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Hierarchies of Wild Animal Protection**

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# BRITISH COLONIALISM, AUSTRALIAN NATIONALISM AND THE LAW: HIERARCHIES OF WILD ANIMAL PROTECTION

STEVEN WHITE\*

*A combination of animal welfare law and nature conservation law establishes a hierarchy of protection for wild animals, with rare, threatened or endangered native animals receiving the highest levels of protection, plentiful native animals lying in the middle — sometimes well-protected, sometimes not — and introduced wild animals at the bottom. In reading beyond the accounts of contemporary law, especially in sociology and environmental history, a plausible argument can be made for the proposition that this prevailing general schema of protection reflects an early 20<sup>th</sup> century assertion of a distinctive Australian identity, combined with the emergence of a conservation ethic and the decline of attempts to acclimatise British wild animals in Australia. Prior to federation the legal protection of wild animals was quite different, with native animals receiving little protection until the late 19<sup>th</sup> century. Introduced wild animals were initially protected to allow their flourishing, but by the late 19<sup>th</sup> century were increasingly being characterised as ‘pests’ and their protection wound back. This article explores how and why attitudes to native wild animals and introduced wild animals in Australia have changed over time, and how this continues to be reflected in Australian law.*

## I INTRODUCTION

Yet even more extraordinary were the animals, the marvellous oddities of a topsy-turvy land.<sup>1</sup>

— Richard White

Contemporary Australian regulation of the treatment of wild animals is marked by definitional and substantive inconsistencies across species and the various settings in which wild animals are found. Partly this reflects the fragmented jurisdictional approaches, given state, territory and Commonwealth intervention in the area. As well, the lack of coherence reflects the influence of differing regulatory regimes, including those of nature conservation and animal welfare, and their differing underlying ethical prescriptions for the treatment of wild animals.

While there is at least a limited concern for the welfare of domesticated animals reflected in animal welfare statutes, especially for companion animals, wild

\* Lecturer, Griffith Law School, Griffith University. Thanks are due to an anonymous referee for highly constructive feedback. Any errors or omissions remain my own.

1 Richard White, *Inventing Australia: Images and Identity 1688–1980* (Allen & Unwin, 1981) 6.

animals in their natural state tend to be excluded. Despite this limited formal recognition in animal welfare legislation, nature conservation legislation ensures that some wild animals receive perhaps the strongest welfare protection of all, in the sense that humans must, essentially, leave them alone. By contrast, the killing of some other types of wild animals is mandated, with the methods allowed for killing paying little regard to their welfare. In general terms, the law establishes a hierarchy of protection, with rare, threatened or endangered native animals receiving the highest levels of protection, plentiful native animals lying in the middle — sometimes well-protected, sometimes not — and introduced wild animals at the bottom.<sup>2</sup> As will be acknowledged in Part II of this article, while exceptions to this general schema need to be recognised, it still serves as a useful rubric for mapping contemporary protection of wild animals in Australia.

In reading beyond the accounts of contemporary law, especially in sociology and environmental history, a plausible argument can be made for the proposition that this prevailing general schema of protection reflects — at least in part — an early 20<sup>th</sup> century assertion of a distinctive Australian identity, combined with the emergence of a conservation ethic and the decline of attempts to acclimatise British wild animals in Australia. Prior to federation, the legal position was quite different. Native animals received limited protection through much of the 19<sup>th</sup> century, while some introduced wild animals were protected to allow their flourishing. This article explores how and why attitudes to native wild animals and introduced wild animals in Australia have changed over time, and the ways in which this is reflected in Australian law. The focus will be on the European invasion of Australia, the ways in which Australian native animals, post-settlement, were represented in Britain, and the changing value attached to native animals and introduced animals in Australia.<sup>3</sup>

After providing a brief overview of the contemporary approach to regulation of wild animal protection in Part II, Part III explores early European responses to Australian native animals. While exciting considerable scientific interest, Australian native animals also invoked unease, confusion, opportunism and hostility, characterised by their widespread killing and the introduction of ‘familiar’ wild animals from Britain, as well as other exotic species. Early colonial law supported this mass killing, even as the first animal welfare protection legislation was being passed in Britain and, later, in the Australian colonies. In terms of a hierarchy of protection, native wild animals were clearly at the bottom. Introduced wild animals were afforded greater legal protection, even if only on

2 For the purposes of this article, ‘native wild animals’ refers to those present in Australia prior to colonisation by the British (eg kangaroos, wombats and emus). By contrast, ‘introduced wild animals’ refers to imported wild animals (eg foxes, rabbits and trout) as well as imported domesticated animals living in a wild state (eg cats, dogs, horses, goats and pigs).

3 This article does not traverse the effects of colonisation, including through law, on Aboriginal and Torres Strait Islanders and their relationships with animals. One aspect of this relationship is the response of Indigenous peoples to animals introduced into Australia by the British: see, eg, David S Trigger, ‘Indigeneity, Fertility, and What “Belongs” in the Australian Bush: Aboriginal Responses to “Introduced” Animals and Plants in a Settler-Descendant Society’ (2008) 14 *Journal of the Royal Anthropological Institute* 628.

the pragmatic basis of ensuring they would become well enough established to be sustainably exploited.

Part IV charts the unravelling of the early colonial preference for introduced wild animals over native wild animals. By the late 1870s, colonial Parliaments were passing legislation aimed at protecting some native animals, particularly native birds. Rising Australian nationalism, especially around the time of federation, as well as the development of a conservation ethic, led to the emergence of the statutory regime which remains in place today — one which places rare, threatened and endangered native wild animals at the top of the protection hierarchy, and leaves introduced wild animals languishing at the bottom.

## II CONTEMPORARY WILD ANIMAL WELFARE REGULATION IN AUSTRALIA<sup>4</sup>

### A *Animal Welfare Law and Wild Animals*

In 1997, Stuart Harrop made the observation that:

As a small subset, wild animal welfare law is sparse, bordering on the non-existent at the international level and moving down to the national level it is clear that the welfare of animals living in the wild usually receives far less attention than the welfare of agricultural or other domestic animals. Often this area of law derives unobtrusively, incidentally or even accidentally from measures designed to conserve species ...<sup>5</sup>

Garner suggests that one reason for this lack of attention is that ‘nature is regarded as red in tooth and claw anyway, whatever humans do to wildlife. Moreover, the biggest threat to wild animals has come, not from deliberate acts of cruelty, but from loss of habitat caused by human encroachment’.<sup>6</sup> Since Garner and Harrop made these comments, greater attention has been given to the legal issues raised by the welfare of wild animals,<sup>7</sup> including issues of cruelty, even if the

4 The brief outline here draws heavily from more detailed accounts in Steven White, ‘Animals in the Wild, Animal Welfare and the Law’ in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 230; Steven White, ‘Regulation of Wild Animal Welfare’ in Deborah Cao (ed), *Animal Law in Australia and New Zealand* (Thomson Reuters, 2010) 225.

