Animal Law Compendium

A selection of student research papers
LAW10487 Animal Law

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Foreword

Anne Schillmoller

From October 2013 to February 2014 I had the opportunity to combine two of my abiding passions: animal protection and student learning. During the third session of the academic year at Southern Cross University as unit assessor and lecturer in LAW10487 Animal Law, I developed relationships with over 100 students. Although it was delivered entirely on-line, it didn’t take long before students who began the unit as names on a ‘users’ list, became members of a learning community, companions and colleagues.

Animal Law attracted a diverse group of students having a variety of talents and experience. What bound them together, however, was a shared concern for the non-human animals with which ‘we’ human animals share the planet. It soon becomes apparent, however, that despite its name, Animal Law is really not so much about animals, but about humans. With a focus upon the legal, philosophical and ethical frameworks which inform and govern human/non-human animal interactions, the central concerns of the unit are necessarily and unavoidably human-centric. As students were counselled in an introductory announcement:

*It is important to recognise…that animal protection and animal law is really not so much about animals themselves but about the responsibilities, practices, preferences, priorities and power of ‘we’ humans. That humans have prospered and benefited from the routine exploitation of animals is undeniable...So not only does this unit cause us to think about the non human animals 'out there', but also to reflect upon ourselves and how we might best act as private citizens and as public advocates in the interests of the other sentient species with which we share the planet.*

As part of their assessment for the unit, students were required to write a 3,000 word research paper on a topic of their choosing. The assignment required them to identify a specific context of human-animal interaction and to evaluate various issues which arise within that context. Specifically, students were asked to identify and analyse the following:

- The legal framework or frameworks which govern the issues, including the applicable law and any relevant legal principles.
- The assumptions relating to human and non-human animals which inform the legal framework(s) identified above.
• The adequacy of the law in addressing the animal welfare concerns in the area identified.
• Ways in which the law may be reformed to better protect the interests of animals in the area identified, and possible strategies to achieve such reform.

This compendium is a selection of these research assignments. They were chosen for their excellence, interesting and informative subject matter and for representing the eight topic areas which were considered in the unit.

While one purpose for this compendium is to showcase the excellent work of students in LAW10487 Animal Law, I think that the contributors will agree that of equal importance, is to bring to readers’ attention to significant issues which impact upon the lives and interests of the other sentient beings with which we humans co-exist. It is hoped that by reading these papers, as one student observed at the conclusion of the session, readers will be ‘challenged, thirsting more information and finding what they thought were their natural positions shifting.’
Contributors

Felicity Abotomey has worked for various Commonwealth government departments, including Centrelink, Customs, the Australian Taxation Office and Immigration. For five years she was also employed in administrative positions at Southern Cross University before commencing her Bachelor of Laws degree in 2011.

Desmond Bellamy (BA Hons SydU, B.Media SCU) is the Special Projects Coordinator for People for the Ethical Treatment of Animals (PETA) Australia. He is also involved in the management committee of Bay FM community radio in Byron Bay. He is currently doing his B.Media Hons, working on a cultural and film studies thesis looking at cannibalism in the movies.

Sonya Broderick (AD Law (Paralegal Studies), SCU) is currently a full-time wife and mother and part-time student. Sonya has previously worked in various positions within Local and State Government and also in private industry. She is in her final year of a Bachelor of Legal and Justice Studies (Community Justice) at Southern Cross University.

John Cronin (PhD, MA (Mgt), G.Dip (Law)) is a business consultant and company director, and is in his final year of a Bachelor of Laws Degree at Southern Cross University.

Kendra Frew (BA Bus (HRM/IR), RMIT) Kendra has spent the last 20 years assisting employees through various positions in the field of human resources and industrial relations. She also ran her own service-oriented team building business for 5 years. Kendra has a strong passion for animal protection and regularly volunteers her time for animal shelters throughout Western Australia. Kendra is in her final year of a Bachelor of Laws (Hons) at Murdoch University where she will complete her thesis on legal personhood for animals.

Paula Hallam BSc (Hons) (King's College, University of London), PhD (University of London) currently works as a consultant, advising lawyers in relation to biological evidence, and DNA in particular, and appearing as an expert witness in criminal trials. She is in her second year of a graduate Bachelor of Laws degree at Southern Cross University.

Robert Lonetree (BA Hons, University of Sydney), is undertaking the honours program in his final year of a Bachelor of Laws degree at Southern Cross University. Robert has also undertaken extensive ethnographic field research in Amazonian and Andean South America as part of his graduate studies in Social Anthropology, and continues to write his doctoral dissertation concerning folk healing and shamanism in the Bolivian Andes. Robert is also a musician, singer/song-writer and regularly performs his original music and poetry at various festivals and other venues on the East coast of Australia.

Ainsleigh Lugger is employed as a paralegal in estates and trust litigation with a
mid-tier law firm in Melbourne with ambitions to bring social and animal welfare matters to the firm, pro bono. She is in her penultimate year of a Bachelor of Laws degree at Southern Cross University.

Peter Madden recently finished a 13 year career in aviation covering diverse roles from international cabin crew through to training design manager. He is now pursuing full-time studies to complete his Bachelor of Laws at Southern Cross University and explore a new career direction.

Cecily Middleton (BA, Charles Sturt) is a chef by trade and holds a B.A in Cultural Studies and Policy from Charles Sturt University. Cecily is an animal lover, environmental activist and gardener and is in her final year of a Bachelor of Laws degree at Southern Cross University.

Alan Parkes (EEN) is a nurse with two agencies in Melbourne specializing in upper gastrointestinal studies. He is currently completing two degrees, a Bachelor of Nursing and a Bachelor of Laws, with a view to addressing injustices within the healthcare system. As a guardian of an abandoned Devon Rex cat, he has a passion to eliminate animal cruelty and protect the welfare of animals. Alan is in his final year of his nursing degree at Charles Sturt University and in his first year of his law degree at Southern Cross University.

Anne Schillmoller (BA, ANU; LLB, UNSW) was employed as a lecturer in the School of Law and Justice, Southern Cross University from 1992-2012. Her areas of teaching and research interest include legal philosophy, administrative law, earth jurisprudence and animal law. Anne retired from full-time employment in 2012 and is now an Adjunct Fellow who teaches in a casual capacity.

Sarah Smith is in her fourth year of a Bachelor of Arts/Bachelor of Laws degree at Southern Cross University in Lismore. Sarah loves animals and is highly interested in their welfare.

Jessica Stanley is employed as a Legal Secretary at MacDonnells Law, working in Insurance Law. Jessica is in her final year of a Bachelor of Laws degree at Southern Cross University. Jessica intends to pursue her interest in animal law in a professional and/or voluntary capacity.

Marie Vella is in her final year of an LLB/Arts (hons) degree at James Cook University. As a keen advocate of animal rights and equality, Marie intends to pursue this interest through law and performance, and hopes to undertake a Doctorate in the area of animal protection. Marie is currently involved in a theatrical production of Pam Valentine's 'A Dog's Life' which raises awareness of animal protection issues, to be performed at the 2014 Far North Queensland One Act Play Festival. A portion of the funds raised will be donated to the Young Animal Protection Society.

Alexandra Whittaker (VetMB (Cantab), MBA (CSU)) is a veterinarian who is employed as a lecturer in animal welfare in the School of Animal and Veterinary Sciences at the University of Adelaide. She is currently in the second year of a Bachelor of Laws degree at the University of New England.
Introduction

‘We are now at a new and strange juncture in human experience. Never has there been such massive exploitation of animals... At the same time, never have there been so many people determined to stop this exploitation.’

Humans have exploited animals for millennia. A variety of historical, philosophical and theological traditions have contributed to an entrenched notion of human dominance over animals and continue, both tacitly and explicitly, to sanction human violence towards animals. While some have remarked that ‘the law does not change society, but society changes the law’, one can point to numerous examples of statutory initiatives and changes to the common law that have had a significant impact upon community sentiment and public practice. The papers in this compendium consider, not only the deficiencies of current legal regimes in the protection of animal ‘interests’, but also gesture towards ways in which law may be used to engender positive change for animals. The insightful and informed investigations of animal law issues considered in these papers demonstrate that animal welfare concerns have become ‘legitimate matters of public debate’ and attest to a growing and shifting sentiment which challenges long held assumptions relating to human superiority and privilege.

For example, in From Property to Personhood: Can Non-Human Animals Make the Transition? Kendra Frew challenges both legal and philosophical conceptions of animals as property, and explores alternatives to the ‘property paradigm’. Kendra argues that their characterisation as property has significant practical consequences for animals. By regarding animals as ‘things’ rather than sentient beings with interests of their own, the property paradigm sanctions the notion of animals as commodities for human use and exploitation. But in her interrogation of alternatives to the property paradigm, including ‘legal personhood’, ‘equitable self-ownership’ and ‘guardianship’, Kendra asks whether such types of recognition are only of semantic and symbolic significance. While reaching no firm conclusion on this issue, Kendra suggests that unless humans undergo a fundamental shift in the way they conceptualise animals, the continued exploitation of animals by humans will continue unhindered.

In Saving our Silent Slaves: Legal and Moral Challenges to Speciesism, Marie Vella argues that significant moral and legal changes are needed to eliminate speciesism, which she characterises as ‘an arbitrary, irrational and morally unjustifiable preference

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3 ABC v Lenah Game Meats (2001) 208 CLR 199, 287 per Kirby J.
for the interests of humans over animals on the basis of species’. While recognising that any such changes will be limited by significant physical, economic, political, religious, historical, legal, and physiological obstacles, Marie’s discussion is an optimist one. With reference to successful challenges to other forms of discrimination such as racism and sexism, Marie is confident that, although it will take time, persistence and patience, non-speciesist alternatives may be realised through education, awareness and legislative change.

Alan Parkes begins his discussion in *The Link between Animal Cruelty and Interpersonal Violence* by identifying the well established link between cruelty to animals and violence towards humans. But rather than embark on a human-centric criminological investigation of the ‘graduation hypothesis’, Alan’s paper investigates why animal cruelty is not taken seriously enough and why legal responses to animal cruelty are inadequate. After identifying some of the philosophical assumptions which contribute to this state of affairs, Alan embarks on a detailed investigation of current anti-cruelty legislation. He notes that while on its face, this legislation looks as if it protects animals, ‘in reality it fails to succeed at reassuring its prime intention, which is the appropriate treatment of animals.’ In a discussion supported by extensive empirical evidence, Alan then identifies both the reasons for this failure, and the legal reforms which are required to better protect animals from human violence.

In *Dogs and Divorce: Chattels or Children?* Paula Hallam interrogates the appropriateness of the treatment of companion animals as property in the context of ‘pet custody’ disputes following relationship breakdown. Suggesting that the status of companion animals as family members is not reflected in legal policy, Paula explores the often inconsistent approach of family courts in the United States and Australia to disputes involving companion animals. With reference to precedents and statutory provisions from both jurisdictions, she notes that while companion animals continue to be regarded as the ‘property’ of a marriage, there is dicta to suggest that some courts are likening disputes over companion animals to custody disputes involving children; ones in which the ‘best interests’ of the animal are taken into account. Paula concludes her discussion with an identification of statutory reforms which could create a ‘middle ground’ for companion animals in family law disputes, somewhere between children and property. She also argues, however, that existing law provides courts with sufficient flexibility and discretion to make ‘just and equitable’ decisions regarding companion animals.

Robert Lonetree argues in *Improving Welfare Outcomes for Impounded Animals: A Critical Appraisal of RSPCA (NSW) Policy and Practice* that while Australian animal welfare laws afford some significant protections to companion animals, the high rate of
impoundment and euthanasia of abandoned, homeless and/or relinquished companion animals suggests that existing regulatory frameworks are failing these animals. In particular, Robert investigates the reasons for the ‘unacceptable’ kill rates of animals under the care of the RSPCA (NSW), a rate acknowledged by the Society itself as being ‘too high’. Robert concludes his paper with an identification of suggestions for legal reforms which would contribute to a reduction in impoundment and kill rates of companion animals. Of particular importance, he suggests, is the abolition of the animals–as-property paradigm, one in which animals are commodified as disposable assets and which enables them to be subjected to unacceptable levels of abandonment and neglect.

In her discussion of Captive Dolphins In Australia, Sarah Smith argues that captive dolphin exhibits, where the dolphins are trained to perform in shows for human entertainment, cannot be justified with reference to the suffering which captivity causes to these animals. Citing scientific evidence which suggests that dolphins possess a ‘large brain, a complex vocabulary and a complex neo-cortex, which has been linked to problem-solving, self-awareness and processing emotions’ Sarah notes that dolphins have a poor record in captivity, including poor breeding success, shorter lifespans and poor health. After identifying the central arguments against keeping dolphins in captive exhibits, Sarah explores the legal frameworks governing captive marine mammals in Australia and the philosophical assumptions that inform them. She argues that because dolphin suffering is unavoidable in a captive context, existing law is unable to protect their welfare. She concludes by suggesting that Australia should follow the lead of some overseas jurisdictions and prohibit captive dolphin shows.

In The Greyhound Racing Industry: having a bet each way on animal welfare, Peter Madden argues that the greyhound racing industry is one of the ‘most crude and ugly examples’ of animal exploitation and one driven by economic and utilitarian imperatives. Noting that greyhound racing is ‘big business’ in Australia, Peter argues that the largely self-regulating industry both perpetuates and sanctions cruelty to greyhounds. While recognising that there are some gestures towards animal welfare concerns within the industry, he suggests that much regulation is oriented towards the imperatives of the industry, in particular, the maximisation of economic returns. Peter then explores the alarming fate of many ‘retired’ dogs, including high rates of euthanasia and their use in medical research. He concludes his discussion with an investigation of legal reforms, while noting that most initiatives directed towards improving the welfare of greyhounds are carried out by volunteer organisations and largely relate to the rehoming of ‘retired’ dogs.

In ‘Bobby Calves and the Dairy Industry: The Milk of Human Kindness?’ Desmond Bellamy focuses upon the problems facing animal welfare reform in Australia, with specific reference to the on-going controversy regarding ‘bobby calves’, the male
calves of milking cows, which are of no commercial value to dairy farmers. These calves are usually taken from their mothers at about 12 hours old and sent to slaughter at 5 days. Desmond’s paper looks at the welfare model of animal protection as it is applied through a complex web of state and territory laws, together with various industry codes of practice. His paper also discusses the largely ineffective attempts to agree on national standards and guidelines, both for bobby calves in particular, and for ‘livestock’ in general. The example Desmond uses to illustrate his discussion is the controversy that erupted after industry-funded research was used in an attempt to set a ‘time off feed’ for calves of up to thirty hours before slaughter. The paper then considers some of the voices raised in that debate, including those of abolitionists, welfare organisations and industry lobby groups. In particular, it raises the issue of whether an animal having no commercial value nevertheless has intrinsic value that warrants legal protection, and how this might be achieved in a situation which is in a state of impasse.

In her investigation of intensive pig farming, ‘Intensive Pig Farming: A Study in Legally Sanctioned Cruelty’, Felicity Abotomey questions the effectiveness of existing animal welfare legislation in the context of pig ‘production’ practices. In particular, her paper assesses the ramifications of intensive farming for pigs, identifies the legislative framework governing the Australian pig industry, and with reference to extensive empirical evidence, examines how the industry itself supports and condones cruel and inhumane practices. Felicity begins her paper with a discussion of a pig’s ‘natural’ life, including their social organisation, feeding and breeding habits. She then contrasts these behaviours with the conditions pigs are forced to endure in intensive farming systems, or ‘factory farms’, the primary aim of which is to ‘produce the maximum amount of animal flesh or products in the most cost-effective way, using as few resources as possible.’ With specific reference to the confinement and management of breeding sows and piglets, Felicity identifies a wide range of practices which adversely impact upon the welfare and well-being of intensively farmed pigs. She concludes her paper with the observation that intensively farmed pigs are subjected to ‘horrific and tortuous conditions’ and that existing animal welfare laws have not only been ineffective, but condone and contribute to the suffering of pigs.

Alexandra Whittaker begins her comprehensive and detailed investigation of animal research regulation in Australia, ‘Animal Research Regulation in Australia: Does it Pass the Test of Robustness?’ with the assertion that biomedical research involving animals is both a ‘public policy issue’ and an ‘ethical minefield’. Within these contexts, Alexandra’s paper explores whether the current system of research regulation adequately protects the welfare of animals used in research. Specifically, she asks whether the largely self-regulatory framework in Australia, which she contrasts and compares with those of the European Union, United Kingdom and United States,
operates behind a ‘cloak of intransparency’ which conceals actual and potential animal welfare concerns. While avoiding the debate surrounding the pros and cons of research using animals, Alexandra’s focus is upon the extent to which the regulatory framework in Australia is effective in its stated aim of ‘avoiding or minimising harm, including pain and distress’, to animals used for scientific purposes. With detailed reference to the National Health and Medical Research Council Code for the care and use of animals for scientific purposes, she explores the role and function of Animal Ethics Committees and mechanisms for compliance and enforcement. Alexandra’s conclusion is that the system at present fails to protect animal welfare and that reform is required. She concludes her paper with specific suggestions for reform which, she suggests, will require some ‘significant shifts in political and legal thinking.’

In ‘Human Exceptionalism and the Use of Non-Human Animals in Scientific Research’ Jessica Stanley also explores the Australian regulatory framework governing the use of animals in research. Jessica’s focus, however, is not only upon the effectiveness of this framework, but also upon the ethical and philosophical assumptions which inform it. Specifically, Jessica argues that a significant problem with the existing framework is that it serves ‘to endorse the belief that animal experiments are necessary, rather than challenge its validity’. The alleged ‘necessity’ for animal research, Jessica suggests, is predicated on an almost axiomatic assumption of human superiority in which humans are regarded as more valuable than animals. Within such a context, the use of animals in research is not regarded as a ‘necessary evil’ but rather as a ‘moral good’. Jessica also takes issue with the utilitarian framework which governs the regulatory model: one in which human interests are allegedly ‘balanced’ with those of animals. However, Jessica notes the ‘profoundly unequal weighting’ which is usually applied in which relatively minor or infrequent human benefits are considered more important than the significant adverse impacts commonly experienced by laboratory animals. Jessica concludes her discussion with an identification of suggestions for regulatory reform, including ones based on an equal consideration approach to balancing the costs and benefits of animal research. Such reform, she suggests would ‘change the face of this important issue’, and would afford animals the greatest form of protection.

In ‘The Price of Freedom: The Controlled Extermination of the Australian Dingo’ Sonya Broderick explores the fate of so-called ‘pest’ animals with specific reference to the native Australian dingo. Considered as an icon to some and a noxious animal to others, the dingo has developed an ambiguous cultural and legal status, being the only non-protected native mammal in NSW. As Sonya notes, the dingo is perhaps ‘the most persecuted animal in the history of Australia’. Sonya argues, however, that because of cross breeding with wild domestic dogs, pure dingoes are extremely rare and are deserving of ‘protection’, not ‘persecution’. She notes that despite the dingo being under threat of extinction, it is considered an ‘invasive’ species and is subject to extensive eradication throughout Australia. Sonya’s paper then explores the regulatory frameworks governing the management of native wildlife and the control of so-called
‘wild dogs’. But noting that the pure dingo has no domestic dog ancestry, Sonya observes that the ‘wild dog’ legislation applicable to dingoes is ‘misleading and ambiguous’. She then explores the methods employed for wild dog control, including poison baiting, which Sonya argues is a ‘cruel and indiscriminate poison’ that inflicts great pain and suffering on affected animals. Sonya concludes her paper with a consideration of proposed legal reforms aimed at better protecting the dingo from pain and suffering and from the ultimate threat of extermination.

In ‘Welfare or Conservation? Indigenous cultural practices relating to turtle and dugong hunting in Northern Australia’ Cecily Middleton explores the tensions between animal protection and indigenous cultural practices relating to turtle and dugong hunting in northern Australia. Noting that s 211 of the Native Title Act 1993 (C’th) preserves the rights of indigenous native title holders to hunt dugong and turtles, her paper considers the juxtaposition of the rights of Indigenous peoples to carry out traditional practices and contemporary standards of animal welfare. With reference to applicable regulatory frameworks, Cecily’s paper explores the ways in which the laws, policies and programs applicable to indigenous rights impinge on the capacity of animal welfare and conservation legislation. The paper also considers the tensions between conservation and welfare approaches to animal protection. Cecily argues that the policy informing dugong and turtle conservation issues in Australia is one of ‘ensuring the continuation of sustainable indigenous harvest’ rather than with animal welfare concerns. Cecily concludes that the current legal and policy frameworks for marine turtles and dugong incorporate a myriad of competing interests that are in tension with national and state animal welfare laws.

John Cronin begins his paper, ‘The Promise and Pitfalls of Legal Standing for Animals’ with a consideration of the legal remedies available to humans deprived of their liberty. He then contrasts this with the absence of effective remedies for non-human animals held in captivity. To deprive a sentient being of its bodily liberty, John argues, is a denial of a ‘fundamental interest’, which the law should be competent to protect. With reference to existing tests for standing, John identifies the philosophical and legal factors which currently preclude animals’ interests from being appropriately represented in, and recognised by, law. While their status as property and a lack of ‘legal personhood’ precludes animals from being represented in legal proceedings, John’s paper also explores the difficulties that human plaintiffs face in establishing the requisite ‘special interest’ in litigation on behalf of animals. While John notes that to date no Australian courts have adjudicated on the matter of standing for a nonhuman plaintiff, he points to US litigation which has the potential of ‘opening the door’ to animal plaintiffs. So while there is some reason to be hopeful, John concludes that the moral, economic and legal challenges that would need to be overcome are almost insurmountable since ‘it would be a significant leap for the courts to interfere with human propriety rights in favour of nonhuman interests.’
In ‘Commercial Seal Hunting and International initiatives in Animal Protection’ Ainsleigh Lugger argues that animal welfare has become a matter of international concern. With reference to the ‘Seal Products’ case, a 2013 decision of the World Trade Organisation, Ainsleigh’s paper demonstrates the potential of international trade law to accommodate, in addition to trade liberalisation, legitimate public policy concerns such as animal welfare. Ainsleigh observes that historically, GATT and other international trade instruments have privileged commercial interests over animal welfare and have sanctioned economic, political and cultural agendas which involve animal exploitation, suffering and slaughter. It is for this reason, she argues, that the Seal Product’s case is especially significant since it is the first time the WTO has upheld a trade restriction based on concerns for animal welfare. Ainsleigh’s paper discusses the EU Regulation that gave rise to the WTO litigation, one that prohibits the importation and marketing of all seal products obtained through commercial hunts in the customs territory of the European Communities. The clear purpose of the EU’s Regulation, she notes, was to impact on Canada and Norway’s inhumane seal clubbing practices by adopting a trade-restrictive measure that would ultimately reduce demand for seal products among consumers, thereby controlling a non-trade-related practice outside their borders and control. While Canada and Norway have filed an appeal against the WTO’s decision, Ainsleigh argues that it is encouraging that the promotion of animal protection can be orchestrated through the global tool of the WTO. Because of wildlife’s envelopment in international trade, Ainsleigh is hopeful that the Seal Products case is ‘pioneering a new avenue toward achieving future animal welfare objectives on an international scale’. She also notes the potential of international trade laws to impact upon animal welfare initiatives in other animal industries, such as the livestock industry.
The all-bountiful creator gave to man ‘dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.’ Blackstone (Book II)

1 Introduction
Bryant begins her detailed and thought provoking article with the assertion that '[t]he idea of "legal personhood" for animals is theoretically interesting but
This claim may equally apply to the position of animals in Australia. Unfortunately it is not possible, due to word restrictions, to cover all of the implications of “legal personhood” for non-human animals raised by Bryant. This paper, however, will attempt to address the main issues, placing particular emphasis on their transition from property to personhood. This paper will begin with a brief description of the current legal status of non-human animals, touching on the issue of standing and the notion of the ‘property paradigm.’ This paper will then turn to the concept of legal personhood by providing various definitions and outline whether such a notion is available and/or obtainable to non-human animals. An identification of the criticisms of personhood for non-human animals will be included in this discussion. Finally, this paper will identify what is required, both from a legal and societal perspective, for non-human animals to transition from their current status of property to the undoubtedly more equitable status of legal personhood.

2 Legal Status of Non-Human Animals

2.1 The Origins of ‘Property’

Hannah contends that “[w]hen man became omnivorous and added meat to his diet, it is fair to say that something like a property concept developed.” In Australia today, it is a well established notion that animals are classified as ‘property’ under the law. An animal’s characterisation as property is

6 Deborah Cao, Katrina Sharman and Steven White, Animal Law in Australia and New Zealand (LawBook Co, 2010) 63 - see page 67-76 re the distinction between wild and domestic animals. See also Brooke Bearup, ‘Pets: Property and the Paradigm of Protection’ (2007) 3 Journal of Animal Law 173; Alex Bruce, Animal Law in Australia: An Integrated Approach (Lexis Nexis Butterworths, 2012); Competition and Consumer Act 2010 (Cth) s 4 defines animals, including fish, as ‘goods.’ Saltoon v Lake [1978] 1 NSWLR 52 (domestic animals were held to be ‘property’); Elder Smith Goldsbrough Mort Ltd v McBride [1976] 2 NSWLR 631 (animals were held to ‘fall within the definition of goods’); Rural Export & Trading (WA) Pty Ltd v Hahnheuser [2007] FCA 1535 (where the term ‘goods’ under the Trade Practices Act 1974 (Cth) was held to include animals).
fundamental to the legal definition and status of a non-human animal and to
the protection of their interests.\textsuperscript{7} The origin of this law, that being the law of
the Ancient Romans has had a major impact on Western law.\textsuperscript{8} This is
reflected in the fact that the legal status of non-human animals, both in the
western civil and common law jurisdictions, has remained largely unchanged
for the past two thousand years.\textsuperscript{9} The continuing legacy of the Ancient Romans lies in how they classified law
into a trichotomy of persons, things and actions.\textsuperscript{10} As Cao recounts, under
Roman law, a person had rights, but a \textit{thing} was the object of the rights of a
person.\textsuperscript{11} All the beings that the Romans thought lacked free will, such as
women, children, slaves, the insane and animals were classified as \textit{things}.\textsuperscript{12}
Hence an animal is a thing capable of being owned by a person as their
property, which can be bought, sold, transferred, stolen\textsuperscript{13} and even killed by
their owner.\textsuperscript{14} As Balcombe suggests, when animals are categorised as \textit{things},
they cease to exist as autonomous individuals with feelings and lives worth
living.\textsuperscript{15} The terminology used when describing non-human animals, such as
“whaling quotas,” “fish stocks”\textsuperscript{16} or “livestock” sanction the notion that they are
not individual sentient beings with interests of their own, but merely the
property of humans to do with what they like.\textsuperscript{17}

\section*{2.2 The Property Paradigm}

\begin{itemize}
\item[7] Cao, above n 4, 63.
\item[8] Ibid.
\item[9] Ibid.
\item[10] Ibid 64.
\item[11] Ibid (my emphasis).
\item[13] Cao, above n 4, 65.
\item[14] Mike Radford, \textit{Animal Welfare in Britain: Regulation and Responsibility} (Oxford University Press, 2001) 100-102 quoted in Cao, above n 4, 77-78.
\item[16] Ibid.
\end{itemize}
Over the last two hundred years the common law’s absolute right of ownership of non-human animals has been constrained by protection and welfare legislation, although the fundamental legal status of animals remains unchanged. Francione argues, however, that animal law reforms (such as welfare legislation) serve the interests of industrial agriculture and ensnare animals further in the ‘property paradigm.’ The consequence of this position, according to Francione, is that:

The property status of animals renders completely meaningless any balancing that is supposedly required under the humane treatment principle or animal welfare laws, because what we really balance are the interests of property owners against the interests of their animal property… Such a balance will rarely, if ever, tip in the animal’s favour…”

Francione contends that there is no morally sound reason to continue to treat non-human animals as property and that we should abolish, not merely regulate, animal exploitation. Bogdanoski provides a similar argument in the context of companion animals. He holds that the “‘pets-as-property” paradigm operates to obfuscate the intrinsic worth and inherent value of companion animals as individual beings and sentient subjects, leaving them as disposable human objects or household commodities.” He argues that, even though an overwhelming number of Australasians assign ‘family’ status to their pet, human interests will always prevail over those of the companion animal under the current property paradigm.

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18 Radford, above n 12, 100 quoted in Cao, above n 4, 76-77.
23 Bogdanoski, above n 20, 84. See also Sonia Waisman, ‘Non-Economic Damages: Where does it get us and how do we get there?’ (2005) 1 Journal of Animal Law 7 for a discussion on whether a change in the property status of companion animals would lead to the development of a new tort for monetary damages for the loss of such an animal.
However not everyone agrees with these sentiments and instead argue that the property status of an animal provides protection for animals, based on the premise that ‘people tend to protect what they own.’\(^{24}\) Epstein argues that the assumption that animals suffer at the hands of human ownership is unfounded and that there is ‘no necessary conflict between [companion animal] owners and their animals.’\(^{25}\) Taking a different route, but arriving at the same position as Epstein, Garner argues that, whilst he believes that the abolition of animals’ property status is a necessary step towards the fulfilment of an animal rights agenda, it is incorrect to suggest that significant improvements for animals cannot be achieved from within the existing property paradigm.\(^{26}\) Garner instead points to political factors, namely the liberalism of the West, as being responsible for severely compromising the welfare of animals, not their legal status as property.\(^{27}\) Similarly Sunstein argues for maintaining an animal’s property status. He states that where it is found that existing laws are insufficient, additional laws can be enacted that adjust an owner’s property rights to counteract these insufficiencies.\(^{28}\) Sunstein also argues that in some cases existing laws would be sufficient if legal standing was available to animals,\(^{29}\) an issue to which this paper will now turn.

