1 Introduction

On December 19th 2013 the Age newspaper in Australia reported on the plight of a young child, let’s call her Mimi. The reporter saw her being detained in a facility located between a rubbish dump and a phosphate mine on the island of Nauru. Held under appalling conditions of searing heat without access to air-conditioning, the reporter expressed serious concerns for Mimi’s future health and well-being. Mimi, forced to line up for meals, often for hours in the beating sun, commented sadly ‘Sometimes I think we are treated like animals, but then I


2 Sarah Hanson-Young ‘Agony of children treated worse than animals’ The Age Online December 19, 2013


3 Note: name added as the real the name or sex of the detainee was not provided in the article.
realise animals have a better life than we do in this place.’ 4 While Mimi could file a writ of habeas corpus and plead a case for unlawful detention, precedent dictated that any such an application is unlikely to be upheld. In June a habeas corpus application on behalf of a number of people alleging they were unlawfully detained at the same regional processing centre was denied.5 Across on the other side of the world Tommy was being held isolated in a cage in a dark shed on a disused trailer park in conditions that were up to forty degrees colder than his native land and for whom observers of his plight held grave concerns in relation to his health and well-being. On Dec 2nd 2013 lawyers in a New York court unsuccessfully filed a common law writ of habeas corpus seeking to end Tommy’s allegedly illegal detention. Access to the legal system for Tommy was refused on the basis that he was not a human or a person, he was a chimpanzee.

Steven Wise in his discussions on personhood maintains that the most fundamental rights to which we are entitled are those that are essential for the protection of our most fundamental interests. He identifies bodily liberty as one of the two most fundamental interests. 6 Bodily liberty he says is so important that ‘…if you are a very bad person, you may be punished by having your bodily liberty taken away.’ 7 Although in the case of Mimi and Tommy one had access to the legal system to plead their case and the other did not, the result is the same and two amongst the most vulnerable in our society are still in forced detention in inexcusable conditions. As Denver’s comment suggests in harming those, be they human or nonhuman, with whom we share the journey on this planet we are in essence harming ourselves and in the process demeaning the moral fabric of our society.

2 Gaining Access to the Legal System
In addition to applications of habeas corpus such as above, a number of other proceedings may be applicable in actions related to the mistreatment of human and nonhuman animals. At common law prerogative writs such as prohibition, certiorari and mandamus as well as equitable remedies of declaration and injunction may also apply. Wise has also raised the question as to whether the ancient writ of de homine replegiando, given its role in the freedom efforts of slaves who at one time were also classed as property, may be relevant to

4 Hanson-Young above n2.
7 Ibid.
the gaining freedom for some illegally detained nonhuman animals. Challenges may be brought as a result of statutory entitlements or decisions. However in order to assert these causes of action a potential plaintiff must be able to have their case heard in court. Access to the legal system to plead one’s case is a fundamental tenet of a civilised society predicated by the rule of law and Courts provide the last resort to resolve both criminal and civil disputes.

Not every potential plaintiff, nonetheless, will be provided with access to the judicial system and *locus standi* or the doctrine of standing has evolved as the set of rules that attempts to ensure that a plaintiff who starts legal proceedings is a proper one to do so. Access to the remedies of *prohibition*, *certiorari* and *mandamus* for example will generally be available only in circumstances where the applicant is an aggrieved person or one to whom a duty is owed; notwithstanding the courts may in some instances be able to exercise some discretion in this respect. A number of specific tests are generally applied where a private person seeks the equitable remedies of *declaration* and *injunction* in relation to matters of public interest. A challenge to the application of a statute may be specified in legislation or accessed through administrative appeals process. While standing may not be judicially determined where it is conceded or not challenged, the doctrine of standing in effect serves to restrict access to the courts to those who have a private right to do so, are provided access as a result of a test set out in individual pieces of legislation, or in their absence to those who have a 'special interest' in the matter of the action.

