared at an establishment that is registered in respect of the operations for the preparation of the meat and meat products of the kind undertaken (“prepared” is defined by the Act to include “slaughtered”) (Order 29.1); the occupier of an establishment engaged in the preparation of meat...for export for food must ensure the applicable requirements of AS4696-2002 are complied with (Order 30); meat for export for food must be prepared in accordance with the requirements of AS4696-2002 (Order 42).

**5.5** Part 7 of AS4696-2002 deals with “animal welfare”. It describes the desired outcome as “the minimisation of the risk of injury, pain and suffering and the least practical disturbance to animals.” It contains provisions relating to handling of animals, dealing with young, injured, sick or stress susceptible animals and slaughter. Standard 7.10 says that it is a requirement that “before sticking commences animals are stunned in a way that ensures that the animals are unconscious and insensible to pain before sticking<sup>6</sup> occurs and do not regain consciousness or sensibility before dying.” Standard 7.12 deals with “ritual slaughter” (ie religious slaughter in accordance with Islamic or Judaic rite to produce Halal or kosher meat, respectively) carried out under an “approved arrangement”<sup>7</sup> which provides for sticking without prior stunning. The key provision is that an animal that is stuck without first being stunned and is not

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4 The Commonwealth may legislate in the area of slaughtering for meat for export, under the trade and commerce power of the Commonwealth *Constitution*; a State Act which sought to legislate in this area will be invalid by virtue of inconsistency with the Commonwealth legislation under s109 of the Commonwealth *Constitution: O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565

5 The *Australian standard for the hygienic production and transportation of meat and meat products for human consumption*: Order 8.1 (Note that there is a 2007 version of this Standard – but the Order refers to the 2002 version); note also section 25 of the Act says (relevantly): “an order may make provision for or in relation to a matter by applying, adopting or incorporating, with or without modification...any matter contained in any other instrument or writing as in force or existing at the time when the order takes effect; but an order shall not, except as provided by this subsection, make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.”

6 “sticking” is the cutting of the major blood vessels in the neck (ie the carotid arteries and jugular veins)

7 it is not entirely clear what an “approved arrangement” is, but it appears it is an arrangement approved by the State, Territory or Commonwealth authority responsible for overseeing the production of meat

rendered unconscious as part of its ritual slaughter is stunned without delay after it is stuck to ensure that it is rendered unconscious.

**5.6** AS4696-2002 contains the statement that “this Standard should be read in conjunction with the Guidelines developed by the Meat Standards Committee.”<sup>8</sup> On 5 February 2004 that committee published a Guideline saying in effect that slaughterers undertaking ritual slaughter of sheep where there was rapid severing of both carotid arteries and jugular veins could do so without stunning. This Guideline has been interpreted by several export abattoirs to authorise throat-cutting without stunning.<sup>9</sup> The view of the Committee is presumably influenced by suggestions that sheep lose consciousness rapidly following the severing of both carotid arteries and both jugular veins. Gregory & Wotton (1984)<sup>10</sup> reported that in such circumstances brain electrical activity (ie measured by electroencephalogram) ceased with a mean time of 14 seconds. The standard deviation for this measurement was such that it can be implied all the subject animals would lose consciousness within 17 seconds. Does this mean a sheep having its throat cut in this manner is “rendered unconscious as part of its ritual slaughter”? Given the next part of the Standard says that if this is not so, the animal must be stunned “without delay” the implication is that any significant “delay” before the onset of unconsciousness is not acceptable under the Standard.

**5.7** Regardless of all of this, in the author's view the relevant Guideline is in any case not to be read as part of AS4694-2002 (despite what that document says on the subject), as section 46AA of the Commonwealth *Acts Interpretation Act* 1901, which deals with the situation where provision is made in legislation regarding an instrument that is not a legislative instrument (ie AS4696-2002), which incorporates something in another “instrument or writing” (ie the Meat Standards Committee Guideline), prevents the incorporation of the second-mentioned instrument other than that instrument as it existed at the time the first-mentioned instrument took effect. In other words, the only Guidelines which could be read with AS4696-2002 are those which were in force at the time that Standard took effect. As the Guideline concerning stunning and religious slaughter was not published until 2004, it can not be read as part of AS4696-2002. This will all change when (if) the latest version of AS4696 (which came into effect in 2007) is adopted under the relevant legislation. At that point the Guideline may arguably be effective.

**5.8** While not legislation as such, the *Australian standard for construction of premises and hygienic production of poultry meat for human consumption*

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8 This is a committee within the Primary Industries Ministerial Committee system

9 See the article on the subject by Lorna Edwards in “The Age”, 19 September 2007

10 NB Gregory & SB Wotton (1984) Sheep slaughtering procedures II. Time to loss of brain responsiveness after exsanguination or cardiac arrest *British Veterinary Journal* 146, 354

(AS4465-2005) or a predecessor document is mentioned in certain States legislation. There are similar standards relating to game meat (AS4464-1997), rabbit meat (AS4466-1997) and other such products. The poultry Standard has a few sections relevant to animal welfare.<sup>11</sup>

## State and Territory Legislation

**5.9** In New South Wales section 24 of the *Prevention of Cruelty to Animals Act* 1979 provides a defence to prosecution for an offence under the Act where, in relation to a “stock animal”<sup>12</sup> the destroying or preparation of the animal for destruction for the purpose of producing food for human consumption is carried out in a manner that inflicted no unnecessary pain on the animal. The section also provides a defence in relation to actions “in the course of and for the purpose of destroying the animal or preparing the animal for destruction in accordance with the precepts of the Jewish religion or of any prescribed religion”. The *Food Regulation* 2004 (made under s102 of the *Food Act* 2003) deals with the regulation of slaughter at abattoirs.<sup>13</sup> Regulation 8 (read with regulations 6 and 62) requires an abattoir to be licensed. Regulation 66 says that the minimum standards for an abattoir include the standards in AS 4696-2002, as amended from time to time.<sup>14</sup> Regulation 67 says that the operation of an abattoir must comply with the requirements of that standard.

