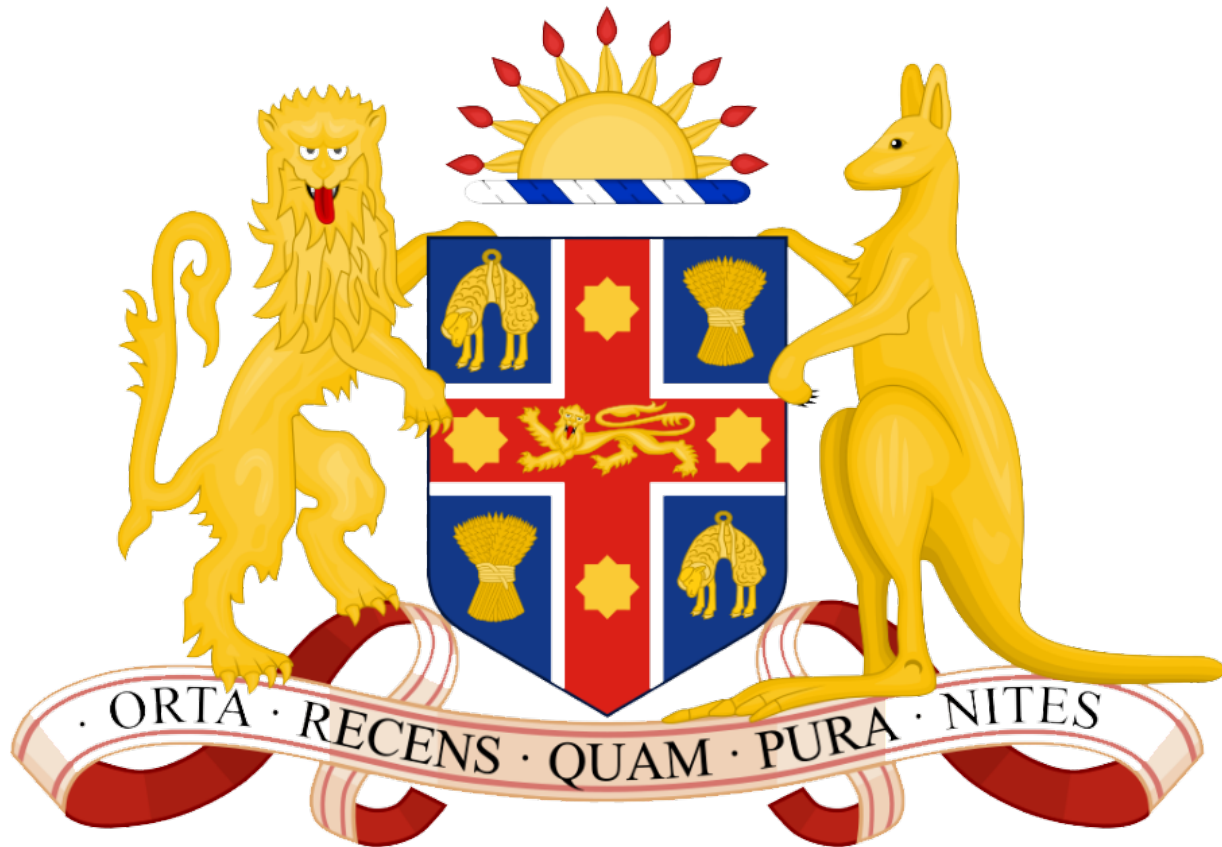


# **Inquiry into the use of exotic animals in circuses and the exhibition of cetaceans in New South Wales, Australia**



**for the  
New South Wales Government**

**Submission by Dr Ingrid N. Visser (PhD)**

**November 2019**

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## Acronyms

<b>CBD</b> .....	Convention on Biological Diversity
<b>CCHPIR</b> .....	Conservation of Cetaceans and their Habitats in the Pacific Island Region
<b>CITES</b> .....	Convention on International Trade in Endangered Species of Wild Fauna and Flora
<b>CMS</b> .....	Convention on the Conservation of Migratory Species of Wild Animals
<b>DMCP</b> .....	Dolphin Marine Conservation Park
<b>EPBCA</b> .....	Environmental Protection and Biodiversity Conservation Act (1999)
<b>NSW</b> .....	New South Wales, Australia
<b>NSW DPI</b> .....	NSW Department of Primary Industries
<b>PCAA</b> .....	Prevention of Cruelty to Animals Act (1979)
<b>SSCAW</b> .....	Senate Select Committee on Animal Welfare
<b>UNCLOS</b> .....	United Nations Convention on the Law of the Sea

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## I. Introduction

Dear Parliamentary Members,

I write to you as a scientist specialising in cetaceans<sup>1</sup> (both wild and captive) and respectfully ask you, under your Terms of Reference<sup>2</sup>, to **introduce a ban on the keeping of cetaceans** (with a 'sunset clause' for those currently in captivity – please see details below).