The protection for nonhuman animals under Australian law is very much a patchwork of human-centred legislative, regulatory and codified requirements. It is rooted in the legal and economic principles of animals as property, and the protections afforded can vary considerably depending on the animals' status as one of companion; entertainer; wild; or farm

---

9 Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd [1998] HCA 49 at [38] per Gaudron, Gummow and Kirby JJ.
10 Preston, Brian J, ‘Standing to Sue at Common Law in Australia’ (Paper presented to The Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, Xian, 11-13 April 2006)
animal. While general laws provide reasonable protection against cruelty for some such as companion animals, the protection afforded to others such as farm animals and those in entertainment is far more restricted. Its philosophical underpinnings lay in what Peter Sankoff refers to as an outdated ‘protection paradigm’ no longer relevant in the more complex world we live in today. It endorses an ethos of human privilege and places ‘…efficiency, higher economic productivity, more desirable aesthetics, and even entertainment…’ ahead of the legitimate rights of nonhuman animals.

The most basic rules relating to standing in Australia were first set out in Boyce v Paddington Borough Council making the clear distinction between actions exercising a private right and those seeking remedy in respect of a public right. A private right being a benefit conferred on an individual or group (a person), such as a property or proprietary right, while a public right is collective in nature and common to all members of the general public. Legislation can create private rights, as for example the private right of action for a person who has been adversely affected by conduct of another person that may breach Competition and Consumer Act, or public rights. In a matter of public rights the Attorney-General is the proper plaintiff but is not bound to commence or endorse an action and as a consequence, in principle, private citizens lack standing to protect a public right. Some attempts have been made to overcome this through the introduction of ‘open standing’ in some legislative and regulatory instruments. In Queensland for example ‘any person’ may bring proceedings in the Planning and Environment Court for a declaration regarding enforcement of the Integrated Planning Act and Section 13 of the Crimes Act 1914 (Cth) provides that ‘any person’ may institute proceedings in respect of an indictable offence. However, in a similar manner to the common

17 Sankoff, above n14.
18 Ibid, 28
20 Competition and Consumer Act (Cth) 2010
law requirement, statutes in general require a plaintiff to be a “person aggrieved” or a “person affected” by the relevant decision or action.21

3 The Human Plaintiff in Animal Law

‘All animals are equal, but some animals are more equal than others.’22

Outside of the realm of private rights, questions of standing are most relevant in matters of ‘public law’ or ‘public interest’,23 which is perhaps the first port of call for many animal rights activists or concerned citizens when seeking to enforce animal protection. A body of law has developed to circumvent the general principle that private citizens lack standing to protect a public right. This is especially the case given the lack of enthusiasm on the part of the courts to find that legislation affords private rights to individual citizens.24 In the case of nonhuman animals the general thrust of this body of law is at its core human-centred and rooted in the anthropocentric notion of the human animals’ superiority over all other species. Indeed it is perhaps even more fundamentally a power-centred view based on the concept of property, which is now applied to nonhuman animals but was once applied to human slaves who were deemed of lesser value than their masters and where such matters as their intentional assault or killing was dealt with as a matter of property law.25 It currently reserves standing for those recognised to have legal personhood, which as the law currently stands rules out nonhuman plaintiffs.

In the absence of a private right of action, as a result of the decision in ACF v Commonwealth,26 a human plaintiff must demonstrate a ‘special interest’ or more specifically a ‘special damage’ in order to have standing when it comes to commencing an action. This requires a plaintiff to demonstrate that they have an interest in the matter which is greater

22 George Orwell, Animal Farm, 1945
23 See eg Preston, above n11.
than any other member of the public and which more than an intellectual or emotional concern, or merely for the satisfaction of righting a wrong or upholding a principle. In North Coast Environment Council Inc. v Minister for Resources it was held that an organisation does not demonstrate sufficient special interest in a matter by simply formulating objects that demonstrate an interest in and commitment to the matter. When Animal Liberation sought an injunction to prevent the aerial shooting of goats and pigs in two nature reserves Hamilton J relied on the test of standing laid down in ACF, and further clarified in Onus v Alcoa of Australia Ltd, and held that Animal Liberation had no standing as it was not enough that they were concerned for the welfare of the animals. His honour held that to establish standing Animal Liberation needed to show that they would be personally disadvantaged by the outcome of the case. Cases such as Lujan v Defenders of Wildlife and Animal Lovers Volunteer Association v Weinberger in US courts reinforce that Australian position that the human interest must be more than a notional one. In contrast in Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA) a union was held to have standing because of the special interest held by its individual members and in Executive Council of Australian Jewry v Scully an unincorporated Jewish association was held to have standing due to its member organisations being “persons aggrieved” by the alleged actions.