**5.10** In the context of religious slaughter, it is relevant to note that section 79 of the *Animal Welfare Act* 1999 (NT) says it is not a defence to a prosecution that the act or omission was in accordance with cultural, religious or traditional practices. The Northern Territory *Meat Industries Act* 1996 has as one of its objects “to ensure the humane slaughter of animals for human consumption, pet meat and bait meat”.<sup>15</sup> The Act does not apply to “private slaughter”.<sup>16</sup> Section 6 of that Act

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11 eg 15.21: moribund, unhealthy or rejected poultry shall be humanely killed immediately; 15.24 “all poultry shall be humanely killed”; 15.26: poultry for processing shall be rendered unconscious by an electric current, approved inert gas or dislocation of the head and must not regain consciousness before slaughter or rendered unconscious or slaughtered by a method that has been approved in writing by the controlling authority

12 defined by section 4 of the Act to mean an animal which belongs to the class of animals comprising cattle, horses, sheep, goats, deer, pigs, poultry and any other prescribed species

13 Regulation 60 defines an abattoir to mean premises used for or in connection with slaughtering: bulls, oxen, steers, cows, heifers, calves, rams, ewes, wethers, hoggets, lambs, goats, kids, pigs, buffalo, crocodile, deer, rabbits or birds, for human consumption and includes buildings used in connection with the slaughtering, handling, drafting or keeping of those animals for human consumption at any premises used and holding yards and the like

14 The current version is AS 4696-2007 *Australian standard for the hygienic production and transportation of meat and meat products for human consumption*

15 s3(c)

16 s5: “slaughter of an animal...where the animal is slaughtered by a person on land owned or occupied by the person for consumption of its meat principally on that land by the person, other persons who reside with the person, the person's employees or non-paying guests or paying guests where they are aware that the animal was slaughtered on the property and where they are not guests at a shop, roadhouse or other similar premises or slaughtered by a drover for consumption of its meat principally by the drover, members of the drover's family accompanying the drover or the drover's employees engaged on the drive or the drover's guests

seems to be in conflict with section 79 of the *Animal Welfare Act* 1999 in that it allows application for grant of a permit to slaughter an animal for religious purposes.<sup>17</sup> The *Meat Industries Act* provides for licences in relation to slaughter facilities.<sup>18</sup> Licences are subject to conditions which may be imposed, which may include compliance with a code of practice.<sup>19</sup> The website for the Department of Primary Industry states that slaughtering of animals at premises under a domestic abattoir licence shall comply with standards including the “Australian Standard for Hygienic Production of Meat for Human Consumption” and the “Australian Standard for the Transportation of Meat for Human Consumption”. It is not clear whether this is a reference to the “*Australian standard for the hygienic production and transportation of meat and meat products for human consumption – AS 4696-2007*”.<sup>20</sup> Curiously, the *Meat Industries Act* does not say that animals may only be slaughtered by a licensee;<sup>21</sup> however, the Act does say that sale of meat must be done under a licence.<sup>22</sup>

**5.11** The Queensland *Animal Care and Protection Act* 2001 and the South Australian *Welfare Act* 1985 both adopt the Commonwealth Code relating to the welfare of livestock at slaughtering establishments.<sup>23</sup> Persons who handle animals prior to slaughter and slaughter animals in accordance with that Code will in effect be immune from a cruelty prosecution under the relevant act (at least so far as it concerns those acts).<sup>24</sup> Compliance with the Code is in any case mandatory in South Australia.<sup>25</sup>

**5.12** The Code deals with matters including the design and construction of unloading ramps at abattoirs, the unloading process (including permissible handling procedures and use of electric prods, etc), identification of sick or injured animals, emergency slaughter, the layout and facilities of holding paddocks or yards, holding times, movement from holding pens to the slaughter floor and slaughter methods. There are detailed requirements relating to the slaughter of chickens.

**5.13** Although the Code says in effect that animals should be stunned prior to slaughter, the Queensland *Animal Care and Protection Act* 2001 by section 45 exempts a person from prosecution under that Act where “the act that constitutes

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17 Conditions can be specified on the permit, and there can be exemption from the provisions of the Act specified on the permit

18 s13

19 s20; s72 says that the Minister may declare a standard or code of practice, by gazettal

20 see <http://www.publish.csiro.au>

21 s34 says merely that slaughter for sale as meat must be in accordance with the Act

22 s33(a)

23 *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments* (2001) CSIRO Publishing (see <http://www.publish.csiro.au/books/>)

24 Queensland Act: Part 6; South Australian Act: s43

25 Regulations 10 and Schedule 2 *Prevention of Cruelty to Animals Regulations* 2000

the offence involves the slaughter, under a religious faith, of an animal”. There is no definition of “religious faith”. Thus, if slaughter under a religious faith essentially prohibited pre-slaughter stunning, it would be possible to do that without breaching the Act.

