

## Legal frameworks for wild animal welfare

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### Introduction

The development of legal frameworks for wild animal welfare remains in its early stages in Australia. As yet, no Australian State or Territory has created a legislative scheme that is expressly intended to promote positive welfare states and minimise negative welfare states for individual wild animals. However, each State and Territory does have a patchwork of statutory provisions, located within nature conservation and animal cruelty legislation, that operate to make some forms of harm to individual wild animals “legally cognisable” and to regulate some human actions that cause those harms.

This paper describes features of these patchwork legal frameworks for wild animal welfare in Australia. It deals with the legal frameworks for free-ranging wild animals (i.e. animals in a condition of “natural liberty”) and does not address legal frameworks for wild animals who are in the care, custody or possession of a person (e.g. for rehabilitation).

### Foundations for legal frameworks in Australia

Legal frameworks for wild animal welfare in Australia are largely founded largely in State and Territory nature conservation and animal cruelty legislation. However, Commonwealth legislation, and specifically the *Environment Protection and Biodiversity Conservation Act 1999*, also provides a legal framework for wild animal welfare, particularly to fill gaps where State and Territory legislation does not extend to or has a more problematic application, e.g. offshore environments.

State parliaments have, subject to the *Australian Constitution*, plenary legislative power to make laws for the peace, welfare and good government of the State. It is a long-standing legal principle that native animals belong to the people of the State. The notion that native animals belong to the people underpins the statutory vesting of property in fauna in the State (or “Crown”) under nature conservation legislation. In *Yanner v Eaton* (1999) 201 CLR 351, the High Court of Australia observed that such vesting represents “a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource” which imposes upon a State a “sort of guardianship for social purposes” in relation to that resource.

### How laws work – legal effect on natural and corporate persons

Legal systems focus upon the regulation of human conduct. The laws which comprise a legal system operate through their legal effect on “natural persons” (human beings) and “corporate persons” (corporations and incorporated associations). Laws create rights, duties, powers, liabilities, liberties, and liabilities for natural and corporate persons. Some of these can only apply to natural persons – e.g. you can’t sentence a corporation to prison.

Criminal laws operate by creating a norm of conduct and attaching a penalty if a person or organisation breaches that norm. An offence is an act or omission (or a series of acts and omissions) that makes a person liable for punishment. The effect of a creating an offence is

to impose a “public duty” on persons which is owed to society generally and not to any particular person. For example, the legal effect of a prohibition on cruelty to animals is to create a duty not to be cruel to individual animals.

Laws may also operate by creating legal relationships between persons. Such relationships are vital for the operation of the civil law in Australia. For example, entering into a contract creates legal rights and correlative legal duties for the contracting parties. Similarly, the law of negligence recognises that some persons may have a duty of care that is owed to other persons.

At least three other features of Australian legal systems are relevant to understanding legal frameworks for wild animal welfare in Australia.

First, although these legal frameworks are largely founded in statutory law, native title and common law rights relating to wild animals are also important, to the extent that these rights have not been extinguished or rendered inoperative because of the imposition of statutory law.

Second, persons may obtain or be granted a proprietary interest in a wild living natural resource (e.g. a stock of fish). The effect of these proprietary interests is to give that person a “bundle” of rights in relation to that resource.

Finally, legal frameworks for wild animal welfare also include legislative schemes for authorising actions and activities that harm individual wild animals, either as a purpose of the action or activity (e.g. harvesting of wildlife) or as consequence of it (e.g. clearing of native vegetation). The legal framework regulating the exercise of a statutory power to approve an action or activity may require or prohibit a decision-maker to take wild animal welfare into account. More commonly, however, the legal frameworks for administrative decision-making will make wild animal welfare a permissible, but not a mandatory or prohibited, consideration for decision-makers.

The legal status of wild animals in Australia is complex. The effect of the legal frameworks for wild animal welfare is that individual animals may be the beneficiary of laws that operate to restrict or prevent human actions. Similarly, it is appropriate to talk about individuals as being the victim of certain offences. And, at least conceptually, we can talk about individual animals having a liability to being harmed or an immunity from being harmed. However, Australian legal systems have not yet developed to the point where wild animals have legal personhood in the sense of possessing liabilities or immunities (or powers, liberties, or positive rights/claims over other persons) because of their status as wild animals. In other words, wild animals have not yet been integrated into legal systems as animal “persons” capable of holding and exercising rights, powers, liabilities, immunities, etc. in the way that natural and corporate persons do, or of participating in the web of legal relationships that exists among natural and corporate persons.

### **Making harm legally cognisable**

Human actions may harm the welfare of individual animals by causing some immediate or longer-term adverse change to the animal’s physical or mental state involving physical injuries, other pathological conditions, pain, and psychological distress to individual animals.<sup>1, 2</sup> Human actions may also affect wild animal welfare by depriving animals of positive welfare states (e.g. actions which remove animals from the wild or prevent animals from engaging in natural behaviours).<sup>3</sup>

To influence wild animal welfare, laws must make a form of harm to individual wild animals “legally cognisable” and allow for a causal link to be made between this harm and a specific human action (or activity).

In broad terms, a harm is legally cognisable if it falls within the meaning of a statutory word or phrase, either expressly (the harm is stated in the text of the statute) or as a matter of statutory construction (i.e. the interpretation of the meaning of the statute and its application to particular factual circumstances).

Definitions of “harm” in animal cruelty statutes have expressly recognised a broad range of harms. For example, section 3 of the South Australian *Animal Welfare Act 1985* defines ‘harm’ to mean any form of damage, pain, suffering or distress (including unconsciousness), whether arising from injury, disease or any other condition, and section 5 of the Western Australian *Animal Welfare Act 2002* defines ‘harm’ to include injury, pain and distress evidenced by severe, abnormal physiological or behavioural reactions.