While a ‘special interest’ or ‘special damage’ must be more than notional, when human detriment can be proved it need not necessarily be what we might consider significant. In Animal Legal Defence Fund Inc. v Glickman the US Court of Appeals for the District of Columbia granted standing to sue on behalf of a number of apes held in the Long Island Game farm. The grant of standing was based on the fact that the human plaintiff had suffered ‘personal distress and aesthetic and emotional injury’ as a result of having to witness the apes’ psychologically debilitated behaviours that was a result of their social deprivation. Rhianne Grieve argues that the result in Glickman provides opportunity to extend the range of human detriment that might be used to gain standing in cases geared towards the protection

27 Ibid.
29 Animal Liberation Ltd v Director-General, Department of Environment & Conservation [2007] NSWSC 221.
32 765 F.2d 937 (9th Cir. 1985).
of animal rights. While this is indeed a good outcome in that access to the courts to plead the case was granted, it is somewhat ironic that an animal held in arguably illegal detention cannot gain standing other than through the fact that it offends some human aesthetic sensibility.

This human-centred approach doesn’t offer much hope to the likes of Tommy, or indeed many categories of nonhuman animal. Where there is no arguable human special interest or special damage there is no standing, and in that sense not all animals are equal.

4 The Nonhuman Plaintiff

‘Only legal persons count in courtrooms, or can be legally seen, for only they exist in law for their own benefits.’

The appearance of nonhuman animals before the court is not novel and E.P. Evans, for one, documents how in Europe during the nineteenth century animals regularly appeared as defendants when tried in court for their alleged misdeeds. However the beginnings of the movement towards recognition of the need to grant plaintiff-status to nonhuman animals can be traced to the early seventies when University of Southern California professor Christopher Stone and Justice William O. Douglas both separately posited the question ‘should trees have standing to sue’. The tree in both their cases was used as a euphemistic placeholder for the more general nonhuman cohabitants of our ecosystem. While to date Australian courts have not had to adjudicate on the matter of standing for a nonhuman plaintiff, in the US courts prior to Tommy’s case a number of other efforts had been made to have nonhuman animals recognised as the plaintiff. The first of these gave a chimera of hope when, in Palila v Hawaii Department of Land and Natural Resources, the uncontested plaintiff status of the


41 649 F (Palila).
Palila bird was acknowledged by the court and appeared to give standing to a nonhuman animal. Two years later, perhaps rather surreptitiously, ‘…livestock animals now and hereafter awaiting slaughter in the United States…’ gained standing through their ‘next friend’ Helen E. Jones. While in a number of subsequent cases nonhuman animals have gained uncontested standing, once standing was contested in Hawaiian Crow (‘Alala) v Lujan and again in Kama’s case it was refused on the basis that the act in question conferred standing to ‘persons’ not ‘animals’.

More recently Cetacean Community v Bush the court was asked to decide whether whales and dolphins have standing to bring suit in their own name under a number of specified legislative instruments. The court distinguished its own judgement in Palila as non-binding dicta given that there were other plaintiffs with standing and the uncontested nature of the Palila’s standing raised no jurisdictional concerns that obliged the court to consider whether the Palila indeed had standing. However importantly in Cetaceans the court did not find that an animal was not a person under the act. Indeed the court noted that it saw nothing to prevent the legislature:

…authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.

In Tommy’s case however the lower court went a step further than previous decisions and ruled definitively that chimpanzees cannot be considered ‘legal person’. This decision brings to the fore the concept of legal personhood which is fundamental to the protection of the rights of animals, be they human or nonhuman. In Australia the definition at law of a legal

---

46 386 F.3d 1169 (9th Cir. 2004) (Cetaceans).
47 Ibid.
48 Ibid.
49 Ibid.
‘person’ as ‘...an entity on which [the] legal system confers rights and imposes duties’ is expansive and could potentially incorporate non-sentient entities. Wise argues convincingly that only an entity possessing legal personhood can possess legal rights, and in turn rights that provide for a private cause of action. Once these elements have been satisfied the issue of standing become a relevant consideration. In other words it is only when a nonhuman animal has been afforded specific legal rights, and at least one of those rights provides a private cause of action, that we can examine whether a potential defendant has committed an act that caused injury to the them that can be adjudicated by a court. Without such a right the matter of standing does not need to be addressed. This in effect, was the decision in Cetaceans. The court found that the legislation in question did not contemplate that the subject of the legislated protection could litigate in its respect. Therefore without a right under the legislation, and without any other right conferring legal personhood, the issue of standing was of itself an irrelevant consideration.