### 2.3 Legal Standing for Non-Human Animals

\(^{24}\) Steven White, ‘Exploring Different Philosophical Approaches to Animal Protection in Law’ in Peter Sankoff, Steven White, and Celeste Black (eds) *Animal Law in Australasia* (The Federation Press, 2nd ed, 2013) 53. Arguments re the primacy of humans have also been prominent, but due to word limitations will not be discussed further here, but see Bryant’s comments on Professor Richard Cupp’s arguments on the primacy of humans, above n 1, 255-256; 287.  
\(^{25}\) Richard Epstein, ‘Animals as Objects, or Subjects, of Rights’ in Cass Sunstein and Martha Nussbaum (eds) *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 148-149 (it is important to note that Epstein focuses his argument primarily on companion animals) quoted in White, above n 22, 53.  
\(^{27}\) Ibid.  
\(^{29}\) Ibid.
Closely related to the legal status of non-human animals is the issue of standing. As the property of humans, and in the absence of any contrary legislative direction, non-human animals do not hold legal standing in their own right. The reason to seek standing must be to achieve favourable interpretations of laws, which could constrain what humans can lawfully do to the non-human animals they consider to be their property. In order to have standing, the plaintiff must have a personal stake in the outcome of the controversy and not merely trying to protect the interests of third parties, which is why the issue of standing is one of the biggest obstacles that animal activists face in filing civil suits on behalf of non-human animals.

In Animal Liberation Ltd v Department of Environment and Conservation the New South Wales Supreme Court refused an application for an injunction due to the lack of standing on the part of Animal Liberation Ltd on the basis that it lacked the necessary “special interest” under the general principles of standing. As standing is a prerequisite for the enforcement of rights, St Pierre contends that the most significant step to obtaining rights for non-human animals can be made by expanding the standing doctrine so that they, via their human representatives, may litigate in their own interests. White

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30 Cao, above n 4, 78.
31 Ibid. For a detailed discussion on standing and how animals are treated at law, see Lauren Magnotti, ‘Pawing Open the Courthouse Door: Why Animals’ Interests Should Matter’ (2006) 80 St. John’s Law Review 455.
34 [2007] NSWSC 221.
35 Cao, above n 4, 80. Cf Animal Liberation Ltd v National Parks and Wildlife Service [2003] NSWSC 457 (standing was granted, along with the subsequent injunction sought, due to objective evidence of cruelty). See also Citizens to End Animal Suffering and Exploitation Inc v New England Aquarium 836 F. Supp. 45 (D. Mass. 1993) where the District Court of Massachusetts held that a dolphin did not have standing under the Marine Mammal Protection Act to protest transfer of the dolphin from the aquarium to the Department of the Navy; Sarah v Primarily Primates Inc No. 04-06-00868-CV, 2008 WL 138080 (Tex. App. Jan. 16, 2008) no standing was granted for either the primates or the human plaintiffs that were seeking relief on the primate’s behalf; Tilikum et al v SeaWorld Parks & Entertainment Inc & SeaWorld, LLC, No. 11 Civ. 2476 (S.D. Cal. 2011) first federal court suit seeking constitutional rights for members of an animal species (orcas). Case was dismissed.
asks a common question: ‘If ships, corporations and children are able to have actions brought on their behalf to secure their rights, then why not animals?’\(^{38}\) The answer to this question lies in the combination of their lack of standing, their property status and the concept of “legal personhood.”

3 What is meant by ‘Legal Personhood’?

In her article, Bryant provides two definitions of legal personhood.\(^ {39}\) The first is a broad definition which encompasses the ‘legal recognition of the extent to which animals should be considered “persons” entitled to inclusion in the moral community such that humans cannot commit acts on animals that humans cannot commit on equally situated humans.’\(^ {40}\) Bryant provides criticisms of this approach, based on pragmatic and philosophical reasons, as it requires the ‘endless, fruitless proofs that animals bear such substantial similarity to humans.’\(^ {41}\) Bryant believes that such an approach will fail because humans are too heavily invested in defining themselves as different from, or in opposition to, animals and are equally invested in using and consuming animals for such an approach to work.\(^ {42}\)

Cassuto, a Pace University Law Professor, claims that, to date, no quintessentially “human” characteristic has emerged to definitively set humans apart from other animals which, he states, is not surprising since the human genome differs only minimally from that of a roundworm.\(^ {43}\) That said, Cassuto also claims that ‘personhood’ will always be defined through contrast with an excluded other, ie on a speciesist basis, and that any inclusion is

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39 Bryant, above n 1, 253-254.
40 Ibid 253.
41 Ibid.
42 Ibid.
dependant on whether their essence sufficiently resembles our own.\textsuperscript{44} Hence, Cassuto, like Bryant, contends that the umbrella or broad definition of legal personhood has its inherent limitations.

As an alternative, Bryant provides a second, more narrow definition of legal personhood; one which awards legal standing for the “aggrieved person” so that they may sue to enforce laws enacted to protect them from harm.\textsuperscript{45} Bryant contends that the ‘[p]ursuit of legal personhood in the form of legal standing need not result in the same fruitless attempted proofs of animals’ similarity to humans.’\textsuperscript{46} Wise, on the other hand, contends that legal personhood is where a being is deemed to be ‘autonomous’ and thus granted fundamental rights and privileges (and duties) the same or similar to a person.\textsuperscript{47} The level of autonomy varies for different animals depending on their level of sentience and consciousness and similarity to humans, ie chimpanzees would possess a high level of ‘practical autonomy’ because they are more like us.\textsuperscript{48} Thus, the basic liberty and equality rights of animals should be recognised dependant on the level of autonomy possessed.\textsuperscript{49} Ultimately though, it does not appear to matter what definition is applied, as Bryant explains:

\begin{quote}
The idea of "legal personhood" has considerable gravitational pull as a means for protecting animals because, regardless of the particular theory of legal personhood, the combination of words, at least, implies respect for animals as individuals who should receive more protection under the law than they currently receive.\textsuperscript{50}
\end{quote}

\textsuperscript{44} Ibid.
\textsuperscript{45} Bryant, above n 1, 253-254.
\textsuperscript{46} Ibid 254.
\textsuperscript{47} Steven Wise, ‘The Case for Non-human Personhood’ <http://www.youtube.com/watch?v=jv4-01DwB-w>. For a similar view, see Tom Regan, The Case for Animals Rights (University of California Press, 2nd ed, 2004) who bases his criteria on the 'subject-of-a-life' or the cognitive and volitional abilities of the non-human animal.
\textsuperscript{49} Ibid. For a contrasting view, see Alison Hills, Do Animals Have Rights? (Icon Books, 2005) 74-79. Hills argues that animals are not autonomous and are thus not morally responsible for their actions like humans.
\textsuperscript{50} Bryant, above n 1, 252
However, Bryant goes on to note that as the starting point for legal reform, ie the status of non-human animals as property, is so far removed from a position of respecting animals that the term "legal personhood" is at this point ‘only a vessel containing difficult legal and cultural questions.’ This paper will now address the potential manifestation and subsequent criticisms of applying the concept of legal personhood to non-human animals.

4 Is Legal Personhood Obtainable for Non-Human Animals?

4.1 Manifestations of ‘Legal Personhood’

When interviewed before the ruling of the case concerning PETA and Sea World, Huss made the comment that "no one's established that animals are legal persons. It doesn't mean we couldn't ... it's just something that we as a society have not decided to do yet. If we can establish corporations as persons, why can't we establish whales as persons?" In her article, Huss makes the claim that it is possible to change the personhood status of animals, just as it has been possible to change the status of other non-human entities such as corporations, ships, universities, government agencies and cities. Wise agrees and suggests that as the common law is exceedingly flexible it therefore has the ability to recognise ‘things’ such as corporations as ‘legal persons,’ thus there is no reason why animals cannot be afforded the same treatment.

Wise recommends that animals can be recognised as 'persons' through a writ of habeas corpus which he explains is where a prisoner is released from

51 Ibid.
52 Tilikum et al v SeaWorld Parks & Entertainment Inc & SeaWorld, LLC, No. 11 Civ. 2476 (S.D. Cal. 2011).
54 Rebecca Huss, ‘Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals’ (2002) 86 Marquette Law Review 47, 78. Huss also provides cases that have specifically considered the issue of an animal being treated as a person, see Bass v State 791 So.2d 1124 (Fla. Dist. Ct. App. 2000) dog not found to be an ‘individual’; Dye v Wargo 253 F.3d 296, 300 (7th Cir. 2001) police dog not a ‘person.’
55 Wise, above n 45. See also Mary Midgley, ‘Persons and Non-Persons’ in Peter Singer (ed) In Defence of Animals (Blackwell, 1985) 52-62 who contends that the law ‘can, if it chooses, create persons...’
unlawful detention, that is, detention lacking sufficient cause or evidence.\textsuperscript{56} Wise is currently working to develop other legal theories that harmonise with the mainline values of judges so that, if they are so inclined, they feel confident enough to rule in the favour and the interests of non-human animals and even declare them persons for one purpose or another. Therefore, through the flexibility of the common law, Wise contends that legal personhood for non-human animals should be able to be achieved at some point in time.\textsuperscript{57}

There are some who believe that there are already movements toward a multifaceted relationship between human and non-human animals, especially regarding companion animals, that is much more than just property or economics based.\textsuperscript{58} In some jurisdictions in the United States, for example Boulder and San Francisco, companion animals are no longer considered ‘property’ and the people who were once their ‘owners’ are now their ‘guardians.’\textsuperscript{59} Favre adopts a similar guardianship model whereby a trust-like relationship is developed between the human and non-human, with the human holding legal title to the animal and the animal holding equitable title in itself; creating an equitably self-owned animal.\textsuperscript{60} Favre does not propose to abandon fully the property paradigm, but rather create a new legal personality that sits between being only property and being freed of property status.\textsuperscript{61} The effect of this intermediary stance is that the interests of the animal are recognised by the legal system, but the framework of property law is still used for limited purposes.\textsuperscript{62} By transferring the equitable title to the animal, creating

\textsuperscript{56} Ibid. This was the focus of his book: \textit{Rattling the Cage: Toward Legal Rights for Animals} (Perseus, 2001).
\textsuperscript{57} Ibid. See also Wise’s comments on the same topic in the ‘Dyson Lecture on Nonhuman Rights to Personhood’ (2013) 30 \textit{Pace Environmental Law Review} 1278.
\textsuperscript{58} Cao, above n 4, 85. See also Bernard Rollin, ‘Animal Ethics and Legal Status’ in Marc Hauser, Fiery Cushman and Matthew Kamen (eds) \textit{People, Property, or Pets?} (Purdue University Press, 2006) 40.
\textsuperscript{61} Ibid 476.
\textsuperscript{62} Ibid. In later years, Favre develops this theory into a new category of property for animals, ie ‘Living Property’ – see David Favre, ‘A New Property Status for Animals: Equitable Self-ownership’ in Cass Sunstein and Martha Nussbaum (eds), \textit{Animal Rights: Current Debates and New Directions} (Oxford University Press, 2004) 245-250; see
for the animal a limited form of self-ownership, Favre contends that it would thus be possible to change the animal’s personhood status within the legal system. 63 Hence, if an animal has self-owned status, it could be treated as a ‘legal person’ with legally-recognised interests including, inter alia, the ownership of property and tort law remedies. 64

4.2 The Critics

Bryant asserts that personhood for animals cannot be pursued without first addressing their legal status and that ‘merely tinkering’ with their property status is not a promising means of instigating change for non-human animals. 65 Francione agrees and uses the well known analogy of property ownership of a slave to demonstrate that ‘tinkering at the edges’ by improving how we use property, ie improving the rules so that a slave can only be whipped three times a week instead of five times a week, ultimately achieves nothing to recognise the moral, or personhood, status of the slave. 66

As an abolitionist, Francione will support only those campaigns and positions that explicitly promote the abolitionist agenda, which is the basic right not to be treated as the property of others. 67 Therefore, it is not surprising that he finds Favre’s concepts of guardianship and self-ownership ‘ridiculous’ because, as he states, ‘[t]he bottom line is that those humans are still owners no matter what you call them. These “guardians” can still have their healthy

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63 Favre, above n 58, 476. See also Bogdanoski, above n 20, 85 who supports Favre’s conceptualisation of ‘equitable self-ownership.’


animals “put down” (ie killed) or can dump them at a shelter.\textsuperscript{68} Likewise, Bryant holds similar criticisms stating that ‘it is difficult to see how Favre’s approach would incrementally improve the situation of animals.’\textsuperscript{69} Fagundes holds that such changes in nomenclature may alter the perception of animals, but is equally sceptical that these ordinances will have much effect on their treatment.\textsuperscript{70} He does concede, however, that changing the perception of non-human animals is ‘a step in the right direction, if only a marginal one.’\textsuperscript{71}

Some commentators are clearly opposed to any form of legal personhood for non-human animals. Schmahmann and Polacheck argue that by giving animals the same legal rights as humans, human rights would suffer.\textsuperscript{72} They claim that animal’s rights could not co-exist with human rights; rather they would be in competition with each other and therefore legal personhood should not be available or obtainable for non-human animals.\textsuperscript{73} The fact that there is legislation that exists which protects the rights of animals is apparently sufficient for Schmahmann and Polacheck.\textsuperscript{74} They state that through this legislation, humans have a responsibility to treat animals in a humane way which is enough to protect the rights of the animal and thus it is not necessary to give animals the same rights as humans through legal personhood.\textsuperscript{75}

Posner argues, with reference to the practical application of legal personhood in the courts, that if courts are to be persuaded to change the law in the way

\textsuperscript{69} Bryant, above n 1, 293.
\textsuperscript{70} Fagundes, above n, 57.
\textsuperscript{71} Ibid.
\textsuperscript{72} Schmahmann, above n 31, 752 quoted in Hannah, above n 3, 576.
\textsuperscript{73} Ibid 760.
\textsuperscript{74} Ibid 761 quoted in Hannah, above n 3, 577.
\textsuperscript{75} Ibid.
advocated by Wise, they need to know the consequences of such changes.\textsuperscript{76} Hence, for Posner, the recognition of rights for animals raises as many questions as it answers.\textsuperscript{77} In addition, the approach taken by Wise that only those animals with ‘practical autonomy’ are awarded personhood status is the subject of criticism from a feminist perspective. In her article, Mackinnon states that ‘[i]f qualified entrance into the human race on male terms has done little for women…how much will being seen as humanlike, but not fully so, do for other animals?’\textsuperscript{78} Although MacKinnon concedes that possessing some rights is better than possessing none, in her view the articulation of formal rights may result in little substantive change to the treatment and status of animals, and ultimately be an exercise in futility.\textsuperscript{79}

5 What will it take to make the Transition?

It is clear from the arguments above that there will be ongoing debate as to whether legal personhood is the key to protecting the rights and/or interests of non-human animals. Although no firm answer is readily available, one prevailing theme amongst the multitude of theories is that there needs to be a significant change in the way we conceptualise animals, and especially how we protect their interests at law.\textsuperscript{80} If, in the final analysis, legal personhood provides the best solution for the protection of animal’s interests then making the transition will require more than just legal reform.\textsuperscript{81} According to Derrida, in the transformation of the relations between humans and animals, there is no such thing as the ‘miracle of legislation.’\textsuperscript{82} Rather, real change will result from a ‘social movement’ grounded in the ever increasing social and moral


\textsuperscript{77} Ibid. See also similar criticisms made by Radford, above n 12, 104 where he notes that it should be left to Parliament to take the initiative to make changes to the law rather than at the initiative of the judges and courts.


\textsuperscript{79} Ibid.

\textsuperscript{80} White, above n 22, 59.

\textsuperscript{81} Bryant, above n 1, 300.

concern for animals. As former President of the Australian Law Reform Commission (1999-2009), Professor David Weisbrot AM proclaimed, animal protection may just be ‘the next great social justice movement.’

St Pierre asserts that underlying the shift from ‘property’ to ‘people’ is a major change in the way society views the groups who are objectified. He argues that a fundamental part of this transition is the deconstruction of the concept of ‘other.’ Before the abolition of slavery and women’s liberation, both slaves and women were considered as ‘others’ or different from the ruling or the dominant class and therefore, ‘otherness’ was justification for their property status; as it is with non-human animals today. Deconstructing these artificially socially constructed differences is required to ensure that the recognition of the interests of non-human animals can occur, as it did for both slaves and women alike. Add to this the increasing economic and environmental pressures experienced by agricultural industries today, and the days of non-human animals being treated as ‘property’ rather than ‘people’ will surely be numbered. Therefore, as Weisbrot proclaims, our recognition for ‘the need to change our behaviour, our consumer preferences, our industrial practices, and our laws,’ will inevitably lead to greater protection for non-human animals.

6 Conclusion

Derrida argues that the type of violence humans have wreaked on animals, particularly since Descartes,

83 Cao, above n 4, 84. See also Hannah, above n 3, 582-583.
85 St Pierre, above n 35, 268.
86 Ibid. See also comments from Bryant and Cassuto above (Part III) regarding the ‘otherness’ of animals.
87 Ibid. See also Zuzana Kocourkova, ‘Why Do Animals Matter in Contemporary Australia?’ (2013) 2 Animal Studies Journal 106, 108 where in Australia, Indigenous Australians were, in the past, regarded as local fauna.
88 St Pierre, above n 35, 270.
89 Ibid.
will not be tolerated for very much longer, neither de facto nor de jure. It will find itself more and more discredited. The relations between humans and animals must change. They must, both in the sense of an "ontological" necessity and of an "ethical" duty.\textsuperscript{91}

It is apparent, from the discussion above, that the current relationship between humans and non-human animals is under scrutiny. Different theories are being developed to change the way in which non-human animals are treated by humans. Some advocate abolishing their property status, some advocate keeping it, some grant them legal standing, some provide equitable ownership in themselves, and some impose the same rights to that of a human through a writ of \textit{habeas corpus} or by granting legal personhood. No matter what theory (or version of it) is eventually applied, in order for animals to transition from their current status as property, it is imperative that humans undergo a fundamental shift in the way they conceptualise animals as ‘others’ so that ultimately (hopefully!) transition will occur.

\textit{There is nothing so powerful in the world as an idea whose time has come} (Michael Kirby)

\textsuperscript{91} Derrida, above n 80, 64.
**Bibliography**

**Articles/Books/Reports**


Bruce, Alex, *Animal Law in Australia: An Integrated Approach* (Lexis Nexis Butterworths, 2012)


Cao, Deborah, Katrina Sharman and Steven White, *Animal Law in Australia and New Zealand* (LawBook Co, 2010)


Francione, Gary, Animals, Property and the Law (Temple University Press, 1995)


Hills, Alison, Do Animals Have Rights? (Icon Books, 2005)


Midgley, Mary, ‘Persons and Non-Persons’ in Peter Singer (ed) In Defence of Animals (Blackwell, 1985)


Radford, Mike, Animal Welfare in Britain: Regulation and Responsibility (Oxford University Press, 2001)


Rollin, Bernard, ‘Animal Ethics and Legal Status’ in Marc Hauser, Fiery Cushman and Matthew Kamen (eds) People, Property, or Pets? (Purdue University Press, 2006)


Waisman, Sonia, ‘Non-Economic Damages: Where does it get us and how do we get there?’ (2005) 1 Journal of Animal Law 7

Weisbrot, David, ‘Comment’ (2007/2008) 91 Reform 2

White, Steven ‘Exploring Different Philosophical Approaches to Animal Protection in Law’ in Peter Sankoff, Steven White, and Celeste Black (eds) Animal Law in Australasia (The Federation Press, 2nd ed, 2013)


Wise, Steven, ‘Dyson Lecture on Nonhuman Rights to Personhood’ (2013) 30 Pace Environmental Law Review 1278

Wise, Steven, Rattling the Cage: Toward Legal Rights for Animals (Perseus, 2001)

Cases

Animal Liberation Ltd v Department of Environment and Conservation [2007] NSWSC 221


Dye v Wargo 253 F.3d 296, 300 (7th Cir. 2001)

Elder Smith Goldsbrough Mort Ltd v McBride [1976] 2 NSWLR 631

Rural Export & Trading (WA) Pty Ltd v Hahnheuser [2007] FCA 1535

Saltoon v Lake [1978] 1 NSWLR 52

Tilikum et al v SeaWorld Parks & Entertainment Inc & SeaWorld, LLC, No. 11 Civ. 2476 (S.D. Cal. 2011)

Legislation

*Competition and Consumer Act 2010* (Cth)

*Marine Mammal Protection Act 1972* (US)

*Trade Practices Act 1974* (Cth)

Other


Gary Francione, ‘Animal Law’ (Presentation)  

Gary Francione, Abolitionist Approach (Website): *Six Principles of the Abolitionist Approach to Animal Rights*  
[http://www.abolitionistapproach.com/about/the-six-principles-of-the-abolitionist-approach-to-animal-rights/#.Ur57TtIW07o](http://www.abolitionistapproach.com/about/the-six-principles-of-the-abolitionist-approach-to-animal-rights/#.Ur57TtIW07o)

HuffPost ‘PETA’s SeaWorld Slavery Case Dismissed by Judge’ September 2, 2012  
[http://www.huffingtonpost.com/2012/02/09/peta-seaworld-slavery-n_1265014.html](http://www.huffingtonpost.com/2012/02/09/peta-seaworld-slavery-n_1265014.html)


*MostlyDogs* discussion forum, ‘Interview with Gary Francione about animals as persons’ August 13, 2008  

‘PETA files case against Sea World claiming killer whales treated as slaves’ *The Australian* (online), February 7, 2012  

Steven Wise, ‘The Case for Non-human Personhood’ (Webcast)  
[http://www.youtube.com/watch?v=jv4-01DwB-w](http://www.youtube.com/watch?v=jv4-01DwB-w)
Saving our Silent Slaves:  
Legal and Ethical Challenges to Speciesism

Marie Vella


‘The French have already discovered that the blackness of the skin is no reason a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognised that the number of the legs, the villosity of the skin, or the termination of the os sacrum are reasons equally insufficient for abandoning a sensitive being to the same fate…The question is not, Can they reason? nor, Can they talk? but, Can they suffer?’ ¹

1 Introduction

In 1963, Martin Luther King announced to the world of a dream for equality between humans of all races.² Fifty-one years later, so too lives a dream that equality will

1 Jeremy Bentham, Introduction to the Principles of Morals and Legislation (2nd ed, 1823)

2 Martin Luther King, ‘I Have A Dream…’ (Speech delivered at the March on Washington, Washington, 28 August 1963).
become reality between all species.\(^3\) Although animal liberation has been an ideology and issue present throughout history,\(^4\) never before have the rights of animals been as prevalent as they are in modern day society.\(^5\) The animal movement is the next revolution.\(^6\) As Singer identified in 1975, ‘over the last few years, the public has gradually become aware of the existence of a new cause: animal liberation’.\(^7\) Nevertheless, thirty years on, Singer\(^8\) identifies that the ideologies of the early 1970s reflected that ‘scarcely anyone thought that the treatment of individual animals raised an ethical issue worth taking seriously’.\(^9\) When comparing those ideals with those of the modern day, however, Singer recognises a considerable difference of opinion over the thirty years.\(^10\) Furthermore, the present world has come a long way from the logic of Descartian in the 17\(^{th}\) century, where animals were treated as ‘automatons’,\(^11\) and an animal’s ‘squeals, squeaks and cries in response to various stimuli were regarded as nothing more than the sounds of improperly functioning machines’.\(^12\)


\(^4\) Ibid.

\(^5\) Ibid.

\(^6\) Ibid.


\(^9\) Ibid.

\(^10\) Ibid.

\(^11\) R Descartes, *Discourse on the Method* (Cottingham, Stoothoff and Murdoch, *The Philosophical Writings of Descartes*) 139 (first published 1637).

This paper aims to focus on the legal and philosophical framework of animal law by drawing attention to the issue of speciesism, prevalent in present society. This essay intends to illustrate that moral and legal changes need to be made in order to eliminate speciesism. In doing so, this essay will first briefly analyse the moral views of animals, placing much weight on the theories developed by Regan. The essay will look at the concept of equality verses equal consideration of rights, and some of the inconsistencies in Regan’s rights theory, namely discrimination based on: times of necessity, age, and the class of animals.

This paper will move on to philosophically address how animals are perceived in law, by briefly scoping the discussion around the property status of animals, which needs to be removed, and legal personhood. In this section, focus will also be had on the need for legal personality to be given to all animals, and the use of the ‘non-property guardianship’ model for companion animals as an addition to legal personality. The essay will follow on to a discussion on the reality of an anti-speciesist society, with focus placed on instincts and the need for meat in the diets of certain species (including humans) being problematic in achieving such a goal. Ultimately, this paper recognises that change needs to be achieved one tiny step at a time and that the purpose of this paper is to provide a hopeful perspective toward anti-speciesism, although achievement of all the recommendations may be somewhat difficult in reality, since change is limited by ‘physical, economic, political, religious, historical, legal, and physiological obstacles’. Finally, this essay will provide recommendations as to how to limit and eventually eliminate speciesism entirely by the use of a two phase model, whereby societal and legal changes need to be adopted before any significant progress can be made.

It is important to note that this essay will adopt a view that animals deserve moral consideration and any debates regarding consciousness and related issues will not be

13 ‘Analogous to racism and sexism, speciesism refers to an arbitrary, irrational and morally unjustifiable preference for the interests of humans over animals on the basis of species’: Steven White, ‘Exploring Different Philosophical Approaches to Animal Protection Law’ in Peter Sankoff, Steven White and Celeste Black (eds), Animal Law in Australasia (The Federation Press, 2nd ed, 2013) 31, 34; Richard D Ryder, Victims of Science (Davis-Poynter, 1975) 16.
discussed in the scope of this paper. Furthermore, due to the limits placed upon this paper, the author will only focus on animal law in an Australian, western, context. Moreover, as this paper aims to analyse speciesism through an essentially philosophical lens, no direct focus will be placed on specific case law or sections of statute. The reader is also to consider that due to these restrictions, the issues mentioned above can only be covered so in brief in the scope of this essay.

2 The Current Moral Views of Animals: An Analysis

2.1 Equality vs Equal Consideration of Interests

Also known as ‘inherent value’, the concept of equal consideration of interests requires that ‘equal moral weight [be given] to comparable interests, regardless of who has those interests’. However, as White identifies, this concept does not mean that humans and non-humans are to be treated equally since ‘the interests of humans and animals differ, so that, for example, humans may have an interest in a claim to free speech that is obviously not shared by animals’ in the same way. What is fundamental here is that the interests of animals need to be considered in the same respect as any other being, human or non-human. Yet there needs to be an understanding that rights must reflect the individual needs of different species.

The problem with this concept, however, is that it is limited by what are included in the definition of “interests”. Furthermore, since humans will inevitably be constructing any formal document outlining such rights, such a document is at risk of being inevitably tainted by the perspectives and ideals of the particular human writing on the behalf of non-human animals. Moreover, as has been seen in human rights history,

15 White, above n 13, 34.


17 White, above n 13, 35.

18 Ibid.

19 See generally ibid.

structuring and restricting rights for particular groups, based on the needs of such groups, is in itself potentially discriminatory.\textsuperscript{22} Though this concept possesses much credit, it is an issue that is far too complex for the scope of this paper, and thus will not be considered further.

Nonetheless, there still remains a need for equal consideration of the interests of all species, based on the notion that all species have intrinsic value as a \textit{life}.\textsuperscript{23} Furthermore, countless theorists have compared the moral treatment of non-human animals with the treatment of young children and the impaired,\textsuperscript{24} with research showing that many animals possess qualities that are even more developed than many young human children and impaired humans.\textsuperscript{25} The author thus wishes to emphasise the importance of how moral attitudes are expounded on these human individuals, and that equal moral respect and rights should thus be given to non-human animals with the same or higher levels of development, as a minimum standard. Thus, ultimately, to take a step towards combating speciesism, it is vital that changes be made to the moral perception of non-human animals.

\textbf{2.2 Regan, Rights and Consistency}

Regan, a rights theorist, provides some very persuasive points in potentially combating speciesism.\textsuperscript{26} For instance, Regan identifies that humans do not require meat to

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\item 22 Ibid.
\item 24 Singer, above n 8, 185.
\item 26 Tom Regan, \textit{The Case for Animal Rights} (University of California Press, 1983); Tom Regan, \textit{Defending Animal Rights} (University of Illinois Press, 2001); Tom Regan and Peter Singer (eds), \textit{Animal Rights and Human Obligations} (Prentice Hall, 2001).
\end{itemize}
\end{footnotesize}
survive. Furthermore, in regard to research animals, Regan’s rights theory proposes that ‘no one, whether human or animal, is ever to be treated as if she were a receptacle, or as if her value were reducible to her possible utility for others’. Regan’s rights theory thus possesses many merits. However, this paper does not support the clear inconsistency in Regan’s theory with regard to necessity and animal types, as these limitations are speciesist in nature.

Regan’s “worse-off principle” grants that there are some circumstances that allow animal rights to be predominated by humans. This is, undoubtedly, in clear conflict with the fight against speciesism emphasised in this essay. This concept provided by Regan merely reemphasises animals as a “less important” species when it comes to a moment of truth. However, any “necessity” defence should be viewed indiscriminately between the species, and thus apply as it ordinarily would in criminal law.

Furthermore, Regan limits his rights theory only to mammals of at least one year old, yet the basis on which Regan determines this concept is arguably not well founded. Additionally, such a theory conflicts directly with the notion of anti-speciesism by marginalising species from certain rights. Thus, though Regan provides a set of ideals that may potentially successfully combat speciesism, the inconsistency present makes Regan’s rights theory difficult to accept in its entirety. Thus, a slight variation of Regan’s rights theory is supported by this paper, in that his theory should apply to all species of all ages and levels of development. Furthermore, the necessity argument should apply to non-human animals no differently as it would to humans.