5 Stuart R Harrop, ‘The Dynamics of Wild Animal Welfare Law’ (1997) 9 *Journal of Environmental Law* 287, 287.

6 Robert Garner, *Animal Ethics* (Polity Press, 2005) 146.

7 Steven White, ‘Animals in the Wild, Animal Welfare and the Law’, above n 4; Steven White, ‘Regulation of Wild Animal Welfare’, above n 4; Dominique Thiriet, ‘Tradition and Change — Avenues for Improving Animal Welfare in Indigenous Hunting’ (2004) 11 *James Cook University Law Review* 159; Dominique Thiriet, ‘The Relocation of Flying Fox Colonies in Queensland’ (2005) 22 *Environmental and Planning Law Journal* 231; Dominique Thiriet, ‘Traditional Hunting: Cultural Rights v Animal Welfare’ (2006) 31 *Alternative Law Journal* 63; Dominique Thiriet, ‘Out of the “Too Hard Basket” — Traditional Hunting and Animal Welfare’ (2007) 24 *Environmental and Planning Law Journal* 59; Dominique Thiriet, ‘In the Spotlight — The Welfare of Introduced Wild Animals in Australia’ (2007) 24 *Environmental and Planning Law Journal* 417; Dominique Thiriet, ‘Recreational Hunting — Regulation and Animal Welfare Concerns’ in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 259.

area still remains comparatively under-researched by contrast with the welfare of companion and farmed animals. Harrop's observation that protection of wild animals emerges incidentally from nature conservation measures is clearly borne out in an Australian legislative context. This is because animal welfare law provides little protection for wild animals. Animal welfare law does not generally differentiate between wild animals and other categories of animals.<sup>8</sup> Instead, a generic definition of an 'animal' is provided.<sup>9</sup> Generically defined, animals are nominally protected against cruelty.<sup>10</sup> However, the application of animal welfare legislation to protect wild animals is rendered illusory by a range of limitations.

First, issues of standing can prevent enforcement of legislative protection and, even where enforceable at the suit of a party, difficulties may be encountered in establishing that relevant acts constitute 'cruelty'. So, for example, animal advocacy groups may lack standing to enforce animal welfare law and, even where standing is satisfied, acts such as the aerial shooting of wild animals in nature reserves (including of wild goats and wild pigs) will not necessarily be regarded as cruel.<sup>11</sup> Second, all Australian jurisdictions include a range of defences or exemptions to cruelty offences in their animal welfare legislation. These defences or exemptions typically apply where the wild animal is a 'pest' or 'feral' animal, or in respect of wild animal hunting more generally.<sup>12</sup> In these cases, there is generally a requirement that no unnecessary suffering is caused to the animal. In Queensland, for example, cruelty and other offences do not apply to 'an act done by a person to control a feral animal or pest animal, including, for example, by killing it', provided that 'as little pain as is reasonable' is caused to the animal.<sup>13</sup> As well, where a code of practice is in place with respect to the use of an animal, compliance with the code will create a defence to, or exemption from,

8 This contrasts with the position in Great Britain, where wild mammals are specifically excluded by the *Animal Welfare Act 2006* (UK) c 45, s 2, with protection instead provided by the *Wild Mammals (Protection) Act 1996* (UK) c 3.

9 See, eg, *Prevention of Cruelty to Animals Act 1979* (NSW) s 4(1) ('*POCTA Act* (NSW)'); *Animal Care and Protection Act 2001* (Qld) s 11 ('*ACP Act* (Qld)'); *Animal Welfare Act 1985* (SA) s 3 ('*AW Act* (SA)'); *Animal Welfare Act 1993* (Tas) s 3 ('*AW Act* (Tas)'); *Prevention of Cruelty to Animals Act 1986* (Vic) s 3(3) ('*POCTA Act* (Vic)'); *Animal Welfare Act 2002* (WA) s 5(1) ('*AW Act* (WA)'); *Animal Welfare Act 1992* (ACT) s 2, Dictionary ('*AW Act* (ACT)'); *Animal Welfare Act 1999* (NT) s 4 ('*AW Act* (NT)').

10 See, eg, *POCTA Act* (NSW) ss 5(1), 6(1) (aggravated cruelty); *ACP Act* (Qld) s 18(1); *AW Act* (SA) ss 13(2), 13(1) (aggravated ill treatment); *AW Act* (Tas) s 8(1); *POCTA Act* (Vic) ss 9, 10 (aggravated cruelty); *AW Act* (WA) s 19; *AW Act* (ACT) ss 7, 7A (aggravated cruelty); *AW Act* (NT) ss 9(1), 10(1) (aggravated cruelty).

11 *Animal Liberation Ltd v Department of Environment and Conservation* [2007] NSWSC 221 (8 March 2007) [9] (Hamilton J). The possibility of private prosecution remains open in some jurisdictions (eg Queensland) but is excluded or subject to permission in others (eg Victoria, Western Australia and New South Wales). See Graeme McEwen, *Animal Law: Principles and Frontiers* (17 June 2011) BAWP, 4 <<http://www.bawp.org.au/animal-law-e-book>>.

12 See, eg, *POCTA Act* (NSW) s 24(1)(b); *ACP Act* (Qld) s 42; *AW Act* (Tas) s 4(1); *POCTA Act* (Vic) s 9(1)(j); *AW Act* (WA) s 24.

13 *ACP Act* (Qld) s 42.

cruelty offences.<sup>14</sup> For example, Victoria has adopted a specific ‘wildlife’ code of practice under animal welfare legislation, although it is confined to wildlife rehabilitation.<sup>15</sup> Finally, animal welfare legislation may not apply to protect wild animals where there is nature conservation legislation in place. The general approach is to provide immunity from animal welfare offences where actions taken against animals are consistent with nature conservation legislation.<sup>16</sup> This last exemption is indicative of the important role played by nature conservation legislation in wild animal welfare regulation.

## B Nature Conservation Law and Wild Animals

Animal welfare is not a primary concern of Australian state and territory nature conservation legislation.<sup>17</sup> The legislation sets in place a regime for the protection or controlled exploitation of wild animals, depending on the species. Gerry Bates provides a useful schematic account:

The general scheme of the legislation is to protect virtually all forms of native wildlife ... by regulating the circumstances in which they may be taken, killed, possessed, sold and otherwise dealt with. ... all aspects of wildlife hunting and dealing are controlled by the appropriate wildlife services through a licensing system. ... animals which fall within the statutory definitions are then generally classified as either unprotected or protected. Unprotected species may include ‘noxious’ pests or simply those which exist in large numbers. Protected species may be partially protected during the breeding season (for example, game species) or totally protected at all times (many native and rare, threatened or endangered species).<sup>18</sup>

A number of important consequences flow from this regulatory approach. First, native animals which are members of a species categorised as rare, threatened or endangered enjoy very high levels of formal statutory protection. While the precise terms vary from jurisdiction to jurisdiction, legislation makes it an offence to harass, disturb, pursue, injure and/or kill these native wild animals. This

14 For a detailed jurisdictional account of the way in which these exemptions or defences may work, see Steven White, ‘Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?’ (2007) 35 *Federal Law Review* 347, 351–7.

15 Bureau of Animal Welfare, Department of Environment and Primary Industries (Vic), *Code of Practice for the Welfare of Wildlife during Rehabilitation* (2001) <<http://www.dpi.vic.gov.au/agriculture/about-agriculture/legislation-regulation/animal-welfare-legislation/codes-of-practice-animal-welfare>>.

16 See, eg, *POCTA Act* (Vic) s 6(1B); *ACP Act* (Qld) s 7.

17 The key primary legislation includes the *Game and Feral Animal Control Act 2002* (NSW); *National Parks and Wildlife Act 1974* (NSW); *Threatened Species Conservation Act 1995* (NSW); *Nature Conservation Act 1992* (Qld); *National Parks and Wildlife Act 1972* (SA); *Nature Conservation Act 2002* (Tas); *Threatened Species Protection Act 1995* (Tas); *Flora and Fauna Guarantee Act 1988* (Vic); *Wildlife Act 1975* (Vic); *Wildlife Conservation Act 1950* (WA); *Nature Conservation Act 1980* (ACT); *Territory Parks and Wildlife Conservation Act* (NT). A jurisdiction-by-jurisdiction account of this legislation can be found in Gerry Bates, *Environmental Law in Australia* (7<sup>th</sup> ed, LexisNexis Butterworths, 2010) 481–524.