As you are no doubt aware, the only facility holding cetaceans in captivity in NSW, the Dolphin Marine Conservation Park (DMCP), located in Coff's Harbour, has recently announced that it has "*stopped its breeding program and is conducting a feasibility study to retire its animals into sea pens.*"<sup>3</sup> DMCP's Managing Director stated that "*Having whales and dolphins and belugas, other marine mammals in captivity is not publicly accepted these days.*"<sup>3</sup>

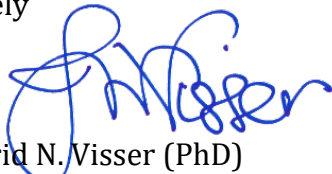
Given that the NSW Department of Primary Industries is responsible for ensuring that the policy and legislative frameworks in the State "*support good animal welfare outcomes*"<sup>4</sup>, it would seem logical that it will implement a ban on the keeping of cetaceans as their welfare needs cannot be met in captivity (see Rose & Parsons 2019 for a comprehensive overview)<sup>5</sup>.

Thirty-four years ago, in 1985, the Australian Parliament of the Commonwealth of Australia, in its report Dolphins and Whales in Captivity by the Senate Select Committee on Animal Welfare (SSCAW), indicated a key recommendation "*that existing oceanaria be allowed to continue keeping cetacea for the time being but that the keeping of cetacea should eventually be phased out unless further research justifies their continuance.*" [emphasis added]

Given that there is a strong, and rapidly growing, body of scientific evidence demonstrating that captivity is detrimental to cetaceans, and that their welfare and species-specific needs cannot be met, the next logical step is to build in a 'sunset' clause into the NSW legislation – in which these dolphins will be the last individuals kept in captivity in NSW.

I provide the following submission in support of my request and invite you to reach out to me should you require any further information. If there is a hearing, I would be available to speak to your committee. I agree to this submission being made available to the public.

Sincerely



Dr Ingrid N. Visser (PhD)

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<sup>1</sup> Please see my CV. And where cetacean means all species of whale, dolphin and porpoise, *i.e.* of the order *Cetacea*.

<sup>2</sup> <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2555/Terms%20of%20Reference%20-%20Use%20of%20exotic%20animals%20in%20circuses%20and%20the%20exhibition%20of%20cetaceans%20in%20NSW.pdf>

<sup>3</sup> Dahlstrom, Michael, Qantas clarifies connection with dolphin parks after other travel companies sever ties, YAHOO! LIFESTYLE (18 Aug 2019), available at [https://au.lifestyle.yahoo.com/qantas-cuts-ties-with-dolphin-parks-023325027.html?soc\\_src=social-sh&soc\\_trk=ma](https://au.lifestyle.yahoo.com/qantas-cuts-ties-with-dolphin-parks-023325027.html?soc_src=social-sh&soc_trk=ma) and see Dolphin Marine Conservation Park website from DMCP website: <http://www.dolphinmarineconservation.com.au/article/no-longer-breeding-dolphins>

<sup>4</sup> <https://www.dpi.nsw.gov.au/animals-and-livestock/animal-welfare>

<sup>5</sup> Rose, N. A., & Parsons, E. C. M. (2019). The case against marine mammals in captivity. Washington, DC. Available from <https://awionline.org/content/case-against-marine-mammals-captivity>

## II. Executive Summary

Phasing out the keeping of cetaceans in New South Wales (NSW) reflects recommendations made as early as 1985 by the Australian Government Senate Select Committee on Animal Welfare<sup>6</sup>, which stated “**the keeping of cetacea should eventually be phased out unless further research justifies their continuance**”.

Scientific evidence demonstrating that captivity is detrimental to cetaceans, in that their welfare and species-specific needs cannot be met, is strong and continues to rapidly grow<sup>7</sup>. The evolution of our understanding of these animals has resulted in a paradigm shift in public sentiment and there is an ever-growing call to ban the keeping of cetaceans in captivity.

Business trends are indicative that captivity is no longer acceptable, with at least 12 airlines and a further five major travel companies all pledging to no longer sell tickets to places that keep cetaceans in captivity.

A ban ensures interactions in NSW are in alignment with its legislation, namely the *Prevention of Cruelty to Animals Act* 1979, the *Exhibited Animals Protection Act* 1986, *Exhibited Animals Protection Regulation* 2010 and *Exhibited Animals Protection Amendment (Misc) Regulation* 2019. The former of which prohibits cruelty to animals and creates a duty of care in animal users. The Act provides for codes and NSW has dutifully developed one for bottle-nosed [sic] dolphins<sup>8</sup>, however, this was ratified in 1994, making it, in 2019, 25 years old.

### KEY POINTS

- *Currently, Australian & NSW legislation allows for the keeping of cetaceans for commercial purposes (display) (albeit that this activity requires permits).*
- *The 1985 Australian Senate Select Committee on Animal Welfare recommended that **“the keeping of cetacea should eventually be phased out unless further research justifies their continuance”***
- *The 2019 Inquiry into the use of exotic animals in circuses and the exhibition of cetaceans in New South Wales provides an opportunity for amendments in the legislation to implement that recommendation and prevent cetacean captivity.*
- *A ban would bring cetacean-specific welfare in line with the Prevention of Cruelty to Animals Act and other relevant Australian legislation.*
- *Support is strong for a ban; from the public sector with businesses trends reflecting this.*
- *NSW will be fulfilling obligations under various international treaties.*
- *Scientific evidence corroborates animal welfare concerns related to cetaceans’ captivity.*

<sup>6</sup> See page ix, (8.10) in Senate Select Committee on Animal Welfare. (1985). Dolphins and whales in captivity. Canberra. Canberra Publishing and Printing Co. Pp117. Available from;

[http://www.aph.gov.au/binaries/senate/committee/history/animalwelfare\\_ctte/dolphins\\_whales\\_in\\_captivity/report.pdf](http://www.aph.gov.au/binaries/senate/committee/history/animalwelfare_ctte/dolphins_whales_in_captivity/report.pdf)

<sup>7</sup> For example see this references and citations within; Rose, N. A., & Parsons, E. C. M. (2019). The case against marine mammals in captivity. Washington, DC. Available from <https://awionline.org/content/case-against-marine-mammals-captivity> and additional publications such as; Marino, L., Rose, N. A., Visser, I. N., Rally, H. D., Ferdowsian, H. R., & Slootsky, V. (2019). *The harmful effects of captivity and chronic stress on the well-being of orcas (Orcinus orca)*. Journal of Veterinary Behavior, 1-14. doi:10.1016/j.jveb.2019.05.005 which have since become available.