28 Regan, above n 26, 392-393.

29 Ibid 77-78.

30 See R v Dudley and Stephens (1884) 14 QBD 273 DC.

31 Regan, above n 26, 77-78.
3 How Animals are perceived in Law: A Philosophical Account

3.1 Animals as Property

It has been described that the ‘property status of animals renders meaningless any balancing that is supposedly required under the humane treatment principle or animal welfare laws’. 32 Francione explains that this is ‘because what we really balance are the interests of property owners against the interests of their animal property’. 33 Furthermore, criticisms provided by Epstein that the property status of animals could provide a positive perspective for animals, in turn, can be criticised, for this concept can be potentially successful only with companion animals, and is thus flawed. 34

As Francione further identifies, ‘as long as animals are treated as a form of property, their interests are not likely to be accorded more weight than they are under the framework of legal welfareism’. 35 Thus, it can be understood that any move towards anti-speciesism involves the removal of the property “label” from non-human animals. Though this is a relatively small step, it is a ‘necessary step towards the achievement of an animal rights agenda where, to all intents and purposes, animals are regarded as the moral equals of humans’. 36

3.2 Legal Personality

Once property status is removed, it gives room for legal personality to be formed. However, arguably, it may be awarded even while animals are regarded as property

33 Ibid.
by simply modifying it. Favre\textsuperscript{37} and Douglas\textsuperscript{38} provide a good alternative which is somewhere in between a property and legal personality status and rides on a revised version of social contract theory: ‘non-property guardianship’\textsuperscript{39}. The concept of ‘non-property guardianship’ provides many merits. For one, it assumes a more formal form of responsibility to companion humans.\textsuperscript{40} Secondly, the term “guardian” implies a less controlling notion over animals, and more of a caring type of responsibility.\textsuperscript{41} Thirdly, the “guardianship” concept reflects a similar rights structure used with children and the impaired, thus giving animals the same standards as applicable to humans.\textsuperscript{42}

However, in conflict with Favre’s view, the notion of “guardianship” should not be formed as a limb of property law, but instead within a new set of statutes solely governing animal rights. This is because moving as far away from the property “label” as possible is a direction that is favourable in combating speciesism.\textsuperscript{43} In addition, the “guardianship” model may only apply successfully to companion animals, as guardianship would not be appropriate for animals without human companions.\textsuperscript{44}

Thus, it is suggested that legal personality operate with non-companion animals in the same way it would with companion animals, yet without the “guardianship” element. In this regard, a more appropriate step would be to give all non-human animals legal personality, with companion animals being given further “guardianship” rights. This would not be to favour companion animals, but to give companion animals the rights


\textsuperscript{39} White, above n 13, 44.

\textsuperscript{40} Favre, above n 37.

\textsuperscript{41} Ibid.

\textsuperscript{42} Singer, above n 8.


\textsuperscript{44} Generally speaking, for the purposes of this paper, the term ‘companion’ animal includes all animals in human care (such as pets, zoos animals, etc.) but does not include animals that are not in human care (such as those in the wild).
necessary for their particular position as companions. Furthermore, as discussed earlier, it is important that legal personality not be limited to practical autonomy, but instead be based on the intrinsic value of an individual life.

3.3 Differentiating Interests

The analysis of property and legal personality brings to light the notion that, in reality, different rights and freedoms apply differently for various classes of animals. For instance, as explained above, in addition to legal personality, the ‘non-property guardianship’ model should be applicable to companion animals due to their positions as companions to humans, while the ‘non-property guardianship’ model would not apply to non-companion animals.45 Also, there obviously needs to be an understanding of the specific needs and instincts of particular animals.46 The fact is that certain needs and instincts may impede on the rights of beings from another species, thus preventing the “victimised” species certain rights. For example, a lion in the wild should have the right to hunt and kill as it would naturally since this is an important part of the behavioural and physical needs of this particular type of animal. However, if it is in the nature of one type of animal to eat another, would it be within the scope of speciesism that the “victimised” animal be denied the freedom to live for the sake of another animal’s freedom to hunt and act with natural instinct? Similarly, would it be within the scope of speciesism to allow an animal the freedom to hunt with natural instinct at the cost of another animal’s right to life? Obviously, there is no clear answer that would allow both rights to coexist.

This reflects on what is considered through a universalist approach,47 where the differences of each animal are not considered. This paper disagrees that the degree of animal complexity should deny certain organism’s fundamental rights. However, it is understandable for rights to be applied with respect to the particular type of animal

45 Francione, above n 32; Douglas, above n 38.

46 See generally White, above n 13.

47 See White, above n 13, 45-49; DeGrazia, above n 16, 112.
involved, thus this paper leans more towards a capabilities approach.\(^{48}\) In this respect, it is important not to compare non-human animals with humans, as provided by similarity arguments.\(^{49}\) This is because this notion is, in itself, discriminatory as it does not respect each species as equally deserving recipients of rights as the next species. In other words, it is important that humans are not the central focus and “guide” for granting rights.

Additionally, what the lion scenario may bring to light is the argument in support of farming animals for food, since humans, as omnivores,\(^{50}\) also have been said to have the right to eat food including meat.\(^{51}\) If leaning toward this perspective, it could be considered that farming may be deemed necessary. However, in rebutting such a proposal, it is important to identify the negativity associated with farming and its conflict with anti-speciesist ideals.\(^{52}\) Furthermore, it is not necessary.\(^{53}\) Prior to farming practices, humans hunted just as the lion did in the scenario described above.\(^{54}\) Therefore, considering this, farming for meat would be inappropriate and unnatural.\(^{55}\)

In fact, using this wave of thinking, the only understandable manner of including meat in a one’s diet would be to hunt animals individually and not in excess.


\(^{49}\) See White, above n 13.

\(^{50}\) Although it should be noted that this is arguable, with considerable research proving that humans were ‘not meant to eat meat’: Deneen, above n 27; Regan, above n 26, 330-353; Towell, above n 27. However, this subject, like many others identified in the scope of this paper, is far too deep to discuss considering the restrictions placed upon this essay and will not be focused on any further.


\(^{53}\) Ibid.


\(^{55}\) Farming for non-meat products such as eggs, milk, etc., however, pose yet again another dilemma. Regrettably, due to the restrictions placed upon this essay, the farming of non-meat products cannot be discussed, with focus only on the farming of meat.
Thinking further into this concept, it has been argued by many academics that humans do not need to eat meat in order to survive. Furthermore, one only need look at a supermarket isle to realise that non-human animal meat, at the cost of another’s life, is in abundance, excess and taken for granted. Moreover, meat, in today’s world, is treated as more of a delicacy rather than a necessity. Nonetheless, regardless of whether or not humans once needed meat in their diets, it is clear that in the present day Western world, where a variety of foods are at one’s fingertips, meat is not a necessity. Thus, the requirement to take a life for food in order to aid survival, as it may apply to other animal species, no longer applies to humans. Therefore, the taking of a life for the fulfilment of human hunger and nutrition is no longer, in the modern world, a necessity, and this concept should thus be reflected in law.

Nevertheless, the author realises that the changes suggested by this paper are not only highly optimistic, but dramatic to the point of being unrealistic since ‘legal rights for animals must proceed one step at a time, as progress is impeded by physical, economic, political, religious, historical, legal, and physiological obstacles’. This is the bitter reality of fighting speciesism. However, as will be discussed in the remaining section below, the purpose of this paper is to provide a brief philosophical account of how animals should be treated through a change in moral ideals and law: as equal and respected, with no barrier placed on the basis of species. The author recognises that the sheer reality of such a hope is certainly some time away, and it is equally certain that many more lives will be lost before the struggle is over.

4 The Journey to Justice


58 Ibid.

59 Ibid.

60 Ibid; Regan, above n 26, 330-353.

61 See also Diamond, above n 56.

62 Wise, above n 14, 19.
4.1 The Road Ahead

‘Prima facie, it is not possible to rule out, in advance of understanding the consequences, the use of animals in a variety of exploitative settings. In the case of ceasing to eat meat, for example, abolition would cause social and economic upheaval’.63 Though this may very well be the case, it is important for the reader to be reminded of the struggles for equality faced by other marginalised groups. Only 190 years ago was slavery a legal practice.64 Furthermore, it has only been 52 years since Aboriginal women have been given the right to vote.65 The world is continuously moving; with time, it is changing; it is, arguably, gradually striving to become more balanced and more neutral.

It is not the intention of this paper to focus purely on the limits to ending speciesism. The purpose of this paper is to provide a beacon of hope to non-humans and to all those supporting the end of speciesism. Certainly, the change associated with ending speciesism will journey a long – and probably rocky, winding, and steep – road. Yet, any change in removing once-acceptable notions of discrimination from both the ideals of society and the legal system involves time, persistence and patience.

Nonetheless, what can be attributed through the research focus of this paper, are two elements which are equally important in fighting speciesism. They are:

(1) A change in the ideals and moral standards of society; and
(2) A change in the law.

4.2 Moral Standards

63 White, above n 13, 41.

64 Slave Trade Act 1824 (Cth) made slavery a criminal offence in Australia.

Lovvorn has made it clear in his writings of support of the law in creating change, suggesting the requirement of ‘footsoldier, not philosophers’. However, Lovvorn also states that ‘the law does not change society, society changes the law’, which only reiterates the importance of moral change, since without moral change in society, the law would remain unmoved. Furthermore, as White identifies, there is an importance of philosophical thinking in stimulating interest in animal treatment regarding prompting legal change, as has been done thus far. Changes in how discrimination has been regarded in law, whether it relates to speciesism or other forms, have a basis in the analysis from varying schools of thought that preceded that law. Thus, the importance of philosophical thought and the moral change of how animals are regarded in society are of immeasurable importance. Not only does such thinking create awareness of activities that may currently be ignored or uncovered, but it also aims to find possible solutions through the examination of important issues via the lens of differing philosophical perspectives. This paper suggests that methods to help change the current moral perception of speciesism, inherent in the ideals of society, should include but not limit itself to awareness, education, and the teaching of non-speciesist alternatives.

5. Legal Change

In addition to changing the morals and ideals of society, a change in international and domestic law is necessary in order to adequately and successfully combat speciesism, and maintain such an ethic. This paper proposes the following changes:

5.1 International Law


67 Ibid 149.

68 White, above n 13, 50-51, 59.

69 Ibid 48.

70 Ibid 51; Singer, above n 8.

71 Ibid.
This should include the formation of an international minimum standard of animal rights as a United Nations Universal Declaration endorsed by signatories. International law is arguably symbolic since the sovereignty of individual nations prevents adequate enforcement and signatories are not obliged to actually enact or amend related domestic law. However, international law provides awareness of the importance of certain issues in the global arena. Furthermore, forming an international minimum standard heightens the general moral thinking relating to non-human animals and the fight against speciesism, as it places animals at the same level of importance as humans; their rights recognised at the international level.

5.2 Domestic Law

Though the complexity of this concept cannot be adequately discussed in the scope of this paper, it is recommended that change includes changes at the state and federal levels, with provincial, territorial, regional and local levels following suit. A body of anti-speciesist legislation needs to be formed, outlining the fundamental rights of all species including human and non-human animals. Ideally, an amendment to the Australian Constitution, although arguably only symbolic, would be powerful in combating speciesism and concreting Australia’s intentions in supporting anti-speciesism. Furthermore, many other areas of law expressly or impliedly supporting speciesist connotations would need to be amended accordingly.

It is recommended that the change would reflect the major points discussed in this essay, including, but not limited to:

72 Although this will not be developed further in the scope of this paper, it is important to quickly note the specific reference to “rights” rather than “welfare” since welfarism would simply reinstate the position animal law is currently lost in: see White, above n 13.


• Removing the property “label” from animals
• Granting that all species have legal personality

In addition to this, the ‘non-property guardianship’ model would apply to companion animals
• Rights would not be limited to species of a particular age, class, or level of complexity, etc., but based on their intrinsic value of life.
• In regard to non-companion animals only, if an animal’s rights to instinct and food conflict with the rights of another to live, the natural and physiological needs of those animals need to be considered.
• In regard to humans, as the consumption of animals is no longer a necessity, animal consumption would not be acceptable.

6 Conclusion

As White explains, ‘even if it may not be possible to come to any prescriptive, all embracing conclusions about the way we should conceptualise our relationship with animals, including law, we can conclude with considerable confidence that prevailing approaches are inadequate.’ Change is needed in both the moral ideals of society, and the legal field. Moral perceptions and the law go hand in hand as each influences the other, thus meaning that any change will involve a long and patient journey.

The author accepts that the recommendations proposed in this paper may be regarded as “rigid” to those readers with more anthropocentric beliefs. However, this paper merely highlights, ever so briefly, the possibility of what a less discriminatory world may look like. A perception of the recommendations in this paper as “rigid” thus only illustrates how, though the world has moved on from the horrifyingly backward thinking of Descartes, society is still entrenched in discriminatory ideology. Nonetheless, it is inspiring to consider just how far rights for animals have come. Thus, as the fight for animal liberation continues to gain momentum through time, this era

78 White, above n 13, 39.
79 Descartes, above n 11.
marks the dawning of a new movement: past gender, race, religion, or class, and to that of non-human animals.
Bibliography

Articles/Books/Reports


Descartes, R, *Discourse on the Method* (Cottingham, Stoothoff and Murdoch, *The Philosophical Writings of Descartes*) 139 (first published 1637)


Green, PC and E Gullone, ‘Knowledge and attitudes of Australian Veterinarians to Animal Abuse and Human Interpersonal Violence’ (2005) 83 Australian Veterinary Journal 17

Gregory, Neville and Temple Grandin (eds), Animal Welfare and Meat Production (CABI, 2007)


King, Martin Luther, ‘I Have A Dream…’ (Speech delivered at the March on Washington, Washington, 28 August 1963)


McEwen, Graeme, Submission to Attorney-General, Panel Submissions to the Attorney-General 3 September 2008


Regan, Tom, Defending Animal Rights (University of Illinois Press, 2001)


Regan, Tom and Peter Singer (eds), *Animal Rights and Human Obligations* (Prentice Hall, 1989)


Ryder, R, *Victims of Science* (Davis-Poynter, 1975)

Sankoff, Peter and Steven White (eds) ‘Animal Law in Australasia – A new dialogue’ (Federation Press, 2009)


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


Singer, Peter, ‘Moral Experts’ (1972) 32(4) *Analysis* 115


White, Steven, ‘Exploring Different Philosophical Approaches to Animal Protection Law’ in Peter Sankoff, Steven White and Celeste Black (eds), Animal Law in Australasia (The Federation Press, 2013) 31


Cases

R v Dudley and Stephens (1884) 14 QBD 273 DC

Legislation

Animal Care and Protection Act 2001 (Qld)

Animal Care and Protection Regulation 2012 (Qld)

Slave Trade Act 1824 (Cth)
Other


Explanatory Notes, Criminal and Other Legislation Amendment Bill 2011 (Qld)


CRIMINAL AND CRUELTY OFFENCES

The Link between Animal Cruelty and Interpersonal Violence

Alan Parkes

1 Introduction

Animal cruelty and violence to humans contain common characteristics. ¹ For instance, the victims in both are sentient beings, implying they do endure pain from the injuries sustained.² The purpose of this essay is to explore the connection between these two forms of crime and the influence of the ‘human’ and ‘non-human’ interpretation. In addition, the laws that govern these offences, their adequacy, and the potential for reform will be examined.

² Ibid.
According to studies in psychology, sociology and criminology, individuals who carry out acts of animal cruelty do not stop here. Instead, several escalate to humans, in which the expectation of committing murder or other violent offences is fivefold. The preliminary acts of cruelty to animals are not simply indications of a slight personality defect, but rather a sign of a deep psychiatric illness. The American Psychiatric Association classifies this illness as a conduct disorder, which is defined in the Diagnostic and Statistical Manual of Mental Disorders IV (DSMIV) as a recurring and persistent behaviour pattern where the rights of others, social customs or rules are disregarded.

Individuals with conduct disorder begin with the abuse of something they are capable of controlling. Such people only feel power and control when enforcing pain or death and need to repetitively retain this rush by executing exploits that are all the more shocking. A case of escalation is Roderrick Ferrell, the Vampire cult leader, who earlier in his life tortured, murdered, and disfigured two pups before his renowned beating of a couple to their demise, in which he is currently imprisoned. In his testimony, Mr Ferrell described these slayings as a ‘rush.’ Furthermore, in discussions with twenty-five University students in America, who confessed to animal cruelty previously in their lives, the abuse of animals was not the desired conclusion. Instead, the possibility of being caught carried emotions of excitement accompanied by achievement if undetected, which was defined too, as a ‘rush.’

6 Ibid.
9 Hodges, above n 4.
The link between animal cruelty and interpersonal violence is also backed by statistics. For instance, of the 117 male prisoners in South Africa who were studied, fifty-eight had committed violent offences.\(^{13}\) Out of the fifty-eight, 63.3% admitted to acts of animal cruelty during childhood, compared to just 10.5% of the fifty-nine prisoners in for nonviolent crimes.\(^{14}\) In addition, a NSW police investigation of sexual homicide offences found 100 percent of the offenders studied, committed acts of animal cruelty in the past.\(^{15}\)

Generally, the majority of mass murderers and serial killers also have animal cruelty in their past.\(^{16}\) In fact, one of their first acts of violence is the torture and/or killing of companion animals and/or rodents, which often then escalates to abusing younger siblings ahead of moving to the streets, where violence against strangers is committed.\(^{17}\) The first victims of serial killer Jeffrey Dahmer were animals. During his childhood, he would commit such acts as beheading dogs and impaling cats and frogs to trees and on sticks.\(^{18}\) Ultimately, he was guilty of seventeen murders.\(^{19}\) Similarly, school shooters also have an extensive history of animal abuse before focusing their anger on colleagues and educators. For example, Andrew Golden, one of the shooters of the Westside Middle School in Arkansas, United States, claimed to have shot dogs, including his own, prior to killing five people.\(^{20}\)

A strong correlation also exists between acts of animal cruelty and domestic violence.\(^{21}\) Domestic violence generally starts with the abuse of household pets, with a study of fifty refuges for abused women revealing 85% of women and 63% of children

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13Ascione, above n 1.
14Ibid.
16Hodges, above n 4.
17Daugherty, above n 8.
18Hodges, above n 4.
confirming instances of pet abuse in the family. The children that reside in the same home as abusers are not just in danger of being abused, but are too at greater risk of becoming abusers themselves. In actual fact, a survey in 1995 displayed that 32% of domestic violence victims indicated that one or more of their children had hurt or murdered a pet.

2 Differential Treatment

For a number of reasons society tends to view animals as inferior to humans. Firstly, the brutal acts to animals are not taken as seriously as humans. For instance, out of 326 animal cruelty cases prosecuted in Victoria between 2010 and 2012, the most common penalty was a fine. In human violence cases on the other hand, the Australian Bureau of Statistics in 2004 reported 80% of defendants accused of sexual assault and associated crimes were guilty, in which approximately 70% received a prison term.

Secondly, animals are regarded as not consciously aware and so incapable of recognizing poor welfare conditions. In contrast, such an archaic view was dismissed in 2012, when a group of renowned scientists signed the Cambridge Declaration on Consciousness, which confirms their support for the notion that animals are just as consciously aware as humans. The evidence that led to the signing showed that humans are not special because they simply contain the neurological components

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23 Ibid.
24 Ibid.
necessary to produce consciousness. Part of this research revealed a recognizable behaviour change amongst octopuses contained in tanks that did not hold enough arousing items.

Thirdly, animals are considered ‘property’ of humans, thus making any animal mistreatment by humans acceptable. This argument equates an animal, a sentient being, to an office desk, a lifeless object; meaning if a person is permitted by law to demolish their property e.g. chop up their desk, then animal cruelty should also continue without punishment. The degree of protection given to animals today is similar to a period in the United States before 1874, in which children were too considered ‘property’ of their parents. It was not until 1874; the case of Mary Ellen McCormack, a severely beaten girl, that child abuse was legally acknowledged. At the time, it was uncommon for a government organization or a person to intervene once a child was wounded, exploited, or abandoned by unworthy parents. However, in this case the American Society for the Prevention of Cruelty to Animals supported Mary Ellen and was successful in their bid for the judge to consider that if Mary Ellen were an animal; her ill treatment would have been deemed illegal. The child was worthy of at least the same protection as an animal, just like an animal is worthy of the same protection as a child today.

Finally, animals do not feel the same pain as humans. Amongst humans themselves, pain is a subjective experience, meaning it cannot be measured; therefore the association between humans and animals is difficult to prove. Pain is defined as an unpleasant sensory and emotional experience related to actual or possible tissue

29 Ibid.
30 Ibid.
31 The Hunter’s Institute, above n 27.
33 Ibid 451-54.
34 Ibid 451-52.
damage, and even though there are biological similarities between human and animal nervous systems e.g. nociceptors, spinal cord, brain, which explains the sensory element, the emotional element is scientifically unresolved. Therefore, since we are uncertain of the pain experienced by animals we cannot reject that their pain is not the same as humans. Until this is established we must stop avoiding the uncomfortable fact of covering the harmful treatment of animals.

3 The Legal Framework and its Adequacy

All states and territories control crimes of animal cruelty and violence to humans in their respective jurisdictions through legislation.

Animal welfare legislation at face value looks as if it defends the rights of animals. However, in reality it fails to succeed at reassuring its prime intention, which is the appropriate treatment of animals. In spite of earlier evidence emphasizing the risk these offenders pose to the public, acts of aggravated animal cruelty are constantly penalized by lenient punishments. In fact, the maximum jail sentence for aggravated animal cruelty in Australia is between 1.5 and 7 years but this is rarely applied. For example, a 2012 case in Victoria revealed that a person, who asphyxiated a kangaroo, by tying a rope around its neck and fastening it to a car which dragged behind for two kilometers, received no prison sentence. Furthermore, a Tasmanian case established the shortfall of such animal welfare legislation, with a man receiving a


38 Peter Sankoff and Steven White, Animal Law in Australasia (2009), 34.

39 Prevention of Cruelty to Animals Act 1979 (NSW); Animal Care and Protection Act 2001 (Qld); Prevention of Cruelty to Animals Act 1986 (Vic); Animal Welfare Act 1992 (ACT); Animal Welfare Act (NT); Animal Welfare Act 1985 (SA); Animal Welfare Act 1993 (Tas); Animal Welfare Act 2002 (WA).

40 Crimes Act 1900 (NSW); Criminal Code Act 1899 (Qld); Crimes Act 1958 (Vic); Criminal Code 2002 (ACT); Criminal Code Act 1983 (NT); Criminal Law Consolidation Act 1935 (SA); Criminal Code Act 1924 (Tas); Criminal Code Act Compilation Act 1913 (WA).


42 Criminal Code Act 1924 (Tas) s 9.

43 Hatten, above n 41, 9.

three month suspended sentence and community service for beheading two kittens.\textsuperscript{45} Inappropriate sentencing demonstrates a total disregard for animals and their safety.\textsuperscript{46}

Section 530 of the \textit{Crimes Act 1900} (NSW) encompasses a number of ‘loopholes’ that hinder the prosecution of serious animal abusers. The term ‘and’ requires that all three elements be proven beyond reasonable doubt i.e. intent,\textsuperscript{47} the act amounts to torture, beating, or a serious act of cruelty,\textsuperscript{48} and the act killed, seriously injured, or prolonged suffering to the animal.\textsuperscript{49} The difficulty arises in not just proving all these very extensive elements, but similar to Victorian and Tasmanian legislation, charges are generally dropped or the magistrate considers the offenders actions not worthy of a tougher punishment.\textsuperscript{50}

On the contrary, a Victorian woman in 2009 who stood convicted of stabbing her ex-boyfriend’s bull terrier 23 times with a kitchen knife was sentenced to three years jail,\textsuperscript{51} which seems optimistic. However, it was not the charge of aggravated cruelty\textsuperscript{52} that was imposed, which brings a maximum two year prison term, but rather the charge of criminal damage to property,\textsuperscript{53} which carries a maximum fifteen year prison sentence. Although some could view this as a victory in enforcing tougher penalties for animal cruelty offenders, it mostly strengthens the already established classification of animals as ‘property’ in law, implying they are incapable of having individual standing.\textsuperscript{54} Whether tougher penalties are the answer will be explored later.

\textsuperscript{45} Ibid.
\textsuperscript{46} Hatten, above n 41, 10.
\textsuperscript{47} \textit{Criminal Code 1900} (NSW) s 530(1).
\textsuperscript{48} \textit{Criminal Code 1900} (NSW) s 530(1)(a).
\textsuperscript{49} \textit{Criminal Code 1900} (NSW) s 530(1)(b).
\textsuperscript{50} Voiceless, \textit{Giles Abattoir Case} (2013) <https://www.voiceless.org.au/content/giles-abattoir-case> at 2 November 2013: Watkins held a tougher punishment was not needed, since “the defendants had already suffered enough by losing their jobs.”
\textsuperscript{52} Prevention of Cruelty to Animals Act 1986 (Vic) s 10.
\textsuperscript{53} \textit{Crimes Act 1958} (Vic) s 197.
\textsuperscript{54} Hatten, above n 41, 3.
With the exception of the ACT and SA, in which intent or recklessness must be present in causing the act, aggravated cruelty provisions apply when a person causes death or severe injury to an animal. Yet, there are many exceptions which appear within the animal welfare legislation that safeguard possible offenders from animal cruelty charges. For instance, the law defines the terms ‘stock animal,’ and ‘farm animal,’ so as to omit them from the scope of legislative power, meaning acts such as teeth clipping, castration, tail docking, dehorning and debeaking are all legal in factory farms. This method of institutionalised abuse is endorsed by the Federal Model Codes of Practice for Animal Welfare, which sets the ‘minimum standards’ and operates in conjunction with animal welfare legislation. However, if an inconsistency arises between the legislation and the codes, the latter will always succeed. For example, in the Animal Care and Protection Act 2001 (Qld), a person is considered cruel to an animal if they cause unjustifiable, unnecessary or unreasonable pain, which raises concerns over whether the castration of a two to seven day old pig without analgesia or the dehorning of cattle not more than six months of age without anaesthetic is justified. Paradoxically, these acts are justified as it is recommended in the applicable Codes of Practice.

The problem with lawful approval of such mutilating acts in factory farms is that some abattoir employees are more susceptible to violence than other members of the public and it also indicates a greater level of crime, especially in regions where abattoirs are situated. In addition, research shows that these acts performed in abattoirs on a regular basis desensitized employees, making them more disconnected and less

57 Prevention of Cruelty to Animals Act 1986 (Vic) s 3.
58 Hatten, above n 41, 8-12.
59 Ibid 11.
60 Ibid 5.
61 Section 18.
empathetic. Critics were quick to blame the rigours of factory work if not for a comparison study that uncovered those who too worked in factories, where the work remained just as perilous and monotonous, but without the butchering of animals, were not linked to an increase in crime, but rather the reverse, in which the amount of crime reduced.

The Australian Veterinary Association’s (AVA) policy on Animal Abuse only recommends veterinarians report cases of suspected animal cruelty, as opposed to making it compulsory. Some regard this as one more drawback in reporting crimes of animal cruelty, whereas others such as the AVA believe mandatory reporting will simply disparage people from taking their animals to the veterinary clinic, as they could be reported. However, providing sentient beings are comparable, the assumption that the veterinarian’s duty to animals is equivalent to that of medical practitioners to children could be made. Therefore, taking into account the specialized training, knowledge, and responsibility of both professions to thoroughly inspect their patients for medical reasons, suggests they are the finest people to properly recognize and report cases of mistreatment.

Aware of the superior knowledge of physicians, all Australian states and territories have enacted legislation that involves mandatory reporting of suspected child abuse by physicians to the relevant authorities. Yet, the same promise is not exhibited in the animal/veterinarian relationship, since no such laws are in place, nor does the Code of Professional Conduct for veterinarians offer encouragement with its terms and clauses i.e. a client’s right to confidentiality must be valued. Although this standard may be pardoned upon the veterinarian obtaining written consent from the client or by

66 Ibid.
68 McHendrix, above n 22, 311.
69 Australian Veterinary Association, above n 67.
70 McHendrix, above n 22, 311.
a court order, veterinarians would rather not risk civil liability, defamation, and their ticket to practice if they wrongly accuse a client of animal cruelty. However, unlike abused children, who are most likely spotted by people outside the family home e.g. school, crèche, physician appointments, neighbours, mistreated animals are usually only spotted by veterinarians. Hence, veterinarians play an important part in the detection of animal cruelty cases.

The enforcement of animal welfare legislation by government agencies, the RSPCA, and police departments also raises inadequacy issues. These issues mostly arise from the lack of government funding, which result in suspended prosecutions and no rehabilitation prospects for animal cruelty offenders. Despite the fact Federal and State budgets are predicted to be almost balanced in the next few years, research projects the burden from infinite healthcare costs is determined to place them with a deficit of approximately 4% of the GDP each year for the next ten years. The effect this will have on animal welfare in the future will be catastrophic. For instance, if Victoria are able to prosecute around 130 cases per year (40 on average for the Department of Primary Industries compared to 90 for the RSPCA) and 4 cases per year for each municipal council, together with a $30.8 billion outlay on health per year, then an additional rise will certainly reduce the total number of cases these authorities already prosecute.

Generally, government organizations such as police handle livestock prosecutions whereas the RSPCA, a private organization, focuses on cases implicating companion

73 McHendrix, above n 22, 311-12.
74 McHendrix, above n 22, 312.
75 Royal Society for the Prevention of Cruelty to Animals.
77 Gross Domestic Product is used to measure the condition of a country’s economy.
animals e.g. killing of a dog due to a domestic dispute. At present, the latter is not seen as a main concern for police, even if their powers are the same as the RSPCA; as they fall short of expanding their already tight budget to build cases against animal cruelty offenders. During 2009-2010, 53,544 complaints of animal cruelty were reviewed by the RSPCA countrywide, in which 247 prosecutions transpired, with 185 resulting in convictions. The RSPCA, who are a charitable institution that largely survive on private donations, face similar, if not tighter, restrictions when it comes to resources, budgets and organizational priorities, however still produce a better outcome than police in prosecuting animal abusers.