18 Bates, above n 17, 495.

protection is unqualified, by contrast with animal welfare law (offence provisions are generally qualified by ‘reasonableness’, ‘necessity’ and/or ‘justification’). Second, delegated legislation or licences may allow the killing of native species, with the legislation or relevant licence providing that this occur ‘humanely’.<sup>19</sup> Third, nature conservation legislation provides no protection at all to non-native wild animals, consistent with the limited protection provided under animal welfare legislation. In fact, other legislation may require landholders to eradicate introduced wild animals from their properties.<sup>20</sup> This means that introduced wild animals have the lowest level of welfare protection of all wild animals.

A final point to note here is the significant role played by the Commonwealth in nature conservation, including the conservation of wild animals, under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*). As with state and territory legislation, significant protection is afforded to rare, threatened or endangered species, and there are some provisions — aimed at regulating trade in native wild animals — which impose strict anti-cruelty offences.<sup>21</sup> The extent to which this formal protection is effective in practice remains a matter of dispute.<sup>22</sup>

### **C Conclusions on Contemporary Wild Animal Regulation**

Based on the above brief analysis of key aspects of the regulation of wild animal protection law, drawing principally on nature conservation and animal welfare legislation, it is possible to set out a general scheme of wild animal protection. Dominique Thiriet, as part of her extensive work on wild animal regulation, provides a succinct statement of the general approach in Australia to the regulation of the welfare of wild animals across a range of settings:

The combination of animal welfare and conservation legislation therefore sets a clear hierarchy of protection against cruelty and suffering ... According to this hierarchy, native species of high conservation status are fully protected (in theory at least) against killing and harm. Native species of lower conservation status are protected to a varying degree. Finally, introduced species are less likely to be protected against harm whilst their killing is encouraged, if not mandatory.<sup>23</sup>

19 For a detailed account of particular provisions, see Steven White, ‘Regulation of Wild Animal Welfare’, above n 4, 247–8.

20 See, eg, *Rural Lands Protection Act 1998* (NSW) s 155; *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) s 77; *Catchment and Land Protection Act 1994* (Vic) s 20(1)(f); *Territory Parks and Wildlife Conservation Act* (NT) s 49.

21 See, eg, *EPBC Act* s 303GP. For a detailed account of the ways in which the *EPBC Act* directly and indirectly affects the welfare of wild animals, see Steven White, ‘Animals in the Wild, Animal Welfare and the Law’, above n 4, 244–51.

22 See Tim Flannery, ‘After the Future: Australia’s New Extinction Crisis’ [2012] 48 *Quarterly Essay* 1.

23 Thiriet, ‘Recreational Hunting — Regulation and Animal Welfare Concerns’, above n 7, 270. Garner identifies a similar hierarchy of protection in Britain: Garner, above n 6, 145.

This hierarchy of protection is open to contestation. For example, it might be questioned whether such a generalised schema achieves succinctness at the cost of a more nuanced account of the relationship between humans and animals in their wild state. Rob White has suggested that '[t]he ways in which animals are valued are perhaps more complicated than this [hierarchy of protection] suggests'.<sup>24</sup> For example, not all introduced wild animals find themselves at the bottom of the protection hierarchy. Trout introduced to Tasmania are protected against harm (at least to the extent eradication is not mandated),<sup>25</sup> as are wild horses (brumbies) in some jurisdictions.<sup>26</sup> As well, the hierarchy does not take into account a range of other practices which may indirectly or unintentionally have an effect on the welfare of wild animals (eg habitat loss, climate change, illegal trade in animals, chemical use affecting soils and bacteria, and so on).<sup>27</sup> However, as White recognises, 'the discussion of stratification is indeed an important one'.<sup>28</sup> The hierarchy of protection set out here is sufficiently qualified to provide the basis of a useful rubric, even if exceptions to the general schema may exist such that it remains unstable. White also suggests that '[w]hat is defined, and what is valued, when it comes to animals is highly variable and subject to ongoing contestation at the level of philosophy as well as at the level of legislative practice'.<sup>29</sup> This understanding of the contingent nature of wild animal protection is clearly borne out when contrasting the contemporary hierarchy of protection for wild animals in Australia with that which emerged through the 19<sup>th</sup> century — when this hierarchy was, if not entirely reversed, at least indicative of a colonial preference for introduced animals over native wild animals.

### III EARLY EUROPEAN ENCOUNTERS WITH WILD ANIMALS IN AUSTRALIA

#### A *Confronting a Non-European Land*

How did European explorers, invaders and settlers respond to Australia's native animals? Penny Olsen, in her study of early European impressions of Australia's animals, points out that the first European encounters occurred considerably earlier than the establishment of a British colony in New Holland in the late 18<sup>th</sup> century. Dutch and French sea voyages had already opened up this part of the world. She notes that early

24 Rob White, *Transnational Environmental Crime: Toward an Eco-Global Criminology* (Routledge, 2011) 68.

25 *Ibid.* See also below n 103.

26 For an account of the changing status of the brumby, see Adrian Franklin, *Animal Nation: The True Story of Animals and Australia* (UNSW Press, 2006) 21–2, 154–5, 226–7. See also below n 91.

27 Rob White, above n 24, 68–9.

28 *Ibid.* 68.

29 *Ibid.*

[a]ccounts of returning explorers and adventurers often described oddities and monstrosities, particularly from the antipodes, that upside-down world at the bottom of the globe. The more popular tales mixed fact with fiction, their exaggerations both shocking and entertaining ‘the civilised world’.<sup>30</sup>

By the early 19<sup>th</sup> century the shock had dissipated, but the sense of the extraordinary nature of Australian animals remained. British naturalists, such as George Shaw, Allan Cunningham and John Gould, providing the first scientific descriptions of Australian animals, were prone to use words such as ‘extraordinary’, ‘remarkable’, ‘peculiar’, ‘curious’ and ‘singular’.<sup>31</sup> Charles Darwin, during his visit to Australia in 1836, referred to his good fortune in seeing several platypus at play, and subsequently shot, stating that ‘it is a most extraordinary animal’.<sup>32</sup> More broadly, he reflected on ‘the strange character of the Animals of this country as compared to the rest of the World’.<sup>33</sup> Before Darwin, French natural historian François Péron, recuperating with his crew at Port Jackson in New South Wales, wrote that the colony ‘defies our conclusions from comparisons, mocks our studies, and shakes to their foundations the most firmly established and most universally admitted of our scientific opinions’.<sup>34</sup>

It did not take long for the strangeness of these animals to be demonstrated first hand to European audiences. Olsen points out that

[a]round the turn of the eighteenth century, when the Australian animals that survived several months at sea finally reached European shores, they quickly became favourites with an increasingly educated audience, who had access to public menageries. The wonderful kangaroo, the vibrant parrots, the paradoxical platypus and the droll wombat all had their day in the English sun.<sup>35</sup>

Given the widespread scientific and public interest in natural history and new discoveries, these novel Australian animals became fashionable within upper class 18<sup>th</sup> century Europe and even bestowed a degree of fame on collectors and documenters, as well as generating income for them.<sup>36</sup>

So if Australian animals were represented in Britain as extraordinary, unusual, challenging and deserving of considerable sympathetic curiosity, how were they

30 Penny Olsen, *Upside Down World: Early European Impressions of Australia's Curious Animals* (National Library of Australia, 2010) 2.

31 *Ibid* 2–3.

32 F W Nicholas and J M Nicholas, *Charles Darwin in Australia* (Cambridge University Press, revised ed, 2008) 73.

33 Olsen, above n 30, 6.

34 *Ibid* 5.