**5.14** In South Australia the relevant legislation is the *Primary Produce (Food Safety Schemes) Act* 2004 and the *Primary Produce (Food Safety Schemes) (Meat Industry) Regulations* 2006 made under section 11 of that Act. The Act provides for the adoption of “food safety arrangements” (s5) which deal with (amongst other things) operations involved in meat production (ss6-8). Producers must be accredited (s12; regulation 8)). Enforcement of the Act's provisions is done by “authorised persons” (ss25-30). Authorised persons can make compliance orders where legislative provisions are being contravened (ss31-32). Slaughtering of animals (except poultry, kangaroos or other game, rabbits or ratite birds<sup>26</sup>) must be done in compliance with AS4696:2002, as amended or substituted from time to time (regulation 12 and Schedule 1 of the Regulations). This means the relevant Standard is AS4696:2007.

**5.15** The Tasmanian *Meat Hygiene Act* 1985 deals with (amongst other things) the licensing of abattoirs. It does not apply to “farm slaughter”.<sup>27</sup> Section 7 of the Act says that a person must not operate a “meat premises” without a relevant licence.<sup>28</sup> Section 33 gives a power to inspectors to (amongst other things) give directions to the holder of a licence concerning the preparation for slaughtering animals and the slaughtering of animals, as well as the “humane management” of the premises. Regulations 9 and 19 respectively of the *Meat Hygiene Regulations* 2003 say that the applicable standard for slaughter of animals intended for human consumption, and for humane treatment of those animals is AS4696-2002.<sup>29</sup>

**5.16** Section 6 of the Victorian *Prevention of Cruelty to Animals Act* 1986 says the Act does not apply in relation to slaughter of animals in accordance with the *Meat Industry Act* 1993 or any Commonwealth Act. It also provides similarly in relation to slaughter of a farm animal on a farm if slaughtered for consumption on the farm and in a humane manner. Section 38 of the Victorian *Meat Industry Act*

26 The relevant codes applicable in those cases are AS4465:2001 *Australian Standard for the Construction of Premises and Hygienic Production of Poultry Meat for Human Consumption*; AS4464:1997 *Hygienic Production of Game Meat for Human Consumption*; AS4466:1997 *Hygienic Production of Rabbit Meat for Human Consumption*; AS5010:2001 *Hygienic Production of Ratite (Emu/Ostrich) Meat for Human Consumption*, in each case expressed to be the version as amended or substituted from time to time

27 s5: re any person slaughtering or causing to be slaughtered at his farm any animals belonging to him for consumption at that farm by that person his family guests or residents in his home or his employees or by animals kept by him (and similarly for birds)

28 s47 expressly prohibits slaughtering an abattoir animal or poultry except at licensed premises; “abattoir animal” means an animal which is not wild that is a bovine animal, a sheep, pig, goat or deer or an animal for which a standard or code is prescribed applicable to licensed meat premises

29 and the earlier version of the poultry Standard, AS4465-2001

1993 provides in essence that a facility for slaughtering animals for production of food must be licensed under the Act. Neither the Act nor the regulations made under it contain any reference to animal welfare or compliance with any slaughtering code which provides for animal welfare. Notwithstanding this, it appears that a person slaughtering animals under a licence under the *Meat Industry Act 1993* is effectively immune from the provisions of the *Prevention of Cruelty to Animals Act 1986*. This is not an acceptable situation, as it leaves provision for animal welfare in abattoirs to the discretion of those imposing conditions on licences.

**5.17** Section 22 of the Western Australian *Animal Welfare Act 2002* provides that it is a defence to a prosecution under that Act for a person to prove that he or she was authorised by or under a written law to do the act alleged to constitute the offence and the act was done in a humane manner. Sections 17 and 23 of the *Western Australian Meat Industry Authority Act 1976* (WA) are to the effect that it is an offence for a person to operate an abattoir without the written approval of the Authority. Neither the Act nor the regulations say anything about animal welfare during slaughter.

***“Control” or “harvesting” of wildlife,<sup>30</sup> “feral animals” and other unwanted animals***

**5.18** It is worth noting at the outset that it is still the case at common law that, without more, a landowner has the right to hunt and kill wild animals on his or her land.<sup>31</sup>

Shooting, poisoning and trapping are all methods which can be used to dispose of wildlife or “feral” animals which those with the power to do so decide are either too populous, pose a threat to the environment or impact negatively on money-making ventures, for example by eating crops. Some of these sorts of activities are also carried out as killing for fun or killing for profit. Killing in these sorts of guises is described by euphemisms such as “control”, “hunting” and “harvesting”. There is a particular issue concerning cruelty to animals in indigenous hunting.<sup>32</sup>

Because the prevailing attitude is that the killing of wildlife or “feral” animals in these circumstances is “necessary”, there has been little real consideration of

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30 There is a useful review by Lyndy Scott on the DAFF website, which is a final report of animal welfare arrangements for animals in the wild, produced as part of the AAWS process (see <http://www.daff.gov.au/animal-plant-health/welfare/aaws/stocktake>). It also contains the text of a very helpful commentary on indigenous hunting and animal welfare by Dominique Thiriet: (2007) “Out of the too hard basket – traditional hunting and animal welfare” *Environment Protection Law Journal* 24, 59

31 *Sutton v Moody* (1697) 91 ER 1063

32 see Thiriet D (2004) Tradition and change – avenues for improving animal welfare in indigenous hunting *James Cook University Law Review* 8 (at <http://www.austlii.edu.au/au/journals/JCULRev8>)

whether those activities are cruel or not. Those involved in these activities in the main assume that this killing of animals is not an offence under the anti-cruelty laws.

The legislative response, where there is one, has been to set out codes, procedures or “plans” for killing these animals. In some cases compliance with a code is a condition of a licence. In other cases the relevant documents serve only an advisory purpose.