4 The Potential for Reform

Overall, it is evident that the treatment of animals in Australian law is mostly inadequate on numerous grounds. Animal welfare legislation fails to progress at the same rate as the continually changing views regarding animal status in Australia. Over time, human knowledge of animal behaviours and degree of sentience has developed considerably with companion animals now generally thought of as family instead of items of property. The existing animal welfare laws fail to openly replicate this point of view and instead retain the extremely inflexible, archaic and unsuitable notion of animals as property. One suggestion to lawmakers is to give more thought to the concerns of animals, as well as do everything within their power to ensure the ancient legal principles relating

81 McEwen, above n 79, 17.
82 Ibid.
83 Hatten, above n 41, 10.
84 E.g. In 2008-2009, RSPCANSW was given $424,000 from the Government; however this amount was increased by donations from private citizens as well as the support from unpaid lawyers, which mirrors the charitable nature of the organization: Elizabeth Ellis, ‘Making Sausages and Law: The Failure of Animal Welfare Laws to Protect both Animals and Fundamental Tenets of Australia's Legal System’ (2010) 4 Australian Animal Protection Law Journal 6, 25.
85 Hatten, above n 41, 10.
88 Visic, Henderson and Gilbey, above n 86, 2.
to animals as property are transformed to better reflect the views of modern Australia.\textsuperscript{89}

Another matter is the vagueness of statutory provisions. In all animal welfare legislation of state and territories, the employment of restrictive language i.e. ‘unjustifiable,’ ‘unnecessary’ or ‘unreasonable,’ proves that some acts can be ironically acceptable in particular situations, as argued earlier. It is essential legislators establish a strong definition of these terms so that prosecutors can successfully build a case against animal cruelty offenders that meets the applicable burden of proof.\textsuperscript{90}

The treatment of animals as property restricts victim compensation in cases where the offender murders or injures an animal.\textsuperscript{91} According to Australian law, victim compensation does not make allowances for the loss or damage endured by an animal.\textsuperscript{92} Instead, it only awards damages of economic loss to an owner in the form of the animal’s market value.\textsuperscript{93} In many other countries with similar common law jurisdictions, a desire to distinguish animals as more significant than property has been demonstrated by the granting of compensation to victims purely on the basis of their emotional value to humans.\textsuperscript{94} For instance, two criminal cases in New Zealand awarded damages to victims for ‘emotional harm.’ The first case, in which a dog was viciously thrown against a tree and killed, saw the owner receive $2000 for emotional harm.\textsuperscript{95} The second case compensated an owner $1000 for also emotional harm that originated from the beating to death of his dog by the defendant.\textsuperscript{96} It is time for Australian courts to follow suit and reassess their unwillingness in awarding costs to victims for emotional harm by empathizing with owners.

\textsuperscript{89} Ibid 16.
\textsuperscript{90} Ibid 3.
\textsuperscript{91} Ibid 6.
\textsuperscript{92} Ibid.
\textsuperscript{93} Ibid.
\textsuperscript{94} Ibid.
\textsuperscript{96} Ibid.
As a long-term goal, amending the vocabulary assigned to people liable for the care of their animal from ‘owner’ to ‘guardian’ on items such as animal chips, public signs, veterinary documents and publications, as seen in the United States, may contribute further to the shifting values of society. Despite the fact these modifications might appear a little insignificant to some, it gives animals the appreciation they deserve to be perceived as sentient beings with emotions, instead of simply property.

With regard to ‘tougher’ penalties, amendments to the existing enforcement regimes must transpire so as to be perceived as ‘truly effective’. Tougher penalties are only the solution if animal abusers can be prosecuted to the full extent of the law, otherwise it is worthless. Since judges are hesitant to changing precedent until something catastrophic occurs, a faster alternative than ‘tougher’ penalties is required to reflect society’s values. Urging politicians to rephrase the legislation as well as advocating for a separate police division that manages only animal cruelty grievances, addresses these concerns and portrays to the larger society that law enforcement agencies are taking animal cruelty seriously. Putting aside the species of the victim, cruelty is cruelty; and as evidence suggests, somebody callous enough to torture a defenseless animal is capable of anything.

5 Conclusion

In summary, it is evident a strong link exists between animal cruelty and violence to humans. Many cases of animal cruelty are overlooked until it is too late, that is, until the violence is directed at humans. Generally, this is attributable to the language of the law as well as the appropriate Codes of Practice, in which animals are regarded as significantly inferior to humans. However, the critical discussion of whether animals

97 Rhode Island.
98 National Association for Biomedical Research, Ownership vs Guardian (2011)
99 Visic, Henderson and Gilbey, above n 86, 16.
100 Steven White, Companion Animals: Members of the Family or Legally Discarded Objects (2009) Griffith Research Online
101 Watson, above n 44.
102 Hatten, above n 41, 10.
acquire any cognitive capacity beyond sentience, to support their existence is mostly irrelevant, since the meaning of sentience is self-awareness.\textsuperscript{103} This is all that is needed to have interests in living.\textsuperscript{104} Yet, in spite of the people who hold such rational explanations for why animals are inferior to humans, at least understand the ramifications animal cruelty has on humans, as confirmed in psychology, sociology and criminology. With respect to reform, amendments to legislation that fit the views of society, empathetic judgments for victims, and a separate police division that only handles animal cruelty cases, must all emerge ahead of tougher penalties.


\textsuperscript{104} Ibid.
Bibliography

Articles/Books/Reports


Peter Sankoff and Steven White, Animal Law in Australasia (2009).


Legislation

Animal Care and Protection Act 2001 (Qld)
Animal Welfare Act 1992 (ACT)
Animal Welfare Act (NT)
Animal Welfare Act 1985 (SA)
Animal Welfare Act 1993 (Tas)
Animal Welfare Act 2002 (WA)
Crimes Act 1900 (NSW)
Crimes Act 1958 (Vic)
Criminal Code 2002 (ACT)
Criminal Code Act 1983 (NT)
Criminal Code Act 1899 (Qld)
Criminal Code Act 1924 (Tas)
Criminal Law Consolidation Act 1935 (SA)
Prevention of Cruelty to Animals Act 1979 (NSW)
Prevention of Cruelty to Animals Act 1986 (Vic)

Other


International Association for the Study of Pain, *IASP Taxonomy* <http://www.iasppain.org/AM/Template.cfm?Section=Pain_Definitions#Pain>


National Association for Biomedical Research, *Ownership vs Guardian* (2011) [http://www.nabranimallaw.org/State/Ownership_v__Guardianship/]


Steven White, *Companion Animals: Members of the Family or Legally Discarded Objects* (2009) Griffith Research Online
[http://www98.griffith.edu.au/dspace/bitstream/handle/10072/30444/59679_1.pdf;jsessionid=579C5883B922B541C865EE2AF8EB5396?sequence=1]

[http://www.huntright.org/where-we-stand/animal-welfare]

[http://www.ocala.com/article/20040229/NEWS/202290323]

1 Introduction

The development of animal law as a distinct area of academic enquiry and legal practice\(^2\) beckons a 'new frontier' in the 'expansion of animal welfare, protection and rights'.\(^3\) These developments also challenge established areas of law, including family law.\(^4\) One such challenge centres on the appropriateness of the continued treatment of companion animals as

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4 Huss, above n.1.
property, particularly in the resolution of pet custody cases following relationship breakdown.

This paper examines the current treatment of companion animals in Australia as property in this context and, through comparison with North America, highlights proposals for legislative reform to explicitly consider the 'best interest' of companion animals in assigning them to parties following relationship breakdown.

However, in presenting counter arguments to the calls for best interest considerations, it argues that this approach may fail to provide increased protection and that the current system of judicial discretion adequately protects the well being of companion animals in custody cases.

2. The Status of Companion Animals in Australia

2.1 Social value

Whilst a variety of animals make up the estimated 33 million pets in over 8 million homes in Australia (including 2.35 million cats, 8.1 million birds and 1.06 million others including 'pleasure horses', reptiles, rabbits and guinea pigs), this paper will concentrate on canine companion animals. There are approximately 3.4 million dogs in Australia, to be found in over a third of households and contributing to one of the highest incidences of pet ownership per capita in the world.

Dogs have played an important role in human lives since their domestication over 17,000 years ago. Their role in Western culture, including Australia, has

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6 Ibid.
developed from one measured by their utility to their owners into one of companionship.

Today, the vast majority of pet owners (81%) view their companion animals as members of family ('like a child') rather than mere property. Over 90% feel 'very close' to their pets with 56% of women and 41% of men finding their pet to be more affectionate than their partner.

This changing view of companion animals is also reflected in the trend towards giving dogs 'human' names rather than previously popular Fido and Rover. The twenty most popular names for dogs in Australia are all 'human', headed by Max and Jessie.

However, it has been shown that these changes are more than just 'sentimental labels'. Companion animals have, in recent decades, moved from the kennel to the house, with 76% of respondents allowing companion animals access to the lounge rooms and family rooms, kitchens (66%) and even bedrooms (52%). Allowing companion animals free range in the house (35%) and even to be on furniture (48%) clearly demonstrates the major shift in the status of companion animals and their position in modern Australian society.

2.2 Legal status

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11 Australian Companion Animal Council, above n4.
13 Franklin, above n9.
15 Franklin, above n9, 12.
16 Ibid.
The laws defining animals as property would appear to be at odds with societal perceptions of companion animals in Australia and 'creates conceptual confusion about their moral status.'

The common law classification of companion animals (and other domestic animals) as property dates back to at least the 18th century and reflects the long held notion that animals are inferior to humans. The Descartian attitudes of the 17th Century held animals as mere 'automatons' indistinguishable from inanimate objects and lacking all protections. A century later, Bentham's utilitarian arguments influenced the common law's assessment of animal suffering and saw society move towards a more compassionate consideration of animals.

Since there is no federal constitutional power over animals, the treatment of animals in Australia is primarily governed by state and territory welfare statutes. And the commodification of companion animals is evident in current NSW legislation providing for, amongst others, the duties and responsibilities of owners to their pets, which explicitly defines an animal as personal property.

Similarly, domestic animals fall within the definition of 'goods' in both the sale of goods legislation in all states and territories and state and federal

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18 LexisNexis, Halsbury's Laws of Australia (at 08 September 2013) 20 Animals, '1 Property in Animals' [20-50].
20 R Descartes, Discourse on the Method Part V (1637) cited by Peter Sankoff, 'The Protection Paradigm: Making the World a Better Place for Animals?' in Peter Sankoff, Steven White and Celeste Black (eds), Animal Law in Australasia (Federation Press, 2nd ed, 2013) 1, 1.
22 For example, Prevention of Cruelty to Animals Act 1979 (NSW).
23 Companion Animals Act 1998 (NSW) s 7(1)(a).
24 For example, the sales of goods legislation, such as Sales of Goods Act 1923 (NSW) s 5(1), defines 'goods' as including all personal chattels other than choses in action and money.
consumer protection legislation.25

Whilst companion animals are not subject to the codes of practice or legal defences or exemptions governing the treatment of farmed animals and which may appear to benefit companion animals with comparatively high standards of protection, these are afforded through companion animals’ continued status as property. As a result of this proprietary status, companion animals are not afforded legal rights, although the law does provide some protections.26

3 The Resolution of Pet Custody Disputes

Legal aspects of the human-companion animal relationship have been explored in depth in some international jurisdictions, especially North America. By comparison, animal law is still an emerging discipline in Australia27 and pet custody cases are relatively new and undeveloped. The longer history of American family courts dealing with these cases can provide a valuable insight into the conflicting views of the legal status of pets.

3.1 North America

North America has comparable rates of divorce and pet ownership to those in Australia.28 American companion animals involved in custody disputes may receive very different treatment depending on the jurisdiction in which the case is heard, leading to ‘divorcing couples ... seeing their beloved pets distributed between them on an arguably arbitrary basis.’29

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25 Consumer protection legislation defines ‘goods’ as including animals, for example Competition and Consumer Act 2010 (Cth) s 4(1) and Fair Trading Act 1987 (NSW) s 4(1).
27 White, above n 13, 853.
28 Information on Divorce Rates and Statistics Divorce Rate <http://www.divorcerate.org> shows divorce rates for 2012 (per 1,000 population) of 2.2 in Australia and 3.4 in the USA; 2013-2014 National Pet Owners Survey American Pet Products Association <http://www.americanpetproducts.org/press_industrytrends.asp> shows approximately 45% of American homes have a dog.
Traditionally, companion animals have been treated as property in American courts. For example, in *Bennett v Bennett* the appellate court declined to apply any special status on the family pets and ordered that awards should be based on 'the dictates of the equitable distribution statute.'

There appears to be dissatisfaction with the courts' application of a pets-as-property model to resolve custody issues and it has been suggested that some courts, without explicitly applying a 'best interests of the animal' approach, have taken the care of the animals into account when awarding custody.

In *Pratt v Pratt*, whilst confirming that child custody statutes were inapplicable, the court awarded custody of the two dogs at least in part 'on the evidence of mistreatment' by one party. Similarly, in *Vargas v Vargas* custody of a dog was awarded to the wife, despite originally being a gift to the husband, since he had 'not treated the dog kindly.' And in *In re Marriage of Stewart*, the court, whilst not finding it necessary to explicitly determine the animal's best interests, stated that it should not put pets in situations with the potential for abuse.

Some courts have explicitly considered the best interests of the animal. In *Raymond v Lachmann* the court determined that it was in the best interests of a cat to remain in the home where he had 'lived, prospered, loved and been loved.'

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31 *Bennett v Bennett* 655 So 2d 109, 110 (Fla Dist Ct App, 1995).
33 *Pratt v Pratt* (Minn Ct App, WL 120251, 15 November 1988) slip op 3.
34 *Vargas v Vargas*, (Conn Sup Ct, LEXIS 3336, 30 November 1999) slip op 21,33, cited in Huss, above 29, 226.
35 356 NW 2d 611, 613 (Iowa Ct App, 1984) cited in Huss, above n31, 221.
36 Huss, above n31, 221.
Courts have also experimented with granting visitation rights to the owner who does not receive custody\(^{38}\) and shared custody arrangements. In *Arrington v Arrington*,\(^{39}\) whilst classifying the companion animals involved as property, the court allowed for visitation rights as part of the order. Similarly, in *Bennett v Bennett*,\(^{40}\) the trial judge awarded custody of the dog to the husband, with visitation rights to the wife. However, this order was later overturned by the appellate court. And in the case of *In re marriage of Trevis-Bleich*,\(^{41}\) the court incorporated the couple’s wishes for visitation rights in its order. When one party later sought to have this provision removed, the trial court and the appellate court both held that such a modification was outside the jurisdiction of the court. In *Juelfs v Gough*,\(^{42}\) the divorcing couple agreed to share ownership of their dog and the court incorporated this into its order. Following reports that the dog faced danger from other dogs at the wife’s home, the court later awarded sole custody to the husband.

A few courts have even allocated ‘petimony’ for the support of the pet. In the matter of *In re Marriage of Ritchie*,\(^{43}\) custody of the dog was awarded to the wife, with the husband paying $30/month in support. And in *Dickson v Dickson*,\(^{44}\) the parties agreed to shared custody and monthly payments of up to $150 for the care and maintenance of the dog.

### 3.2 Australia

Whilst there is currently little case law in Australian family courts concerning pet custody disputes, there is growing coverage in the Australian media.\(^{45}\)

\(^{38}\) For example, in *Dickson v. Dickson* (Ark Garland County Ch Ct, No. 94-1072, 14 October 1994) the couple agreed to joint custody and maintenance payments, cited in Huss above n31, 223.


\(^{40}\) *Bennett v Bennett* 655 So 2d 109, 110 (Fla Dist Ct App, 1995).

\(^{41}\) 939 P 2d 966, 967 (Kan Ct App, 1997).

\(^{42}\) *Juelfs v Gough*, 41 P 3d 593 (Alaska, 2002).

\(^{43}\) (Fla Duvall County Ct, No. 95-06264, 7 June 1992), cited in Huss above n31, 223.

\(^{44}\) (Ark Garland County Ch Ct, No. 94-1072, 14 October 1994).

In the matter of *Boreland v Boreland*\(^{46}\), the disputed custody of a parrot was decided by Brown J, who declined to include orders for visitation rights to the non-custodial party, saying ‘pets can be very important in the lives of adults and children but they are not people’. In the case of *Nutt v Nutt*,\(^{47}\) one of parties disputing custody withdrew the application and orders were made accordingly. And in *Watson v Watson*,\(^{48}\) orders were made regarding kennelling costs.

**4 The Family Law Act 1975 (Cth)**

Almost 50,000 divorces were granted in Australia in 2012.\(^{49}\) When couples separate (and divorce, if married), family court hearings may be necessary to divide property, including real estate, finances and valuable goods, such as jewellery and motor vehicles.\(^{50}\) The courts are not concerned with items of personal property with little monetary value and expect that parties will negotiate their division without the courts' involvement.\(^{51}\) Items of sentimental value may become significant, despite low monetary value, and may be subject to the court's decision,\(^{52}\) for example when 'the chattels ... have significance for the parties'.\(^{53}\)

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\(^{51}\) Ibid.

\(^{52}\) Ibid.

\(^{53}\) *Khademollah v Khademollah* (2000) 26 Fam LR 686, 695 [32].
Sections 79 and 90SM of the *Family Law Act 1975* (Cth) (*FLA*) enable the court exercising jurisdiction to assign interests in property between the parties.

The court has a broad discretion under s 79 and 90SM to make “such order as it considers appropriate”. However, s 79(2) and 90SM(3) provide that the “court should not make an order under these sections unless it is satisfied that, in all the circumstances, it is just and equitable to make the order”.

The *FLA* stipulates factors the court should consider in bringing about a just and equitable property order, ss 79(4)(a)-(c) and 90SM(4)(a)-(c), which include financial and non-financial contributions made by each party.

Two possible approaches are available to the courts in the assessment of the entitlement of the parties to property under the *FLA*; the global approach and the asset-by-asset approach.\(^{54}\) The former involves the division of the parties’ assets on an overall proportion of the global view of the total assets, whilst the asset-by-asset approach involves a determination of the parties’ interests in individual items of property. This latter approach is often applied to heavily contested assets.\(^{55}\) The court may also consider, under ss 79(4)(d)-(g) and 90SM(4)(d)-(g), the post-separation needs of the parties.

However, whilst the *FLA* allows judicial discretion in determining a just and equitable order, under ss 79(4) and 90SM(4), the emphasis is primarily on the claims of the parties to the chattels and the past and future needs of the parties. Since companion animals are considered chattels, their interests are not considered in the courts' decisions. Indeed, ‘[i]f they are purely companion animals they are really personal property - like photos and CDs.’\(^{56}\)

### 5 Proposed Statutory Reform

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\(^{54}\) CCH International, above n49.

\(^{55}\) *Norbis v Norbis* (1986) 65 ALR 12.

\(^{56}\) Harman FM, quoted extra-curially in Farah Farouque, ‘Feathers fly as pets dragged into custody rows’, *The Age* (Melbourne), 26 May 2012.
Academics in both North America\textsuperscript{57} and Australia\textsuperscript{58} have proposed applying guardianship models to replace the notion of ownership in order to promote and protect the interests of animals.

However, it has been argued that the courts will be unlikely to adopt such 'best interests of the animal' considerations without legislative reform.\textsuperscript{59} For example, in \textit{Nuzzaci v Nuzzaci},\textsuperscript{60} the court cited a lack of statutory support for any orders in refusing to apply a 'best interests of the animal' approach.

\textbf{5.1 North America}

The jurisdiction of American courts to decide child custody cases rests in the \textit{Uniform Child Custody Jurisdiction Act} (1968) and updated in the \textit{Uniform Child-Custody Jurisdiction and Enforcement Act} (1997).

This statute is independent of divorce proceedings (allowing for hearings of de facto couples) and has been suggested as a model for statutory reform with regard to animal custody cases in the USA.\textsuperscript{61} Under § 3(ii) the court examines 'evidence concerning the child's present or future care, protection, training, and personal relationships.' Since, it is argued that companion animals share these concerns,\textsuperscript{62} a proposed \textit{Uniform Animal Custody Jurisdiction Act} would enable courts to hear pet custody cases in their own right, separate from the property division following divorce.

The court could consider any relevant factor including the wishes of the owners, any documented preference of the animal, the prior and future care

\begin{footnotes}
\footnotetext[59]{Huss, above n1.}
\footnotetext[60]{\textit{Nuzzaci v Nuzzaci} (Del Fam Ct, WL 783006, 19 April 1995) cited in Huss, above 29, 225.}
\footnotetext[61]{Stroh, above n28, 252.}
\footnotetext[62]{Ibid.}
\end{footnotes}
requirements and the suitability of the home environments.  

Alternative suggestions have included a *Custodial Determination of Companion Animals in Divorce Act*, which, whilst defining companion animals as part of the marital estate as a separate class of 'living property,' would allow for judicial orders on shared custody arrangements, visitation rights and financial support if deemed to be in the animal's best interest. Whilst it is possible to envisage a court determining the physical requirements of an animal and which party might meet those best, an evaluation of its psychological requirements may be beyond the court.

There have been attempts to introduce pet custody bills (to decide post-separation custody, but not visitation rights). These have failed to gain sufficient support to pass.

North American academics and lawyers have proposed additional considerations in determining custody of companion animals. These have included which party has paid attention to the animal's basic daily needs (food, exercise and medical) and has the greatest ability to meet them, and the inherent financial demands, in the future.

### 5.2 Australia

Australian academics and lawyers have further elaborated on developments in North America; including determining the preference of the parties and the animal (if possible) and the suitability of the parties, including their home environments, to meet the present and future needs of the animal.

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63 Ibid, 253.
67 Stroh, above n28.
Amendments to the *FLA* have been also proposed to create a middle ground for companion animals, somewhere between children and property. The suggested provisions, whilst acknowledging that animals are not children, infer similar welfare interests.

Proposed provisions mirror those of Part VII (Children) of the *FLA*, with explicit objectives to ensure the best interests of the animals by:

1. protecting them from physical or psychological harm;
2. ensuring they receive adequate and proper care; and,
3. ensuring that pet owners fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their pets.

The proposals do not extend to enforcing joint custody rulings, due to the 'limited court resources,' but do include expanding the court's role in making child maintenance orders, to provide similar for companion animals.

The model of guardianship for minors under the *Children's and Young Persons (Care and Protection) Act 1998* (NSW) has also been suggested as a platform for establishing guardianship for animals and ensuring a mechanism to recognise the best interests of companion animals.

However, to date there are no specific legislative provisions or precedents available in Australian cases of custody disputes involving companion animals, other than as part of equitable distribution of the couple's property.

### 6 Counter Arguments

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69 Ibid.
70 Cf *Family Law Act 1975* (Cth), s 60B(1)(b).
73 Bogdanoski, above n67, 226.
74 Cf *Family Law Act 1975* (Cth), s 64D.
75 Bogdanoski, 'above n67, 227.
The arguments raised in relation to custody determinations for companions animals in this paper centre on several issues, which have resonance with general animal welfare issues.

### 6.1 'Rights' of companion animals as property

Generally, the status of animals as property has been viewed as a major impediment to ensuring their welfare, including those animals at the centre of custody disputes. It is argued that a more animal-centred approach, emphasising the needs of the animals and the responsibilities of the owners, would result in custody being awarded to the person who 'can best care for the animal.'

Whilst the current property-centred approach cannot be considered animal-friendly, since it is the needs and interests of the owners that are paramount, it is possible for just outcomes for companion animals in custody disputes within the existing pets-as-property construct, especially when emphasis is placed on the non-financial contributions as a factor in awarding custody.

Some commentators have suggested benefits for animals classified as property, given the tendency of people to be protective of what they own. Epstein argues that 'a contemporary case for animal rights cannot be premised on the dubious assumption that our new understanding of animals justifies a revision of our old legal understandings.' He dismisses suggestions of animals as holders of legal rights as 'altruistic sentiments' which 'are the indulgence of the rich and secure.' He questions why 'anyone assumes the human ownership of animals necessarily leads to

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77 Tony Bogdanoski, 'A Companion Animal's Worth: The Only 'Family Member' Still Regarded as Legal Property' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 84.
78 Bogdanoski, 'above n67.
79 Mills and Akers, above n29, 292.
80 Debora Cao, *Animal Law in Australia and New Zealand* (Lawbook, 1st ed, 2010) [6.50].
82 Ibid, 10.
their suffering, let alone their destruction.\textsuperscript{83}

If it is accepted that 'ownership' does not grant Blackstonian 'exclusive and absolute control,'\textsuperscript{84} but represents a relationship that varies in different contexts, then not all situations of ownership prevent achieving justice for animals, including in custody disputes.

Favre\textsuperscript{85} has argued that replacing pets-as-property with a self-ownership of animals model would 'recognise the intrinsic worth of companion animals',\textsuperscript{86} a more qualified concept of ownership may allow for the rights of animals and their moral status to be protected. This 'politically astute approach'\textsuperscript{87} would lead to a separation between the legal and equitable interest, with a guardianship role replacing one of ownership and would lead to judges and legislators being 'more comfortable in pushing the process along.'\textsuperscript{88}

\section*{6.2 Best interest models}

Whilst the best interests of the child standard is applied in child custody disputes, it has been criticised as being vague and indeterminate, and allowing for 'virtually untrammeled exercises of discretion.'\textsuperscript{89} It is also alleged that it poorly serves the interests of the child, instead 'speaking... to the interests of the contending adults.'\textsuperscript{90}

Interestingly, research relating to the behavioural development of companion dogs does not appear to provide support for the academic challenges to their

\begin{itemize}
\item \textsuperscript{83} Ibid, 10.
\item \textsuperscript{84} Alasdair Cochrane, 'Ownership and Justice for Animals' (2009) 21(4) \textit{Utilitas} 424, 424.
\item \textsuperscript{85} Favre, above n56.
\item \textsuperscript{86} Tony Bogdanoski, 'A Companion Animal's Worth: The Only 'Family Member' Still Regarded as Legal Property' in Peter Sankoff, Steven White and Celeste Black (eds), \textit{Animal Law in Australasia} (Federation Press, 2nd ed, 2013) 84, 103.
\item \textsuperscript{87} White, above n13, 875
\item \textsuperscript{88} Steven White, 'Animals and - the New Legal Frontier?' (2005) 29 \textit{Melbourne University Law Review} 298, 313.
\item \textsuperscript{90} Ibid.
\end{itemize}
characterisation as property in divorce proceedings and separations, or to the related quest for a "best interest of the dog" standard in these cases.\textsuperscript{91}

6.3 Need for legislative reform

It has been argued that focusing on revolutionary legal reform, such as abolishing the property status, is counter-productive and merely an 'intellectual indulgence'\textsuperscript{92}

Analogies with the development of rights for black slaves in the United States or married women after they gained legal 'personhood' demonstrate the length of time required to achieve the transition. Opposition to slavery in the USA began in at the beginning of the 1800s, but it took over 150 years until the Civil Rights Act was enacted.\textsuperscript{93} The advances in the treatment of animals has not happened through radical, legal-system-changing theories, rather than the use of the current legal system to 'squeeze .. every last drop of available protection'\textsuperscript{94} for animals.

In general terms, merely abolishing the property status of animals and granting them rights would not guarantee that they would cease to be exploited. Again, the parallels with human rights abuses may be drawn.

6.4 Practicalities

One of the goals of property division in divorce is final separation of the parties. Determinations as to pet custody and visitation could lead to continuing enforcement and supervision problems.

Courts often reject requests for shared custody or visitation of companion animals, citing reasoning such as a lack of statutory authority to support

\textsuperscript{93} Ibid, 141.
\textsuperscript{94} Ibid, 146.
shared custody of personal property,\textsuperscript{95} hesitation to “open the floodgates” or judicial economy,\textsuperscript{96} and the problems that would be presented in attempting to enforce such a decree.\textsuperscript{97} Courts would become burdened with interminable proceedings arguing the best interest issue and creating stressful situation for all involved, including the animals.\textsuperscript{98}

Furthermore, if couples devise joint custody arrangements that have been rejected by the court due to lack of legal authority, they have been successful in drawing up agreements for custody and visitation outside court.\textsuperscript{99} In the absence of a best interest model, perhaps the best outcome for a disputed pet should be determined by the owners, either through pre-nuptial agreements\textsuperscript{100} or alternate dispute resolutions such as arbitration or mediation.\textsuperscript{101} This might allow workable custody arrangements to be agreed, whilst ensuring the animals are treated with respect.\textsuperscript{102}

\section*{7 Conclusion}

The status of companion animals as family members is not reflected in legal policy concerning relationship breakdown. The lack of legislative and judicial guidance has lead to inconsistent decisions in American courts.

By continuing to subject companion animals to the discretion of the courts as part of an equitable distribution of property, the rights of the owners may be placed above the welfare interests of the animals involved.

\textsuperscript{95} Desantis v Pritchard 655 So 2d 230, 232 (Pa SC, 2002).
\textsuperscript{96} Bennett v Bennett 655 So 2d 109, 110 (Fla Dist Ct. App 1995).
\textsuperscript{97} Bennett v Bennett 655 So 2d 109, 110 (Fla Dist Ct. App 1995).
\textsuperscript{100} McLain, above n63, 166.
The status of companion animals as property may be a serious impediment to their welfare, but not necessarily with respect to disputed custody hearings following separation. The courts are well equipped to make just and equitable decisions regarding companion animals. The courts appear to consider the welfare of the animals, even without specific legislative authority, although they have not gone as far as to apply a best interests model.