The statutory text may also indicate whether wild animal welfare is a permissible consideration for an administrative decision-maker. For example, section 3(1) of the Western Australian *Environmental Protection Act 1986* (WA) defines “environment” to mean: “living things, their physical, biological and social surroundings, and interactions between all of these”. Thus, the harming or killing of a ‘living thing’ falls within the concept of an “effect” on the “environment” that a decision-maker could have regard to in assessing the environmental impact of a proposed development.

Offence provisions relevant to wild animal welfare come in two basic forms. The first uses “action” verbs to describe the offending conduct, e.g. “kill”, “injure”, “harm”, “disturb”. These verbs often combine the human act and the result of the act – e.g. “kill” and “injure” would encompass both the relevant physical conduct and the harm that an animal suffered as a result of that action. Legal questions may arise as to whether action/activity X, which results in effect Y to wild animal Z, falls within the meaning of a particular verb, e.g. did exposure to high concentrations of an agricultural pesticide in a farm pond poison birds and therefore “kill” them? The efficacy of legal frameworks for wild animal welfare will often turn on legal questions about whether a particular harm, and the specific human action that causes that harm, fall within the meaning of a word or phrase in a statutory provision.

The second form that an offence provision may take is to use evaluative words, such as “unnecessary”, “unreasonable”, or “unjustifiable”, in relation to the “harm” that an animal sustains because of a human action or activity. Animal cruelty provisions often include these evaluative expressions, usually in conjunction with other provisions that prescribe unlawful human actions to more precise terms.

Evidentiary considerations must also be evaluated when determining whether a particular harm is “legally cognisable” in a practical sense. For example, a prosecution for a taking offence can only succeed if it is possible to adduce evidence by which a court (e.g. a Magistrate) could be satisfied that an animal had suffered a particular harm. This may present challenges as to the availability of physical evidence (e.g. possession of an animal body for post-mortem examination) and witness evidence (e.g. persons who observed the animal being harmed), the quality of the evidence (e.g. post-mortem changes in an animal body), and whether evidence of the harm could be given at all (e.g. there are no reliable indicators for a particular harm, psychological distress that does not manifest in an observable behavioural response).

## How laws can affect wild animal welfare

Laws can influence wild animal welfare in several ways.

### 1. Laws may prohibit certain acts that harm wild animals.

For example, all jurisdictions in Australia have some form of statutory prohibition on the killing or injuring of wild animals without lawful authority. These are frequently referred to as prohibitions on the “taking” of wild animals or “taking” offences. For example, the Western Australian *Biodiversity Conservation Act 2016* defines “take” to mean, in relation to fauna, to mean “to kill, injure, harvest or capture fauna by any means”. Statutory prohibitions on cruelty to animals may also extend to wild animals. The legal effect of taking and animal cruelty offences is to impose a liability to be punished on persons if they perform acts that “take” wild animals or are “cruel” to an animal.

### 2. Laws may confer a person with an immunity from a legal liability for an act or omission that harms wild animals.

Statutes often exempt certain activities from taking prohibitions or allow persons to apply for a licence to “take” wild animals for a particular purpose. The exemption or licence provides an immunity from prosecution for a taking offence, as long as the person complies with circumstances of the exemption or the conditions of the licence. Similar exemptions or provisions for licensing exist for animal cruelty offences.

### 3. Laws may fail to create liability for persons for certain harms that they cause, either because of their content or because of the manner in which they are enforced.

- (a) Statutory construction: The harm itself may not fall within the meaning of a statutory word or phrase. For example, the meaning of “injure” in the definition of a taking offence might not extend to include psychological distress or pathological conditions other than physical injuries
- (b) Legal causation: A court may, as a matter of policy, find that there is no causal basis (i.e. no chain of causation) to connect a human act, omission or activity to a legally cognisable harm to a wild animal. For example, a court might refuse to find that the unlawful clearing of native vegetation caused an animal to be severely injured by a car on an adjacent road, two days after the vegetation was cleared.
- (c) Prosecutorial discretion: Prosecutorial authorities may refuse to lay a charge for an offence in particular factual circumstances, even if liability in the circumstances is at least arguable. Prosecutorial discretion can thus lead to under-enforcement of laws that might otherwise protect wild animals.

### 4. Laws may require persons to perform acts that harm wild animals.

For example, biosecurity legislation may create a statutory duty requiring landowners to undertake prescribed measures to control declared pest species.

### 5. Laws may grant a person a positive right to harm wild animals.

For example, at common law, persons had a right to fish in the sea and in tidal waters and to access intertidal areas. Native title rights include rights to hunt and fish. In Australia, the principle of parliamentary sovereignty means that statutory laws can abrogate or extinguish native title and common law rights.

6. Laws may create positive duties towards individual wild animals.

For example, animal cruelty provisions may impose a legal duty on owners or carers of wildlife who are in their care or custody (e.g. pets or animals held temporarily in captivity) to provide for their basic needs. Persons may have positive duties towards free-ranging wild animals if a legal agreement (e.g. a conservation covenant), a condition attached to a regulatory authorisation (e.g. a licence or development approval, or a court order (e.g. an injunction) requires them to take some positive measure (e.g. to create and maintain a habitat feature) or prevents them from removing or degrading something that already exists (e.g. native vegetation).

7. Laws may require public authorities, government officers and other persons to take wild animal welfare into account when performing or exercising a statutory duty or power (undertaking a statutory function) or when making a decision under legislation (engaging in administrative decision-making).

Examples of statutory function include a government department using a statutory power to manage Crown land under its care, control, and management to conduct prescribed burning.

### References

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