35 *Ibid* 7.

36 This understanding is not without challenge, depending on the nature of the claim made. Adrian Franklin, for example, argues that ‘[b]ack in England, Australia failed to stir the exotic romantic sublime reserved for many other parts of the Pacific, and influential critics often used Australia metaphorically as the place of abomination’: Franklin, above n 26, 83. There is no doubt that the curiosity and wonderment on the part of the British in Britain in the first part of the 19<sup>th</sup> century gave way to parody, media sensationalism and demonisation: Olsen, above n 30, 10.

being received on the ground in the new colony? Sociological, historical, and ecological accounts suggest a very different response in the colony itself.

Pragmatism was the first, dominant response. For one thing, native animals such as the kangaroo provided a source of food for the fledgling colony, at least until enough farm animals could be raised to meet the needs of the colony.<sup>37</sup> As Norman and Young suggest ‘generally the early interest in fauna was for food since the early settlers were initially confined to maintaining life and the limits of their horizon were set by the monotonous gums and the more intimate restrictions of hunger’.<sup>38</sup>

As well, Olsen highlights the early commodification of native animals, drawing on the testimony of settlers. Animals were being collected by convicts to be sold to those on transports: ‘Animals were a source of income; they were sold to the live animal trade and taxidermists, to museums and collectors, and as souvenirs and decorations’.<sup>39</sup> A Sydney surgeon in the 1820s recalled that ‘[a] number of individuals in Sydney earn a good livelihood by collecting our beasts, birds, and insects; stuffing, preparing and arranging them in cases; and disposing of them to individuals leaving the colony. A considerable number of prepared bird-skins are also disposed of in this way’.<sup>40</sup>

From the 1840s, local settlers were beginning to form scientific societies and natural history museums — an indication of a desire to better understand their new land, even if these institutions were relatively short-lived, due to small populations and a lack of resources.<sup>41</sup> As discussed below, scientists played a key role in advocacy organisations which emerged around the time of federation, and which lobbied for greater understanding and better legal protection of native animals.

## **B Remaking the Land in the Image of Britain**

Thomas Dunlap contends, though, that by and large the settlers ‘were less interested in understanding the land than remaking it’.<sup>42</sup> Here, Dunlap is referring to what sociologist Adrian Franklin has labelled the ‘Britainisation of Australia’. Franklin summarises the process of ‘Britainisation’ as follows:

British settlers of all ranks executed one of the most extraordinary and audacious acts of environmental intervention. They sought, at first informally and then quite systematically and institutionally, to introduce

37 Keely Boom and Dror Ben-Ami, ‘Shooting Our Wildlife: An Analysis of the Law and Policy Governing the Killing of Kangaroos’ (Research Report, THINKK, University of Technology Sydney, 2010) 9.

38 F I Norman and A D Young, ‘Short-Sighted and Doubly Short-Sighted Are They: A Brief Examination of the Game Laws of Victoria, 1858–1958’ (1980) 4(7) *Journal of Australian Studies* 2, 3.

39 Olsen, above n 30, 8.

40 Ibid.

41 Ibid 9–11; Thomas R Dunlap, ‘Australian Nature, European Culture: Anglo Settlers in Australia’ (1993) 17(1) *Environmental History Review* 25, 28.

42 Dunlap, above n 41, 28.

British wildlife into Australia, to transform Australia into a likeness of Britain.<sup>43</sup>

The contention that the introduction of animals to Australia in the 19<sup>th</sup> century reflected the goal of ‘Britainisation of Australia’ needs to be tempered by the fact that non-British animals were introduced as well. A wide range of species were introduced into Australia, beginning with pigs and cattle escaping from the First Fleet and the early settlement of Sydney. Subsequently, horses, ponies, and donkeys escaped or were released, as well as the more exotic buffalo and camel. Some birds, such as English songbirds, were imported for their musical reminders of home. Rabbits<sup>44</sup> and foxes<sup>45</sup> were introduced to be hunted. Animals were introduced for utilitarian reasons, as well as for sporting and ornamental reasons. For example, the common myna was ‘introduced into northern Queensland as a predator of grasshoppers and cane beetles’.<sup>46</sup>

By the 1860s acclimatisation societies were being established in the colonies, with ‘Australian colonists, pining for English birds in a strange, often hostile land ... ripe for the idea’.<sup>47</sup> Although not always successful, especially in their ambition to introduce a range of African and Asian exotic animals (such as

- 43 Franklin, above n 26, 79. Similarly, Flannery states that  
[t]he question of adapting to Australian conditions has only recently taxed the minds of many Australians. For throughout the nineteenth century, and well into the twentieth, Australians thought instead of ways to make Australia adapt to them. In its most extreme form, this view saw people attempting to create a second Britain in Australia. ... this almost inconceivably arrogant goal is one of the saddest chapters in the history of our continent.  
Tim Flannery, *The Future Eaters: An Ecological History of the Australasian Lands and People* (Reed New Holland, 1994) 355.
- 44 McLeod states that  
[t]he rabbit originated in Spain and southern France and domesticated rabbits arrived in Australia with the first fleet. The first feral populations were in south-eastern Tasmania where they numbered in the thousands on some estates by 1827. Thomas Austin, a member of the Victorian Acclimatisation Society, released 24 rabbits he had brought from England onto his property near Geelong for sport hunting on Christmas Day, 1859  
Ross McLeod, *Counting the Cost: Impact of Invasive Animals in Australia, 2004* (Cooperative Research Centre for Pest Animal Control, 2004) 13 <<http://www.feral.org.au/wp-content/uploads/2010/03/CountingTheCost.pdf>>.
- 45 Although not introduced as a rabbit control, the introduced fox appears to have thrived alongside rabbits. McLeod points out that ‘[t]he fox occurs naturally only in the northern hemisphere and was introduced into southern Victoria in 1871 for recreational hunting. Colonisation was rapid and closely linked to the spread of the rabbit’: *ibid* 19.
- 46 Jim Hone, ‘Introduction and Spread of the Common Myna in New South Wales’ (1978) 78(4) *Emu* 227, 227. Although the date of introduction into Queensland is not certain, mynas were introduced into Victoria between 1863 and 1872 and into New South Wales at probably around the same time. Legal protection was specifically extended to animals introduced for utilitarian purposes. For example, s 4 of the *Animal Protection Act 1879* (NSW) allowed for the listing and protection of ‘[a]ny animals known to be destroyers of snakes vermin or insects which are injurious to vegetation’. By 1893, starlings were included in the list of birds ‘absolutely protected for five years’: *Birds Protection Act 1893* (NSW) s 6, sch 1.
- 47 Tim Low, *Feral Future: The Untold Story of Australia’s Exotic Invaders* (Penguin Books, 1999) 32. Zoos were also an important site for acclimatisation. Lloyd suggests that ‘[t]he philosophy and practice of acclimatization involved the introduction of a wide range of bird and mammal species and was an important, although not entirely successful, project at all zoos of the major colonial centers’: Natalie Lloyd, ‘“Something of Interest about Ourselves”: Natural History and the Evolutionary Hierarchy at Taronga Zoological Park’ (2007) 15 *Society & Animals* 57, 59 (citations omitted).

monkeys, springboks, flamingos and giraffes) acclimatisation groups were still significant in introducing a range of animals:

The golden age of acclimatisation left us a legacy that includes the starling, blackbird, song thrush, bulbul, skylark, pheasant, goldfinch, greenfinch, red deer, hog deer, roach, tench, carp, brown trout and rainbow trout. To be fair ... not all the exotic species established in that era were released by these groups; acclimatisers cannot be blamed for rabbits and foxes, and others must share responsibility for ... sparrows and Indian mynas.<sup>48</sup>