Every social movement is said to involve three stages: ridicule, discussion and then adoption.\(^{103}\) Whilst ridiculed by some, animal rights and protection are certainly being discussed. Justice Kirby states that concerns about animal welfare 'are clearly legitimate matters of public debate.'\(^{104}\) Perhaps discussions around pet custody cases, as one of the more palatable areas of animal welfare, even if not initially successful in legal terms, may generate further discussion and 'lay the groundwork for more effective legal activism in the future.'\(^{105}\)

'\[T\]he law does not change society, society changes the law.'\(^{106}\) Abolishing the property status of animals does not guarantee that they will not be exploited. A change in society's attitudes towards animals is required before the property status can be abolished. In reflecting on the ways the interaction between animals and humans is legally constituted, ' the pervasiveness of pet ownership makes the human-companion animal relationship a natural starting point.'\(^{107}\)


\(^{104}\) ABC v Lenah Game Meats (2001) 208 CLR 199, 287.

\(^{105}\) Helena Silverstein, 'The Legal Status of Nonhuman Animals' (2008) 8 Animal Law 1, 68.

\(^{106}\) Lovvorn, above n91, 149.

\(^{107}\) White, above n13, 853.
Articles/Books/Reports


Bice, K, 'Couple goes barking mad in pet custody row', Herald Sun (Vic), 6 April 2012


Bogdanoski, Tony, 'A Companion Animal's Worth: The Only 'Family Member' Still Regarded as Legal Property' in Sankoff, Peter, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 84

Cao, Debora, *Animal Law in Australia and New Zealand* (Lawbook, 1st ed, 2010) [6.50]


<http://www.law.uchicago.edu/files/files/171.rae_.animals.pdf> 9


Farouque, Farah, 'Feathers fly as pets dragged into custody rows', *The Age* (Melbourne), 26 May 2012


Kirby, M, 'Foreword' in Mirko Bagaric and Keith Akers, Humanising Animals: Civilising People (CCH, 2012) xv

LexisNexis, Halsbury's Laws of Australia (at 08 September 2013) 20 Animals, '1 Property in Animals' [20-50]


Offer, Kaitlyn, 'Pet custody disputes a growing problem', PerthNow (online) 15 July 2013


Sankoff, Peter, 'The Protection Paradigm: Making the World a Better Place for Animals?’ in Sankoff, Peter, Steven White and Celeste Black (eds), Animal Law in Australasia (Federation Press, 2nd ed, 2013) 1

Silverstein, Helena, 'The Legal Status of Nonhuman Animals' (2008) 8 Animal Law 1, 68


Cases
Australian
ABC v Lenah Game Meats (2001) 208 CLR 199, 287.
Boreland v Boreland [2002] FamCA 1433
Khademollah v Khademollah (2000) 26 Fam LR 686, 695 [32].
Nutt v Nutt 2003] FamCA 1079
Watson v Watson [2003] FamCA 1685

North American
Bennett v Bennett 655 So 2d 109, 110 (Fla Dist Ct App, 1995).
Dickson v. Dickson (Ark Garland County Ch Ct, No. 94-1072, 14 October 1994)
In re Marriage of Ritchie, (Fla Duvall County Ct, No. 95-06264, 7 June 1992), cited in In re Marriage of Stewart, 356 NW 2d 611, 613 (Iowa Ct App, 1984)
In re marriage of Trevis-Bleich 939 P 2d 966, 967 (Kan Ct App, 1997)
Juelfs v Gough, 41 P 3d 593 (Alaska, 2002)
Nuzzaci v Nuzzaci (Del Fam Ct, WL 783006, 19 April 1995)
Pratt v Pratt (Minn Ct App, WL 120251, 15 November 1988)
Raymond v Lachmann, 695 NYS 2d 308, 309 (NY App Div, 1999)
Vargas v Vargas, (Conn Sup Ct, LEXIS 3336, 30 November 1999)

Legislation
Australian
Companion Animals Act 1998 (NSW)
Competition and Consumer Act 2010 (Cth)
Fair Trading Act 1987 (NSW)
Prevention of Cruelty to Animals Act 1979 (NSW)
Sales of Goods Act 1923 (NSW)

North American
Assembly Bill No 436, Wisconsin Legislature, 2007
House Bill No 5598, Michigan Legislature, 2008

Other


Bow Wow Meow, Find a Name for Your Pet <http://www.bowwow.com.au>

Harman FM, 'Pets in the Context of Family Law' (Speech delivered at the Animal Law Committee CLE Meeting, Law Society of NSW, Sydney, 31 March 2011)

Information on Divorce Rates and Statistics Divorce Rate
<http://www.divorce-rate.org>

Improving Welfare Outcomes for Impounded Animals: A Critical Appraisal of RSPCA (NSW) Policy and Practice

Robert Lonetree

http://www.vacs.ca/impounded-animals

1 Introduction

Australian animal welfare laws afford some significant protections to so-called 'companion animals'.¹ However, despite the privileged status companion animals² enjoy over other animals under Australian law, these protections remain far from adequate. This critical appraisal of recent RSPCA policy and practice aims to illuminate the shortcomings of the law in providing sufficient protection to the thousands of cats, dogs and other animals that are unnecessarily but legally 'euthanised'³ by RSPCA annually.

¹ Many commentators have noted the differential treatment in law that companion animals receive in comparison to farm animals. See, eg, Katrina Sharman, 'Farm Animals and Welfare Law: An Unhappy Union' in Peter Sankoff, Steven White and Celeste Black (eds), Animal Law in Australasia (Federation Press, 2nd ed, 2013) 61, 63; Ian Weldon, 'Why Doesn't Animal Protection Legislation Protect Animals? (And How It's Getting Worse)', [2008] 1 Animal Protection Law Journal 9, 9. As Barrister Ian Weldon notes, '[t]o keep a dog or cat in conditions which are commonplace for pigs or hens would certainly attract prosecution and public censure': at 9.

² The term 'companion animals' is used in the literature to refer primarily to cats and dogs, but also other species not kept for commercial purposes.

³ The use of the term euthanasia in this context is ubiquitous in the literature, but not strictly accurate. The Macquarie Dictionary defines euthanasia as ‘...the deliberate bringing about of the death of a person suffering from an incurable disease or condition.’ However thousands
RSPCA policies and ideology that inform its extraordinarily high kill rates are examined, along with the legal and regulatory framework that sanctions the abandonment and extermination of animals, and which sustains their enduring status as disposable property. The assumptions which inform that legal framework are also examined, along with the adequacy of existing NSW anti-cruelty legislation, and RSPCA’s use, and failure to use, such legislation for the advancement of animal welfare. Possible solutions, suggestions and strategies, including legislative reform, are also briefly considered.

2 Context and rationale

The RSPCA is the premier body that enforces anti-cruelty legislation in NSW and other Australian jurisdictions. RSPCA Australia spends more than $80 million annually, exerts a potent influence upon legislators, and enjoys a privileged relationship with industry and government. The public have high expectations regarding welfare outcomes for companion animals. It is clearly vital that RSPCA policy and practice is free of hypocrisy, corruption and inconsistency, and that it reflects the fundamental, original ethic upon which RSPCA was founded - that of caring for ‘all creatures great and small’.

of healthy animals that are not suffering any ‘disease or condition’ at all are killed each year by RSPCA for ‘behavioural’, legal, financial and pragmatic reasons.


6 RSPCA regularly advises government on law reform issues and is a regular participant in initiatives such as, for example, the NSW Companion Animals Taskforce. See also, RSPCA How we Govern Ourselves (accessed 18 December 2013) <http://www.rspca.org.au/what-we-do/about-us>.
3 The RSPCA: action and inaction

There is a growing perception that RSPCA condones animal suffering. RSPCA Australia has been widely criticised over its perceived failure to provide adequate protection from cruelty for animals. Critics have condemned RSPCA over such policies and practices as, for example, its; financial business arrangements - receipt of royalties, sponsorship arrangements, etc. - with animal products industries, use of deceptive and misleading conduct in its provision of 'stamps of approval' for certain farming and other practices that involve the use of animals, failure to use the powers it enjoys as a 'charitable organisation' under existing legislation to intervene in cases of severe animal cruelty (to seize neglected animals and bring prosecutions, etc.), and,

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10 The Australian public expects bodies charged with the enforcement of animal welfare law such as RSPCA to vigorously prosecute criminal cases of cruelty toward companion animals, but prosecution rates remain very low, with less than 1% of all complaints investigated by SPCA's in Australia and New Zealand resulting in charges being laid, Annabel Markham, 'Animal Cruelty Sentencing in Australia and New Zealand' in, Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 208, 211. The moral legitimacy of the animal welfare legal regime, at least as far as companion animals are concerned, is firmly established in Australian society, Jed Goodfellow, 'Animal Welfare Law Enforcement: To Punish or Persuade?’, in Sankoff, White and Black (eds), at 190. Regarding RSPCA’s failure to prosecute cases in which a high public expectation that prosecution was urgently warranted, see eg, Noah Hannibal, *RSPCA Fails Horses in Need* (accessed 29 November 2013) RSPCA Watchdog <http://www.rspcawatchdog.org/articles/tolmiehorses.htm>; Karen Collier, 'Cruelty Claims in
alternatively, its waste of resources prosecuting marginal and questionable cases that have no reasonable cause or likelihood of success. 11 Other criticisms of RSPCA include its perceived failure to work appropriately with other animal welfare groups, 12 misuse and mismanagement of funds, 13 support of the mass culling of native wildlife, 14 a corporate culture of greed and largess, underpayment of staff, 15 and the manipulation of official data to conceal or ameliorate the true state of affairs regarding the suffering of animals in its shelters, 16

The most vehement criticism of RSPCA concerns the extra-ordinarily high 'kill rates' of animals in its care, and the related RSPCA 'behaviour assessments' and 'euthanasia allowances'. 17 It is this aspect of RSPCA practice and policy that is the primary focus of this paper.

11 Accusations that RSPCA pursues cases with little chance of success are less common. As Voiceless lawyer Katrina Sharman notes, a lack of funds available to RSPCA, which essentially remains a charity, renders the organisation reluctant to prosecute marginal and costly test cases, Sharman, 'Farm Animals and Welfare Law', above n 2, 79.


4 The Legal Framework

RSPCA NSW Inspectors are appointed under state animal welfare legislation. The *Prevention of Cruelty to Animals Act 1979 (NSW) (POCTAA)* empowers Inspectors to seize animals, issue animal welfare directions/notices and fines, and initiate prosecutions. Whilst Companion animals enjoy significantly more protection under *POCTAA* than animals in agriculture, the act empowers inspectors to destroy animals in certain circumstances.18

*POCTAA* makes specific mention of RSPCA as a 'charitable organisation' within its definition.19 The Act defines an 'approved charitable organisation' as one approved by the Minister.20 RSPCA and the Animal Welfare League are the only approved charitable organisations prescribed by the Minister for Primary Industries that are allowed to appoint inspectors to enforce the provisions of *POCTAA*.21

Another important statute for the purposes of the present discussion is the *Companion Animals Act 1998 (NSW) (CAA)*. *CAA* provides for the identification and registration of companion animals, outlines the liabilities, duties and responsibilities of pet owners and councils, and provides for the promotion of responsible care and management of companion animals.22 *CAA* provides for the seizure and impoundment of companion animals under certain circumstances.23 The act also sets out the procedures for dealing with seized companion animals, and provides for their sale or destruction by charitable organisations.24 *CAA* provides for the imposition of fees and

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18 See, eg, *POCTAA* s 24J (1)(e). S 31A also makes provision for the 'humane destruction' of animals by charitable organisations.
19 *POCTAA* 'definitions'.
20 Ibid. See also S 34B, 'Approved charitable organisations'.
22 *CAA*, long title.
23 See ss 13(3), 14(3) 18, 22, 30, 32, 36, 52, 57, 57D, 58B, 58G.
24 See ss 62A-69, especially ss 63-67.
charges by councils for the maintenance and release of animals in their shelters.25

The accompanying Companion Animals Regulation 2008 (NSW) also contains significant provisions concerning the identification and registration of companion animals.

The Impounding Act 1993 (NSW) sets out the circumstances in which dogs and other animals can be impounded26 and who can impound them.27 The act provides that an impounding authority may destroy an impounded animal in certain circumstances.28

Also relevant is the present initiative to develop a Code of Practice for council pounds in NSW.29 The code will be consistent with the existing provisions of the NSW Animal Welfare Code of Practice No 5 – 'Dogs and Cats in Animal Boarding Establishments'.30 The Code will seek to ensure that all reasonable action is taken to reunite animals with their owners, or where relocation occurs, to place animals in safe and caring permanent homes.31

Finally, two Animal Welfare Codes of Practice are of particular import to the present discussion;

Breeding Dogs and Cats,32 and Animals in Pet Shops.33 The Code pertaining to animals in pet shops identifies legally enforceable standards and best practice guidelines for animal retailers in NSW.34 The code sets standards for

25 S 65.
26 See ss 7,9,10,11,12.
27 See ss 5(1), 5(2), 5(3).
31 Schillmoller and Hall, above n 30.
34 Ibid.
the provision of information regarding the legal requirements for pet ownership, and the desirability and advantages of desexing animals.

Other statutes also contain provisions that are relevant to the present discussion, notably the *Crimes Act 1900 (NSW)*.

5 RSPCA Kill Rates: 'Convenience killing' or necessity?

RSPCA Australia's own statistics for the years 2011-2012 reveal the appalling kill rates of animals received nationally by the organisation. 14,211 dogs (25.6% of total dogs), 24,651 cats (47.1% of total cats) and 10,826 of of 'other animals' (45.8% of total 'other animals') were 'euthanised'. Most alarmingly 8,734 dogs and 9,637 cats were 'euthanised' for 'behavioural problems', that is, the animals were healthy, but deemed inappropriate for adoption upon the basis of widely condemned and grossly flawed RSPCA temperament or behavioural assessments. During this period RSPCA NSW killed a total of 3,013 dogs and 2,898 cats for 'behavioural reasons'.

The 'kill rates' of companion animals in the care of RSPCA has been widely condemned. Despite being by far the best resourced animal welfare and

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35 Ibid.
36 See particularly s 530, ‘Serious animal cruelty’.
38 RSPCA Above n 38, Table 3: ‘Reasons for euthanasia of dogs and cats by each state and territory’.
39 Ibid.
rescue organisation, RSPCA kill rates dwarf those of other welfare groups and non aligned local council pounds.

RSPCA has itself acknowledged that its kill rates are unacceptably high.41 but remains unwilling to implement legal and other strategies that other animal welfare groups have successfully employed to reduce kill rates of shelter animals. Moreover, RSPCA appears reluctant to collaborate, liaise and communicate meaningfully and openly with other welfare groups to reduce its kill rates, and often exhibits a dogmatic and myopic refusal to release animals to the care of willing rescue groups who have better options than euthanasia for the animals.42

Obtaining access to animals helps reduce kill rates dramatically, but RSPCA routinely denies access to rescue groups of seized animals. Secrecy and deception in its interactions with the public and other animal rescue groups are common criticisms of RSPCA.43

Many claim that RSPCA privileges younger animals and those breeds that it believes will be easier to sell and re-house.44

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42 SBS Insight, above n 15.
6 Animal Temperament Testing

There has been widespread criticism of the so-called RSPCA ‘temperament tests’ or ‘behavioural assessments’ used to decide whether dogs and cats are re-homed or killed. The temperament test scores dogs negatively for exhibiting behaviours such as barking, backing away, trembling or jumping. Growling or biting on approach attracts an immediate fail. However, most animals in the stressful and alien environment of a shelter are very likely to display ‘abnormal’ behaviours such as excessive barking, trembling, becoming startled at sudden noises, and aggression. Animals that fail the temperament test are put down.

Nathan Barnes, a former RSPCA employee and animal behaviour expert who says he helped devise the RSPCA temperament test is now scathingly critical of it, and claims the tests are being used incorrectly;

‘...the dogs are failing because ...they've got such a high level of stress they are not reacting normally...if a dog lunges or growls... if it's reactive, if it hesitates at a small noise...refuses to come...reacts negatively to food...’

7 Funding issues

Principal of Lawyers for Companion Animals, Anne Greenaway, believes RSPCA policy and practice is informed by a perverse bid to monopolise

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48 *Insight* SBS, above n 15. Monash University research casts further doubt on the integrity of temperament testing, finding almost one-quarter of shelter staff who conducted the assessments received no formal training in them, and only 56 per cent believed they were given enough time to assess behaviour. Hasham, ibid. There is no uniform temperament test. Steve Coleman from RSPCA NSW defended the temperament test and provided an explanation of it; ‘...dogs are assessed in terms of...whether or not they are food aggressive (food guarding), whether or not they react to strangers, whether or not they react to other dogs...different environmental conditions...’ ibid.
scarce funding and public donations, and an unconscionable determination to save money at the expense of animals in their care;

'It's a lack of proactive measures to try to save animals, rather than put in the monumental effort that rescue groups do, the RSPCA appears to find it...more cost effective... to kill [them]...49

Animal ethicist Tony Bogdanoski asserts that;

'those advocating a 'no kill' approach to SPCAs and other animal shelters also need to propose how this can be achieved in light of funding problems to these shelters, which are essentially charities'.50

A zero rate of euthanasia may well be impossible to achieve for any welfare organisation. However, we need not agonise about how a significant reduction in kill rates at RSPCA shelters might be achieved. Many smaller rescue groups manage to achieve infinitely better rehabilitation, adoption and re-homing rates than RSPCA, providing admirable examples that could be followed.

8 Reform: Ideas and Solutions

I see merit in a legal guardianship model similar to that proposed by Joyce Tischler,51 or the equitable self-ownership model offered by David Favre52 and endorsed by Tony Bogdanoski and others. Under such a model the law would recast human 'owners' as 'guardians' in a fiduciary relationship with their animal companions with enforceable obligations, something akin to the

49 Hasham, above n 48.
custodial relationship of human parents to their human children.\textsuperscript{53} Certainly, abandonment rates will diminish if legal sanctions were imposed for relinquishing companion animals.\textsuperscript{54} However, as Bogdanoski notes, offences already exist in Australian jurisdictions for an owner who abandons or deserts an animal.\textsuperscript{55} But the provisions can be bypassed by an owner simply ceding ownership to a pound or shelter (lawful abandonment).\textsuperscript{56}

In discussing possible reform options, we need not attempt to 'reinvent the wheel'. In 2011 the Minister for Local Government and the Minister for Primary Industries established The \textit{NSW Companion Animals Taskforce} (CAT) and commissioned a report (CATR).\textsuperscript{57} Many of the 22 recommendations included in the report contain strategies which, if implemented, would greatly reduce rates of companion animal impoundment and euthanasia. Indeed, reducing kill rates was the primary objective of the Taskforce.\textsuperscript{58}

My following recommendations to reduce kill rates derive considerable impetus from those made by the NSW Companion Animals Taskforce;\textsuperscript{59}

(a) The over-supply of companion animals must be arrested. Some breeders engage in over-breeding and fail to comply with micro-chipping and registration requirements. Not all states require breeding licences, including NSW. A statutory breeder licensing system with minimum mandatory information requirements that includes the compulsory registration of all

\textsuperscript{53} Bogdanoski, above n 51, 101, 103.
\textsuperscript{54} Ibid, 101.
\textsuperscript{55} See, eg, \textit{POCTAA} s 11.
\textsuperscript{56} Bogdanoski, above n 51, 101.
\textsuperscript{58} Companion Animals Taskforce, \textit{Executive Summary}, \textit{Companion Animals Taskforce Report (CATR)}.
\textsuperscript{59} My list of recommendations is not intended to be exhaustive. Within the confines of this brief paper, these recommendations must remain general in nature.
animal breeders should be established under \textit{POCTAA}.\footnote{See Recommendation 1, CATR. The Greens have also proposed such an initiative, (see, n 65 below). An initiative to introduce mandatory registration of all animal breeders was rejected by the Queensland Government. See, eg, Kate Clifford 'Puppy Farms off Leash as Government Dismisses Legislation, \textit{Sunshine Coast Daily} (Online) 8 November 2012 <http://www.sunshinecoastdaily.com.au/news/puppy-farms-off-lease-legislation/1614196/>\footnote{Recommendation 1 NSW Companion Animals Taskforce. See, Recommendation 1, CATR.}} 'The Companion Animals Register should be updated to capture breeder licence information for each animal record'.\footnote{Kitten and puppy farms are in fact becoming increasingly outlawed enterprises. Bogdanoski, above n 51, 100. See, eg, \textit{Prevention of Cruelty to Animals (General) Regulation 2012} (NSW) cl 26. See also RSPCA, \textit{End Puppy Farming - The Way Forward} Discussion Paper (November 2010) <http://kb.rspca.org.au/afile/325/76/>\footnote{A Bill similar to that introduced by independent Clover Moore, the Animals (Regulation of Sale) Bill 2008 (NSW) should be reconsidered. There is merit in such provisions as were contained in Clover Moore's defeated bill, which included the banning of the sale of cats and dogs in pet shops and markets. Greens representative Cate Faehrmann has recently attempted to reinvigorate the debate, arguing that only two sources of supply of cats and dogs should be available: registered points of sale and registered owners and breeders. NSW, \textit{Parliamentary Debates}, Legislative Council, 19 September 2012, ADJ Puppy Farms (Cate Faehrmann). New South Wales Parliament. See, eg, Recommendation 2, CATR.}} So-called 'puppy farmers' could thus be better identified and located, and their activities controlled to comply with standards set out in the Breeder Code.\footnote{See, Recommendation 3, CATR. See also Recommendation 4 CATR.}

Puppy and kitten farms could be outlawed.\footnote{Animal Liberation Campaigns: our solution (accessed 14 December 2013) <http://animal-lib.org.au/campaigns/animals-as-companions/pet-shops-puppy-farms-and-pounds>\footnote{Recommendation 3, CATR. See also Recommendation 4 CATR.}} Consideration should be given to the banning of the sale of cats and dogs in pet shops, markets and fairs, or at least the banning of their display in order to help prevent impulse buying.\footnote{My recommendations here go significantly further than those contained in the CATR, and I accept they are controversial and arguably too wide in scope. At the very least, an animal's microchip number, or the licence number of the breeder, should be displayed at point of sale to ensure compliance with micro-chipping requirements and easy identification of unethical breeders. Incentives should be provided to those who adopt animals from shelters, rather than purchasing them from pet shops and puppy farms.} My recommendations here go significantly further than those contained in the CATR,\footnote{See, eg, Recommendation 2, CATR.} and I accept they are controversial and arguably too wide in scope. At the very least, an animal's microchip number, or the licence number of the breeder, should be displayed at point of sale to ensure compliance with micro-chipping requirements and easy identification of unethical breeders. Incentives should be provided to those who adopt animals from shelters, rather than purchasing them from pet shops and puppy farms.\footnote{Prevention of Cruelty to Animals (General) Regulation 2012 (NSW) cl 26. See also RSPCA, \textit{End Puppy Farming - The Way Forward} Discussion Paper (November 2010) <http://kb.rspca.org.au/afile/325/76/>\footnote{A Bill similar to that introduced by independent Clover Moore, the Animals (Regulation of Sale) Bill 2008 (NSW) should be reconsidered. There is merit in such provisions as were contained in Clover Moore's defeated bill, which included the banning of the sale of cats and dogs in pet shops and markets. Greens representative Cate Faehrmann has recently attempted to reinvigorate the debate, arguing that only two sources of supply of cats and dogs should be available: registered points of sale and registered owners and breeders. NSW, \textit{Parliamentary Debates}, Legislative Council, 19 September 2012, ADJ Puppy Farms (Cate Faehrmann). New South Wales Parliament. See, eg, Recommendation 2, CATR.}}
A standardised information sheet should be issued to support the requirement in the two relevant Animal Welfare Codes of Practice that information concerning the care of animals be provided at point of sale.\(^{68}\)

Related to this proposal, a socially-responsible pet ownership education campaign should be developed that emphasises the importance of registration and de-sexing.\(^{69}\)

CAT acknowledges the contentious nature of its 8\(^{th}\) recommendation, which calls for the replacement of the existing lifetime registration provision under CAA with an annual registration regime for cats and dogs.\(^{70}\) However, the Taskforce insists the recommendation is a key component of its whole strategy.\(^{71}\) Whilst noting the concerns of CAT about the supposed shortcomings of lifetime registration, lifetime registration has contributed to the steady increase in registration numbers since 2001, and annual registration would be immensely unpopular with the public. For these reasons I recommend the retention of lifetime registration.

The government should fund the introduction of a standardised low-cost de-sexing capacity readily available to all owner/guardians of cats and dogs.\(^{72}\) Further, 'Cat and dog registration fees should be reviewed and set at such a level to provide an additional incentive for owners to de-sex their animals'.\(^{73}\)

(b) The determination of Australasian legislatures to continue to outsource responsibility for criminal law enforcement of anti-cruelty legislation to private charities has been identified as a significant obstacle to achieving improvements in animal welfare outcomes.\(^{74}\) Government should assume responsibility for the enforcement of a criminal statute. Outsourcing of this

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\(^{68}\) Recommendations 5 and 6, CATR.

\(^{69}\) See recommendations 5, 6, 15, 16, 17, CATR.

\(^{70}\) Annual registration of dogs was mandatory under the Dogs Act 1966 (NSW) until 1998 when CAA commenced.

\(^{71}\) CATR, Executive Summary.

\(^{72}\) Faehrmann, above n 65. This proposal is consistent with Recommendation 13 of CATR.

\(^{73}\) CATR, Recommendation 9.

\(^{74}\) As animal law expert Elizabeth Ellis notes, 'Australasian governments in the 21st century continue to delegate much of this quintessentially public function to animal welfare bodies, principally the RSPCA.' Elizabeth Ellis, 'The Animal Welfare Trade-off or Trading Off Animal Welfare?', in Peter Sankoff, Steven White and Celeste Black (eds), Animal Law in Australasia (Federation Press, 2\(^{nd}\) ed, 2013) 344, 353.
task to private charities appears unique to the field of animal welfare.\textsuperscript{75} Charities lack the necessary resources to effectively undertake this task, and the high costs of caring for and attempting to re-home impounded animals contributes to euthanasia rates.

(c) CAA obliges councils to seek alternatives to euthanasia for impounded cats and dogs.\textsuperscript{76} However, councils are independent statutory bodies, and it is for each of them to determine their impounding procedures. Recommendation 19 of CATR contains proposals which are especially relevant to addressing high kill rates. The standardisation of impounding practices is a vital imperative to help reduce abandonment and euthanasia rates. Better practice guidelines issued to councils that encourage them to enter into regional arrangements with animal welfare and rescue organisations for the purposes of re-homing impounded cats and dogs are needed. Ensuring that pounds are accessible to the public is, as CATR recommends, also essential.\textsuperscript{77}

A significant number of submissions concerning Recommendation 19 CATR suggested that certain conditions should be imposed on councils with regard to the operation of their pounds.\textsuperscript{78} Particularly, the mandatory adoption of 'Getting to Zero' or 'No-kill' policies were advocated.\textsuperscript{79} I wholeheartedly support the tenor of such submissions.

Just as pounds must be encouraged to collaborate with animal welfare and rescue organisations, RSPCA must improve its relations with other rescue groups, and be prepared to liaise and collaborate with them. Rescue groups who approach RSPCA about specific individual animals in good physical health should be permitted to take them in appropriate circumstances if their facilities and record of care are adequate. Legislative reform may be required to compel RSPCA to release healthy animals to groups which enjoy good welfare outcomes for impounded animals where appropriate.

\textsuperscript{75} Ibid.
\textsuperscript{76} CAA s 64A(2).
\textsuperscript{77} Recommendation 19, CATR.
\textsuperscript{78} CATR, 30.
\textsuperscript{79} CATR, 30.
Animal welfare legislation must be reformed to reward and empower groups who manage to achieve low or zero euthanasia rates, whilst penalising those with high kill rates. Councils should cancel existing contracts, and not establish or renew contracts with RSPCA and other welfare groups if they cannot achieve and maintain low kill rates.

(d) Government funding to animal welfare organisations should be increased significantly. The distribution of that funding should be determined by a group’s record in achieving good animal welfare outcomes, its use of resources, its euthanasia rates and overall performance, rather than by any privileged status or historical relationship with government.

(e) Consideration should be given to the establishment of an investigating pet ombudsman. 80

(f) Residential tenancy laws should be reformed to increase the prevalence of more pet friendly landlords. 81 The provision of 'Pet bonds' that landlords could impose should be considered.

(g) Volunteer networks should be established to improve re-homing and rehabilitation rates.

(h) More lawyers should consider offering their services pro bono in advocating for animals. Dedicated organisations of lawyers already provide such services. For example, Lawyers for Companion Animals provide pro bono services for pursuing 'cruelty complaints where it is alleged the RSPCA has refused to act or allegedly failed to take appropriate action… [and where]… pounds or shelters breach Acts or Codes of Practice with regards to the care of impounded cats and dogs.' 82

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81 See recommendation 21 CATR.

(i) Veterinarians should consider conscientiously refusing to perform euthanasia on healthy animals.\textsuperscript{83}

(j) The NSW greens have proposed the development of a socially responsible pet ownership education program that emphasises the value of pet adoption and responsible pet ownership.\textsuperscript{84} Such an initiative should be embraced by government.