<sup>8</sup> <https://www.dpi.nsw.gov.au/animals-and-livestock/animal-welfare/exhibit/standards,-guidelines-and-policies>



Figure 1. A bottlenose dolphin during an interactive program with the public, in captivity in SeaWorld Gold Coast Queensland (SWGC), Australia. This individual shows typical long-term and recent (open wound) damage to the tip of the rostrum. Injuries of this type are the result of self-harming and are often described by the industry as occurring due to ‘the animal exploring its enclosure’. However, logic would have it (and legislation requires it) that an appropriate enclosure would not elicit such behaviour, nor such injuries, in the first place.

Furthermore, SWGC touts itself as ‘one of the best facilities in the world’, implying by default that the facility found in NSW is inferior and, by supposition, that its animals would suffer more.

Photo: © Ingrid N. Visser, taken 09 October 2019, Sea World Australia, Gold Coast



### III. Background

Australia's waters provide habitat to an incredible diversity of cetaceans; currently at least 45 species have been documented<sup>9</sup>. Although the Australia Federal Parliament enacted the Whale Protection Act in 1980, which protected all cetaceans in Commonwealth waters, the Act did allow for permits to be issued by the appropriate Federal Minister for the capture of cetaceans for display, educational or research purposes. That Act was superseded by the Environmental Protection and Biodiversity Conservation Act (1999) (EPBCA)<sup>10</sup> which has a specific section on cetaceans which recognises that it is no longer appropriate to capture cetaceans for public display by stating; "*Division F, Application for Permits (4) The Minister **must not grant a permit** authorizing its holder to kill a cetacean or take a **cetacean for live display**."*

Historically, Australia began keeping cetaceans in captivity by utilizing a public swimming pool in the 1950's<sup>11</sup> and by 1956 the first dolphin show in Australia, where the public could hand feed the dolphins and watch them perform tricks, was established (Jack Evan's Pet Porpoise Pool at Tweed Heads, Queensland)<sup>12</sup>. A total of 11 facilities have held cetaceans in Australia; African Lion Safari; Atlantis Marine Park; Dolphin Marine Magic; Hamilton Island Resort; King Neptune's Park; Marineland Adelaide; Marineland of Australia; Jack Evan's Pet Porpoise Pool; Sea World Gold Coast; Taronga Park Zoo and Underwater World Perth.

The first facility to keep cetaceans in captivity in NSW was Dolphin Marine Magic (now known as Dolphin Marine Conservation Park, DMCP) at Coff's Harbour (established 1970); followed by King Neptune's Park at Port Macquarie (established 1973) and African Lion Safari at Warragamba, (also established 1973). Taronga Park Zoo in Sydney, kept cetaceans for a period but they were forced to drain the cetacean tank "*when many animals died from foreign objects being thrown into the pool.*"<sup>13</sup>

DMCP has kept one species of cetacean; bottlenose dolphins (*Tursiops truncatus*) and of the 13 animals it has held, eight have died.<sup>14</sup> Three of those were captured from the wild, one was a previous rescue and four were born at the facility. Of those currently on display (five), three were born at the facility and two were rescued.

The use of rescued cetaceans for commercial purposes is prevalent in the captivity industry, where facilities 'green-wash' their actions and obtain highly valuable animals for financial gain and to breed them.<sup>15</sup> In fact, all three calves born at DMCP are offspring of Bucky a male

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<sup>9</sup> <http://www.environment.gov.au/marine/marine-species/cetaceans> (last visited 20 November 2019); see also Jefferson, T. A., M. A. Webber and R. L. Pitman (2008). Marine mammals of the world. A comprehensive guide to their identification. Amsterdam, Academic Press.

<sup>10</sup> <https://www.legislation.gov.au/Details/C2004A00485>

<sup>11</sup> See page 8 in Senate Select Committee on Animal Welfare. (1985). Dolphins and whales in captivity. Canberra. Canberra Publishing and Printing Co. Pp117. Available from: [http://www.aph.gov.au/binaries/senate/committee/history/animalwelfare\\_ctte/dolphins\\_whales\\_in\\_captivity/report.pdf](http://www.aph.gov.au/binaries/senate/committee/history/animalwelfare_ctte/dolphins_whales_in_captivity/report.pdf)

<sup>12</sup> <http://www.goldcoaststories.com.au/jack-evans-porpoise-pool/>

<sup>13</sup> Page 8 in Senate Select Committee on Animal Welfare. (1985). Dolphins and whales in captivity. Canberra. Canberra Publishing and Printing Co. Pp117. Available from: [http://www.aph.gov.au/binaries/senate/committee/history/animalwelfare\\_ctte/dolphins\\_whales\\_in\\_captivity/report.pdf](http://www.aph.gov.au/binaries/senate/committee/history/animalwelfare_ctte/dolphins_whales_in_captivity/report.pdf)

