INQUIRY INTO THE HEALTH AND WELLBEING OF KANGAROOS AND OTHER MACROPODS IN NEW SOUTH WALES

Supplementary questions

Hearing – 11 June 2020

Supplementary Questions for Animal Defenders Office

Q1: Is it an offence under the Biodiversity Conservation Act to kill native animals?

A1:

Yes, in certain circumstances it is an offence under the *Biodiversity Conservation Act 2016* (NSW) ("BC Act") to kill native animals.

What is the actual offence?

Under the BC Act, it is an offence to harm a protected animal (s2.1(1)(c)).

Does 'harm' include killing?

Yes. 'Harm' is defined to include 'kill' (s1.6 of the BC Act).

Are kangaroos 'protected animals'?

Yes. Protected animals include 'mammals of any species (including aquatic or amphibious mammals but not including dingoes)' that are native to Australia (Schedule 5 to the BC Act).

Kangaroos are therefore protected animals.

Killing a kangaroo is therefore harming a protected animal, which is an offence under section 2.1(1)(c) of the BC Act.

Are there any defences?

Yes. For the purposes of this Inquiry, the main defence to the offence of harming a protected animal is if the harming was authorised by a biodiversity conservation licence (s2.10 of the BC Act).

Q2: What defence do non-commercial shooters have when they shoot kangaroos without a licence?

A2:

Under the BC Act it is an offence to harm a protected animal (s2.1(1)(c)). It is a defence to this offence if the harming was *authorised by a biodiversity conservation licence* (s2.10 of the BC Act).

Under the BC Act a 'biodiversity conservation licence' can be granted to authorise a person to do an act that would otherwise constitute an offence under the BC Act (s2.11).

For kangaroo shooters, holding a biodiversity conservation licence is therefore necessary to render lawful the harming of a protected animal which would otherwise be a breach of the Act.

Kangaroo shooters harming kangaroos as part of the commercial kangaroo industry apply for a 'professional kangaroo harvester licence'.[1] Holding such a licence would constitute a defence to the offence of harming a protected animal.

Historically, non-commercial kangaroo shooters were also expected to apply for a licence. However, since the 2018 drought changes[2], the NSW Government changed administrative requirements with the effect that non-commercial kangaroos no longer had to apply for and hold a licence when shooting kangaroos. Only the occupant of the land where the kangaroos were to be shot must hold a licence.[3]

Defences available to non-commercial kangaroo shooters

It is unclear what defence, if any, now applies to non-commercial shooters who harm protected animals without a licence which, as discussed above, is *prima facie* an offence under section 2.1 of the BC Act.

If non-commercial shooters can no longer use the defence under section 2.10 because they themselves do not hold a licence, the question becomes whether they can rely on another defence under the BC Act.

Defence—act authorised by regulations or codes of practice

Section 2.9 of the BC Act makes it a defence if the potential offender is acting in accordance with a code of practice made or adopted under section 2.9(2). However, the ADO is unaware of any code of practice applying to non-commercial shooters being made or adopted under section 2.9(2) of the BC Act. The defence of acting under a published code of practice therefore would not appear to apply.

Defence—act authorised by other legislation

It is a defence to a prosecution for an offence under the BC Act if the person charged establishes that the act for which she or he were charged is authorised under other legislation or other instruments (s2.8 of the BC Act). None of the legislation or other instruments specified appears to pertain to non-commercial kangaroo shooters so this defence does not appear to apply to non-commercial shooters.

Other options

One option could be to interpret the landholder's licence as extending to the non-commercial shooter. However, section 2.11 of the BC Act authorises a licence to be granted to *a person* rather than persons. In addition, only a 'fit and proper person' is eligible to hold a licence (clause 2.27 of the BC Regulation), and the regulator cannot be satisfied that a shooter meets this requirement as the shooter is not the applicant for the licence.

Another option may be that, provided a non-commercial shooter harms a kangaroo in accordance with the landholder's licence, the non-commercial shooter could rely on the defence under section 2.10 because it requires the person charged with an offence only to establish that 'the act that constitutes the offence was authorised by, and done in accordance with, ***a*** biodiversity conservation licence' (emphasis added). In other words, there is no specific requirement that the licence authorising the act must be a licence held by the person doing the act.

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[1] https://www.environment.nsw.gov.au/topics/animals-and-plants/wildlife-management/kangaroo-management/commercial-harvester-licence.
[2] https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0006/827016/farmers-given-more-power-to-manage-roos.pdf.
[3] https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/licences-to-control-or-harm/licences-to-harm-kangaroos.