(k) A one-stop registration and micro-chipping system must be developed and participating veterinarians and organisations must be reimbursed.\textsuperscript{85}

(l) The RSPCA derives a commercial advantage from lending its stamp of approval to animal products businesses. For example, RSPCA charges producers 2\% of products sold to use their logos under its Approved Farming Standards (Paw of Approval) scheme.\textsuperscript{86} Widespread public concerns about high stocking densities and other questionable farming practices with respect to RSPCA approval logos is exemplified in the often massive number of submissions to the Australian Competition and Consumer Commission (ACCC) opposing such arrangements.\textsuperscript{87} RSPCA lends its stamp of approval to businesses that maintain such concentrations of farmed animals that the public would never consider to be 'free range', undermining the ability of consumers to make informed choices.

The Department of Primary Industries' view of itself as a 'friend' of industry constitutes another profound conflict of interest.\textsuperscript{88} The DPI Minister enjoys

\textsuperscript{83} POCTAA S 26AA(1)(e) empowers veterinary practitioners to destroy animals in certain circumstances.
\textsuperscript{84} Faehrmann, Hansard, above n 65.
\textsuperscript{85} Ibid.
\textsuperscript{87} See, eg, ACCC's rejection of an application by the Australian Egg Corporation relating to a free-range certification trademark (ibid). More than 1700 submissions opposed the application, and only 7 supported it. (Ibid).
\textsuperscript{88} Greenaway, ibid. Dale and White have drawn attention to the fact that it is those with mercantile interests in animals are typically those most influential in creating and enforcing animal welfare law, and in deciding what is necessary and unnecessary in the treatment of animals, Arnja Dale and Steven White, 'Codifying Animal Welfare Standards: Foundations for Better Animal Protection or Merely a Façade?' in, Peter Sankoff, Steven White and Celeste Black (eds), \textit{Animal Law in Australasia} (Federation Press, 2\textsuperscript{nd} ed, 2013) 151, 166-67. See
enforcement powers under POCTAA. Under the Act, certain farming methods are exempt.89

The public must be better informed of actual stocking densities and living conditions of animals. Consumer protection law should be invoked to challenge RSPCA and its animal products industry allies for false and misleading advertising/labelling when and where breaches are apparent, and in order to promote truth in labelling of animal products generally.90

(m) Owner-guardians should fund animals' boarding at shelters until they are adopted and rehoused.91

(n) Despite issues of underfunding at RSPCA and other welfare shelters, urgent reform of legislation that provides for the destruction of unclaimed, seized or surrendered animals is required. Specifically, specified time periods after which animals may be destroyed remain too short.92

(o) More broadly, a fundamental change in the legal status of animals from articles of property to right bearing subjects is urgently required, along with a radical rethinking of the welfare model that seeks to justify and provide legal sanction for the 'necessary and reasonable' infliction of pain and suffering upon animals.

9 Conclusion

It would be easy to condemn RSPCA for its high kill rates and other failings identified in this paper. However, reform of RSPCA policy and practice alone is insufficient. RSPCA kill rates are a symptom of more basic assumptions,
and of a more elemental prevailing ideology. This ideology and attitude is informed and sustained by a liberalist legal framework that continues to define animals in proprietary terms, fostering public perceptions of animals as expendable articles of property that can be enjoyed for a time and discarded at will. Whilst such an ideology persists in the popular consciousness and continues to find support in animal welfare legislation, animals will continue to be commodified as disposable assets and abandoned in vast numbers. The issues this paper has discussed concerning RSPCA failings in general, and its high kill rates in particular, at least now feature prominently in the national media where they are regularly debated. The debate must continue, and it must include legislators.

The preoccupation of liberal philosophy with proprietary interests continues to sanction the widespread exploitation of animals provided they are treated 'humanely'. The existing legislative and regulatory regime in Australia continues to derive its legitimacy from the animal welfare model. RSPCA policy and practice tends to constitute a ringing endorsement of this paradigm, and tends to be characterised by the same 'moral schizophrenia' identified by Gary Francione in his forceful condemnation of the 'animals as property paradigm', in which the imposition of suffering upon animals by humans is regarded as necessary whenever it benefits property owners.

Scholarly critiques of the animal welfare model and utilitarian calculus abound. But a radical rethinking of the 'animals as property' paradigm, and of our treatment of animals in general, has now entered the popular imagination too. And the language of this new and timely zeitgeist is that of 'animal rights',

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93 The common law defines companion and farm animals as personal property. For a discussion of the property status of animals at law, see, eg, Peter Sankoff, ‘The Protection Paradigm: Making the World a Better Place for Animals?’, in Peter Sankoff, Steven White and Celeste Black (eds), Animal Law in Australasia (Federation Press, 2nd ed, 2013) 1-30; Bogdanoski, ‘A Companion Animal’s Worth’, above n, 51; Steven White, ‘Exploring Different Philosophical Approaches to Animal Protection in Law’, in Peter Sankoff, Steven White and Celeste Black (eds), Animal Law in Australasia (Federation Press, 2nd ed, 2013) 31-60.


95 Ellis, above n 75, 344-45.

96 Ibid, 345.

and it is fast replacing the old talk of 'humane treatment' and 'animal welfare'.\textsuperscript{98} It is my hope that legislators will increasingly embrace this new zeitgeist and come to afford companion, farm and other animals the rights they deserve.

\textsuperscript{98} Deidre Bourke, 'The Use and Misuse of ‘Rights Talk’ by the Animal Rights Movement', in Peter Sankoff and Steven White (eds), \textit{Animal Law in Australasia} (Federation Press, 2009), 128.
Bibliography

Articles/Books/Reports


ABC Radio National, 'RSPCA Lends Rare Support to Feral Animal Cull' *PM*, 4 November 2013 (Caitlan Gribbin) <http://www.abc.net.au/pm/content/2013/s3883788.htm>


Bogdanoski, Tony, 'A Companion Animal’s Worth: The Only ‘Family Member’ Still Regarded as Legal Property’, in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 84

Bourke, Deidre, ‘The Use and Misuse of ‘Rights Talk’ by the Animal Rights Movement’, in Sankoff, Peter, and Steven White (eds), Animal Law in Australasia (Federation Press, 2009), 128


Craven, Nick and Lynne Wallis, 'Revealed: RSPCA Destroys HALF of the Animals that it Rescues -Yet Thousands are Completely Healthy' Mail Online (online) <http://www.dailymail.co.uk/news/article-2254729/RSPCA-destroys-HALF-animals-rescues—thousands-completely-healthy.html>


Dale, Arnja, ‘Animal Welfare Codes and Regulations – The Devil in Disguise?’, in Peter Sankoff and Steven White (eds), Animal Law in Australasia (Federation Press, 2009), 174


Department of Premier and Cabinet, Division of Local Government (2012) New South Wales Companion Animals Task force Report to the Minister for Local Government and the Minister for Primary Industries


Ellis, Elizabeth, ‘Collaborative Advocacy: Framing the Interests of Animals as a Social Justice Concern’, in Peter Sankoff and Steven White (eds), Animal Law in Australasia (Federation Press, 2009), 354


Goodfellow, Jed, ‘Animal Welfare Law Enforcement: To Punish or Persuade?’, in Peter Sankoff, Steven White and Celeste Black (eds.) Animal Law in Australasia (Federation Press, 2nd ed.) 2013, 183


Hannibal, Noah, RSPCA Fails Horses in Need (accessed 29 November 2013) RSPCA Watchdog <http://www.rspcawatchdog.org/articles/tolmiehorses.htm>


Hatten, Ruth, 'International Dimensions of Animal Cruelty Law', in Peter Sankoff, Steven White and Celeste Black (eds.) *Animal Law in Australasia* (Federation Press, 2nd ed.) 2013, 289


Mark, Patty, and Erik Gorton, *What’s Wrong with the RSPCA?* (accessed 12 December 2013) RSPCA Watchdog <http://www.rspcawatchdog.org/newsarchive.htm>


NSW Greens, *Greens Condemn Free-Range Porkies* (09 January 2012)  
Norris, Sam, 'Poll: Call to RSPCA to Reveal Pound Kill Rate' *Maitland Mercury* (online) 3 October 2012,  
O'Sullivan, Siobhan, 'Australasian Animal Protection Laws and the Challenge of Equal Consideration', in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (Federation Press, 2009), 108  
Petrie, Lesley-Anne, 'Companion Animals: Valuation and treatment in Human Society', in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (Federation Press, 2009) 57  
Raggatt, Matthew, 'Canberra RSPCA Chief Executive Michael Linke Resigns', *Canberra Times* (online), 14 October 2013  
RSPCA Australia *Approved Farming Scheme* (accessed 14 December 2013)  
RSPCA Australia, *About Us* (accessed 18 December 2013)  
RSPCA Australia *How we Govern Ourselves* (accessed 18 December 2013)  
RSPCA NSW *Financials* (accessed 18 December 2013)  
RSPCA NSW *About RSPCA NSW* (accessed 18 December 2013)  
RSPCA NSW, *RSPCA Agrees - Kill Rates are too High* (25 September 2012)
RSPCA Watchdog, *In Bed with the Abusers* (accessed 12 December 2013)  
<http://www.rspcawatchdog.org/articles/inbed.htm>

RSPCA Watchdog, *RSPCA CEO (NSW) Approves Killing of 145,000 Kangaroos* (accessed 06 December 2013)  
<http://www.rspcawatchdog.org/mailbag/mail_09-06-01_01.htm>

<http://www.rspcawatchdog.org/articles/thelaw.htm>

Sankoff, Peter, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013)

Sankoff, Peter, and Steven White (eds), *Animal Law in Australasia* (Federation Press, 2009)

Sankoff, Peter, ‘The Protection Paradigm: Making the World a Better Place for Animals?’, in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 1

Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 1


Saving Pets, *There is No Death Row at the RSPCA* (8 May 2013)  

Saving Pets, *How a Shell Game is Killing Our Pets* (13 July 2013)  

Saving Pets, *RSPCA Face High-kill-Rate Backlash* (10 October 2012)  

SBS 'The Tail End', *Insight*, 25 September 2012 (Jenny Brockie)  

Schillmoller, Anne, and Amber Hall, 'LAW 10487 Animal Law Study Guide', *Southern Cross University* (2nd ed.) 2013


White, Steven, ‘Exploring Different Philosophical Approaches to Animal Protection in Law’, in Peter Sankoff, Steven White and Celeste Black (eds), Animal Law in Australasia (Federation Press, 2nd ed, 2013) 31


Zappavigna, Adrianna, 'Euthanasia Rates Remain High in Australian Animal Shelters,' Reportage: Magazine of the Australian Centre for Independent Journalism (online), 15 August 2013

**Cases**

*Klewer v Coffs Harbour City Council* [2003] NSWCA 637

**Legislation**

*Animals Act 1998* (NSW)

*Animals (Regulation of Sale) Bill 2008* (NSW)

*Companion Animals Act 1998* (NSW)

*Companion Animals Regulation 2008* (NSW)

*Criminal Code 1900* (NSW)

*Dogs Act 1966* (NSW)

*Impounding Act 1993* (NSW)

*New South Wales Animal Welfare Code of Practice: Animals in Pet Shops*

*New South Wales Animal Welfare Code of Practice: Breeding Dogs and Cats*

*NSW Animal Welfare Code of Practice No 5 – 'Dogs and Cats in Animal Boarding Establishments*

*Prevention of Cruelty to Animals Act 1979* (NSW)

*Prevention of Cruelty to Animals (General) Regulation 2012* (NSW)
Other

ANIMALS IN ENTERTAINMENT AND SPORT

Captive Dolphins In Australia

Sarah Smith


1 Introduction

Throughout the world, animals are used and often harmed for the purpose of human entertainment. In rodeos, circuses, zoos and aquaria, animals are held captive and forced to perform acts which are often unnatural, to further the economic, social and cultural interests of humans. Cetacea, which include dolphins, whales and porpoises, are kept in aquariums around the world and are often forced to perform tricks and shows as a form of entertainment for humans. These shows are a source of substantial economic profit. While it is argued that dolphin captivity can provide valuable education for the public, opponents believe that any education and research generated through captive dolphin exhibits cannot justify the suffering caused to the dolphins. In Australia, the States and Territories are responsible for the regulation of
animal welfare, and most have enacted relevant legislation and codes of practice which offer standards and guidelines in relation to dolphin captivity and exhibition. This essay will comment on the existing legislative frameworks for dolphins in captivity in Australia, evaluating their adequacy in protecting dolphins from cruelty, stress and suffering.

2 Dolphin Captivity in Australia

For many years, aquaria, which are facilities which confine animals within water tanks displayed to the public, have operated as a source of human entertainment. ¹ Bottlenose dolphins are the most common cetacean that is held in captivity around the world. ² In Australia, there are currently thirty-two bottlenose dolphins held at Sea World on the Gold Coast, and four at the Pet Porpoise Pool in Coffs Harbour.³ While some of these dolphins have been rehabilitating from injuries, many are held in captivity for recreational use and entertainment.⁴ Dolphins are highly intelligent animals.⁵ They have a large brain, possess a complex vocabulary and a complex neocortex, which ‘has been linked to problem-solving, self-awareness and processing emotions in people’⁶. With this high level of intelligence in mind, many people argue that dolphins held in captivity are imprisoned and are suffering as they are denied a natural existence by being held in aquariums. Marine animals in captivity spend their life in a highly restricted space that allows ‘limited scope to perform natural hunting, social and reproductive behaviour’⁷. All aspects of the animals’ lives are monitored and managed and animal rights activists have likened this to slavery.⁸ Randall Eaton notes

1 Peter Sankoff, Steven White and Celeste Black (eds), Animal Law in Australasia (The Federation Press, 2nd ed, 2013) 142.
6 Ibid.
that cetacean, namely dolphins and orcas, have poor records in captivity, as they have ‘poor breeding success, shorter life spans, and poor health in captivity’.

3 Conservation, Education and Entertainment

There is much contention relating to the role of zoos and aquaria within society, and as to whether these facilities serve purposes other than the display of animals for human entertainment. Zoos and aquaria have been regarded as ‘guardians of endangered species’, and they claim to promote ‘community education, research and conservation’. Zoos and aquaria can play a role in the conservation of endangered species, as a number of species which have died in the wild or were on the verge of extinction have been saved through captive breeding programs in zoos and aquaria. Sea World Australia asserts that captive breeding programs can offer ‘a glimmer of hope and often refuge from environmental degradation issues’ for marine species, and that they must maintain their captive dolphin population so that they can ‘continue to learn, educate and foster care for, all well-being of these precious mammals’.

Many zoos and aquaria aim to educate the public about conservation and environmental concerns relating to their animals. Sea World believes that people are more likely to value and wish to protect an animal if they are able to experience it up close.

However, animal captivity can be harmful to the animals, regardless of the standard of care that they receive. Opponents to dolphin captivity assert that these goals of education, research and conservation cannot justify the pain and suffering that is

10 Sankoff, White and Black, above n 1, 142.
11 Sankoff, White and Black, above n 1, 142.
14 Ibid.
15 Ibid.
imposed upon captive dolphins.\textsuperscript{16} Those against animal captivity believe that dolphin exhibitions are not appropriate educational experiences because the dolphins don’t display the behaviour that they would in the wild due to restrictive and unnatural living conditions.\textsuperscript{17} The Whale and Dolphin Conservation Society claims that ‘marine parks and dolphinariums significantly distort the public’s understanding of the marine environment’ \textsuperscript{18}, as they mislead people to think that it is healthy and normal for cetacea to be kept captive in small areas.\textsuperscript{19} Captive dolphins are forced to perform tricks to entertain humans at dolphin shows and are given dead fish as reward. This is vastly different to their natural existence where they use their instincts to hunt for food.\textsuperscript{20} It is alleged that many aquariums and marine parks use deliberate punishment as a fundamental aspect of the training regimes.\textsuperscript{21} According to former dolphin trainer at Sea World Australia, Doug Cartlidge, if the dolphins are not performing properly, they are locked away in a pen on their own, and ignored.\textsuperscript{22} Cartlidge refers to this punishment as ‘psychological torture’.\textsuperscript{23} Many marine parks offer contact sessions where people, for an additional fee, can meet the dolphins, touch them, and sometimes swim with them. At Sea World in Australia they have various ‘dolphin adventures’ where visitors can have a ‘once-in-a-lifetime experience’ with the dolphins.\textsuperscript{24} Contact and petting sessions can cause additional stress on the captive dolphins, increase the chance of disease transmission, cause the dolphins’ sensitive skin to be exposed to the sun for extended periods, and can cause risk to the public of serious injuries.\textsuperscript{25}

\textsuperscript{16} Sankoff, White and Black, above n 1, 145.
\textsuperscript{18} Ibid.
\textsuperscript{19} Sankoff, White and Black, above n 1, 145.
\textsuperscript{20} ACRES, above n 17, 22.
\textsuperscript{21} Ibid, 24.
\textsuperscript{22} Ibid.
\textsuperscript{23} Ibid.
\textsuperscript{25} ACRES, above n 17, 24.
4 The Law in Australia

In Australia, there is no federal legislation which specifically deals with the use of animals for entertainment. The Australian Constitution does not explicitly address matters of animal welfare, and therefore, the Commonwealth does not have a significant role in this area. In 2009, the Australian government drafted the Australian Welfare Standards and Guidelines: Exhibited Animals. These standards and guidelines have been reviewed by a panel of the Australasian Regional Association of Zoological Parks and Aquaria, and are open for public consultation. These standards aim to ‘ensure animal health and welfare and public safety’. In 1986, Victoria was the first Australian state to prohibit the capture of cetaceans from the wild for purposes of live display. Section 238(4) of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) states that ‘the Minister must not grant a permit authorising its holder to kill a cetacean or to take a cetacean for live display’.

The State and Territory governments have long had the responsibility for animal welfare regulation and ‘the issuance of permits for keeping native and exotic species in zoos and aquaria’. Each State and Territory, except for the Northern Territory and South Australia, has its own legislative framework governing captive animals in zoos and aquaria, and the movement of these animals within Australia. Some states and territories also have codes of practice which ‘promote greater responsibility by zoos [and aquaria] for the professional exhibition of native animals’. In Queensland, the Animal Care and Protection Act 2001 (Qld) ‘promote[s] the responsible care and use

26 Sankoff, White and Black, above n 1, 130.
28 Sankoff, White and Black, above n 1, 130.
31 Schillmoller and Hall, above n 9, 105.
32 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s238(4).
33 Sankoff, White and Black, above n 1, 143.
34 Ibid.
of animals.\(^{36}\) The Act outlines the duty of care owed to an animal by the person in
charge of it, and contains provisions about cruelty prohibitions, the use of animals for
scientific purposes, and the appointment of authorised officers.\(^{37}\) The *Code of Practice
of the Australasian Regional Association of Zoological Parks and Aquaria: Minimum
Standards for Exhibiting Wildlife in Queensland*\(^ {38} \) provides detailed standards for
exhibiting wildlife, regarding husbandry, food requirements, transport requirements
and record keeping.\(^ {39} \)

In New South Wales, the regulatory framework is ‘quite comprehensive compared with
the other States and Territories’\(^ {40} \). The *Exhibited Animals Protection Act 1986 (NSW)*
regulates the exhibition of all animals in New South Wales, whether they are in
permanent displays such as aquaria, or temporary establishments such as circuses.\(^ {41} \)
The Act requires exhibitors to hold an authority issued by the Director-General of
Industry and Investment New South Wales and that animal exhibitions adhere to
standards produced by the Director-General.\(^ {42} \) The *General Standards for Exhibiting
Animals in New South Wales*\(^ {43} \) list the minimum standards necessary to ‘ensure the
welfare of animals kept for exhibit purposes’\(^ {44} \). The standards cover a range of areas
including the psychological and physical welfare of animals, public safety, and the
educational value of exhibits.\(^ {45} \) Clause 18 requires that the ‘size and shape of
enclosures must provide freedom of movement, both horizontally and vertically’\(^ {46} \).
Clause 19 requires that exhibits provide, as far as possible, a ‘naturalistic setting’ that

\(^{36}\) *Animal Care and Protection Act 2001 (Qld)* s3(a).

\(^{37}\) *Animal Care and Protection Act 2001 (Qld).*

\(^{38}\) Department of Agriculture, Fisheries and Forestry, *Code of Practice of the Australasian Regional Association of Zoological

\(^{39}\) Department of Agriculture, Fisheries and Forestry, *Code of Practice of the Australasian Regional Association of Zoological

\(^{40}\) Sankoff, White and Black, above n 1, 143.


\(^{42}\) Ibid.


\(^{44}\) Ibid, cl 2.

\(^{45}\) Ibid.

\(^{46}\) Ibid, cl 18.
is similar to the animal’s habitat, unless the exhibitor can demonstrate that their exhibit will offer ‘sufficient educational merit’ which could not be achieved if the requirement were enforced.\textsuperscript{47} There are also specific standards for the exhibition of bottle-nosed dolphins in NSW. Clause 5 of these standards provides that applicants for a license to exhibit captive dolphins need to show that education plays a key role in all aspects of the exhibition.\textsuperscript{48}

5 Assumptions Informing the Law

The aim of animal protection legislation is to prevent the ill-treatment of animals.\textsuperscript{49} Regulation for animals used in entertainment industries aims to minimise harm and suffering caused to animals to a degree that is necessary to fulfil the human desire to be entertained.\textsuperscript{50} Harm to animals is viewed as being unnecessary if it does not provide any wider social benefit, and therefore suffering is assessed against the advantages achieved by imposing the suffering.\textsuperscript{51} Regulation of animals in entertainment often allows some degree of harm to animals, which is seen as justified on the basis that it provides entertainment, and/or education to humans. Various state and territory legislation and codes of practice prescribe the keeping of dolphins in tanks that are very small and allow little movement compared with their wild habitat. There is evidence that this causes suffering to dolphins, yet it is enshrined in law because it allows people to see dolphins up close for educational and entertainment purposes. It is evident when looking at legislation which regulates the exhibition of animals, including dolphins, that it is human demands that predominate.\textsuperscript{52} The suffering caused to dolphins for entertainment and education is permissible under Australian legislation, and is seen as legitimate because of its benefits to humans, particularly economically.\textsuperscript{53} Rather than a neutral balance between human needs and animal suffering, the balance is ‘tilted heavily from the outset in favour of justifying the

\textsuperscript{47} Ibid, cl 19.
\textsuperscript{49} Sankoff, White and Black, above n 1, 8.
\textsuperscript{50} Ibid, 129.
\textsuperscript{51} Ibid, 15.
\textsuperscript{52} Ibid, 16.
\textsuperscript{53} Ibid, 18.
harm imposed’. Human privilege has primacy over animal suffering, as ‘efficiency, higher economic productivity, more desirable aesthetics and even entertainment count as legitimate ends’. The law also appears to particularly value education in animal exhibitions, and appears to prioritise this education over the welfare of animals in some circumstances.

6 Adequacy of the Law

The existing law which regulates the exhibition of dolphins in aquaria does not sufficiently protect the welfare interests of the dolphins, as cruelty and suffering are routine in animal entertainment industries. While State and Territory legislation and codes of practice include standards and guidelines which offer some protection to dolphins, the reality is that this legislation does not protect them from the pain and suffering of being kept in captivity and used for entertainment purposes. In 1985, the Senate Select Committee on Animal Welfare published a report titled *Dolphins and Whales in Captivity*. The report indicated that cetaceans experience ‘varying degrees of stress and trauma during capture and captivity’, and the committee concluded that cetaceans should ‘not be subjected to the possibility of deprivation or suffering which conditions and quality of life in captivity might occasion’. The World Society for the Protection of Animals is one of many organisations that actively fight for the closure of all dolphin attractions. They believe that despite the existence of frameworks which regulate live dolphin exhibitions, ‘the entire captive experience for marine animals is so sterile and contrary to even the most basic elements of compassion and humanity that it should be rejected outright’. They assert that it is

55 Sankoff, White and Black, above n 1, 27.
58 Schillmoller and Hall, above n 9, 106.
59 *Ibid*.
60 *Ibid*.
61 *Ibid*.
62 Schillmoller and Hall, above n 9, 106.
‘unacceptable for marine mammals to be held in captivity for the purpose of public display’

In the wild, cetacea swim large distances, some suggesting that it is up to 100 miles per day. In their natural environment, they are almost always in motion, and they often dive deeply, with some species spending under 20% of their time at the surface of the water. Life for dolphins in captivity is far different from life in the wild. In captivity, dolphins are confined in small tanks, which may be as small as 24 feet long, 24 feet wide, and 6 feet deep. Professor Giorgio calls this an ‘inherent contradiction’, as dolphins that are ‘accustomed to vast open spaces’, are kept in cramped conditions. Experts believe that the physical activity possible in the small exhibition tanks is far less than what is suitable, and necessary for satisfactory physical health of the dolphins. Enclosures for captive dolphins are more simplistic than their natural habitat, as it is not possible to replicate the natural setting of a dolphin in an aquarium or marine park. Dolphin enclosures are usually bland and sterile environments, and the tanks are chemically treated.

Boredom, restriction of normal activities, and sensory deprivation are serious concerns for captive dolphins. Evidence suggests that captive dolphins experience severe mental and physical stress, which can be expressed through aggression and frustration, stereotyped behaviors, and other behavioral changes. This stress can cause some captive dolphins to exhibit self-inflicted trauma, such as drifting on the surface of

63 Ibid.
64 People for the Ethical Treatment of Animals (PETA), Marine Animal Exhibits: Chlorinated Prisons <http://www.peta.org/issues/animals-in-entertainment/animals-used-entertainment-factsheets/marine-animal-exhibits-chlorinated-prisons/>,
65 ACRES, above n 17, 13.
66 PETA, above n 62.
67 ACRES, above n 17, 14.
68 Ibid.
69 Ibid.
70 Ibid, 13.
71 David Grimm, above n 5, 527.
72 Ibid.
73 ACRES, above n 17, 14.
74 Sankoff, White and Black, above n 1, 145.
the water, or chewing on concrete and causing damage to their teeth. Captivity causes dolphins ‘profound social disturbance and neurotic behaviour’, which are then worsened by the tricks that dolphins are often forced to perform. Some captive dolphins have even ended their own lives by jumping out of their tank, hitting their head against the side of the tank, or not coming up from under the water for air. Some dolphins in captivity also die prematurely due to gastroententitis and fungal infections. A 2009 report titled The Case Against Marine Mammals in Captivity identified that between 5.6% and 7.4% of dolphins die each year in captivity. This is higher than the 3.9% in the wild.

7 Law Reform

While state and territory legislation and codes of practice do offer some protection to dolphins used for entertainment in aquaria by aiming to promote animal health and welfare, evidence suggests that the welfare of these animals is not adequately protected, and that they are subject to pain and suffering by being held in captivity. The current regulatory frameworks are insufficient, and reform is needed. It is concerning that the Northern Territory and South Australia don’t have any legislation or codes of practice in place to regulate the keeping of dolphins in aquaria. It is essential that these jurisdictions adopt legislation and codes of practice which offer guidelines and standards that must be followed by aquaria, and provide penalties for where they are not adhered to. In the 1985 report, Dolphins and Whales in Captivity, the Senate Select Committee on Animal Welfare recommended that no new facilities for holding captive cetacea be established, and that ‘the keeping of cetacea should eventually be phased out unless further research justifies their continuance’. If the welfare of dolphins in Australia is to be adequately protected by the law, all dolphin

75 PETA, above n 62.
76 ACRES, above n 17, 14.
77 Ibid.
78 Grimm, above n 5, 527.
79 Ibid.
80 Ibid.
81 Ibid.
82 Sankoff, White and Black, above n 1, 143.
83 Senate Select Committee on Animal Welfare, above n 56.
84 Senate Select Committee on Animal Welfare, above n 56, recommendation 8.10.
captivity for entertainment must be prohibited and the keeping of dolphins in aquaria phased out. Overwhelming evidence suggests that aquaria 'cannot adequately provide for the physical, health and behavioural needs' of cetacea, and therefore their health and welfare are compromised when held in captivity and forced to entertain humans.

A number of countries have completely banned dolphin entertainment shows. In May 2013, the Ministry of Environment and Forests in India forbade keeping dolphins captive for public entertainment. The ministry said that it is ‘morally unacceptable’ to keep them held in captivity for the purpose of human entertainment. Due to the high level of intelligence of dolphins, India has granted them the status of non-human persons, therefore giving them their own specific rights. India is now the fourth country to prohibit captive dolphin shows, along with Costa Rica, Hungary and Chile. Dolphin enclosures and exhibits cannot closely resemble the natural habitat of dolphins, and therefore they should be prohibited to ensure that dolphins are not suffering in captivity. If dolphins in Australia are to be protected from cruelty and suffering, Australia should follow the lead of India and other countries, and prohibit the keeping of dolphins captive for entertainment.

8 Conclusion

Based on the outlined evidence, it appears that the regulative frameworks governing dolphins in captivity in Australia do not adequately protect their welfare. The regulations seem to allow suffering to dolphins based on the premise that it is ‘necessary’ in order to provide wider social benefits such as human entertainment, economic profit, public education and scientific research. Captive dolphins endure stress and frustration due to being kept in enclosures which are vastly different from

85 Sankoff, White and Black, above n 1, 145.
86 Ibid.
87 China Despain, India Becomes Fourth Country to Ban Captive Dolphin Shows (22 May 2013) <http://www.ecorazzi.com/2013/05/22/india-becomes-fourth-country-to-ban-captive-dolphin-shows/>.
89 Ibid.
90 Despain, above n 86.
91 Ibid.