At the same time as acclimatisers were introducing exotic animals, a war was being waged on native wild animals:

As more land was turned to pastoral use, grazing marsupials and larger birds, such as emus and bustards ... became inconvenient and were butchered on a large scale, in what have been described as the fauna wars of the late-nineteenth and early-twentieth centuries. The digging habits of wombats and bilbies made them 'useless', various avian and mammalian carnivores were blamed for stock losses, the grazers competed for grass ... A frontier mentality had set in. Too often, the animals bore the brunt of inexperience and poor management decisions; that they were strange, lowly and stupid made it easier to banish them.<sup>49</sup>

Apart from the direct killing of native animals, indirect killing was also widespread through land-clearing, and '[w]ith the trees and the undergrowth went the flying squirrels, the bilbies, the bandicoots, the potaroos, the paddymelons and all the others'.<sup>50</sup>

As well as being killed as pests or as the victims of land clearing, native wild animals continued to be exploited for cheap meat, fur and feathers. The scale of the killing was massive. Franklin claims that '[p]rofessional shooters worked their way through country shooting out the wildlife much as the forests were clear-felled',<sup>51</sup> with Australia 'something of a killing field for its indigenous animals'.<sup>52</sup>

There were some opposing voices raised about this sanctioned killing of native animals, as well as the importation of exotic animals. In 1863, John Gould was warning of the need for legal protection for native animals:

Short-sighted indeed are the Anglo-Australians, or they would long ere this have made laws for the preservation of their highly singular, and in many cases noble, indigenous animals; and doubly short-sighted

48 Low, above n 47, 38.

49 Olsen, above n 30, 10–11. Marshall states that the killing of animals went well beyond what was necessary to make land viable. For example, he suggests that while some kangaroos would need to be killed by the first settlers to accommodate grazing by sheep, '[w]hat was inexplicable was that these people savagely butchered every kangaroo on the property; and every koala, paddymelon, bilby and bustard too': A J Marshall, 'On the Disadvantages of Wearing Fur' in A J Marshall (ed), *The Great Extermination* (Heinemann, 1966) 9, 18 (emphasis in original).

50 Marshall, above n 49, 17–18.

51 Franklin, above n 26, 15.

52 Ibid 85.

are they for wishing to introduce into Australia the production of other climes. ... Let me then urge them to bestir themselves, ere it be too late, to establish laws for the preservation of the large kangaroos, the Emeu and other conspicuous indigenous animals: without some such protection the remnant that is left will soon disappear, to be followed by unavailing regret for the apathy with which they had been previously regarded.<sup>53</sup>

Warnings such as those provided by John Gould, and the debates occurring almost from the outset of invasion in the 18<sup>th</sup> century about management of the environment, including native fauna, show the need to guard against '[t]he standard view of the colonial period ... that the invaders wreaked havoc on their new environment — both gratuitously and as an inevitable part of the process of settlement'.<sup>54</sup> By and large, though, these separate aspects of the colonisation of Australia — the slaughter of native animals and the importation of introduced animals — were strongly supported for a range of reasons: native animals could get in the way of pastoral farming, the strangeness of the animals made them easier to demonise; the countryside, to European eyes, could be barren, monotonous, unreadable and truly wild; lacking the familiar sights and sounds of Britain, homesickness was ever-present; and, finally, Australian animals were not regarded as suitable for the cultural practice of hunting — a vehicle not just for sport, but also for controlling and civilising engagement with nature. Rather than protecting native animals, the law of this time was employed to sanctify existing practices, to reflect 'the scale of social values' in place at the time.<sup>55</sup> In the mainland colonies, the relevant social values were those at the top of the class structure:

Whilst the trappings of the English legal system were transplanted, what was not anticipated was the associated translocation and development of a class system. And the upper reaches of this structure was for many years responsible for framing legislation involved with wildlife. Inevitably the laws themselves become a reflection of change, a mirror of sectional attitudes which altered with time. But the matter of wildlife conservation troubled no stratum for some time.<sup>56</sup>

53 Marshall, above n 49, 18, quoting John Gould, *The Mammals of Australia* (Taylor and Francis, 1863) vol II <<http://www.nla.gov.au/apps/cdview/?pi=nla.aus-vn760101-2-s22-v>>.

54 Tim Bonyhady, *The Colonial Earth* (Melbourne University Press, 2000) 2.

55 Dunlap, above n 41, 29.

56 Norman and Young, above n 38, 4. Norman and Young focus on Victoria. This is significant, since, as James Boyce argues:

Our nation's history is much diminished by its neglect of the extraordinary convict settlers of Van Diemen's Land. Their life-changing experiences in the new land can help qualify sweeping national claims, and point to the diversity of Australian settlement across time, class and region. Moreover, in the light of contemporary environmental and social challenges, their experiences provide an alternative to the competing metaphors of development/progress versus destruction/conquest that still shape both Australian environmental history and environmental debates.

James Boyce, 'Return to Eden: Van Diemen's Land and the Early British Settlement of Australia' (2008) 14 *Environment and History* 289, 304.

Colonial governments regulated the use of wildlife from around the mid-19<sup>th</sup> century, although there are earlier examples of legal intervention.<sup>57</sup> Boom and Ben-Ami note that, at first, colonial governments

enacted a Game Act or Animal Protection Act which listed native and introduced animals and sought to protect these animals through an ‘off season’. This legislation assumed the continuation and validity of hunting and simply sought to ensure that such hunting was sustainable.<sup>58</sup>

In early legislation, limited protection was extended to both imported and native animals. Key reasons for protection were reflected in the preamble to the *Animals Protection Act 1879* (NSW): ‘Whereas it is expedient to encourage the importation and breeding of Game not indigenous to the Colony of New South Wales and also to prevent the destruction of Native Game during the breeding season’. Under the legislation, certain listed imported and native birds were protected from killing between August and February (coinciding with breeding seasons). Under the *Birds Protection Act 1881* (NSW), unqualified protection was extended to imported birds, as well as ‘song birds’ (which included some native birds). Otherwise, native birds were protected by a defined closed season. Parliamentary debate on the legislation centred on whether a gun licence, restricted to adults, should be required for the purposes of shooting wild animals. A range of views were expressed on this question, and the proposal did not succeed. One consistent theme, though, in the debates, was a need to preserve introduced species, with one parliamentarian stating ‘we are greatly indebted to those gentlemen who have gone to so much trouble in the introduction of song-birds’,<sup>59</sup> and another saying ‘[i]t is at all times delightful to hear the song of birds, especially of some of the English birds’.<sup>60</sup> Another concern was to make allowance for the possibility of protection of birds not yet imported (and therefore not specifically named in the bill). By this time, though, some criticism of the introduction of some animals was being aired, even if a minority view and only on the highly pragmatic ground that

57 Bonyhady states that

[w]hen Robert Ross succeeded King as commandant of Norfolk Island in 1790, the settlers faced the worst crisis of their ‘starvation years’. But Ross was not just concerned to ensure a continued supply of food when he restricted the taking of birds on the island. Nor was he just mimicking existing metropolitan or colonial practice. His laws included what was probably the world’s first prohibition of cruelty to animals.

Bonyhady, above n 54, 6. The law was impossible to enforce. The bird species in question, the Mount Pitt Bird, had disappeared from Norfolk Island by 1910: at 37.

58 Boom and Ben-Ami, above n 37, 10 (citations omitted). The mechanics of the statutory approach are remarkably similar to that still in place today under most nature conservation legislation, with a list-based approach to categories of species protection, usually set out in appendices. In the case of Victoria, Norman and Young point out that

[i]n general, constructive acts were proclaimed with associated schedules listing the fauna which was to be afforded varying protection. Usually the second schedule dealt with alien species, and the third schedule with native wildlife which might, as in the 1890 consolidation, have different periods of protection

Norman and Young, above n 38, 5.