**5.19** “Feral” animals (as opposed to “native” or “domestic” animals) are animals introduced by humans to Australia and which are now living in the wild. These include horses, camels, cats, dogs, foxes, pigs and rabbits. There is no doubt that such animals do cause damage to human economic interests and to other animals, including native species. For example, the Invasive Animals Cooperative Research Centre estimates there are between 4 and 23 million feral pigs in Australia, said to cause an estimated \$106 million per annum worth of damage to livestock, infrastructure, etc;<sup>33</sup> Thiriet has referred to a report which estimates the damage caused by the 11 major introduced species at \$720 million per annum.<sup>34</sup> However, despite having been introduced by humans in the first place, “feral” animals have nevertheless become the target of public vilification, particularly by farming groups, and government campaigns aimed at killing large numbers of these animals. A cynic might say that this sort of targetting of these unfortunate creatures is but a distraction from the real causes of damage to the environment and biodiversity, that is human development in all its forms, including land clearing for housing and to create grazing for farmed animals. That same cynic might also point out that damage to farmers' crops and animals by “feral” animals can be prevented easily by erecting suitable barriers. However, the reality is that such measures are costly, farmers want to maximise profits, and it is much cheaper in the main to poison, trap or shoot the alleged offenders. It is even cheaper for the farmers if they can convince governments that “feral” animals are a cause of their financial woes and persuade those governments to spend taxpayer money poisoning, shooting and trapping them.

There is an incidental danger of labelling an animal as a “pest”, “feral” or “vermin” (or equivalent); it has the effect of demonising that species, and potentially encouraging cruel practices against those animals. This is of particular concern given that shooting, poisoning and other potentially cruel killing practices are usually done well away from the public gaze.

Although it is not clear how many such animals are killed each year, Thiriet has

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<sup>33</sup> See <http://www.invasiveanimals.com/invasive-animals/pigs/index.html>

<sup>34</sup> Thiriet, D (2007) In the spotlight – the welfare of introduced wild animals in Australia 24 *Environment Protection Law Journal* 417



suggested on the basis of published figures that there may be many millions.<sup>35</sup>

**5.20** So far as feral animals are concerned, the recent publication by Sharp and Saunders<sup>36</sup> gives an excellent overview and review of the status of methods for “control”. The authors note that inhumane methods are in use for control of feral animals, in particular pigs and rabbits. Those methods include the use of poisons (such as anticoagulants, yellow phosphorus, metabolic poisons such as 1080 and chloropicrin), warren blasting and ripping. Concern was expressed about the use of strychnine-soaked cloths on foot-hold traps (eg for dogs), as variation in dosages used raised the possibility that trapped dogs ingesting a small amount may take up to 24 hours to die. In any case, the report notes that use of strychnine is inhumane. The report also raises the question of poisoning by 1080 of non-target species (including native species). The same was said of pindone (an anticoagulant usually used for poisoning rabbits). Catching of animals such as feral pigs by dogs was said to be a matter of concern.

There can be little doubt that killing any animal by poisoning is potentially inhumane. Thiriet<sup>37</sup> refers to several reports and statements to the effect that poisoning with 1080 can apparently cause severe distress to animals for period from hours to days, with similar observations for anticoagulants and other poisons. It goes without saying that trapping animals in steel-jawed or other traps is probably cruel, while shooting animals can not be guaranteed to cause a quick death. McEwen has provided a useful summary of techniques currently in use and the possibility of increasing use of fertility control as a more welfare friendly approach.<sup>38</sup> Thus, without more, poisoning, shooting or trapping an animal, whether native or “feral”, would probably be in breach of the relevant anti-cruelty statute. As with slaughter, it may be a court would regard the “control” of “feral” animals in this way as not involving “unreasonable” or “unnecessary” cruelty – in which case the relevant laws would not be breached, in the main. This perhaps explains why the legislation, codes and plans which deal with killing “feral” animals do not focus much on welfare issues, but rather focus on the mechanics of killing the animals.

**5.21** Regardless of the legislative framework dealing with this killing, it appears that the enforcement of any animal welfare requirements which might be imposed (for example as a condition of a trapper's licence) would be almost impossible to enforce or oversee. Most of these killing activities take place in country and bush areas, well away from the public gaze; indeed professional killing of native wildlife is usually done at night. For example, in the case of Kangaroo Management Plans

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35 Footnote 34

36 Sharp, T & Saunders, G (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>)

37 Footnote 34

38 McEwen G (2008) The challenge posed by feral animals *Reform* 91, 30

adopted in various States, RSPCA Australia reported that enforcement involved inspection for any “incidence of cruelty” “usually by recording any body-shot kangaroos...during monitoring of chillers and processors”.<sup>39</sup> This presupposes that a shooter who had killed a kangaroo with a body shot rather than a head shot (the former of which could be regarded as inhumane killing) would expose themselves to the risk of prosecution or loss of their licence by seeking to process the carcase. This seems highly unlikely.<sup>40</sup>

## Commonwealth

**5.22** There is a growing movement towards the development of codes of practice seeking to set out “acceptable” procedures for the killing of “feral” animals.<sup>41</sup> Adoption of such codes by States and Territories legislatures has been patchy and inconsistent; codes which are not adopted have no legal effect. The Commonwealth Code concerning feral livestock animals<sup>42</sup> has been adopted under the animal cruelty statutes of the Northern Territory, Queensland, South Australia and Western Australia. The Code includes statements such as “methods used [for culling] should involve the lowest level of suffering consistent with effective control” and “culling...should be carried out with due regard to the welfare of the animals involved.” It says that “poisoning using unregistered poisons which cause severe and prolonged pain, denial of water, wounding of animals so that they will die away from the shooting area and trapping without prompt destruction” are unacceptable on animal welfare grounds. Regarding poisoning, the Code says it should not be used where more human, economic and practical alternatives are available. It notes that an effective humane poison is one which has an initial depressant action on the animal's nervous system, and that unsatisfactory poisons are those likely to cause prolonged and severe pain or discomfort prior to death. It provides guidelines on shooting animals and particularly focuses on the need to be able to kill an animal cleanly and quickly.