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their natural environment, and this stress is exacerbated by being forced to perform tricks, and participate in shows and human contact sessions. State and territory legislation and codes of practice offer some protection to captive dolphins, but they do not protect them from suffering. The small tanks and pools that hold dolphins in aquaria and marine parks can cause them to express aggression and frustration, and make them vulnerable to diseases and fungal infections. It is not possible to confine dolphins in small areas without causing them to suffer, and therefore in order to protect their welfare, dolphin captivity and dolphin entertainment shows should be prohibited and phased out.
Bibliography

Articles/Books/Reports


Despain, China, *India Becomes Fourth Country to Ban Captive Dolphin Shows* (22 May 2013) <http://www.ecorazzi.com/2013/05/22/india-becomes-fourth-country-to-ban-captive-dolphin-shows/>


Grimm, David, ‘Are Dolphins Too Smart for Captivity’ (2011) 322 *Science* 527


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


**Legislation**

*Animal Care and Protection Act 2001* (Qld)


Department of Agriculture, Fisheries and Forestry, *Code of Practice of the Australasian Regional Association of Zoological Parks and Aquaria: Minimum Standards for Exhibiting Wildlife in Queensland*

Director General, NSW Agriculture, *Standards for Exhibiting Bottle-nosed Dolphins in New South Wales*  

*Environment Protection and Biodiversity Conservation Act 1999 (Cth)*
The Greyhound Racing Industry: 
Having a bet each way on animal welfare

Peter Madden


‘As a civilised society, we have a duty to support those among us who are vulnerable and in need. When times are hard, that duty should be felt more than ever, not disappear or diminish.’

Justin Welby, Archbishop of Canterbury

1 Introduction

It is often suggested that the mark of a civilized society is measured by the support shown to its fellow man and woman who are vulnerable and in need. Looking at recent calls to action as a result of tropical storms, bushfire devastation and stranded travellers, it would be easy to suggest that we live in an era of unprecedented civilization. Strengthening this view, this ‘duty to support’ the vulnerable often extends itself to animals that we cohabitate with, evidenced by recent outrage towards the mistreatment of animals used in food production and live exports. However, this duty has its limits and generally is tempered by economic and practical constraints. This is no more evident than when we look to the general acceptance of the use of animals in
sport and entertainment, with the greyhound racing industry being one of the most crude and ugly examples. In considering whether this ‘duty to support’ is present in the racing industry, it is pertinent to ask if the level of welfare provided to greyhounds is adequate, both during and after their time in the racing fraternity, and does the role that industry plays in establishing and enforcing those standards achieve the best outcome for greyhounds? This can be addressed through an analysis of legislative tools, contributions by activists and their related organisations seeking to raise the public consciousness of issues and commentary provided by peak industry bodies such as Greyhound Racing NSW (“GRNSW”).

2 The Business of Greyhound Racing
Greyhound racing is big business in Australia, with over fifty greyhound racetracks in use and millions of dollars in gambling revenue generated each year. In New South Wales alone, in 2012-2013 there was a 3.1 per cent increase in wagering from the previous year with over $1.035 billion being wagered.¹ In addition to this, it is estimated in 2001 that over 20,500 greyhounds were bred in Australia, ranking it as the world’s third largest producer of racing dogs after the United States (32,000), and Ireland (23,000).² As a result of the scope and economic impact of the industry, a number of legislative tools exist to assist in its administration and supposed promotion of animal welfare.

3 The Legal and Industry Framework
In NSW, the main legislation dealing with animal welfare is the Prevention of Cruelty to Animals Act 1979 (NSW) (the “PCAA”). Under the act, any person in charge of an animal is responsible for meeting the legal obligations of that animal’s welfare.³ Ironically though, the Greyhound Racing Act 2009 (NSW) (the “GRA”), makes reference to ‘welfare’ on only two occasions. Not in reference to animals though but to that of the greyhound racing industry in general,⁴ essentially delegating the responsibility of animal welfare to GRNSW. This organisation has been charged with

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1 Annual Report, Greyhound Racing NSW (GRNSW) 2012-2013 at 6
3 Prevention of Cruelty to Animals Act 1979 (NSW) s 3
4 Greyhound Racing Act 2009 (NSW) ss 9(2)(c) and (12)(2)
providing strategic direction and leadership in the development, integrity and welfare of greyhound racing in NSW. Its CEO, Brent Hogan, makes recognition of this by stating, “…GRNSW has set about launching numerous initiatives to ensure that the welfare of all animals is a primary consideration for all participants in the greyhound industry.”

Sadly, the national jurisdictional body that represents the industry, Greyhounds Australasia, is less direct in its support of animal welfare stating that its function is to, “…provide its stakeholders with value-added services and industry practices that support industry integrity, maximise returns and ensures a sustainable future.”

A Code of Practice has been developed for participants licensed by GRNSW involved in the industry with its overriding objective to, “…provide for the welfare of greyhounds by specifying the minimum standards of accommodation, management and care that are appropriate to the physical and behavioural needs of greyhounds.” It also highlights to participants that persons in charge of greyhounds have a legal liability under the law. However, these tools and objectives are only as good as the law’s application and in the sphere of animal protection this is no more evident than with the PCAA. It does prohibit certain acts that have traditionally been used in this industry that have a direct impact on the suffering and distress of animals, such as blooding or baiting in greyhound racing. However, specific measures for the welfare of greyhounds in racing is minimal with the only reference to the breed being in the prohibition of clitoridectomies being performed. Other provisions exist that protect dogs more generally, such as a ban on tail docking, cropping ears or operations that prevent a dog from barking. However, guilt of an offence can be avoided if the court is satisfied that the procedure comprising of the alleged offence was performed by a veterinary practitioner and was in the interests of the dog’s welfare.

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5 see n1
7 Code Of Practice – Greyhounds In Training, Greyhound Racing NSW, April 2011 at 1
8 Blooding is when a live animal, usually a rabbit or hare, is used as a bait or lure for the purpose of training, baiting and racing of greyhounds. It is highly likely to cause the live animal to suffer serious pain, injury, distress and even death during the process. Non-animal devices and products must be used for training purposes. Live baiting in greyhound racing and other dog racing is illegal in Australia.
9 see n3 s 12(1)(f). A clitoridectomy is the surgical removal of the clitoris. The practice was performed on female greyhounds whose clitoris becomes hypertrophied from the chronic use of virilising anabolic steroids.
10 see n3 s 12
11 see n3 s 12(2A)
Adding reasonable doubt that these tools adequately protect animals to any reasonable standard is the situation where the development of the industry Code of Practice is done so by bodies with significant economic interests in maintaining racing activities. Since July 2009, GRNSW has been responsible for the regulatory affairs of the sport. This broadening of responsibilities was the result of a government decision to transfer the greyhound division functions of the Greyhound and Harness Racing Regulatory Authority to GRNSW. The business structure of GRNSW covers both the commercial and regulatory responsibilities of the industry. Even the Chairman of GRNSW in 2010 publically recognised that, “…greyhound racing in NSW has been self regulated and totally free of government influence… the sport is now in total control of its own destiny.”

4 Welfare Issues

With the mix of legislative tools and industry involvement, you could be forgiven for hoping that there is some hope that the welfare of greyhounds meets a satisfactory level. This viewpoint though is easily defeated with a number of sources exposing significant animal welfare issues facing the industry due to the high rates of euthanasia of healthy dogs. During an interview with the ABC Radio National program “The Quick and The Dead”, Brent Hogan, CEO of GRNSW, admitted that in NSW alone around 3,000 greyhounds bred for the racing industry are euthanised every year. Disturbingly, this figure does not take into account those pups reared but not registered with GRNSW for racing. The reliability of industry statistics is dubious as there is little information in the public domain covering reported welfare issues, and when it is available it is often obscure and unreliable to draw conclusive assumptions. Contributing to this doubt also, is the observation by Lewis J of the industry’s under-reporting that, “…the conclusion which can be drawn, is that 7,500 greyhounds are born (in Victoria), approximately only 1,000 will live a full life span.” Devastatingly, the reported cases of euthanasia by the industry includes healthy dogs that have been...

12 Chasing 2020, Greyhound Racing NSW July 2010
13 Alexander McQueen, ‘The unbearable lightness of being a greyhound’, The Conversation, 2 December 2012
14 Timothy McDonald, “The Quick and The Dead”, Background Briefing ABC Radio National 11 November 2012
deemed too slow for competition, those being retired from racing, and others who were unfortunate enough to suffer an injury on the track.

As if the treatment of greyhounds in Australia isn’t shocking enough, driven by the potential for increased profits, the industry has sought out new export markets with surplus dogs often exported to countries throughout Asia, with China and South Korea reportedly receiving regular shipments. The industry is hard pressed to resist the allure of these markets with some purchasers willing to pay up to $5000 for dogs considered "second hand" by Australian standards because they are a couple of seconds too slow to be competitive domestically. The subsequent welfare issues associated with the live export of greyhounds are comparable to those raised in relation to the live export of cattle. For all its weaknesses, Australian law still attempts to guard against, and has numerous penalties for those involved with the cruel disposal and inhumane treatment of animals as discussed earlier. This concern is not a feature shared globally and many of the countries that greyhounds are exported to lack substantive animal welfare regulations that generally deter acts of cruelty towards the animal. As a result of the public and political anger following the broadcasting of videos taken by animal rights activists of the brutal and unnecessarily painful handling of cattle for live export, the government initiated a ban on this market with Indonesia in 2011. Chinese animal welfare groups have urged Australia to implement a similar ban on the export of greyhounds after reports that 383 healthy greyhounds exported from Australia were culled at a Macau racetrack during the 2010-2011 year when their racing careers had come to an end. The issue is compounded by local track rules that restrict the adoption of dogs as pets and their possible return to Australia because of strict quarantine restrictions.

16 see n2 at 19
18 see 17 at 678.
So while the range of legislative and industry tools goes some ways to protecting the welfare of greyhounds while they are in the racing fraternity, is the same level of welfare afforded to those lucky enough to survive it and leave? Immediate euthanasia is not always the first option considered by the industry when dealing with what it brands as ‘wastage’. Unfortunately for some greyhounds, their path will take them to the realms of medical testing and research. There are countless reports of greyhounds being used in medical research facilities, not only in Australia but also across the globe. In one reported case in the United States, over 2,500 greyhounds were donated for medical research to Colorado State University by the racing industry over a three-year period in 1995. A third of the dogs were used in university teaching labs and discarded after use, while the remainder had no immediate use and were euthanised within 24 hours of their arrival at the facility.\(^{21}\)

Closer to home though, a published study by researchers at the University of Newcastle, used greyhounds that underwent invasive and distressing surgery without the use of general anaesthetic or sedatives.\(^{22}\) Particularly distressing was the treatment of the dogs after this initial procedure. Humane Research Australia as an advocate for the animals, revealed disturbing treatment that the dogs underwent after a brief recovery period which saw further surgical testing occur with research staff deliberately abstaining from administering any form of general anaesthetic or sedative. Essentially, the dogs were fully awake and aware of the surgery being conducted on them. At the conclusion of the study, the authors of the study did not confirm whether the dogs were euthanised. In all likelihood with an industrial and academic culture focused on profit and cost efficiencies, they might be used again or ultimately euthanised.

The law covering the use of animals in research is regulated in Australia by separate legislation in each state and territory, but all making reference to the Australian Code of Practice for the Care and Use of Animals for Scientific Purposes Code.\(^{23}\) In NSW, the *Animal Research Act 1995* (NSW) and *Animal Research Regulation 2010* (NSW)
are the main legislative tools that cover this field. While these tools prescribe a range of issues including what animals can be used, who can supply them and offences under the act, there is generally an acceptance of self-regulation for certain establishments through the utilisation of Animal Ethics Committees (AECs). The role of an AEC is to review and monitor all activities concerned with the breeding, supply and use of animals and to approve all animal research before it can continue.\textsuperscript{24}

In the study conducted by the University of Newcastle, the experiment was supported by a Project Grant from the National Health and Medical Research Council of Australia (NHMRC) and approved by the AEC of the university. Humane Research Australia questioned the decision made by the committee and the validity of the study conducted by the university, citing comments from a report into the decision by veterinarian Andre Menache, “…(that) where such studies are funded by taxpayer money, there is a need for greater transparency and accountability… if society does not condone using sentient animals in research that does not lead to cures and if basic research is just that kind of research, then society does not condone using sentient animals in basic research.”\textsuperscript{25}

For many discarded greyhounds though once identified as ‘waste’, their welfare becomes secondary and often escapes any specific legislative protections. Many surplus greyhounds see their final hours being drained of their blood and then euthanized.\textsuperscript{26} Although the practice is justified by the industry using a utilitarian bravado of the practice assisting with the treatment of other dogs, you can’t help think they wouldn’t be in that vulnerable position had the industry sanctioned breeding programs not been in place. The practice generally sees the surrendered greyhounds put under anaesthetic and then bled and finally euthanised while under anesthetic. Interviews by ABC’s 7.30 with nurses involved in the practice, revealed that when they struggled to get blood out, they’d give the dog adrenalin to obtain maximum output. Not surprisingly, with an industry motivated by profit and cost efficiencies, the practice was trumpeted as having enormous economic benefit to veterinarian clinics and the

\textsuperscript{24} Animal Research Act 1985 (NSW) s 14  
\textsuperscript{25} <http://www.humaneresearch.org.au/case-studies/invasive-surgery-conducted-on-conscious-greyhounds> on 29 December  
\textsuperscript{26} Sean Rubinsztein-Dunlop, “Unwanted greyhounds routinely drained of blood then euthanized”, 7.30, 8 November 2013  
racing industry, with the charge for a bag of blood being $150 as opposed to buying the same product from a capital city blood bank costing upwards of $400.

Stepping into the mix and contributing to improving welfare outcomes for greyhounds are a number of reputable adoption organisations that try to save as many retired dogs as they can. In Australia, through a collective response of state racing bodies to increasing community concern for the killing of greyhounds on their retirement from the industry, the Greyhound Adoption Program (GAP) has been established. In NSW, GAP is a non-profit organisation, incorporated with the NSW Department of Fair Trading, focussed on the welfare of greyhounds. Its primary purpose is to educate the public on the benefits and care of greyhounds as companion animals, and to find permanent homes for them. Although the emergence of associations such as GAP is encouraging, these organisations focus on rescue rather than legal advocacy for greyhounds. The industry is a reluctant supporter of the adoption program recognising it as a ‘double edged sword’, because with increased public awareness of greyhounds the public is also asking the question of what happens to the dogs after they finish racing.

5 Reform Initiatives

So in seeking to answer the question initially posed in this piece of whether an adequate level of welfare is being provided to greyhounds, I think it’s useful to look to the response other jurisdictions have taken in addressing this issue. In the United States, seven states have stopped racing and 38 have banned it entirely. If democracies that we share a common sense of duty to protect the vulnerable with can stop the industry, then surely it is time for our society to also recognise that breeding dogs for the purposes of sport, so that we can race, have a wager and then kill them, is not showing the level of compassion our society is capable of. With the combination of vague legislation and industry groups such as GRNSW playing the dominant role in

27 Greyhound Racing, People for the Ethical Treatment of Animals at <http://www.peta.org/issues/animals-in-entertainment/cruel-sports/greyhound-racing/#x2zz2pcpeU8I0> on 29 December 2013
30 “Put an End to Greyhound Racing”, Animals Australia at <http://www.animalsaustralia.org/media/opinion.php?op=325> on 29 December 2013
establishing Codes of Practice that see economic interests promoted over the welfare of its most important constituent, the greyhound, then the level of welfare achieved will be sadly and horrifically inadequate. However, with greyhounds being universally recognised as gentle, quiet, and friendly, it is comforting to know that some steps are being taken to better welfare outcomes through reputable adoption groups, volunteers, and those willing to adopt in saving as many retired greyhounds as they can.
Bibliography

Articles/Books/Reports


Annual Report, Greyhound Racing NSW (GRNSW) 2012-2013

Code Of Practice – Greyhounds In Training, Greyhound Racing NSW, April 2011

Chasing 2020, Greyhound Racing NSW July 2010


Anne Schillmoller & Amber Hall, Animal Law Study Guide, 2nd Ed, Southern Cross University, 2013 at 180


Timothy McDonald, “The Quick and The Dead”, Background Briefing ABC Radio National 11 November 2012


**Legislation**

Prevention of Cruelty to Animals Act 1979 (NSW)

Greyhound Racing Act 2009 (NSW) ss 9(2)(c)

Animal Research Act 1985 (NSW)

**Other**


<http://www.humaneresearch.org.au/case-studies/invasive-surgery-conducted-on-conscious-greyhounds> on 29 December

<http://www.humaneresearch.org.au/case-studies/invasive-surgery-conducted-on-conscious-greyhounds> on 29 December


“Put an End to Greyhound Racing”, Animals Australia at <http://www.animalsaustralia.org/media/opinion.php?op=325> on 29 December 2013
Bobby Calves and the Dairy Industry:
The Milk of Human Kindness?

Desmond Bellamy


“There is no difference... between the pain of humans and the pain of other living beings, since the love and tenderness of the mother for her young ones is not produced by reasoning, but by imagination, and this faculty exists not only in man but in most living beings.”

- Maimonides (Rabbi Moshe ben Maimon) (1135 – 1204) Guide for the Perplexed

1 Introduction
Sharman claims in her paper on farm animal welfare in Australia that no major farm animal reforms have yet been achieved. This raises the question

of how or, indeed, whether farm animal reforms can be contested and won through legal reform alone. If welfare reforms are to be successful, they can only be driven by supply or demand. Concentrating on ‘supply’ requires legislation to manage industry’s activities through compliance (voluntary guidelines) or deterrence (punitive regulations). Australian welfare regulation reflects both approaches, tending overwhelmingly to the compliance model.3

The ‘demand’ method attempts to persuade consumers to insist on welfare improvements or boycott products seen as produced through cruel methods. At one end of this spectrum is the RSPCA’s “paw of approval” seal,4 attempting to identify ‘humanely’ processed animal products; at the other end abolitionists like Francione who reject all reforms as counter-productive tokenism and advocate boycotts of all animal exploitation and a vegan world. Between those positions are the major animal protection organisations such as Animals Australia (AA), Animal Liberation and PETA who lobby for more humane farming methods while simultaneously encouraging supporters to forego animal products. This paper looks at both aspects of the campaign for welfare reform through the lens of one issue: the slaughter of about 700,000 male dairy calves annually in Australia as ‘waste products’, the commercially worthless by-products of keeping milking heifers pregnant in order to maintain high levels of milk production.5.

2 Is Reform Achievable?

Improving the lot of animals, whether by liberating them or just resizing their pens, requires significant effort or sacrifice by humans, rewarded only by clear consciences (since the animals cannot offer any reciprocal material trade-off).

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4 “If you see the RSPCA logo on a carton of eggs, packet of pork, chicken or turkey, you can be assured that animals involved in the production of these products were raised under high animal welfare standards.” RSPCA, Shop Humane <http://www.rspca.org.au/shophumane/>

Ellis\textsuperscript{6} states that improving animal welfare makes humans more comfortable with continuing exploitation by offering a pretence of protection. Powerful forces back this pretence – the cultural attachment to animal products (in this case dairy products) and the huge profits generated from developing and fulfilling these desires.

Voiceless, the Australian “animal protection institute”, points out that the movement promoting animal law reform is growing rapidly, as evidenced by nine Australian universities now offering animal law courses\textsuperscript{7}. Their patron, JM Coetzee, adds that industry has a huge advantage in resourcing and access to government but “it is impossible to believe that, in the end, justice and compassion will not triumph.”\textsuperscript{8}

Others are less sanguine. Animal regulations are overwhelmingly updated and overseen by vested interests, and the regulations themselves are often incoherent, fragmented in authority and rife with conflicts of interest.\textsuperscript{9} The industry counters that welfare regulations are working fine because welfare makes good business sense.\textsuperscript{10} The national industry body, Dairy Australia, posts interviews with farmers, transporters and functionaries of abattoirs stating that all welfare regulations are followed.\textsuperscript{11} The process of removing a baby from his or her mother on the day of birth is claimed to “reduce the risk of getting diseases from adult cattle and lower the stress for cow and calf”.\textsuperscript{12}

\begin{thebibliography}{99}
\bibitem{s5} Ibid.
\bibitem{s6} Ellis, above n 6, 353.
\bibitem{s7} Ibid, 358-9.
\end{thebibliography}
Farmers, we are told, give their animals the best of care, because they “wouldn’t make any money if they mistreated them”.13

Animal advocates disagree, pointing to the inexorable trend of increasing productivity at the expense of welfare, more so in the dairy industry perhaps than in ungulate meat production. Francione famously stated that “there is probably more suffering in a glass of milk than in a pound of steak”.14 A cow could live to the age of twenty,15 during which she would normally interact with her calf for 9-12 months. Instead, she is kept lactating and pregnant almost continuously, with the aid of what farmers call a ‘rape rack’ and is ‘spent’ and sent for slaughter at 5-7 years.16 Added to that is the distress of having each calf taken from her within hours of birth. Cows “will bellow for days, pace the spot where they gave birth, and stop eating. Then they’ll produce a season’s worth of milk and be led straight back to the rape rack.”17 The calf, meanwhile, will be raised as a new milk machine or, if male, transported, bewildered and terrified, for butchering.

3 The Bobby Calf Issue
Cows are represented in children’s literature as creatures that ‘naturally’ give milk. In fact, dairy cows are similar to humans: mammals, with a comparable gestation period, who only lactate after giving birth. Selectively bred to produce much larger quantities of milk than their wild ancestors, cows will lactate for up to a year, during which time they will be artificially impregnated so that they are almost always lactating from the previous birth and pregnant for the next. The ‘side effect’ of this cycle is, of course, a calf, half the time a

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17 Ibid.
male\textsuperscript{18}. Besides his first drink of colostrum, the bull calf then becomes a rival for his mother’s milk – the farmer’s commercial product. Bull calves are a financial drain to the dairy industry, requiring feeding and transport to the slaughterhouse. They are taken from the mother at about 12 hours old and, because farmers are ‘squeamish’ about killing them on the farm,\textsuperscript{19} fed watered milk or substitutes for a few days, and then either fattened and processed into veal or shipped to the abattoir at about five days old to be processed into dog food, pharmaceuticals and calf leather.\textsuperscript{20} The cost of transport is often more than the value of the new-borns, and they were (in the days of sterling) sold for a shilling or ‘bob’\textsuperscript{21}; thus the name. The stress on newly born and weaned animals is severe – they are placed in a truck for the first (and last) time, often handled roughly by men facing deadlines, sick from the motion of the vehicle and desperately hungry and thirsty after often lengthy transportation.\textsuperscript{22} Pollan, despite promoting omnivorism, states that weaning is the most stressful time for farmers and animals: “the cows will mope and bellow for days and the calves, stressed by change of circumstance and diet, are prone to get sick.”\textsuperscript{23} Claims are often made that activists indulge in sentimental anthropomorphism, but studies comparing calves separated abruptly to those who can see their mothers show significant physiological and behavioural differences.\textsuperscript{24} Unless we are Cartesians, the distress of the cow and calf are self-evident.

\textsuperscript{18} Sexed semen is available but still considered “unprofitable” - see Albert De Vries, \textit{The Economics of Sexed Semen in Dairy Heifers and Cows} Animal Sciences Department, Florida Cooperative Extension Service, Institute of Food and Agricultural Sciences, University of Florida <http://edis.ifas.ufl.edu/an214>.

\textsuperscript{19} Donovan, above n 5, 250. Also see Holly Humphreys, ‘Call for better life for dairy’s rejects’, \textit{The Age} (Melbourne), 13 October 2013 http://m.theage.com.au/victoria/call-for-better-life-for-dairys-rejects-20131012-2vff7.html - “It's too hard. You're not farming to be a murderer.”

\textsuperscript{20} Holly Humphreys, ‘Call for better life for dairy’s rejects’, \textit{The Age} (Melbourne), 13 October 2013 <http://m.theage.com.au/victoria/call-for-better-life-for-dairys-rejects-20131012-2vff7.html>


\textsuperscript{22} Peter Singer, \textit{Animal liberation: a new ethics for our treatment of animals} (Harper Perennial, 2009), 17.

\textsuperscript{23} Michael Pollan, \textit{The omnivore’s dilemma : a natural history of four meals} (Penguin Press, 2006), 71.

\textsuperscript{24} EO Price et al, ‘Fenceline contact of beef calves with their dams at weaning reduces the negative effects of separation on behavior and growth rate’ (2003) 81(1) \textit{Journal of Animal Science} 116.
The dairy industry maintains that it is committed to ensuring that “our calves are provided with a safe, healthy environment for the whole of their lives.” As the ‘whole of their lives’ will be under a week for at least half of the calves born in Australia, the focus of campaigns that have gone toward improving this ‘safe, healthy environment’ are very narrow, compared to other campaigns that may follow several stages of a particular animal’s life and treatment.

4 The Bobby Calf Campaign

Australian Bureau of Statistics figures indicate that 680,000 calves were slaughtered in the twelve months to September 2013. Milk production is centred in Victoria, which produces about 68% of the national total. Of the 1.65 million dairy cows in Australia in 2012-13, 1.079 million were in Victoria. Interestingly, the number of dairy farms has fallen from 22,000 in 1979 to 6,400 today while the total herd has fallen by about 12%, indicating a trend to large-scale industrial farming of high-yielding dairy cattle, replacing the family farmer that advertising likes to feature.

Legal reform in Australia is complicated by the fact that most relevant legislation is determined at State level. State and Territory laws are general purpose criminal laws that apply to all animals, but then exclude farmed animals (the vast majority) by classifying them as ‘stock’.

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25 Dairy Australia, above n 11.
26 Humphreys, above n 20.
30 Each of the six states and two territories have their own legislation, e.g. Prevention of Cruelty to Animals Act 1979 (NSW).
31 The NSW Act cited above states that confined animals must be exercised unless they are stock animals (other than horses) or “an animal of a species which is usually kept in captivity by means of a cage.” See also Sharman, above n 2, 75-6.
hand’ effectively makes farmed animals ‘disappear from the law’. In the 1970s, animal welfare reform overseas (particularly in Europe) gave rise to fears that Australia would be perceived as outdated in its treatment of farmed animals, only perceived as a problem in that it might affect trade. Codes of practice were developed at this time to provide ‘guidance’ to farmers (with no legislative enforcement, which might have been seen as a states rights issue). As these were developed, they were, nominally at least, based on the Farm Animal Welfare Council’s “Five Freedoms.” These were freedom:

1. From hunger and thirst
2. From discomfort
3. From pain, injury and disease
4. To express normal behaviour
5. From fear and distress

Most of the States and Territories adopted Codes of Practices in the 1980s based on the Model Codes developed by the Primary Industry Ministerial Council (PIMC). This left the decision on which Codes to implement (if at all) to individual States and Territories, which failed to institute consistent and uniform adoption of even minimum standards. Accordingly, the Commonwealth from 2005 started developing the Australian Animal Welfare Strategy (AAWS) which aimed to create “a more consistent and effective animal welfare system” which would also have enforceable standards as well as voluntary guidelines.

34 Ibid.
The first standard developed was “The Australian Standards and Guidelines for the Welfare of Animals: Land Transport of Livestock” in 2008, endorsed by the PIMC in 2009. The draft standards proposed that bobby calves aged 5-30 days and travelling without their mothers be transported “in less than 18 hours from last feed with no more than 12 hours spent on transports.” As delivery was often followed by an overnight stay before the commencement of slaughter, the sticking point of the proposal became the acceptability of leaving these new-borns hungry for some 30 hours from last feed to slaughter. This seems to fly in the face of all the “Five Freedoms.” Public submissions were invited by May 2008 and the 16 submissions that mentioned bobby calves resulted in a number of ‘unresolved issues’ which mostly revolved around welfare versus cost. A study of transport mortality from 1998-2000 in Victoria showed that 1,430 calves (0.64%) died on 1,376 consignments, out of a total 220,519 sent to abattoirs. Extensive studies of bobby calf transportation indicate that their welfare “may be seriously compromised.” Both the advocates of animal welfare and the meat processing industries called for the minimum age for transport to be raised from five to eight days, but producers argued that this would cause “significant extra cost”. The 18 hours time-off-feed (TOF) was argued back and forth, and the difficulties in assessing calf welfare as well as proving their ages were

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37 Elizabeth Ellis, *Hot topics: legal issues in plain language: animal law* (Legal Information Access Centre, 2010), 32.
42 JG Cave, APL Callinan and WK Woonton, 'Mortalities in bobby calves associated with long distance transport' (2005) 83(1-2) *Australian veterinary journal* 82.
considered. The decision was to make no decision, but to examine ways to improve calf welfare and revise the standards “over the next two years.”

Animal Health Australia (AHA) was charged with preparing a “science-based standard” for maximum allowable TOF. Public consultation was invited by AHA on their preferred option: “a maximum of 30 hours without a liquid feed from the time of last feeding to the next feed or slaughter of the calf.” Submissions were invited from 4 January to 3 February 2012, and resulted in some 6,000 email submissions plus 33 detailed written submissions from industry and welfare organisations and government departments. The flood of emails came largely through a sustained campaign by Animals Australia (AA) and RSPCA. AA placed quarter-page ads in newspapers around Australia headed “Do you want to know a secret?” Much publicity was engendered, such as an article in The Australian which called the issue Dairy’s “dark secret.”

The AHA reported that the bobby calf issue was ‘emotive’ (implying unreasonable or impractical) and that, while the bulk of email submissions called for shorter TOF or questioned the need for transport at all, there was not unanimous support for a shorter TOF option whereas there was “good support for a 30 hours TOF limit from some government and all industry respondents.” As a result of this consultation, and despite the 6,000 email submissions, AHA concluded that “the 30 hours TOF option [be] recommended for government endorsement.” The rationale was largely that this standard would set a mandatory maximum TOF, whereas previously...
there had been a divergent set of model codes which were applied at law “at best as guidance or a defence to a prosecution.” 50 Dale and White bluntly state that this was an example of science being “commissioned to support a pre-determined standard.” 51 The report admitted that the science used had several shortcomings in terms of the climatic period chosen, the methods used to test stress and the fact that the report was commissioned by the Dairy Industry. 52 Although a consensus was as far away as ever, the AWS website confirmed that industry had agreed to implement the 30 hour TOF, with a possible further review mooted for 2014. 53 Ellis observes that this is “unsurprising” as this was the industry’s preferred position. 54 Dale and White point out that, since industry controls the funding for research (including the matched government funding), it is quite likely that researchers will often conclude that the status quo does not damage animal welfare. 55

The proposed 2014 review is unlikely to happen. The Federal government elected in September 2013 scrapped the AAWS Advisory Committee, which oversaw the development of the strategy, in November 56, then cut funding from the Strategy itself in its Mid-Year Economic and Fiscal Outlook statement in December. 57 This effectively cements the limbo status quo of divergent and largely unenforceable State and Territory standards and guidelines.