<sup>14</sup> <http://www.cetabase.org/captive/cetacean/dolphin-marine-magic>

<sup>15</sup> At least 13 different species, from at least 13 different facilities, encompassing numerous individuals have been 'rescued' and repurposed for commercial gain. See Visser, I. N. (2015). 'Rescuing' cetaceans; Compassionate conservation or just lining aquaria's corporate coffers? Paper presented at the Compassionate Conservation Conference, Vancouver, Canada. 29-31 August, 2015. Available from [www.orcaresearch.org](http://www.orcaresearch.org)

dolphin rescued in 1971 and two of those three also have a mother (Calamity) who was rescued in 1994 making both these animals very profitable ‘rescues’. Additionally, two of the four calves who have died at DMCP were born to Calamity (with at least one of them sired by Bucky)<sup>14</sup>.

## A. Conflict between Policy Recommendations and Current Practice

In its 1985 report ‘Dolphins and Whales in Captivity’, the Parliament of the Commonwealth of Australia Senate Select Committee on Animal Welfare (SSCAW), indicated a key recommendation (#8.10) “*that existing oceanaria be allowed to continue keeping cetacea for the time being but that **the keeping of cetacea should eventually be phased out unless further research justifies their continuance.***” [emphasis added].

At the time of the writing the recommendations thirty-four years ago, there were seven cetacean captivity facilities in Australia. Although today only two facilities remain (one in NSW and one in Queensland), no legislation has been proposed to reflect these clear policy recommendations by the Committee from more than three decades ago.

In the same report the SSCAW identified issues regarding the welfare of cetaceans in captivity, which appeared to influence their very clear recommendation to phase out cetacean captivity in Australia. In addition, the legislation of the PCAA states in section 3 Objects of Act, that; “The objects of this Act are:

- (a) to prevent cruelty to animals, and
- (b) to promote the welfare of animals by requiring a person in charge of an animal:
  - (i) to provide care for the animal, and
  - (ii) to treat the animal in a humane manner, and
  - (iii) to ensure the welfare of the animal”

By default, the keeping of cetaceans in captivity either infringes on this Act, violates the law, or the spirit of the law, because it is not possible for these animals to be kept in a manner which meets their basic biological needs and therefore their welfare is compromised. (see next section for more details).

Furthermore, within the EPBCA, the specific clause that prohibits captures of cetaceans from the wild for public display is indicative that the current practice of actually having them on display is not necessarily in line with the legislation. The EPBCA brings into line one of the key recommendations (#8.9, page 95) of the SSCAW “*that no further facilities for keeping captive cetacea be permitted to be established in Australia and that no further permits be issued for the capture of cetacea in Australian Commonwealth or State waters. It further RECOMMENDS that importation of cetacea from overseas be banned.*”, yet that recommendation has not been fulfilled.

## B. Consistent with the Welfare of Animals

As early as 1985, the SSCAW recognised the concerns and fundamental flaws of keeping cetaceans in captivity and was striving to acknowledge and respect the fundamental social and biological needs of cetaceans. On page 10, at point 2.8 they state “*Oceanaria were criticised for painful and stressful capture techniques, the high mortality rate of captive cetacea **and a captive environment which was not able to provide for the cetacean's social or biological needs.** The critics argued that, not only were oceanaria detrimental to the cetaceans welfare, but that the behaviour displayed by these*

*captive animals was so different from their natural behaviour that there was now little scientific or educational justification for keeping them captive.”*

The 2019 report by Rose & Parsons<sup>16</sup> has a comprehensive list of the issues of keeping marine mammals in captivity. It would be redundant to repeat them all here, however, there are few salient points which I draw the reader’s attention to, below, which are specifically poignant in the light of the fact that I have visited over 30 facilities, holding at least 15 different species of cetaceans captive, in 17 countries. I have yet to find a single specimen that was thriving and that didn’t show some level of stress, abnormal behaviour or self-mutilation (or a combination of these).

I attach to this submission, reports and previous submissions that I have prepared for a number of situations (e.g., presentation to the Canadian Government regarding Bill S-203 banning the keeping of cetaceans, a report for the USA court for the case *Anderson v SeaWorld*, a report about the situation at Loro Parque, (a theme park in Spain) discussing a range of issues with their captive orca. All of this, along with the Rose & Parsons (2019) report paints an extremely poor picture of facilities, individual animals and the issue of captivity in general. The key points to note are that;