In the ADO's view, however, this is not in the spirit of the BC Act. Parliament clearly considered that harming a protected animal was sufficiently serious that it would allow this to happen only if the person harming the animal had applied for and been granted a licence, with their suitability to hold a licence to harm being assessed during the application process. The BC legislation has not changed in this respect since it came into effect in 2016. The 2018 'drought' changes to non-commercial shooting were introduced through administrative arrangements made without any parliamentary scrutiny. For these reasons the ADO has submitted that the 2018 changes should be revoked and at the very least the pre-drought regulatory framework reinstated for non-commercial kangaroo shooting.[4]

Q3: Are the commercial and non-commercial kangaroo shooting codes of practice the same when it comes to guidelines on killing joeys? If not, how?

A3:

The commercial and non-commercial kangaroo shooting codes of practice are not the same when it comes to guidelines on killing joeys. There are significant points of difference including recommended killing methods. In the ADO's view it is alarming that there are such differences, inconsistencies and discrepancies in the two codes regarding the same animal.

Some of the key differences between the commercial and non-commercial kangaroo shooting codes of practice in relation to killing joeys are summarised below.

- **Competency requirements:**
  - The commercial code of practice contains minimum competency requirements for shooters including "use of acceptable methods for euthanising pouch young".
  - The non-commercial code has no competency or testing requirements, and states "nor is there an intention to introduce such a regime".

- **Permissible firearms:**
  - The commercial code of practice permits only centre-fire or rim-fire rifles for young. It does not permit the use of shotguns.
  - The non-commercial code permits the use of shotguns for euthanasing pouch young or young at foot at close range.

- **Small furless pouch young killing methods:**
  - For small furless pouch young the commercial code requires:
    - For small unfurred pouch young <5cm length: decapitation and/or cervical dislocation using thumb and finger or sharp blade. Cervical dislocation must be done without removing the young from the teat as they are permanently attached to the teat.
    - For larger unfurred pouch young >5cm length: decapitation using a sharp blade.
  - The non-commercial code requires a single forceful blow to the base of the skull with a blunt instrument or decapitation using a sharp blade. No acknowledgement is made of the potential for young to be permanently attached to the teat.

- **Partial or fully furred young killing methods:**
  - The commercial code requires a concussive blow to the head (or 'blunt force trauma') by holding the young kangaroo by their hind legs and swinging them against a hard surface such as the shooter's vehicle. It specifically prohibits suspending joeys upside down by the hindquarters or tail and then trying to hit the head with an iron bar (or

[4] Page 4 of the ADO's submission, #234.

similar), due to the risk of missing the correct location on the joey's head and failing to render the joey unconscious with only one strike.
    - The non-commercial code also requires a concussive blow to the head, to be delivered with a 'hard and heavy' blunt instrument.

- **Young at foot killing methods**:
    - Both the commercial and non-commercial codes recommend a gun shot to the head or chest/heart.
    - The commercial code also recommends a concussive blow to the head where the young at foot is less than 5kg in weight and can be caught by hand.

Q4: In your view are there any measures that could provide reliable evidence that the kangaroo shooting codes of practice are complied with at the point of kill?

A4:

The only reliable evidence would be first-hand observation of the killing by inspectors or other authorised officers. Failing that, other measures could include installing cameras on shooters' vehicles, or mounting small cameras onto rifles or the telescopic sights of rifles, to record shooting activities at night. The uninterrupted footage could be provided to a regulatory authority on demand or at regular intervals for spot checks.

Q5: Is it your opinion that the kind of extensive cluster fencing that is being rolled out in Western NSW could risk landholders being prosecuted under POCTAA if kangaroos and other wildlife are injured, dehydrated or starved by become entrapped on the impenetrable fence or deliberately excluded from access to food or water?

A5:

Yes. In the ADO's view landholders risk committing an offence under the *Prevention of Cruelty to Animals Act 1979* (NSW) ("POCTA Act") if they cause pain or suffering to an animal due to fencing they erected or caused to be erected.