**5.23** The federal Australian Animal Welfare Strategy says that its “vision” of promoting the welfare of all animals in Australia extends to the “care, uses and direct and indirect impacts of human activity on all sentient species...”, specifically expressed to include “introduced wildlife and feral animals”. In the author's view, this laudable aim is probably little more than a pipe dream.

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39 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 (see <http://www.environment.gov.au/biodiversity/trade-use/publications/kangaroo-report/examination.html>)

40 See Footnote 62, paragraph 202

41 see Sharp, T & Saunders, G (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>)

42 *Model Code of Practice for the Welfare of Animals – Feral Livestock Animals; Destruction or Capture, Handling and Marketing* (2002) (<http://www.publish.csiro.au>)

**5.24** There are provisions in the *Environment Protection and Biodiversity Conservation Act 1999* (the “EPBC Act”) which in effect allow the “control” (including killing and eradication) of animals which are declared to be part of a “key threatening process” which may impact negatively on a listed threatened species.<sup>43</sup> The listed key threatening processes at the time of writing include competition and land degradation by feral goats and by feral rabbits, predation by feral cats and the European red fox and predation, habitat degradation, competition and disease transmission by feral pigs.<sup>44</sup> Division 5 of the Act concerns (amongst other things) the development and approval of “threat abatement plans”. Before deciding to have such a plan, the Minister must consult with the scientific committee established under the Act and consult with those likely to be affected by a plan, including governments of States and Territories.<sup>45</sup> A plan may be made jointly with a State or Territory.<sup>46</sup> Approved threat abatement plans relate to feral goats, feral rabbits, the European red fox, feral cats and feral pigs.<sup>47</sup> All of these plans were under review at the time of writing, apart from the plan for feral pigs. As an example of consideration of animal welfare issues, the Threat Abatement Plan for feral pigs (published in 2005) notes that there is some doubt about the use of the anticoagulant warfarin to poison feral pigs and animal welfare concerns about the use of yellow phosphorus (CSSP). Ground shooting, while acknowledged by many to be the “best” approach from the animal welfare point of view, when it is conducted by an expert shooter, is regarded as too labour intensive. The plan remarks that there are animal welfare concerns about the use of dogs to hunt and kill feral pigs.

**5.25** Division 3 of the EPBC Act concerns the regulation and licensing of the export of products (including meat) of native animals. It is an offence to export such products without a permit.<sup>48</sup> The EPBC Act also contains provisions requiring the development and approval of wildlife trade management plans in relation to the commercial export of wildlife products.<sup>49</sup> Those plans must be consistent with the objects of Part 13A of the EPBC Act<sup>50</sup> and must not be detrimental to the species to which the plan relates. In resolving whether to declare a plan the Minister must be satisfied that if an animal is killed it is done in a way that is generally accepted to minimise pain and suffering and that the animal is killed in a way that is known to result in minimal stress and risk of injury to the animal.<sup>51</sup>

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43 s183 provides that the Minister must establish a list of key threatening processes.

44 <http://www.environment.gov.au/cgi-bin/sprat/public/publicgetkeythreats.pl>

45 s270A

46 s270B

47 <http://www.environment.gov.au/biodiversity/threatened/tap-approved.html>

48 s303DD

49 s303FO(2) EPBC Act

50 which include the promotion of the humane treatment of wildlife: s303BA(1) EPBC Act

51 see Regulation 9A.05 *Environment Protection and Biodiversity Conservation Regulations 2000*, which sets out conditions for (relevantly) section 303FO(3)(f) of the EPBC Act

## State and Territory

### 5.26 ACT

The provisions of the *Animal Welfare Act* 1992 relating to administering or laying poisons make it an offence in essence to poison a “domestic or native” animal. A “native animal” is defined by the *Nature Conservation Act* 1980. Does the failure to refer to feral animals imply that it is not a breach of the Act to poison a feral animal? Probably not.<sup>52</sup>

Another factor is there has not been adoption of the provision of the *Animal Welfare Act* providing a “defence” to prosecution where a code of practice has been complied with. Consequently, even though codes of practice concerning “fox control” and “trapping” have been adopted, they are of no legal effect.

Sections 44 and 45 of the *Nature Conservation Act* 1980 prohibit taking or killing a native animal without a licence. There are higher penalties for the offence where the relevant animal has “special protection status”.

Under section 16 of the *Pest Plants and Animals Act* 2005 the responsible Minister may declare an animal to be a pest animal. He or she may prepare a “pest animal management plan” for the management of a pest animal.<sup>53</sup>

The *Pest Plants and Animals (Pest Animals) Declaration* 2005 (No 1) declares that a range of species are “pest animals”. These include wild pigs, rabbits, dingos and goats, but does not include brumbies (“feral horses”).