- A. Not only are cetaceans sentient, but they are intelligent, self-aware, highly social animals with complex family structures and culture<sup>16</sup>. We have much to learn, yet we already know that cetaceans exhibit cultural behaviours such as teaching foraging methods, communicating in sounds unique to different social groupings such as dialects, and using signature whistles to identify individuals. These unique cultures are maintained even where subgroups of the same species overlap geographically. Further, cetaceans require vast amounts of space as they can travel hundreds of kilometres a day, a necessity which captivity cannot accommodate. Additionally, cetaceans have evolved to be cooperative and efficient hunters, yet in captivity they are deprived of any opportunity to hunt and are only fed carrion. Lastly, sound is incredibly important to the survival and health of cetaceans, and is critical for their hunting, navigation and communication; captivity interferes with and compromises these fundamental aspects of their lives.
- B. Acknowledging that there is a wide spectrum of captive cetacean facilities internationally, with varying degrees of attention to welfare issues, there is still no aquarium facility which can replicate conditions in the wild that would meet a cetacean’s needs, including ‘modern’ facilities. Space alone restricts the ability of a cetacean to perform even a minority of his or her natural behaviours or to allow for the social structures typically encountered in the wild. Captive facilities are habitats that distort and amplify sound, creating stress and discouraging cetaceans from using echolocation for navigation and communication. Additionally, captive facilities completely remove the opportunities for hunting and the accumulative result is that captivity effectively destroys normal cetacean culture.
- C. Recalling that the SSCAW stated “*the keeping of cetacea should eventually be phased out unless further research justifies their continuance,*” scientific evidence consistently finds that captivity is detrimental to cetaceans, in that their welfare and species-specific needs cannot be met, that they suffer chronic stress and exhibit behaviours consistent with distress, all as facets of being held under inappropriate conditions. As such there is no research that “justifies” the keeping of these animals in captivity. Currently, the only reason they are kept

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<sup>16</sup> e.g., see Rose, N. A., & Parsons, E. C. M. (2019). The case against marine mammals in captivity. <https://awionline.org/content/case-against-marine-mammals-captivity>



in captivity is for commercial purposes, although ‘education’ and ‘conservation’ are often claimed as reasons by the captivity industry, these two aspects continue to fail (see details in Rose & Parsons (2019) for examples).

- D. Therefore, any cetaceans kept in concrete tanks will not meet PCAA requirements. Moreover, the keeping of cetaceans as allowed under current law, is typically to generate income (by providing entertainment for people) and as such the pain and distress the animals suffer is unreasonable and unnecessary, resulting in actions that are in direct opposition of the spirit of the PCCA. Consequently, it is appropriate for the NSW Government to take responsibility for championing a change in the legislation to better protect these animals.
- E. In the rare cases of permanent captivity (e.g., individuals who cannot be rehabilitated and/or released into the ocean due to injuries or other contributing factors), sanctuary conditions in sea pens (i.e., in the ocean) should be created, where cetaceans are autonomous and able to make choices, and where humans are able to provide for their needs whilst giving priority to their welfare.

### **C. Consistent with International Practice and Conventions**

Australia is a party to many international conventions which encourage the conservation of cetaceans. As explicated below, the phasing out of captive cetaceans will bring Australia one step closer to formally keep in line with evolving international practice, as well as fulfil its responsibilities under the international conventions to which it is a party, when NSW phases out the keeping of cetaceans.

#### **1. International Practice and Law**

In 1979 Australia adopted an anti-whaling policy, permanently ending whaling in Australian waters<sup>17</sup>. At the same time the country started to focus heavily on working towards the international protection and conservation of whales, reflecting that it is among one of the global leaders in the treatment of cetaceans. However, by still keeping cetaceans in captivity, it is falling behind and without this practice being phased out and formalized in the law, there is currently no assurance that this will become part of the country’s history.

Nations around the world are increasingly recognizing, through law, that cetaceans should not be kept in captive facilities except for narrow exceptions (such as rescues or during the phasing out of the industry), for example: Bolivia (2009), Canada (2019), Chile (2005), Costa Rica (2005), Croatia (2009), Cyprus (2011), Greece (2012), Hungary (1992), India (2003), Slovenia (2004), Switzerland (2012) and one state in the USA (South Carolina) have all implemented laws banning the keeping of cetaceans. By implemented changes to the NSW legislation to do the same, the NSW Government would signal the intent and practice of NSW as a global leader in cetacean welfare and conservation.

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<sup>17</sup> <https://www.environment.gov.au/marine/marine-species/cetaceans/whaling>

## 2. Convention on the Conservation of Migratory Species of Wild Animals (CMS)

In addition to an evolution in the global laws to ban captivity for display and entertainment, many countries and international law seek to ban the live capture of wild cetaceans. In 2014 CMS (also known as the Bonn Convention), to which Australia has been a Party of since 1991,<sup>18</sup> passed Resolution 11.22 discouraging the live captures of cetaceans from the wild for commercial purposes.<sup>19</sup> In that resolution, CMS acknowledged that many countries “including Argentina, **Australia**, Brazil, Chile, China, Costa Rica, India, Lao People’s Democratic Republic, Malaysia, Member States of the EU, Mexico, Monaco, Nicaragua, Peru, Philippines, Singapore, Thailand and Uruguay, [had] already established total or partial prohibitions of live captures of wild cetaceans in their national waters.” Resolution 11.22 then invited Parties “to develop and implement national legislation, as appropriate, prohibiting the live capture of cetaceans from the wild for commercial purposes.”