59 NSW, *Parliamentary Debates*, Legislative Assembly, 25 November 1881, 2198 (G A Lloyd).

60 NSW, *Parliamentary Debates*, Legislative Council, 14 December 1881, 2549 (Hill).

having allowed for the destruction of native animals, the bill was now 'seeking to protect the importation of fresh nuisances, for they are nothing better'.<sup>61</sup>

By 1893, some native birds, along with imported birds, were extended 'absolute protection' for a period of years, while other native birds continued to be subject to closed season protection.<sup>62</sup> The Member of Parliament introducing the 1893 bill opened his second reading speech by stating, '[i]n introducing this bill I have been actuated by a desire to do something to preserve a number of our native birds which are not harmful or destructive to anything which is valuable in the community, and which are in very great danger of being absolutely exterminated'.<sup>63</sup> By 1903, the NSW Parliament passed legislation specifically protecting native animals, including wombats, platypus, possums and red kangaroos.<sup>64</sup> This pattern of legislative development is broadly consistent with an increasing concern for native animals. However, this should not be overstated, since '[t]he public generally held little concern for the local fauna and the various acts, which ostensibly offered some protection, were poorly enforced or little heeded'.<sup>65</sup> This meant that even where limited legal protection was put in place, it was largely ineffective. Many practices in breach of legislation continued unabated.<sup>66</sup> The theme of token protection at best for native wild animals is also explored by Dunlap:

The first game laws, passed in the 1860s, occasionally noted the expense incurred by public-spirited gentlemen in bringing in game for the improvement of the colony. They always gave landowners property in these species and sometimes part of the fine imposed on violators. Legislators sought to save native birds from [sic] 'wanton destruction', but with notably less vigor. Fines were lower, seasons long, bag limits and wardens non-existent. That enforcement depended upon someone's bringing a complaint further biased the system toward the imported species.<sup>67</sup>

61 Ibid (De Salis).

62 *Birds Protection Act 1893* (NSW).

63 NSW, *Parliamentary Debates*, Legislative Assembly, 14 February 1893, 4124 (Carruthers). Carruthers proposed to add the emu to the schedule of protected birds, a matter of fierce debate, on the basis that this 'distinctively Australian bird' should not 'go without any protection whatever ... in many districts rewards are offered for the destruction of the emu; so that it will soon be driven beyond the bounds of civilisation, and before long it will be exterminated'. Concern about declining numbers of kangaroos and wallabies was also expressed: at 4126 (O'Sullivan). An amendment to remove the emu from scheduled protection was successful: at 4130.

64 A similar evolution in the protection of native animals occurred in other colonies. For example, by 1900 in South Australia a number of native birds, including magpies, wrens and bower birds enjoyed year round protection, while some introduced birds, such as starlings and sparrows were not protected at all: *Birds Protection Act 1900* (SA).

65 Norman and Young, above n 38, 10.

66 In debate on the bill for the *Birds Protection Act 1893* (NSW), it was noted that '[t]here is an idea throughout the country that there is no game bill in existence ... this gross, open, and notorious violation of the game law has been carried on ... for years, not only in the north and south, but in all other places': NSW, *Parliamentary Debates*, Legislative Council, 23 February 1893, 4566 (Thornton).

67 Dunlap, above n 41, 29. In a similar vein, Norman and Young, referring to an 1861 Victorian bill for the protection of 'imported game', argue that '[t]he emphasis of the bill was on alien species, towards their introduction, liberation and protection': Norman and Young, above n 38, 6.

These laws were supported by an extensive bounties system, especially where a native animal was plentiful and designated as a pest.<sup>68</sup> Boom and Ben-Ami show that

[b]y the 1880s, all of the States in eastern Australia created legislation for the eradication of kangaroos. In NSW, kangaroos and wallabies were declared vermin under the *Pasture and Stock Protection Act 1880* (NSW). Bounties were offered for ‘the head of each grass-eating marsupial’.<sup>69</sup>

Underpinning the legally-sanctioned bounties system was a strong demand for fur, both locally and internationally. In Australia, a prosperous and growing middle class had the ‘consumer power to participate in new clothing fashions and tastes which were wreaking havoc on the world’s birds and furred animals’.<sup>70</sup> Supplying animal fur for European garments ‘led to large-scale slaughter of Australian birds and marsupials’.<sup>71</sup>

At the same time as these legislative developments for the treatment of wild animals were occurring, the first anti-cruelty legislation was being passed by various colonies, following in the footsteps of landmark anti-cruelty legislation introduced in Britain in 1822. The first colonial legislation was introduced in Van Diemen’s Land in 1837, with similar legislation introduced in the mainland colonies in the 1850s.<sup>72</sup> The focus of the legislation was limited to protection of domesticated animals. Jamieson argues that the legislation reflected the interests of the ruling elite, which while consistent with a ‘genuine concern for animal welfare beyond merely protecting their value as property’,<sup>73</sup> also sought to exert some social control over lower class practices (such as public cruelty to animals, whether beating work animals or using animal in fights as entertainment).<sup>74</sup> Even if the passage of such legislation was indicative of a sentiment to prevent some animals from unnecessary cruelty, from the very outset there was a clear divide in the legislative protection of domesticated and wild animals, a divide which, as shown in Part II, persists to this day. So, as Jamieson notes, the ‘legislation in no way sought to abridge the more gentlemanly activities of the hunt, drawing from the English precedent in being directed solely at the leisure pursuits of the lower

68 A study of the effects of European settlement on native mammals in the Bega district of NSW points out that ‘[m]acropodid numbers were sufficiently high during the 1870s and 1880s to be exploited for a thriving fur trade. During this period, they were so common that they were regarded as “noxious animals” under the *Pastures and Stock Protection Act* of 1880 and bounties were offered’: Daniel Lunney and Tanya Leary, ‘The Impact on Native Mammals of Land-Use Changes and Exotic Species in the Bega District, New South Wales, Since Settlement’ (1988) 13 *Australian Journal of Ecology* 67, 76.

69 Boom and Ben-Ami, above n 37, 10 (citations omitted).

70 Drew Hutton and Libby Connors, *A History of the Australian Environment Movement* (Cambridge University Press, 1999) 40.

71 *Ibid.*

72 Philip Jamieson, ‘Duty and the Beast: The Movement in Reform of Animal Welfare Law’ (1991) 16 *University of Queensland Law Journal* 238, 239–40.

73 *Ibid.* 239.

74 *Ibid.* 240–2. The legislation closely mirrored that in place in Britain, similarly imbued with an element of social control of the poor by the rich. See Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001) 33–59, especially 57–9.

classes.<sup>75</sup> By the late 19<sup>th</sup> century, cruelty exemptions were being introduced into the legislation which, in a slightly different form, remain intact today. An amendment to an 1881 Victorian bill introduced an exemption to the cruelty offence for ‘any act done in the process of exterminating rabbits, foxes, wild dogs, or vermin of any kind ... [and] any act done in the hunting, snaring, trapping, or shooting of any wild animal’.<sup>76</sup> This process of exemption marked a distinctively Australian approach to legislative refinement of the cruelty prohibition, ‘an early departure from the English precedent’.<sup>77</sup>

With the increasingly insistent concerns being expressed by scientists and others about the fate of Australia’s native wild animals, the legal regulation of wild animals was beginning to take the protection of some native animals more seriously by the turn of the 20<sup>th</sup> century. However, reflecting a range of pragmatic, aesthetic and social agendas, their protection in practice was limited. And many introduced animals were enjoying formal legal protection at least the equal of that extended to native animals. Again, this representation of wild animal protection must be qualified. Introduced animals such as the rabbit were already being targeted as ‘vermin’, while some native animals, such as the platypus, were benefitting from protection.<sup>78</sup> Nonetheless, this regime of protection was quite different to that which prevails under contemporary law and which was considered in Part II. In particular, introduced wild animals, with some limited exceptions, are today at the bottom of the protection hierarchy. On the other hand, all native wild animal species are, as a default position, ‘protected’ animals and, in the increasing number of cases where a species is rare, threatened or endangered, they enjoy a very high level of legal protection. The shift from a bias against native wild animals in the early period of colonisation to a bias against introduced wild animals was slow and uneven, but was clearly emerging as Australia approached federation.