The ACT government has established several “pest animal management plans”, most notably in relation to the “control” of pest animals in Namadgi National Park. The plan relating to feral pigs specifically purports to sanction the poisoning of those animals with warfarin. This is clearly a cruel practice. This instrument does not have any legal effect in modifying the breach of the *Animal Welfare Act* 1992 which would appear to be associated with poisoning pigs. However, that Act is irrelevant where the poisoning (etc) is done by the government, its agents, employees or contractors, as they are essentially immune from prosecution.<sup>54</sup>

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52 Applying the maxim *expressio unius est exclusio alterius* (an express reference to one matter indicates that other matters are excluded). See, however, the discussion of case law relating to the application of this maxim in Pearce DC & Geddes RS *Statutory Interpretation in Australia* (2006) 6th edition, at page 139 and in particular the reference to *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88, 94, in which the High Court said “it is not of universal application and applies only when the intention it expresses is discoverable upon the face of the instrument.”

53 s17

54 s121(3) *Legislation Act* 2001

### 5.27 *New South Wales*

There are no provisions in the *Prevention of Cruelty to Animals Act 1979* relating to poisoning of “feral” animals.<sup>55</sup>

Section 24(1)(b)(i) of the *Prevention of Cruelty to Animals Act 1979* provides a defence to a prosecution for cruelty under the act where the subject act or omission was done in the course of and for the purpose of hunting, shooting, snaring, trapping, catching or capturing an animal “in a manner that inflicted no unnecessary pain upon the animal.”

**5.28** Section 143 of the *Rural Lands Protection Act 1998* provides that the Minister may make pest control orders which may include empowering an authorised officer to take measures to eradicate a pest.<sup>56</sup> That order must not specify any method of eradication that would constitute an act of cruelty within the meaning of the *Prevention of Cruelty to Animals Act 1979*. Division 3 of that Act allows “eradication orders” to be made concerning a pest.

**5.29** Part 5 of the *Threatened Species Conservation Act 1995* deals with “threat abatement plans” to manage “key threatening processes” in relation to a listed threatened species. “Key threatening processes” include competition and habitat degradation by feral goats, feral European rabbits, herbivory and environmental degradation caused by feral deer, predation by the European red fox, predation by feral cats and predation, habitat degradation, competition and disease transmission by feral pigs, death or injury to marine species following capture in shark control programs on ocean beaches and predation by ship rats on Lord Howe Island (see Schedule 3). The plan for feral foxes<sup>57</sup> refers to poisoning of the animals with 1080-containing baits. The plan acknowledges that “animal welfare is an important consideration in the methods employed in fox control” but does not address that consideration other than to say that the plan will minimise negative impacts on non-target species.

**5.30** The *Game and Feral Animal Control Act 2002* has as its objects the “effective management of introduced species of game animals” and the promotion of “responsible and orderly hunting” of game animals on public and private land of (certain) pest animals on public land.<sup>58</sup> Nothing in that Act affects the operation of the *Prevention of Cruelty to Animals Act 1979*.<sup>59</sup> In essence the Act is concerned

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55 Section 15 deals with poisoning of domestic animals

56 There must be public notice of a proposal to make an order (s146) and consultation with any public authority occupying relevant land (s147), although those requirements may be waived by the Minister if in his or her opinion it is in the public interest to do so (s148)

57 <http://www.environment.nsw.gov.au/resources/pestsweeds/RedfoxApproved.pdf>

58 section 3; section 5 defines a “game animal” as deer, California quail, pheasant, partridge, peafowl, turkey, pig, dog, cat, goat, rabbit, hare, and fox, where those animals are living in the wild

59 s6

with granting licences allowing the hunting of “game animals”. Section 24 of the Act provides that the Minister must approve a code of practice for the holders of game hunting licences; regulation 18 (read with Schedules 1 and 2) of the *Game and Feral Animal Control Regulation 2004* set out the conditions of the licences. These include that “an animal being hunted must not be inflicted with unnecessary pain”. This in essence is said to be done by making sure that the equipment and technique used to kill the animal is reasonably able to ensure the animal is humanely killed. There is also a condition that where an animal is wounded, the hunter must take all reasonable steps to locate it so that it can be killed quickly and humanely.

**5.31** The *National Parks and Wildlife Act 1974* allows the preparation of management plans,<sup>60</sup> which may take into consideration the maintenance of populations of threatened species. That Act also provides for the issuing of licences including a “general licence” an “occupier’s licence” and a “commercial fauna harvester’s licence”, allowing the killing of animals, the latter for the purposes of sale.<sup>61</sup> Commercial fauna harvester’s licences are subject to the condition that kangaroos killed must be shot in accordance with the Commonwealth *Code of Practice for the Humane Shooting of Kangaroos*<sup>62</sup> That Code says that the shooter must ensure a sudden and painless death for the target animal. This is said to be achieved by “the projectile striking the brain of the target animal.” Wounded kangaroos “must be despatched as quickly and humanely as possible.” Shot females must be examined for pouch young and if it is present it must be killed. The killing method for very small hairless young is decapitation with a sharp instrument, or a properly executed heavy blow “to destroy the brain”. The meaning of these provisions is uncertain, to say the least. The most recent Kangaroo Management Plan has adopted the contents of this Code. Note that the adoption of this plan was the subject of an unsuccessful appeal to the Administrative Appeals Tribunal under section 303GJ(1) of the EPBC Act.<sup>63</sup> The applicant’s submissions argued strongly that these provisions allow the inhumane and cruel treatment of kangaroos and their young. They pointed out that young at foot which escape into the bush when their mothers are shot are likely to suffer, either by being taken by predators, or by starving. The Tribunal did not accept that this amounted to a failure to ensure the animals were killed humanely and regarded killing in compliance with the Code as minimising pain and suffering to the animals concerned.<sup>64</sup>

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60 s72

61 ss120, 121 and 123, respectively

62 (1990); see <http://www.environment.nsw.gov.au>; detail of the conditions are set out in *Wildlife Protection Association of Australia Inc v Minister for the Environment, Heritage and the Arts (Cth)* [2008] AATA 717