In 2016, CMS provided an update on Resolution 11.22, reporting that 32 CMS Parties, including the European Union which consists of 28 Parties, or effectively, 59 countries “have legislation prohibiting the live capture of cetaceans from the wild for commercial purposes.”<sup>20</sup> Under the auspices of the CMS, Australia also became a signatory (15 September 2006) to the Memorandum of Understanding for the Conservation of Cetaceans and their Habitats in the Pacific Island Region (CCHPIR)<sup>21</sup> which is also in collaboration with the Pacific Regional Environment Programme. One of the fundamental components of the CCHPIR is that signatories “Review, enact or update, as appropriate, legislation to conserve cetaceans”. Should NSW ban the keeping of cetaceans in captivity they would support this component, as the display of captive cetaceans has been repeatedly shown to drive their capture from the wild and therefore impact their conservation.<sup>22</sup>

## 3. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

Australia is one of the original signatories to the CITES (in 1973). Following ratification, a regulation of the European Council which came into force at the beginning of 1984, added dolphins and killer whales to Appendix I of the Convention, which requires ratifying nations (including Australia) not to trade these cetaceans for primarily commercial purposes. Should any of the dolphins currently in NSW be traded to any display facility, this would be in violation of CITES.

CITES, through the Conference of the Parties, identifies species that should be protected and places them into one of three appendices. Notably, all cetacean species are listed in either Appendix I or

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<sup>18</sup> <https://www.cms.int/en/country/australia> (last accessed 22 November 2019).

<sup>19</sup> Convention on the Conservation of Migratory Species of Wild Animals, Res. 11.22, *Live Captures of Cetaceans from the Wild for Commercial Purposes*, UNEP/CMS/Resolution 11.22 (Nov 2014).

<sup>20</sup> Convention on the Conservation of Migratory Species of Wild Animals, *Update on Res. 11.22 on Live Capture of Cetaceans from the Wild for Commercial Purposes*, UNEP/CMS/ScC-SC1/Inf.4 (Apr 2016).

<sup>21</sup> <https://www.cms.int/en/document/memorandum-understanding-conservation-cetaceans-and-their-habitats-pacific-islands-region>

<sup>22</sup> <http://uk.whales.org/wp-content/uploads/sites/6/2018/08/Driven-by-demand.pdf> / *List of Parties*, Convention on Biological Diversity, available at <https://www.cbd.int/information/parties.shtml> (last visited 22 November 2019).

Appendix II and are therefore afforded protection under CITES. In 2002, CITES addressed conservation of cetaceans in Resolution 11.4. articulating the desire of the Parties that “*the maximum protection possible under [CITES] be afforded to the cetaceans listed in the Appendices*” and acknowledging “*the need for special attention to the conservation of whales and other cetaceans.*”<sup>23</sup> In addition, Resolution 11.4 recommends that “*the Parties agree not to issue any import or export permit, or certificate for introduction from the sea, under this Convention for primarily commercial purposes for any specimen of a species or stock protected from commercial whaling by the International Convention for the Regulation of Whaling.*”

#### **4. Convention on Biological Diversity (CBD)**

Australia became a Contracting Party to the CBD in 1993.<sup>24</sup> Although the CBD promotes both *in situ* and *ex situ* conservation, it clearly prefers *in situ*.<sup>25</sup> The CBD’s vision as articulated in its Strategic Plan 2011-2020 is “*Living in Harmony with Nature*” where by “*2050, biodiversity is valued, conserved, restored, and wisely used...*”<sup>26</sup>

##### **1. United Nations Convention on the Law of the Sea (UNCLOS)**

Australia ratified UNCLOS in 1994. Marine mammals are afforded special conservation provisions under UNCLOS, with specific protections articulated under Article 65 (applying to a country’s Exclusive Economic Zone) and Article 120 (applying to the high seas). UNCLOS asks Parties to “*cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.*” Besides working through the International Whaling Commission (another regulatory body which Australia is a signatory to, and which would fall under UNCLOS’s reference to appropriate international bodies), it is important that Australia fulfil its obligations related to cetaceans under the other international conventions.

##### **1. International Convention for the Regulation of Whaling (ICRW)**

Australia became a member of the IWC by adhering to the ICRW in 1991.<sup>27</sup> The IWC addresses issues such as animal welfare, strandings and conservation for cetaceans globally.<sup>28</sup> Reports have also recognized that live captures for the captivity industry have put pressure on some cetacean populations<sup>29</sup> and as described in detail below, there is a direct link between captivity and captures. Although there is no requirement to report to the IWC, Australia may communicate either informally or formally to the IWC, of any legislation that bans (and/or phases out) the keeping of cetaceans in captivity, as it would be of interest to the IWC and other member countries.

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<sup>23</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, *Conservation of Cetaceans, Trade in Cetacean Specimens and the Relationship with the International Whaling Commission*, Resolution ConfC. 11.4 (Rev. Cop12) (2002).

<sup>24</sup> <http://www.cbd.int/doc/world/au/au-nr-05-en.pdf/>

<sup>25</sup> Jefferies, C. S. (2016). *Marine Mammal Conservation and the Law of the Sea*. Oxford Press: p. 50

<sup>26</sup> The CBD Strategic Plan for Biodiversity 2011–2020 and the Aichi Targets, available at <https://www.cbd.int/doc/strategic-plan/2011-2020/Aichi-Targets-EN.pdf> (last visited 22 Nov 2019).

<sup>27</sup> *Membership and Contracting Governments*, International Whaling Commission, available at <https://iwc.int/members> (last visited 22 November 2019).

<sup>28</sup> See generally, <https://iwc.int/home>.

<sup>29</sup> See, e.g., Report of the Workshop on Small Cetaceans and Climate Change, available at [https://iwc.int/document\\_1038](https://iwc.int/document_1038) (last visited 17 Aug 2019), and Report of the IWC Scientific Committee Workshop on Habitat Degradation, available at [https://iwc.int/document\\_915](https://iwc.int/document_915) (last visited 22 Nov 2019).