Section 5 of the POCTA Act makes it an offence for any person to 'commit an act of cruelty upon an animal'. An act of cruelty includes any act or omission a consequence of which an animal is unreasonably, unnecessarily or unjustifiably wounded, mutilated, maimed, terrified, or inflicted with pain (s4(2)). It is realistic to suggest that extensive cluster fencing could result in a kangaroo being wounded, mutilated or maimed, for example by trying to jump over the fencing, or terrified or inflicted with pain, for example by being trapped or deprived of food and water due to the fencing. If there are alternatives, or if it was not necessary to install the extensive cluster fencing, or if it was reasonable to erect the fencing in a different way so as to avoid inflicting pain, then any pain inflicted on the animal due to the fencing could be regarded as unnecessary, unreasonable or unjustifiable, and would therefore be unlawful.

Can a landholder be charged for cruelty inflicted on a wild animal for whom the landholder is not responsible?

Yes. Any person can commit an act of cruelty to an animal. It does not have to be a person 'in charge of' an animal, in the sense that the person has the animal under their care, control or supervision.

Therefore, a landholder could be charged for committing an act of cruelty to a wild animal for whom the landholder is otherwise not responsible.

Is intention or some other mental element required?

No. There is no mental element to the offences of cruelty or aggravated cruelty under the POCTA Act.[5] This means that a person could be prosecuted for an act of cruelty even if the person did not 'deliberately' cause an animal to be maimed or terrified or inflicted with pain. Therefore, if a landholder caused extensive cluster fencing to be erected, as a consequence of which a kangaroo was wounded, mutilated, or otherwise inflicted with pain, the landholder could be charged for cruelty to an animal even if the landholder did not intend to inflict pain on the animal.

Q6: Can you please provide more details on the law reforms you suggest to reduce the suffering that clusters of exclusion fencing cause.

A6:

Requirement to report injuries to animals caused by exclusion fencing

Section 14 of the POCTA Act is headed 'Injuries to animals to be reported'.[6]

Currently section 14 creates an offence only in relation to drivers of vehicles that strike and injure an animal. Under section 14(a), a driver who fails to take reasonable steps to alleviate any pain inflicted on the animal commits an offence. The offence applies to any kind of animal (ie domestic or wild).

If the injured animal is a domestic animal, it is an offence under section 14(b) to fail to inform an officer or a person in charge of the animal about the injury as soon as practicable.

The ADO has proposed that similar requirements could be imposed on landholders who use exclusion fencing on their properties.[7] Section 14 could be amended to require landholders responsible for exclusion fencing on their property to take reasonable steps to alleviate any pain caused to an animal caught in or otherwise trapped by the fencing. It could also require landholders to immediately report the animal to a relevant authority such as a licensed wildlife rescue organisation or individual. Finally, landholders and occupants could be required to monitor their fences so that any animals trapped or injured due to the fencing will not be left to suffer over a prolonged period of time.

Such requirements would be in line with the POCTA Act's purpose to prevent cruelty to animals (s3(a)) and would lead to greater transparency and understanding of the inadvertent consequences of the use of exclusion fencing.

Requirement to phase out barbed wire fencing

The ADO's written submission discussed the immense suffering inflicted on wildlife by barbed wire fencing.[8]

The ADO suggested that barbed wire fencing should be legislatively phased out. This could be achieved by inserting a new section in Part 2 of the POCTA Act prohibiting the use of barbed wire fencing. The new provision would make it an offence to install new barbed wire fencing, and to continue to have barbed wire fencing on land after a certain date. The latter offence would apply to existing barbed wire fences and would mean that landholders would have to remove the barbed wire by the specified date. The legislated phase-out period would be determined in consultation with landholders, and would allow landholders to replace the barbed wire with less inhumane alternatives

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[5] Bell v Gunter (unreported, NSW Supreme Court, 24 October 1997), cited with approval in *Fleet v District Court of NSW & Ors* [1999] NSWCA 363 and *Pearson v Janlin Circuses* [2002] NSWSC 1118.
[6] https://legislation.nsw.gov.au/view/html/inforce/current/act-1979-200#sec.14.
[7] Page 3 of the ADO's submission, #234.
[8] Ibid.

such as plain wire or white plastic-coated wire, or other alternatives suggested by wildlife organisations.[9]

Such an amendment would be in line with wildlife-friendly measures in other jurisdictions, such as the regulation of the sale and use of fruit-tree netting in Victoria which aims to minimise injuries to flying foxes.[10] The new law was introduced in 2019 and is due to commence on 1 September 2021.

[9] http://www.wildlifefriendlyfencing.com/WFF/Friendly_Fencing.html, https://www.lfwseq.org.au/wp-content/uploads/2016/11/LFW-Note-2016_G4.pdf.
[10] *Prevention of Cruelty to Animals Regulations 2019* (Vic) reg 13.