#### **IV A DISTINCTIVE AUSTRALIAN IDENTITY WITHIN THE BRITISH EMPIRE: THE DECLINE OF THE INTRODUCED ANIMAL AND CHEQUERED RISE OF THE NATIVE ANIMAL**

Over time, attitudes to native wild animals changed, and the acclimatisation project faded away. For one thing, some introduced animals and plants did not adapt. Efforts to remake the landscape were undone by droughts. On the other hand, some introduced animals, such as the rabbit, adapted too well, and came to be regarded as an economic disaster. Legislatures around the country mandated poisons, bounties and fences to control this introduced animal.<sup>79</sup>

75 Jamieson, above n 72, 241.

76 Ibid 243, citing Victoria, *Parliamentary Debates*, Legislative Assembly, 12 October 1881, 343 (Sir B O’Loghlen).

77 Jamieson, above n 72, 243.

78 Dunlap, above n 41, 32.

79 Ibid 29.

Second, the passage of time meant that successive generations were now being born and raised in Australia, with no particular memory or first-hand knowledge of Britain. The countryside of Britain was less and less a reference point for how nature should look.<sup>80</sup> This was increasingly reflected in children's educational experiences, as '[e]arly in the century the states added nature study to the elementary school curriculum, providing a formal introduction to Australian nature and, through school bird clubs, organizations that supported nature preservation'.<sup>81</sup>

Third, the extent of the destruction being wrought on native animals prompted the formation of increasingly specialised animal advocacy groups. Ornithological and other naturalist societies were becoming increasingly engaged in advocacy activities. Hutton and Connors write that while 'scientific societies had regularly raised issues of bird and animal protection ... the assault of the expanding plumage trade towards the end of the century prompted ornithological interests to form their own specialist groups'.<sup>82</sup> These groups became active in lobbying for legal change, including an extension of closed seasons and protection for a wider range of animals.

Fourth, nationalism emerged to provide a focus for revaluing native and introduced wild animals, as argued by Franklin:

under the growing influence of independence from Britain and Federation, together with the rise of Australian national culture, the relative values placed on ... [introduced wild animals and native wild animals] were reversed. Henceforth nativeness was to be associated positively with the emergent nation and privileged over the introduced species, who could now be associated with their rejected colonial status. More than that, the acclimatised 'foreigner' animals could be cast as endangering true Australian wildlife. In the same stroke, native animals seemed to demand policies of protection while the introduced animals seemed to deserve eradication.<sup>83</sup>

This change in orientation was reflected in national symbols adopted around the time of federation. For example, Australia's coat of arms features a shield, representing federation, supported by two native Australian animals: the red kangaroo and the emu. The coat of arms was granted by King George shortly after federation. The Department of Foreign Affairs and Trade states that '[i]t is thought the kangaroo and emu were chosen to symbolise a nation moving forward, reflecting a common belief that neither animal can move backwards

80 Ibid 30.

81 Ibid 31.

82 Hutton and Connors, above n 70, 40. Similarly, Norman and Young point out that society was changing, and with the change entrenched attitudes were being challenged. Sentiment, humanity and the benefits of native fauna were to be advanced as reasons for its protection. The newly emerging naturalist's societies were to play a leading role in developing and forming both awareness and opinion.

Norman and Young, above n 38, 12.

83 Franklin, above n 26, 15.

easily'.<sup>84</sup> Their inclusion is also consistent with the nationalist, unifying impulses identified by Franklin.

It was also around the time of federation that the first efforts at a national system of legal protection for native animals emerged. A problem for those seeking to establish legal protection for native animals was that '[n]ew state laws could not be effective ... when different states not only had different periods for their closed seasons but also protected different species'.<sup>85</sup> Enforcement was particularly difficult given that 'bird and animal skins illegally trapped in one state were easily sold and exported from another'.<sup>86</sup> The Australasian Ornithologists Union, a national scientific and protection body, led a campaign for a national approach to bird protection. Ultimately, at a forum of state government representatives and ornithologists in 1908, '[t]he meeting decided against preparing model legislation for the states'.<sup>87</sup> The meeting did, however, endorse a call for 'Commonwealth legislation to complement state protection laws, an end to the introduction of exotic birds, and all states to institute a bird day in schools'.<sup>88</sup> Shortly after, there was an 'expansion of the agenda to include native mammals'.<sup>89</sup> In the 1920s and 1930s, the problem of interstate inconsistencies was addressed on a piecemeal basis by the states, through the introduction of trade restrictions.<sup>90</sup>

While Australians increasingly began to take pride in their natural landscapes, and native wild animals, the development of a conservation ethic was uneven, and occurred over an extended period of time. In fact, as Norman and Young suggest, while it might be possible to identify different phases in the legislative approach to native and introduced wild animal protection, no neat division is possible:

In the development of the legislation dealing with wildlife in Victoria it is possible to identify various themes, to propose various phases. There was an initial exploitative period which pre-dated any legislative control; in turn this was followed by an acclimatization movement (which paid but cursory attention to native species). Humanitarian or utilitarian motives heralded a later stage and ultimately these gave rise to the final phase in which there was an implicit intention to actively manage wildlife through regulative means. Not that these phases necessarily follow a formal progression, indeed it is possible to find different themes being expressed

84 Department of Foreign Affairs and Trade, Australian Government, *About Australia: Coat of Arms* <[http://www.dfat.gov.au/facts/coat\\_of\\_arms.html](http://www.dfat.gov.au/facts/coat_of_arms.html)>.

85 Hutton and Connors, above n 70, 41.

86 *Ibid.*

87 *Ibid.* 42.

88 *Ibid.*

89 *Ibid.*

90 Referring to Victorian legislation, Norman and Young state that

[i]n June 1927 modification of constitutional free-trade arrangements were sought to prevent interstate movement of protected animals. The continuing fur trade was still causing alarm, and the Queensland experience with koalas was commented on. An amendment proposed and passed in 1930 extended the act's provisions to game taken anywhere, thereby halting the killing of game in one state and offering it for sale in Victoria.