## D. Consistent with Business Trends

Increasingly, businesses are changing their practices to reflect the evolution in understanding that cetacean captivity, for the purposes of commercial display, has a negative effect on the welfare of cetaceans and does not effectively contribute to their conservation. They also understand that customers increasingly are considering welfare and conservation issues when making purchases.

Responsible whale-watching in the wild is considered a more sustainable and respectful means to experience and understand cetaceans. Recently, after assessing animal welfare issues, travel companies AAA Northeast, Corendon, Responsible Travel, Thomas Cook, Virgin Holidays and other responsible travel companies have established policies that they will not sell tickets to facilities that keep cetaceans in captivity. Airlines are also increasingly cutting ties with facilities that keep cetaceans' captive, including, but not limited to: Air Canada, Alaska Airlines, Corendon, Delta Airlines, British Airways, JetBlue, Southwest, Spirit, Sunwing, Transat, United Airlines and Virgin Airlines.

SeaWorld in the USA has changed its corporate policy to no longer breed orca, with the long-term goal of phasing out orca in captivity. The National Aquarium located in Baltimore, Maryland in the USA, is retiring all of its dolphins to a sanctuary for the health and welfare of the animals.<sup>22</sup> Dolphin Marine Conservation Park, located in Coff's Harbour, Australia, has recently announced that it has *"stopped its breeding program and is conducting a feasibility study to retire its animals into sea pens."*<sup>23</sup> Dolphin Marine Conservation Park's Managing Director stated that *"Having whales and dolphins and belugas, other marine mammals in captivity is not publicly accepted these days."*<sup>22</sup>

Marine ecotourism has a strong presence in Australia, with significant numbers; for example in 2008 it was reported that the whale watching industry earned AU\$31 million in direct revenue and attracted 1.6 million people<sup>30</sup>. A 2011 report specifically investigating the value of whale watching in Australia stated the country *"has a well-established commercial whale watching industry, with operations in every state."* They noted that the 1.6 million people cited above generated AU\$47 million in ticket expenditure and AU\$264 million in total tourism expenditure in 2008. That represented an increase in direct expenditure of nearly 600%.<sup>31</sup>

Public sentiment against the keeping of cetaceans will continue to impact businesses who hold them captive.<sup>32</sup> The economic value of the last remaining facility in NSW is not publicly available, however occasionally information is provided; such as the statement by the owner of DMCP, in 2010 that they have "90,000 guests" (although the duration over which this number was counted, was not explicit. At AU\$38 per person entry fee into DMCP, the contribution to the economy (AU\$3,420,000) does not rival Australia's whale & dolphin watching industry)<sup>33</sup>. Additionally,

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<sup>30</sup> <https://www.theaustralian.com.au/news/world/worlds-whale-watching-industry-worth-2-billion-a-year-and-growing/news-story/3c09361901f5edf43651e73d9b59342c>

<sup>31</sup> Knowles, T., Campbell, R., 2011. What's a whale worth? Valuing whales for National Whale Day, a report for the International Fund for Animal Welfare (IFAW), prepared by Economists at Large, Melbourne, Australia. <http://www.ecolarge.com/wp-content/uploads/2012/06/IFAW-NWD-Report-FINAL-lowres.pdf>

<sup>32</sup> [https://www.huffpost.com/entry/anatomy-of-the-blackfish\\_b\\_9511932](https://www.huffpost.com/entry/anatomy-of-the-blackfish_b_9511932)

<sup>33</sup> Claims of *"The economic benefit to Coff's Harbour [from Dolphin Marine Conservation Park] is something in the vicinity of \$20 million per annum, and they are figures done by Southern Cross University,"* seems excessive in comparison to the analysis of the whale watching industry in Australia. <https://www.sbs.com.au/news/feature/baby-dolphin-dead-marine-park-under-siege>

visitor numbers from the park's annual reports, show a steady decline in profits from around \$370,000 in 2008 to just \$30,000 by 2014.

## **E. Consistent with Conservation**

In times past, some cetacean species were threatened with extinction through the practice of commercial whaling. Today, these cetaceans are generally protected, for the most part, by the IWC's moratorium on commercial whaling, to which Australia was instrumental, and/or through an individual country's own laws. Although whaling and capture for display are now prohibited in Australia, a direct link between cetacean captivity and removing cetaceans from the wild has been well established.<sup>34</sup> It is logical to also recognise that such removal has the same result as if they were killed (as individuals no longer contribute to the increase or maintenance of wild populations, to ecosystem services or to the social fabric of cetacean societies through breeding, cultural transmission, or in other ways). Therefore, it is vital that the cycle be broken and captive be banned.

The captivity industry often claims that their 'work' is conservation orientated, however, one must question how effective such work is, given that there continues to be a decline in conservation measures to protect cetaceans (at a world-wide level) and that pollution and other issues in the oceans continues to grow. The owner of DMMCP has stated "*The work that they [the dolphins] do is what gives our guests the greatest pleasure; the ability to inspect, connect and touch and then possibly change their behaviour at their homes when they go home.*" This statement is hardly an endorsement for an effective conservation program, rather it seems more about self-gratification for the guest.

## **F. Consistent with Public Sentiment**

Lastly, but just as importantly, captive facilities are increasingly losing their social license to keep cetaceans in captivity.<sup>27</sup> Tourism businesses at an international level are changing their practices and a grown number of travel agencies, airlines and related tourism companies are no longer selling tickets to places that keep cetaceans in captivity.

