

[issue] **10(2)**

[category] **Case Studies**

[title/headline] **Kangaroos vs. Cattle and Sheep: Animal Welfare, Animal Protection, and the Law**

[subtitle/subhead] **Comment on “Conservation Through Sustainable Use” by Rob Irvine**

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**Keywords** Animal welfare; Law; Enforcement

[article note] The original article by Rob Irvine, published in the *Journal of Bioethical Inquiry*, 9(4): 509–510, can be located at DOI 10.1007/s11673-012-9403-x.

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In 2008 the *Garnaut Climate Change Review: Final Report* made a bold recommendation:

For most of Australia’s human history—around 60 000 years—kangaroo was the main source of meat. It could again become important. ... [Modelling shows] the potential for kangaroos to replace sheep and cattle for meat production in Australia’s rangelands, where kangaroos are already harvested. ... [B]y 2020 beef cattle and sheep numbers in the rangelands could be reduced by 7 million and 36 million respectively, and ... this would create the opportunity for an increase in kangaroo numbers from 34 million today to 240 million by 2020 ... [leading to a] net reduction in greenhouse gas emissions (Garnaut 2008, 547–548).

Perhaps inspired by the *Garnaut Report*, the Committee on Sustainable Agriculture and Environment, in the case study presented by Irvine (2012), is proposing to substitute rangeland domesticated animal farming with kangaroo harvesting to improve the ecology and soil quality of semi-arid regions in Australia. As laudable as this goal may be, the committee’s policy prescription rests on key assumptions about animal welfare that are open to question.

For one thing, the framing of the ethical debate seems to shift back and forth, with the committee in some places contrasting the harvesting of wild kangaroos with animal agriculture in semi-arid regions, while at other points focussing on consumption of meat derived from a system of industrialized agriculture. A proportion of cattle from semi-arid regions will be “finished” in intensive feedlots, particularly in circumstances of drought or to meet consumer preferences for meat derived from grain-fed cattle (Australian Lot Feeders’ Association undated). However, these two approaches to animal agriculture are distinct, even if there may be areas of overlapping concern (especially around animal husbandry, transport, and slaughter). The welfare issues raised by intensive management of farm animals may be different to those raised in a rangeland farm setting, which in turn may influence resolution of the ethical balancing exercise framed by the committee. (For an overview of the welfare of cattle, see Broom and Fraser 2007, 261–271.) Also, if the focus is the environmental damage caused by domesticated animal farming in semi-arid regions, an alternative response to shifting to kangaroo harvesting would be to increase intensive farming of cattle and sheep. However, given the adverse consequences of intensive farming—whether in relation to the environment (see, e.g., Henning 2011; Bristow and Fitzgerald 2011; Stehfest et al. 2009), animal welfare (see, e.g., Sharman, 2009), or public health (see, e.g., Henning 2011; Bristow and Fitzgerald 2011)—this would likely not be a policy approach favoured by the committee. The committee emphasises the humane values promoted by favouring the harvesting of kangaroos over the farming of domesticated animals. In relation to kangaroos, though, how are these humane values given effect to and what level of protection is actually provided? The committee would no doubt contend that such values can be assured through appropriate regulatory design. Humane standards are currently imported into law and other regulatory instruments governing the way in which kangaroos may be killed. This occurs principally through the *National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes* (Commonwealth of Australia 2008), although the path to its application is not straightforward.

Kangaroos are protected native animals under state nature conservation legislation. Four jurisdictions (Queensland, Western Australia, New South Wales, and South Australia) allow the killing of this otherwise protected animal where an appropriate licence has been granted. Licences for the commercial killing of kangaroos will generally include a condition that holders comply with the *National Code* (see, e.g., State of NSW 2011, 6). As well, given that a proportion of kangaroo meat and fur will be exported, the States are required to prepare management plans for approval by the federal Minister under the *Environment Protection*

and Biodiversity Conservation Act 1999 (Cth) (EPBC). The EPBC governs the export and import of wild animals and animal “specimens” and includes provisions aimed at promoting the humane treatment of animals. Under the EPBC regulatory regime, a management plan must provide that the killing of animals will be done in a way which “minimises pain and suffering,” and, in a kangaroo context, the *National Code* is specifically cited as satisfying this requirement.

What, then, does the *National Code* require? The text of the *National Code* is slightly confusing, purporting to set out “conditions” for the killing of kangaroos, but then listing as a “goal” the following:

When shooting a kangaroo or wallaby, the primary objective must be to achieve instantaneous loss of consciousness and rapid death without regaining consciousness. For the purposes of the Code, this is regarded as a sudden and humane death (Commonwealth of Australia 2008, 9).