5 The Challenge

There seems little doubt that continuing to develop the nature of ‘special interest’ or ‘special damage’ and expanding the reach of open standing within the framework of existing law, can help to improve the circumstances of nonhuman animals at the margin. However such an approach continues to focus on human needs and fails to address the fundamental question of what rights should be afforded to nonhuman animals, that recognises their inherent worth and the fact that ‘...we are all here together’ which presupposes an existence mutual dependence. Lori Gruen says ‘...there are no defensible grounds for treating animals in any way other than worthy of moral consideration’.

On the other hand granting a legal right to nonhuman animals through recognition of their legal personhood is, as Paul Taylor suggests, ‘...the means by which a society that subscribed to the ethics of respect for nature could give public recognition to their inherent worth’. However this very notion challenges not only existing legal, but also many current moral and economic, paradigms. As Sankoff reflects ‘...most modern uses of animals have

51 Wise above, n8, 2-3.
52 Wise, above n6, 1281.
been accepted and are not considered to be ill-treatment…\textsuperscript{55} Indeed the prevailing moral norm asserts that human animals such as ‘…infants, mental defectives, psychopaths, Hitler, Stalin and the rest – have some kind of dignity or worth that no elephant, pig or chimpanzee can ever achieve.’\textsuperscript{56} Wise suggests that the thought of opening ‘…legal personhood to billions of nonhuman animals we eat…’\textsuperscript{57} would be too much of a leap for any judge to legitimise. Furthermore the prevailing legal status of animals as property poses an inevitable conflict given that any actions by a nonhuman legal person would by their very nature challenge or impact proprietary rights of a human legal person.\textsuperscript{58} It would indeed be a significant leap for the courts to interfere with human personal proprietary rights in favour of nonhuman interests.

Notwithstanding the benefits to be gained from increasing the scope through which nonhuman animals can be afforded standing, whether through their own personhood or through assertion of the rights of human persons, as Mimi’s plight demonstrates it alone does not mean that the most vulnerable in our society will achieve a level of justice that one would expect from ‘…a society that subscribed to the ethics of respect for nature’.\textsuperscript{59}

\textsuperscript{55} Ibid, 28; although in a specific reference to farm animals but perhaps I would argue with more general applicability.
\textsuperscript{56} Peter Singer, All Animals are Equal in Peter Singer (ed) \textit{Applied Ethics} (Oxford University Press, 1986) 228.
\textsuperscript{57} Wise, above n6, 1286.
\textsuperscript{58} See eg Sankoff, above n14, 5.
\textsuperscript{59} Taylor, above n54.
Bibliography

Articles/Books/Reports


International Society of Animal Rights, Animals and Standing to Sue <http://www.isaronline.org/animals_sue.htm>


Preston, Brian J, ‘Standing to Sue at Common Law in Australia’ (Paper presented to The Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, Xian, 11-13 April 2006)


Sankoff, Peter, Stephen White and Celeste Black (eds) Animal Law in Australia (The Federation Press, 2nd ed, 2013)

Singer, Peter, ‘All Animals are Equal’ in Regan Tom and Peter Singer (eds), Animal Rights and Human Obligations (Prentice Hall, 1999)

Stone, Christopher D, ‘Should Trees Have Standing – Towards Legal Rights for Natural Objects’ *Southern California Law Review* 45 (1972) 450


Wise, Stephen M, ‘Legal Personhood and the Nonhuman Rights Project’ (2011) 17(1) *Animal Law* 1

**Cases**

*ACF v Commonwealth* (1980) 146 CLR 493


*Animal Lovers Volunteer Association v Weinberger* 765 F.2d 937 (9th Cir. 1985)

*Animal Liberation Ltd v Director-General, Department of Environment & Conservation* [2007] NSWSC 221

*Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* [1998] HCA 49

*Boyce v Paddington Borough Council* [1903] 1 Ch 109

*Cetacean Community v Bush*

*King v Goussets* (1986) 60 LGRA 116
Lujan v Defenders of Wildlife 504 US 555 (1992) 199


Sierra Club v Morton (1972) 405 U.S. 727

Thorne v Doug Wade Consultants Pty Ltd [1985] VR 433

The Nonhuman Rights Project Inc. on behalf of Tommy v Lavery