This public sentiment is also reflected in Australia. The 1985 report by the SSCAW, already described the change in attitude towards the keeping of cetaceans in detail (see pages 8-12) and that sentiment has only grown. Informed public now frequently attend protests outside facilities in Australia<sup>35</sup> and at an international level such actions are also prevalent. The World Animal Protection (2019) report, which specifically looked at the economics behind cetacean captivity note that "*Our consumer survey shows that people visit dolphin venues because they love them, and that people are largely unaware of the life of suffering endured by dolphins in captivity. After hearing how dolphins suffer in captivity, almost half of respondents (48%) suggested they would be more likely to agree that venues should be closed.*" They then have a statement that could be a warning for businesses; "*The public have the power to stop the exploitation of dolphins in several ways. Consumers can make a huge difference by not buying tickets and by advising travel companies that they disapprove of their involvement in the captive dolphin industry – particularly*

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<sup>34</sup> <http://uk.whales.org/wp-content/uploads/sites/6/2018/08/Driven-by-demand.pdf>

<sup>35</sup> <https://www.sbs.com.au/news/feature/baby-dolphin-dead-marine-park-under-siege>



*on social media. Decreasing the sales of tickets decreases the economic incentive to breed and capture more dolphins, thereby reducing the number of dolphins facing a lifetime of suffering in captivity”<sup>36</sup>*

At DMCP, visitor numbers, and therefore profits, have dropped a significant AU\$340,000 in just six years (2008-2014).<sup>37</sup>

Political support has also been offered; in the 1980’s Former NSW Premier Bob Carr apparently tried to close dolphariums when he was in power; more recently, in May 2016 the NSW Labor party, NSW Greens and the Animal Justice Party pledged their support of a Bill to end dolphin captivity in NSW<sup>38</sup>. That legislation was not ratified. However, with public sentiment continuing to grow in support of phasing this practise out, the time has now come to revisit this option.

## IV. Conclusion

The scientific evidence against keeping cetaceans in captivity is strong and continues to grow. The Australian public, visitors and a wide range of supporters want to see a legislative ban imposed in NSW. Such a move has been recommended for decades and proposed a number of times. I am in full support of such a ban and respectfully call on the Australian Government to implement this.

## V. List of Supplemental Material

**Visser:** CV & list of captive cetacean facilities visited

**Report:** Visser, I. N., & Lisker, R. B. (2016). *Ongoing concerns regarding the SeaWorld orca held at Loro Parque, Tenerife, Spain.*

**Submission:** To Canadian Government in support of Bill S-203, banning the keeping of cetaceans. Includes seven appendices.

**Submission:** To Canadian Government regarding the export of x2 beluga to Spain

**Report:** to USA San Diego Court, regarding Anderson v SeaWorld

**Scientific Paper:** Jett, J., Visser, I. N., Ventre, J., Waltz, J., & Loch, C. (2017). Tooth damage in captive orcas (*Orcinus orca*). Archives of Oral Biology, 84, 151- 60.  
doi:10.1016/j.archoralbio.2017.09.031

**Scientific Paper:** Marino, L., Rose, N. A., Visser, I. N., Rally, H. D., Ferdowsian, H. R., & Slootsky, V. (2019). The harmful effects of captivity and chronic stress on the well-being of orcas (*Orcinus orca*). *Journal of Veterinary Behavior*, 1-14. doi:10.1016/j.jveb.2019.05.005

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<sup>36</sup> World Animal Protection (2019) Behind the smile. The multi-billion dollar dolphin entertainment industry [https://d31j74p4lpxrfp.cloudfront.net/sites/default/files/int\\_files/behind\\_the\\_smile\\_-\\_dolphins\\_in\\_entertainment\\_report\\_final\\_011019.pdf](https://d31j74p4lpxrfp.cloudfront.net/sites/default/files/int_files/behind_the_smile_-_dolphins_in_entertainment_report_final_011019.pdf)

<sup>37</sup> <https://www.sbs.com.au/news/feature/baby-dolphin-dead-marine-park-under-siege>

<sup>38</sup> [https://www.huffingtonpost.com/au/2017/01/19/why-does-australia-still-keep-dolphins-in-captivity\\_a\\_21653254/?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce\\_referrer\\_sig=AQAAACBvFLHailQmw\\_RvOMM3wyxfUOq2iDy\\_32TLQQHVYtb3Lft2b1\\_NIFlueuB4Jn0V-PHeC3bMYusRRKpDRnYbulVWnddXNjPIZlpaz-OtUcUEyHGScRF8\\_10\\_a7VeY0PMs-T\\_IJGmNQKQEvHLloB4qwCh3Y3ESAW9pxoFHuP0f7ut](https://www.huffingtonpost.com/au/2017/01/19/why-does-australia-still-keep-dolphins-in-captivity_a_21653254/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAACBvFLHailQmw_RvOMM3wyxfUOq2iDy_32TLQQHVYtb3Lft2b1_NIFlueuB4Jn0V-PHeC3bMYusRRKpDRnYbulVWnddXNjPIZlpaz-OtUcUEyHGScRF8_10_a7VeY0PMs-T_IJGmNQKQEvHLloB4qwCh3Y3ESAW9pxoFHuP0f7ut)