Norman and Young, above n 38, 17 (citations omitted).

almost simultaneously, but rather that elements of the identified phases gradually became dominant.<sup>91</sup>

To illustrate the point, despite an increased regard for native wild animals following federation, large-scale killing of some native species was still occurring well into the 20<sup>th</sup> century. Ellis Troughton states that '[a]s far back as 1906 appalling faunal destruction is indicated by the fact that over four million possum and 60,000 wallaby skins were marketed that year in London and New York alone. In 1924, the colossal total of over two million koala skins was exported'.<sup>92</sup> This widespread killing was occurring despite changes in the law designed to protect native wild animals:

As did other Anglo jurisdictions, the states restricted methods of hunting to those deemed sportsmanlike, provided legal protection to non-game animals, and protected a few, like the platypus, that were distinctive and becoming rare, but their action was erratic. Market hunting continued ... and enforcement was minimal.<sup>93</sup>

As well, regardless of formal policies of protection, base politics could undermine established native animal protection, as shown most clearly in the Queensland open season on koalas in 1927. Donegan summarises the affair:

In May 1919, the Queensland government — as it had done two years previously — declared an open season on koalas, legalising the slaughter of more than a million 'native bears' for the international fur trade. Six months later, amid great public outcry, the government promised to protect the marsupial and subsequently passed the *Animals and Birds Act* (1921). The reprieve, however, was short-lived and in 1927 — as the State slid prematurely into Depression — the Labor government declared another open season, resulting in a one-month massacre that netted nearly 600,000 koala pelts for overseas markets. The koala was already a national icon and an endangered species — Queensland's was its last substantial population and the Minister for Agriculture and Stock, William Forgan Smith, had reiterated there would be no more koala hunting — yet the decision was overturned and the koala faced politically-induced extinction.<sup>94</sup>

By contrast with 19<sup>th</sup> century killing of native wild animals, though, there was wide public criticism of this action, and the 'political uproar contributed to the

91 Ibid 4.

92 Boom and Ben-Ami, above n 37, 10, quoting Ellis Troughton, *Furred Animals of Australia* (Angus & Robertson, 7<sup>th</sup> ed, 1962) xxvi.

93 Dunlap, above n 41, 32.

94 Jacqui Donegan, 'Unfair Game: Queensland's Open Season on Koalas in 1927' (2001) 3 *Access History* 35, 35 (citations omitted). The killing extended to possums as well. Hutton and Connors state that '[i]n one month over one million possums and over half a million koalas were killed by hunters for their skins — an onslaught from which the koalas have never fully recovered': Hutton and Connors, above n 70, 43.

defeat of Labor at the Queensland state elections of 1929'.<sup>95</sup> Such action clearly ran contrary to a strengthening consensus on the need for enforceable native animal protection.

After World War II, and the pressures of a post-war boom, there was a further impetus for rethinking the value of native animals:

World War II reinforced Australian nationalism, and the post-war collapse of the British Empire forced Australians to reconstruct their national identity. This combination of increased development (which made conflict apparent), ecology (which provided a framework to critique the effect of industrial society on the land), and nationalism (which encouraged identification with the country), drove and helped define the popular environmental movement that has begun to reshape Australian ideas and policy.<sup>96</sup>

As has been extensively explored elsewhere,<sup>97</sup> the legal protection of native wild animals, particularly rare, threatened or endangered native animal species, was further enhanced when the Commonwealth began playing a significant regulatory role, especially from the 1970s. With increased Commonwealth involvement in the protection of native animals, on the back of international flora and fauna protection treaties, Australia had significantly revised the value placed on most native wild animal species relative to most of those introduced by the British.

## V CONCLUSION

As argued at the outset of this article, it is possible to identify a hierarchy of protection in contemporary law with respect to the protection of wild animals in Australia. According to this hierarchy, native species of high conservation status are fully protected against killing and harm. Native species of lower conservation status are protected to a varying degree. Finally, introduced species are much less likely to be protected against harm whilst their killing is encouraged, if not mandatory. This contemporary hierarchy is very different from that which prevailed in Australia prior to federation. For a range of pragmatic, aesthetic and social reasons, meaningful protection for native wild animals only began emerging towards the end of the 19<sup>th</sup> century, while introduced wild animals were afforded significant protection, at least until they were well-enough established to be killed without fear of eradication.

95 Hutton and Connors, above n 70, 43. Donegan observes that US President Herbert Hoover, in his earlier life a miner/engineer on the Western Australian goldfields, had witnessed large-scale native animal killing, and subsequently, as US Secretary of Commerce, 'put an end to the importation of Australian skins, labelled either "koala" or "wombat", and thereby helped save the species': Donegan, above n 94, 45 (citations omitted).

96 Dunlap, above n 41, 34.

97 Hutton and Connors, above n 70. For a legally-focused account, see Gerard Early, 'Australia's National Environmental Legislation and Human/Wildlife Interactions' (2008) 11 *Journal of International Wildlife Law & Policy* 101; Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2010) 123–34; D E Fisher, *Australian Environmental Law: Norms, Principles and Rules* (Thomson Reuters, 2<sup>nd</sup> ed, 2010) 446–56; Bates, above n 17, 105–52.

The shift in the bias of legal protection of wild animals reflects a range of influences, including the failure of acclimatisation, an increasingly 'Australian-born' population, the emergence of conservation/scientific advocacy groups and a growing nationalism. It is notable that a concern about animal welfare had minimal influence in shaping wild animal protection. From the very outset, and consistent with the law to the present day, nature conservation and animal welfare legislation largely operate independently of one another. This has important implications for the relative value of conservation and welfare, especially given the conflicts which can arise between an ethic of conservation, where the focus may be on species conservation, and a welfare ethic, where the focus will be on the well-being of individual animals, regardless of species.<sup>98</sup>

Perhaps reflecting the absence of an underlying animal welfare ethic, the patterns of protection identified in this article are highly ambiguous and unstable. To take the present day, the kangaroo — an iconic Australian animal — is a protected native animal. It is featured on Australia's coat-of-arms and is a symbol of internationally recognised companies such as Qantas. Despite this, at least three million kangaroos (and probably many more) are killed every year in Australia.<sup>99</sup> This represents the 'largest land-based slaughter of wildlife in the world'.<sup>100</sup> Consider too that despite the significant formal legal protection extended to rare or endangered species under the *EPBC Act*, in practice it is proving ineffective at preventing extinctions.<sup>101</sup> On the other hand, colonial influences linger. While most introduced wild animals enjoy very little legal protection against harm, with mandatory killing often required, a few introduced species have established some protection beyond being a declared pest, including wild horses<sup>102</sup> and trout.<sup>103</sup> What is remarkable about wild animal protection, from European invasion to the present day, is its highly contingent nature. Even today, with increased understanding of the physiological and cognitive capacities of animals, rather than drawing on a principle such as sentience to provide a rational basis for governing legal protection against harm — recognising that native and introduced wild animals alike have a similar capacity to suffer pain and experience pleasure — the welfare of many wild animals remains hostage to the prevailing currents of aesthetics, conservation, nationalism and economic expediency.

98 For a detailed consideration of these differing ethics, see Olivia Khoo, 'A New Call to Arms or A New Coat of Arms? The Animal Rights and Environmentalism Debate in Australia' (2009) 5 *Journal of Animal Law* 49. See also Steven White, 'Regulation of Wild Animal Welfare', above n 4, 234–36.

99 Keely Boom and Dror Ben-Ami, 'Shooting Our Wildlife: An Analysis of the Law and its Animal Welfare Outcomes for Kangaroos & Wallabies' (2011) 5 *Australian Animal Protection Law Journal* 44, 44.

100 *Ibid.*

101 See Flannery, 'After the Future', above n 22.

102 An inconsistent approach is adopted nationwide in Australia, with some states declaring wild horses a pest, while others do not (in effect protecting these horses from mandatory 'control'). For a summary of the various legislative approaches, see Steve Csurhes, Gina Paroz and Anna Markula, Queensland Primary Industries and Fisheries, *Pest Animal Risk Assessment: Feral Horse* (2009) 20.

103 While it is accepted that introduced trout may adversely affect some native fish species, all jurisdictions allow for the conservation (ie sustainable killing) of trout, rather than mandated control: see, eg, P L Cadwallader, Australian Nature Conservation Agency, *Overview of the Impacts of Introduced Salmonids on Australian Native Fauna* (1996) 49–53.