The *National Code* also provides that the shooter must “aim” to hit the kangaroo in the brain (Commonwealth of Australia 2008, 10). At face value, these provisions accord with the committee’s assumption that the wild harvest of kangaroos can be achieved humanely, through “a single, clean shot to the brain with instantaneous death” (Irvine 2012, 510). The committee is not alone in relying on such an assumption to argue for a sustainable kangaroo meat industry. One of Australia’s most prominent scientists, Professor Tim Flannery, asserts that:

Even from an animal welfare perspective, however, opposition to the controlled killing of kangaroos seems ill-founded. The first a kangaroo knows of its interaction with the industry is a spotlight and a bullet to the brain, which usually results in a clean kill (animals shot elsewhere in the body are not marketable for meat) (2003, 42).

The problem, though, is that the *National Code* clearly does not make achievement of these standards mandatory—rather, they are goals or objectives. Aspirational requirements such as these are very difficult to legally enforce in practice. This is vividly illustrated by an Administrative Appeals Tribunal (AAT) decision from 2008 in which the Wildlife Protection Association of Australia (WPAA) argued that a kangaroo management plan for NSW, approved by the federal Minister under the EPBC, did not meet the required humane standard (*Re: Wildlife Protection Association of Australia Inc and Minister for the Environment, Heritage and the Arts* [2008] AATA 717). The management plan relied on compliance with the predecessor to the current *National Code* as satisfying the humane standard of “minimising pain and suffering.” The WPAA argued that the management plan was deficient,

in part because an instantaneous death would not always occur. The AAT rejected this line of argument (at [48], [50]):

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

As well, even if instantaneous killing in all cases could be achieved, serious welfare concerns are raised by the fate of orphaned joeys and the young-at-foot. They may suffer lingering deaths due to starvation or be subject to predation. For those that are recovered by shooters, the methods allowed for killing expose them to considerable risk:

Where euthanasia [of pouch young or the young-at-foot] is carried out using a blow to the head, the blow must be delivered with force sufficient to crush the skull and destroy the brain. The blow should be delivered with a suitably hard and heavy blunt instrument (Commonwealth of Australia 2008, 13).

The WPAA also challenged such methods as failing the humaneness test imposed by the EPBC. The WPAA was again unsuccessful. In the words of the AAT, such methods are “as humane as can be expected” (at [54]).

The standards imposed by the *National Code*, then, must be understood as being heavily qualified. Even so, this is just “law on the books,” glossed by judicial interpretation such as that provided by the AAT. What occurs in practice? The available evidence suggests that a significant number of non-head shot kangaroos are killed each year, that limited compliance activities are undertaken by regulatory authorities, that there are few prosecutions, and that, in the rare circumstances where there is a successful prosecution, insubstantial penalties are applied (Boom, Ben-Ami, and Boronyak 2012).

If there are shortcomings in the protection of kangaroos under conservation regulation, could additional protection be found in state animal welfare regulation? The current regulatory regime does not provide this. So long as a shooter has complied with the (loose) requirements of the *National Code*, he or she will generally be protected from prosecution under animal welfare law. This might be because lawful conduct under nature conservation legislation is not subject to animal welfare legislation. Or, it might be because of a statutory proviso that

where there is compliance with a code, then a defence to, or exemption from, prosecution for an animal welfare offence is provided (Dale 2009).

Having made the moral assessment that the harvesting of kangaroos is preferable to the farming of domesticated animals, I would urge the committee to reconsider this assessment. Even if the environmental and health benefits relied upon by the committee may be defensible, the animal welfare benefits claimed are much less certain. The key point is that there are significant limitations in cattle and sheep protection under animal welfare law (Sharman 2009), and the committee identifies some of the major welfare concerns. It's just that kangaroos are no better protected under nature conservation and animal welfare law. Across these species, the same orthodox animal welfare ethic underpins the law: Animals have an intrinsic value and for that reason we should seek to protect them from harm, but only to the extent this does not impede our use of them. If necessary for our use, the welfare of animals may be infringed, sometimes seriously (Garner 2005). It is one thing to reach a considered ethical view about how we ought to value and treat animals, and another to see this understanding reflected in law. Law can be both expressive and facilitative – in the sense of reflecting a particular ethic as well as contributing to an increased appreciation of the implications of applying a particular ethic in practice. It's important to be clear about those implications. A code of practice for the humane shooting of kangaroos may well be expressive of a desire to give *some* consideration to the welfare of kangaroos in circumstances where we have decided it is permissible to kill them. However, by drawing on empirical evidence of how the law is applied, it is possible to be clear-eyed about the very limited consideration actually required.

Finally, the committee's proposed policy change turns on an "either/or" approach—either we continue domesticated animal agriculture or we harvest kangaroos. There is an implicit assumption that we must substitute one form of animal-based food for another. A third option, of course, would be to destock cattle and sheep from semi-arid regions and look to non-animal sources of food substitution. This approach would be consistent with improving animal welfare (since fewer farm animals would be exposed to conditions compromising their welfare) as well as achieving environmental and health benefits (Henning 2011).

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