63 *Wildlife Protection Association of Australia Inc v Minister for the Environment, Heritage and the Arts (Cth)* [2008] AATA 717; see the submissions at <http://www.kangaroo-protection-coalition.com/nswaatappeal2008.html>; note that the ability to appeal a decision made personally by the Minister in this regard has been removed in the current version of the Act

64 The Tribunal referred to its earlier decision on this aspect of the Code in *Wildlife Protection Association of*

### 5.32 Northern Territory

The *Animal Welfare Act 1999* makes it an offence to poison an animal unless the action is authorised by a Territory law.<sup>65</sup>

The *Territory Parks and Wildlife Conservation Act 1977* provides for the development of wildlife management programs and management programs for the control and management of feral animals.<sup>66</sup> A species of animal can be declared feral under section 47 of that Act. Section 45 of the Act provides that the Minister may by gazettal declare that it is lawful to kill animals of a specified species of protected wildlife (which term means indigenous wildlife in a park, sanctuary, etc). Section 47 provides that the Minister may by gazettal declare an animal species to be feral. The Act also provides for permits for the killing of protected wildlife, including for commercial purposes.<sup>67</sup>

### 5.33 Queensland

Poisoning an animal is prohibited by section 36 *Animal Care and Protection Act 2001*; section 42 of the Act provides an “offence exemption” against a cruelty prosecution for an act done to a feral animal if the act is done in a way that causes the animal as little pain as is reasonable and the control complies with any conditions prescribed. This again raises the question as to what is “reasonable” as an act intended to “control” “feral” animals. Even if the Act is breached by the government, there can be no prosecution.<sup>68</sup>

**5.34** The *Nature Conservation Act 1992* provides that it is an offence for an unauthorised person to kill a protected animal.<sup>69</sup> Section 97 of that Act relates to native wildlife in an area identified under a conservation plan as including a critical habitat or an area of major interest. It says that only an authorised person may kill the wildlife other than under the conservation plan or a relevant licence, permit or other authority. A regulation or conservation plan cannot authorise the recreational hunting of native ducks or native quail.<sup>70</sup> Part 3, Division 5 of the *Nature Conservation (Wildlife Management) Regulation 2006* deals with “commercial wildlife harvesting licences” (in relation to protected animals). Part 3, Division 6 of the Regulation concerns “recreational wildlife harvesting licences”. In both cases the killing must be done in a “quick and humane way”.<sup>71</sup> Division 2 of Part 4 allows the grant of “damage mitigation permits” which allows the killing of a protected animal which is causing (or may cause) damage to property or represents

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*Australia Inc and Minister for the Environment and Heritage*[2004] AATA 1383

65 s17

66 s32

67 s55; it is an offence to kill protected wildlife without a permit: s66, or to kill unprotected wildlife for commercial purposes without a permit: s67

68 s5(2) of the Act

69 s88; see also *Nature Conservation (Wildlife Management) Regulation 2006*

70 s97A

71 regs 115 and 123, respectively

“a threat to human health or wellbeing”. Regulations 185 and 186 of the Regulation provides that the proposed killing method must be humane and not likely to cause unnecessary suffering to the animal.

**5.35** Under the *Nature Conservation (Wildlife) Regulations 2006* the red kangaroo, the eastern grey kangaroo and the common wallaroo are “species of least concern” wildlife that may be subject to a declared harvest period. There is a “Wildlife trade management plan for export – commercially harvested macropods 2008-2012” for Queensland which has been adopted under the EPBC Act provisions.<sup>72</sup> It refers to the requirement for “harvesters” to comply with the “Code of practice for the humane shooting of kangaroos”. The killing of macropods is regulated by the *Nature Conservation (Macropod) Conservation Plan 2005*. It must be done in a “quick and humane way”.<sup>73</sup>

**5.36** Finally, the *Land Protection (Pest and Stock Route Management) Act 2002* in Part 5 provides for declarations that an animal species is a “pest”. It allows for the preparation of pest management strategies in relation to those animals.<sup>74</sup> The *Land Protection (Pest and Stock Route Management) Regulations 2003* provides that “Class 2 pests” include feral cats, foxes, dingos, dogs, goats, rabbits and pigs, while native animals are said not to be “Class 1 pests”.<sup>75</sup>

### **5.37** *South Australia*

There is no specific provision relating to poisoning animals (“feral” or otherwise); the general “ill-treatment” provision of the *Animal Welfare Act* (s13) will probably apply to poisoning.<sup>76</sup>

Chapter 8 of the *Natural Resources Management Act 2004* concerns the “control of plants and animals”. It allows the categorisation of species of animals and the making of orders (to be complied with by owners of land) relating to the control or destruction of animals in certain categories, or the taking of other prescribed steps.<sup>77</sup>

**5.38** Under s53 of the *National Parks and Wildlife Act 1972* the Minister may

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72 see <http://www.environment.gov.au/biodiversity/trade-use/sources/management-plans/pubs/qld-kangaroo-08.pdf>

73 reg 14; the holder of an authority is taken to have killed the macropod in a quick and humane way if they comply with the relevant code of practice for macropods; the “relevant code of practice” in the case of kangaroos is the “Code of practice for the humane shooting of kangaroos”: see <http://www.environment.gov.au/biodiversity/trade-use/wild-harvest/kangaroo/practice.html>. This requires a shot to the brain to kill kangaroos, or a shot to the heart in the case of injured or wounded kangaroos;

74 see [http://www.dpi.qld.gov.au/cps/rde/dpi/hs.xml/4790\\_8259\\_ENA\\_HRML\\_hm](http://www.dpi.qld.gov.au/cps/rde/dpi/hs.xml/4790_8259_ENA_HRML_hm)

75 A “Class 1 pest” is one which is not commonly present or established in the State and has the potential to cause an adverse economic environmental or social impact, while a “Class 2 pest” is established in the State and is causing that sort of damage (s38 of the Act), as declared.

76 It is an offence to kill an animal in a manner that causes the animal unnecessary pain

77 ss182, 187



grant a permit allowing the killing of a protected animal (which includes native animals) for reasons including to permit the destruction or removal of animals that are causing or a likely to cause damage to the environment, or to crops, stock etc. Section 68A of the Act also provides that hunting is not permitted without a permit under the section. A permit is not required for the destruction of animals that are causing damage to crops, stock or other property on land.<sup>78</sup>

The “harvesting” of kangaroos is dealt with under the *National Parks and Wildlife (Kangaroo Harvesting) Regulations 2003*. Regulation 22 says that shooting of kangaroos must be in accordance with the *Code of Practice for the Humane Shooting of Kangaroos* and that the kangaroo has not suffered damage from a firearm other than damage to the head or damage to the head and such damage as results from a single shot to the heart (otherwise sale or supply of the carcass is prohibited).

**5.39** The *Wilderness Protection Act 1992* (Division 3 of Part 3) provides for the establishment and implementation of a code of management for wilderness areas. The “Wilderness protection areas and zones code of management” says (amongst other things) that the objectives include control and where practical the eradication of non-indigenous animals. The Code specifically says that non-indigenous species which significantly affect the wilderness quality of a wilderness area will be controlled or eradicated. There is no mention of animal welfare considerations.

#### **5.40** *Tasmania*

s4(1) of the *Animal Welfare Act 1993* says that the provisions relating to cruelty do not apply to practices used in the hunting of animals “done in a usual and reasonable manner” and without causing excess suffering.

Section 8 of the Act provides that it is an offence to poison an animal, but “controlling a pest animal” by poisoning is not an offence.<sup>79</sup>

**5.41** The *Wildlife Regulations 1999* are made under the *National Parks and Wildlife Act 1970* (repealed: see *Nature Conservation Act 2002* and transitional provision 7 of that Act, which says the Regulations are taken to have been made under this Act). Regulation 6 allows the issue of licences and permits in relation to certain activities, including licences allowing the killing of wallabies. Regulation 13 allows the issue of a permit allowing the killing of wildlife for the purpose of preventing destruction of or injury to stock or plants. It is an offence to kill “specially protected”, “protected” or “partly protected” wildlife without an appropriate permit.<sup>80</sup> The adoption of the King Island and Flinders Island

<sup>78</sup> Where the “destruction” is done by the land owner, a member of his or her household or an employee or agent of the land owner

<sup>79</sup> A “pest animal” is a member of a species entered in the “pest register”: s8A

<sup>80</sup> regs 15 – 17, respectively (see also Schedules 1-4).

Management Plans for commercial killing of wallabies and pademelons was unsuccessfully challenged in the Administrative Appeals Tribunal.<sup>81</sup>

**5.42** The *Threatened Species Protection Act* 1995 provides for the making of a threatened species strategy, which includes the development of proposals for the identification and proper management of threatening processes.<sup>82</sup> Section 27 of that Act provides for the preparation of threat abatement plans for threatening processes.

#### **5.43** *Victoria*

Section 9 of the *Prevention of Cruelty to Animals Act* 1986 makes it an offence to poison an animal other than in accordance with the *Catchment and Land Protection Act* 1994 or the *Wildlife Act* 1975.

The *Flora and Fauna Guarantee Act* 1988 deals with the making of management plans in relation to a potentially threatening process.<sup>83</sup> For example, there is an action statement relating to the predation of native wildlife by the red fox and by feral cats (listed as potentially threatening processes).

**5.44** The *Wildlife Act* 1975 concerns (relevantly) the grant of licences for hunting wildlife.<sup>84</sup> It is an offence to kill “endangered”, “notable” or “protected” wildlife.<sup>85</sup> Regulations made under that Act control and licence commercial and “recreational” hunting.<sup>86</sup>

Under the *Catchment and Land Protection Act* 1994 the Minister may declare species of animals to be “prohibited”, “controlled”, “regulated” or “established”.<sup>87</sup> An order may be given to a land owner that an established pest animal be controlled or eradicated.<sup>88</sup>

#### **5.45** *Western Australia*

Section 19 of the *Animal Welfare Act* 2002 says it is an offence to poison an animal, but it is a defence to a cruelty prosecution under the Act for a person to prove that the relevant act was done while the person was attempting to kill pests in a manner generally accepted as usual and reasonable for pests of the kind.<sup>89</sup>

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81 *Re The Wildlife Protection Association of Australia Inc and Minister for Environment and Heritage* [2006] AATA 953

82 s10

83 Part 3, Division 3

84 Part III

85 ss41-43, respectively

86 *Wildlife (Game) Regulations* 2004; *Wildlife Regulations* 2001

87 ss64-67, respectively

88 s70B

89 s24

**5.46** The *Wildlife Conservation Act* 1950 makes it an offence to kill protected fauna without an appropriate licence.<sup>90</sup> The *Wildlife Conservation Regulations* 1970 allow the issue of licences for killing protected fauna which are causing damage to property.<sup>91</sup> Regulation 6 provides for the issue of licences permitting the killing of kangaroos for sale.

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90 s16

91 Regulation 5