The decision by the Abbott government to Axe the AAWS and cut funding to AA (which paid for its participation in the Committee) has delighted supporters of the animal industries. 58

50 Ibid, 5.
51 Dale & White, above n 33, 175.
52 Australian Animal Welfare Standards and Guidelines, above n 45, 9-10.
54 Ellis, above n 6, 347.
55 Dale & White, n 33, 176.
5 Conclusion

Is reform possible beyond the productivity improvements that may benefit animals as a side-effect of improving profitability? How can we assign value to a ‘waste product’?

Steven Wise asks the “core question” of morality and law: “are things or beings or ideas valuable because we value them or because they are inherently valuable?” Animals, in Australian law, are considered ‘property,’ which Adams calls a “device used to deny moral culpability.” Supporters of animal agriculture contend that property status protects animal welfare; for example Posner states (as do many industry websites) that “people tend to protect what they own.” Pollan goes further, stating that domestication is not a form of slavery but rather a “symbiosis” that ensures the survival of the species, if not the welfare of the individual animals. However, bobby calves are in the invidious position of being commodities without value. If, therefore, such commodities lack Wise’s ‘inherent value’, a determination that they are without personal value to humans must make any treatment of them acceptable and any legal reforms either superficial or subject to blocking by vested interests. Meanwhile, a significant section of the animal rights movement will settle for nothing less than “the purest philosophical position,” total abolition of animals’ property status.

The bobby calf campaign is a good example of this clash of paradigms. The failed attempts at reform over eight years seem to evidence both Sharman’s statement that no major reform has been secured and Francione’s...
assertion that welfare reform only results from higher productivity and profits. However, despite or because of its legislative failure, this campaign crystallised the issue around the 30 hour TOF question and led to widespread discussion and public outcry which has certainly raised awareness of the calves’ plight. Further progress will not come from ‘supply-side’ legislative impositions of standards, but rather from industry response to consumer ‘demand’ – the clamour against bobby calving or the wide-scale boycott of dairy products. Some smaller farms are already responding that they do not bobby calf\textsuperscript{66}, instead keeping calves with their mothers for extended periods before incorporating them into the milking herd or sending them for slaughter. Dairy Australia has recognised community concern with several programmes to improve supply-chain handling of calves.\textsuperscript{67} Bizarrely, the RSPCA\textsuperscript{68} has encouraged Australians to eat more veal, to motivate farmers to postpone calves’ slaughter.

Posner, while rejecting ‘ethical’ arguments for animal rights, believes that people are willing to recognise the inherent value of non-human animals, regardless of their commercial value, if they are made aware of their needs (and see minimal personal costs).\textsuperscript{69} However, it is unrealistic to expect that Australia’s 1.65 million cows will be matched in future by the same number of bulls saved from slaughter, so the only long-term strategy for the reduction or abolition of bobby calving is reducing demand for dairy products through the development of public empathy. Children are an obvious target for persuasion as they tend to observe moral issues with far less social mediation.\textsuperscript{70} At the

\textsuperscript{65} Gary Francione, \textit{Animal Rights: The Abolitionist Approach} \<http://www.abolitionistapproach.com/author/gary/page/3/#.UsEf9I0tQQA>.  
\textsuperscript{68} Humphreys, above n 20.  
\textsuperscript{69} Posner, above n 61, 66.  

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same time, the burgeoning capital and labour costs of producing milk, together with the plummeting farm gate price, may in fact be more effective than any campaigns activists can devise.\(^71\)

As for activism, it is apparent that people will generally avoid campaigns that make them feel uncomfortable or appear to have personal costs.\(^72\) Future campaigns, while aiming to convert people to plant-based diets, will most effectively start with the empathetic image of the vulnerable baby animal. Getting people to look into the eyes of a bobby calf, as the AA campaign\(^73\) did, is far more effective than handing out pamphlets of vegan recipes.

\(^{71}\) Mendelson, above n 15, 137.

\(^{72}\) Nick Cooney, \textit{Change of heart : what psychology can teach us about spreading social change} (Lantern Books, 2011), 35.

\(^{73}\) Animals Australia, \textit{What you never knew about dairy} \<http://www.animalsaustralia.org/issues/dairy.php>.
Bibliography

Articles/Books/Reports


Animals Australia, Do you want to know a secret? <http://www.animalsaustralia.org/features/newspaper-ads-speak-up-for-bobby-calves.php>

Animals Australia, What you never knew about dairy <http://www.animalsaustralia.org/issues/dairy.php>


Cave, JG, APL Callinan and WK Woonton, 'Mortalities in bobby calves associated with long distance transport' (2005) 83(1- 2) Australian veterinary journal 82

Cooney, Nick, *Change of heart : what psychology can teach us about spreading social change* (Lantern Books, 2011)


Ellis, Elizabeth, Hot topics: legal issues in plain language: animal law (Legal Information Access Centre, 2010)


Maimonides, Moses, A guide for the perplexed (Veritatis Splendor Publications, 2013)
McWilliams, James, 'Milk Of Human Kindness Denied To Dairy Cows' (2013) 
*Forbes*  


Neales, Sue, 'Killing of young calves is dairy industry's 'dark secret"  
*The Australian*  


Price, EO et al, 'Fenceline contact of beef calves with their dams at weaning reduces the negative effects of separation on behavior and growth rate'  

RSPCA, *Shop Humane*  


Shop Ethical!, *Elgaar Farms responds on bobby calves*  


*Te Ara,* *Story: rural language*  


Vries, Albert De, The Economics of Sexed Semen in Dairy Heifers and Cows Animal Sciences Department, Florida Cooperative Extension Service, Institute of Food and Agricultural Sciences, University of Florida <http://edis.ifas.ufl.edu/an214>

Wise, Steven M., Rattling the cage: toward legal rights for animals (Perseus Books, 2000)


**Legislation**


Primary Industries Ministerial Council, *Australian standards and guidelines for the welfare of animals Land transport of livestock Regulatory Impact Statement – Abridged*


Primary Industries Ministerial Council, *Australian Standards and Guidelines for the Welfare of Animals: Land Transport of Livestock*

1 Introduction

‘If a man aspires towards a righteous life, his first act of abstinence is from injury to animals.’

In Australia, there are a number of farming methods used in the production of pigs. One such method is intensive pig farming. It is by far the most popular method for farmers due to its profitability and the low cost of required resources. For sentient, smart animals such as pigs, however, this mode of farming results in a dismal existence filled with pain and suffering. Breeding pigs remain segregated from each other and spend most of their lives pregnant and confined to cramped stalls. Pigs bred for meat are separated from their mothers early in their lives and are subjected to cruel and painful husbandry practices before being prematurely slaughtered. Animal welfare legislation does little to protect pigs from these practices and consumers, for the most part, remain blissfully unaware of how the industry operates. This paper will assess the ramifications of intensive farming for pigs, identify the legislative roles the

1 Leo Tolstoy, The First Step: An Essay on the Morals of Diet, 1900
Commonwealth, States and Territories play in the pig industry, and examine how the industry itself supports and condones cruel and inhumane practices.

2 A Pig’s Natural Life

Pigs are known to be highly intelligent, sentient creatures with “feelings that matter”.\(^2\) In their natural environment, pigs are active and like to spend their time wallowing, ‘rooting’ around in soil, smelling and foraging with their snouts. Pigs are extremely sociable animals and are capable of forming strong bonds, not only with each other but also with other species. They communicate with each other continuously and thrive on bodily contact, particularly when resting together.\(^3\) As Ingrid Newkirk from PETA so aptly stated, ‘[i]n their capacity to feel fear, pain, hunger, and thirst, a pig is a dog is a bear is a boy.’\(^4\)

Pregnant sows are known to build nests in preparation for the impending birth. They choose clean, dry sites away from their group, and will gather materials such as grass and straw to line their nests. A sow is very defensive of her young but will encourage them to leave the nest and socialise with other pigs once they are 5-10 days old.\(^5\)

Piglets are energetic, playful and curious animals. They learn to recognise their mother’s voice and she is known to sing to her litter whilst nursing them. Even after weaning occurs at around three months, the young pigs continue to live close to their mother and siblings.\(^6\) They gather natural materials to sleep on and are generally clean animals, preferring to keep their sleeping, eating and dunging areas separate.\(^7\)


\(^5\) Brian Sherman, Ondine Sherman, Katrina Sharman, above n 2.

\(^6\) Ibid.

\(^7\) Australian Pork Limited, *Truth or Porky Pies? Australian Pork Industry Overview Fact Sheet* (July 2012), 1
3 History of the Australian Pig Industry

Farming in Australia once consisted of ‘Old MacDonald’ family farms and backyard producers.\(^8\) Following World War II, intensive animal farming was introduced in response to the economic climate and consumer demand for inexpensive meat.\(^9\) The primary aim of factory farming was to produce the maximum amount of animal flesh or products in the most cost-effective way, using as few resources as possible.\(^10\)

Between 1970 and 2003, over 94% of small family pig farmers left the industry, despite production volume increasing 130%.\(^11\) Today, over 90% of farmed pigs in Australia are raised intensively in foreign-owned ‘factory’ facilities.\(^12\) Farmed pigs are either used for breeding purposes or are raised for meat production. In the last financial year, it is estimated that 4.75 million pigs were slaughtered for human consumption, which equates to 355,000 tonnes of pig meat.\(^13\) In addition, 260,000 sows were current kept for breeding purposes.\(^14\)

4 Conditions on Factory Farms

Pigs that are farmed intensively are generally housed in large ventilated, temperature-controlled buildings or barns. These warehouse-like structures are artificially lit and are continually monitored, thereby increasing productivity and purportedly resulting in fewer fatalities.\(^15\)

The majority of pregnant sows in Australia spend most of their reproductive lives in ‘sow stalls’. Sow stalls were introduced into Australia in 1962 to maximise the number

\(^8\) Katrina Sharman, ‘Farm Animals and Welfare Law: An Unhappy Union’ in Peter Sankoff, Steven White, Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 61, 64. See also Brian Sherman, Ondine Sherman, Katrina Sharman, above n 2, 1.
\(^9\) Malcolm Caulfield, above n 1, 8.
\(^10\) George Seymore, ‘Animals and Us’ (2011) 36 *Dissent* 50, 50.
\(^11\) Brian Sherman, Ondine Sherman, Katrina Sharman, above n 2, 3. See also Katrina Sharman, above n 7, 64.
\(^12\) George Seymore, above n 9.
of sows that could be housed in one area and to minimise labour and animal management costs.\textsuperscript{16} It is also believed to lessen the likelihood of fighting amongst sows.\textsuperscript{17} The stalls consist of a cage made of steel bars with a concrete and/or slatted floor. The size of a stall is approximately 0.6metres x 2.2 metres, barely large enough to house the body of a pregnant pig. The space is so confined that there is no opportunity for the sows to turn around or move more than a step forward or back.\textsuperscript{18}

In Australia, 95\% of sows are transferred to a farrowing crate, a smaller version of a sow stall, within a week prior to giving birth.\textsuperscript{19} This is purportedly done in order to prevent piglets from being crushed or trampled by their mother. Whilst confined to these crates, sows are unable to move and can only eat, drink and defecate. They are positioned in such a way that their litter are able to suckle through the steel bars.\textsuperscript{20} After three to four weeks, the piglets are prematurely removed from their mother, which is some months prior to when natural weaning ordinarily takes place.\textsuperscript{21} The process then begins again, with artificial insemination, or mating,\textsuperscript{22} of the sow and a return to the ‘sow stall’ for the majority of her 16 week pregnancy. Whilst pigs are known to survive up to 15 years of age in a natural setting, female breeding pigs barely live past two or three years, and are generally slaughtered due to injury\textsuperscript{23} or when deemed to no longer be productive or profitable.\textsuperscript{24}

For the piglets born into factory farms, life begins with their birth on a concrete or slatted floor.\textsuperscript{25} Contact with their mother is vastly restricted by steel bars. They are

\textsuperscript{16} Malcolm Caulfield, \textit{above} n 1, 8.
\textsuperscript{17} Malcolm Caulfield, ‘The law and pig farming’ (2008) 91 \textit{Reform} 22, 22.
\textsuperscript{18} Katrina Sharman, \textit{above} n 7, 67. See also Brian Sherman, Ondine Sherman, Katrina Sharman, \textit{above} n 2, 4.
\textsuperscript{19} The Pig Code states that the crates must measure a minimum of 2m x 0.5m, at Primary Industries Standing Committee, Commonwealth of Australia, \textit{Model Code of Practice for the Welfare of Animals - Pigs Third Edition} (2008) 21. See also Brian Sherman, Ondine Sherman, Katrina Sharman, \textit{above} n 2, 17.
\textsuperscript{20} Katrina Sharman, \textit{above} n 7, 68.
\textsuperscript{21} Ideal weaning for piglets occurs at three months of age, with free range pigs being weaned anywhere from 13-22 weeks. See Brian Sherman, Ondine Sherman, Katrina Sharman, \textit{above} n 2, 9, 14.
\textsuperscript{22} A sow will ordinarily will be on heat within a few days of giving birth, thereby enabling mating or artificial insemination and facilitating the constant cycle of pregnancies. See \textit{Australian Pork Limited, Housing: Sow Stalls} (July 2012) <http://australianpork.com.au/industry-focus/animal-welfare/housing/>.
\textsuperscript{24} Katrina Sharman, \textit{above} n 7, 68.
\textsuperscript{25} Ibid. See also Brian Sherman, Ondine Sherman, Katrina Sharman, \textit{above} n 2, 4.
subjected to a rapid weaning process and also undergo tail docking, castration and teeth clipping at an early age, procedures which are generally conducted without veterinary intervention, anaesthesia or pain relief.26

The short lives of young pigs comprises of moving from weaner pens to grower pens, and finally into finisher pens.27 They are fed a specialised diet of mainly grains, with added hormones or antibiotics. At around 14 to 16 weeks of age, they are then sold for slaughter as ‘porkers’ or ‘baconers’/‘finishers’, depending on their weight.28

5 Legal Framework

5.1 Animal Welfare Legislation

Anti-cruelty legislation can be traced back to 1837, when it was first enacted in Van Diemen's Land, with New South Wales following in 1850. Other colonies introduced similar legislation in the 1860s.29 Historically, the Australian Constitution has not played a major role in animal welfare matters. Currently, Federal laws in relation to animals are limited to the direct regulation of the live export of farmed animals industry and the wildlife trade,30 and it is the States and Territories that are largely responsible for animal welfare legislation.31

Ostensibly, animal welfare legislation protects all animals from ‘unreasonable, unjustifiable or unnecessary suffering’32 and provides for criminal offences against cruel treatment. However, farmed animals are generally not shielded under State and

26 Katrina Sharman, above n 7, 69; Brian Sherman, Ondine Sherman, Katrina Sharman, above n 2, 4.
27 Katrina Sharman, above n 7, 69.
30 Ibid, 348, 349, 365. The Commonwealth indirectly regulates aspects of animal welfare under the heads of power of trade (Australian Constitution s 51(i)), quarantine (Australian Constitution s 51(ix)), fisheries (Australian Constitution s 51(x)), and external affairs (Australian Constitution s 51(xix)).
Territory Acts. The origin of this anomaly can be traced back to the early 20th century when the Australian economy relied heavily on the rural industry. The States were granted ‘substantial concessions’ and began exempting certain farming practices from animal welfare legislation, including dehorning of cattle, castration, branding etc. In the 1970s and 1980s, this widened to include a complete exemption for all farming practices. Today, a considerable number of those exemptions are still applicable.33

Effective legislative protection is also denied farm animals because they are distinguished from other species and are classified instead as ‘stock’ or ‘livestock’.34 The legislation, therefore, affords animal species (other than farm animals) recognition that they are sentient beings with their own interests, whilst completely disregarding the needs of farmed animals and relegating them to ‘property status’ and a life based solely on their economic profitability.35

Legislation, such as Prevention of Cruelty to Animals Act 1979 (NSW), further illustrates this point; section 24(1) sanctions cruel practices on a ‘stock animal’, including branding and castrating, which would otherwise be classed as an offence if performed on other animal species.

5.2 Model Codes of Practice

Currently in Australia, the policy framework relating to the farming of animals is found in the Commonwealth Model Codes of Practice (MCOP).36 A MCOP is a set of standards, guidelines and recommended practices which relate to the treatment of farmed animals. The Commonwealth coordinates the development of the codes through the Primary Industries Ministerial Council (PIMC), which comprises Federal, State/Territory and New Zealand primary industry ministers. Their stated objective is ‘[t]o develop and promote sustainable, innovative and profitable agriculture,

33 Steven White, above n 28, 350.
34 For example, an “animal” is defined in section 4 of Prevention of Cruelty to Animals Act 1979 (NSW) as a member of a vertebrate species which includes amphibians, birds, fish, mammals (other than a human being), reptiles, or crustaceans at an eating place. A “stock animal” includes cattle, horses, sheep, goats, deer, pigs and poultry.
35 Katrina Sharman, above n 7, 75-76.
36 Steven White, above n 28, 350. There are currently 22 MCOP, a list of which can be found at <http://www.publish.csiro.au/nid/22/sid/11.htm>.
fisheries/aquaculture, food and forestry industries’. Remarkably, the objective is devoid of any animal welfare goal.

Basically, MCOPs set minimum standards for the welfare of agricultural animals, including accommodation, food/water requirements, and husbandry practices. The process for developing and drafting the content of the codes is dominated by industry interests; animal welfare representatives are typically outnumbered. Government officials may not necessarily possess the required expertise and rely on industry representatives when developing the codes. This allows for a perpetuation of practices which are based entirely on economic and profitability grounds, with minimal protection being afforded to farmed animals.

For a MCOP to be legally binding, it must be adopted by the States and Territories into their animal welfare legislation. The PIMC has allowed for modification of the codes, with the outcome being a lack of uniformity in their implementation by the various jurisdictions. Some States have directly adopted MCOPs; others have revised them before incorporating them into regulations. Generally, compliance is voluntary but most jurisdictions provide an exemption from prosecution where there has been compliance with the relevant codes of practice. This allows for a continuation of practices which would otherwise fall within the scope of cruelty offences.

5.2.1 The Pig Code

In 1983, the first Commonwealth Model Code of Practice for the Welfare of Animals - Pigs (the Pig Code), was issued. The code is currently in its third edition, with its latest review in 2006 resulting in a number of key amendments.

39 Arnja Dale, Steven White, above n 37, 51.
40 Steven White, ‘above n 28, 355. In NSW, adherence to a code is not a defence against a cruelty prosecution but compliance with a code can be used as admissible evidence. See Prevention of Cruelty to Animals Act 1979 (NSW) ss 5, 34A.
As of 2012, the size of sow stalls and farrowing crates has been increased, but this only applies to new housing instalments. From 2017, sows stalls are still permitted for the first six weeks of pregnancy, despite sow crates being banned or phased out in the UK, Sweden, Finland, Holland and six states of the USA. Whilst the use of farrowing crates is also still permitted, confinement is restricted to no longer than a period of six weeks. These changes have since passed into law in NSW, South Australia, Queensland, Victoria and Western Australia.\(^{42}\)

Despite declaring that sow stalls would be prohibited in Tasmania, the Government has since reneged on this commitment.\(^{43}\) From July 2013, Tasmania now allows for sows to be confined in stalls for up to 10 days after mating, and up to 42 days in farrowing crates.\(^{44}\)

5.3 Australian Animal Welfare Strategy

In 2005, the Australian Animal Welfare Strategy (AAWS) was developed by the Commonwealth Government in order to create ‘a more consistent and effective animal welfare system’.\(^{45}\) Its purpose was to standardise relevant State and Territory animal protection laws and establish a regulatory framework that could be endorsed by all States and Territories and replace the existing codes of practice.\(^{46}\)

However, the AAWS has been criticised for endorsing current codes of practice and for not analysing if the standards were sufficient to protect animals. This is particularly the case with the exemptions or defences created by the codes of practice – they were not even part of the review. Furthermore, Animal Health Australia was assigned to

\(^{42}\) Malcolm Caulfield, above n 1, 4. See Prevention of Cruelty to Animals (General) Regulation 2006 (NSW) reg 19; Schedule 2 (incorporating the Animal Welfare Code of Practice – Commercial Pig Production 2009; Animal Welfare Regulations 2000 (SA) reg 28; Livestock Management Regulations 2011 (Vic) reg 5, and Livestock Management Act 2010 (Vic) ss 6, 46; Animal Welfare (Pig Industry) Regulations 2010 (WA) regs 2(d) and 13(4).

\(^{43}\) Malcolm Caulfield, above n 1, 10.

\(^{44}\) Animal Welfare (Pigs) Regulations 2013 (Tas) reg 25A, 27.


develop the Standards and Guidelines. That panel consisted of Federal and State
departments of agriculture, who were considered to be 'standard bearers of producer
interest'. This, therefore, purportedly created an obvious conflict of interest.47

Whilst the AAWS has the potential to coordinate a national approach to animal
welfare, the strategy is now in some doubt - the Coalition government has recently
dissolved its Advisory Committee. Whilst the Agriculture Minister, Barnaby Joyce,
assured the public that ‘this does not mean the Government is not concerned about
improving animal welfare’, he advised there would be a freeze on all new programs
and that responsibility for the AAWS would be taken over by the Department of
Agriculture.48

6 Pig welfare issues

In order to assess the welfare of an animal, one must observe how it copes in its
environment. For active, sentient, social creatures such as pigs, confinement to small
areas, coupled with an inability to express normal behaviour, can be manifested by
poor health and behavioural issues.49

6.1 Sow stalls

APL has consistently maintained that keeping sows in stalls is good for the welfare of
the pregnant sow: it allows for individual feeding, thereby minimising fighting amongst
the pigs, and sows get individual attention which would not otherwise be possible if the
pigs were group housed. APL also contends that science shows that confining sows
to stalls reduces the likelihood of injuries.50

48 Anna Vidot, Welfare grants frozen as government chases savings (15 November 2013) ABC Rural News
49 Malcolm Caulfield, above n 1, 24.
Studies have shown that pigs raised in natural or free-range conditions socially interact with each other and aggression between sows is rarely an issue. Where pigs are housed in groups, inter-sow aggression can occur where there is simultaneous access to food, or where pigs, unfamiliar with each other, are confined to a small area. Contrary to APL’s claims, inter-sow aggression still occurs in sow stalls and is a considerable source of stress because the aggression remains unresolved.\(^5^{1}\)

Where a pig raised in a natural environment would spend a considerable amount of time foraging, sow stalls force them into a life of inactivity. This culminates in stereotypies; repetitive, unvarying behaviour patterns which have no real function. It is believed that stereotypies, such as chain and bar biting, sham-chewing, nosing, tongue rolling and attempting to root the concrete, affect more than 90% of sows in stalls and are an inevitable result of stress, frustration and depression. The behaviours are less common amongst group-housed pigs and are a rare occurrence for pigs living in a natural or free-range environment.\(^5^{2}\)

Despite APL assertions, the health of sows is severely compromised by stall confinement. The lack of activity and the continual standing and lying on concrete floors is known to cause a reduction in muscle mass and bone strength, rendering pigs with damaged joints and lameness. They can suffer physical injuries from stereotypic behaviour, in addition to abrasions to the back area caused by rubbing or pressing against the stall bars. Sows also suffer greater incidence of sickness and disease due to having weakened immune systems, and endure urinary tract infections, gastrointestinal problems and reduced cardiovascular health. Ultimately, they are culled early in their lives, with few surviving past 2-3 years of age.\(^5^{3}\)

There have been numerous studies conducted both in Australia and overseas in relation to the productivity performance of pigs raised in different housing conditions. There was no conclusive evidence that productivity rates of sows confined to stalls were any different from those housed in groups. Interestingly, in the UK and Sweden,

\(^{51}\) Malcolm Caulfield, above n 1, 25-26.
\(^{52}\) Brian Sherman, Ondine Sherman, Katrina Sharman, above n 2, 15-17; Malcolm Caulfield, above n 1, 26-27.
\(^{53}\) Brian Sherman, Ondine Sherman, Katrina Sharman, above n 2, 16-17; Malcolm Caulfield, above n 1, 31.
where the use of stalls has been abolished, and sows are housed exclusively in groups, their productivity rates were greater than or equal to Australian pig producers.  

6.2 Farrowing crates

APL maintains that confining sows to farrowing crates increases their reproductive performance and protects piglets from being crushed by their mother. The industry claims to have invested substantial funds researching alternatives to the farrowing crates but have found nothing that is comparable to their productivity rates.

In addition to some of the welfare issues noted earlier in the use of sow stalls, farrowing crates cause great stress to pregnant sows. Although unable to build nests for their litter, they still attempt to perform these activities. Birthing occurs on concrete or slatted floors, often resulting in injury to both mother and babies.

Animal advocates maintain that farrowing crates are used solely for the purpose of reducing the amount of space required by sows, thereby maximising sow/piglet numbers and production profits. Sows still manage to inadvertently roll on their piglets but muscle weakness, injury or confinement often prevents them from standing up, thereby crushing the piglet. Animals Australia has reported that farrowing crates do not achieve their purpose of preventing deaths, with an estimated 600,000 piglets dying each year in crates.

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54 Malcolm Caulfield, above n 1, 32-33.  
56 Brian Sherman, Ondine Sherman, Katrina Sharman, above n 2, 17.  

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6.3 The welfare of piglets

As outlined earlier, piglets are subjected to a rapid weaning process, generally around two to three weeks after birth. This is highly stressful for both mother and piglets, and typically results in piglets experiencing diarrhoea and clinical disease.59

Piglets also undergo a number of procedures without the benefit of anaesthesia or pain relief, including tail docking, teeth clipping and castration.60 It is unclear how widespread these procedures are (they are listed as ‘elective procedures’ on the industry website)61 however, they are not prohibited or restricted under legislation.62

Tail docking is purportedly performed to reduce tail biting in piglets but it is unclear just how effective this method is. Animal advocates report that biting still occurs regardless of tail docking, and that it is due mainly to stress from overcrowding, boredom and shed conditions. Scientists agree that it is highly likely that the pain experienced by this procedure is considerable for at least a few days, resulting in trembling, leg shaking, vomiting and tail jerking.63

Piglets are born with eight sharp needle or milk teeth. Teeth clipping is used in the pork industry to prevent laceration to the teats and udders of nursing sows, and prevent injury to littermates.64 Animal advocates argue that injury occurs to sows due to the confinement of farrowing crates. In a natural setting, a sow is able to push her piglets away, or will move away from them, if they are causing her pain or discomfort. However, confinement prevents this from occurring.65 Teeth clipping causes

59 Brian Sherman, Ondine Sherman, Katrina Sharman, above n 2, 17-18.
60 Ibid.
62 Katrina Sharman, above n 7, 68.
64 Katrina Sharman, above n 7, 68.
considerable pain to piglets, particularly if it is performed inaccurately, and it is unclear if it is beneficial in protecting sows from injury.66

The castration of male pigs is widespread and results in pain and stress for the animals, particularly when performed without anaesthesia. APL advises that castration is ‘a necessary management practice for production to meet the consumer requirements’. Furthermore, without this procedure, APL states that pig meat develops ‘undesirable flavour and odour characteristics of the meat that are rejected by consumers’ - otherwise known as ‘boar taint’.67 Vaccination against boar taint is available but research has shown that it is not cost-effective, the results are not as reliable as castration and the quality of pig meat is compromised.68

It is interesting to note that in the 2012-2013 Annual Report, APL lists their core values as:

1. Passion and dedication to the cause of our farmers;
2. Deliver what we promise, when we promised it;
3. Respect and support colleagues;
4. Creating the future our farmers need; and
5. Celebrate achievement.69

There is no inclusion of statements or values in relation to animal welfare standards in the industry, and there is no mention of them by Andrew Spencer, the current CEO, in his ‘message’ contained within the APL Report. Instead, Mr Spencer refers to the industry’s ‘historic’ voluntary phasing-out of sow stalls and how this has been implemented in order to ‘improve our product for consumers’.70

66 Brian Sherman, Ondine Sherman, Katrina Sharman, above n 2, 18.
7 The Way Forward

Whilst there have been some legislative progress, there is some scepticism that the 2017 voluntary ban on sow stalls by the pig industry will eventuate. Malcolm Caulfield opines that APL is not committed to the phasing out of stalls and the industry has a poor self-regulation record. Caulfield asserts that the Pig Code should prohibit sow stalls outright, thereby putting pressure on State and Territory governments to introduce or amend their legislation.71

Caulfield believes a greater way forward is for each jurisdiction to ensure that the responsibility for animal welfare is not allocated to the primary industry or agriculture ministers and should be assigned to an impartial minister. He is also of the opinion that there should be uniform animal cruelty legislation, applicable to all animals, which is drafted, reviewed and enforced by an independent statutory body.72

Animal advocates would prefer to see an end to intensive pig farming altogether. Most agree that consumers are the key to reform and that awareness and education about the cruel practices in the pig industry are essential for change to occur.73 It is encouraging to see that Coles made a public commitment from January 2013, stating it would source its brand-name pig meat products only from Australian and international suppliers that do not use sow stalls for more than 24 hours per pregnancy. Woolworths has also stated that 98% of its fresh pork comes from suppliers who do not use sow stalls and that by mid-2013, all of its fresh pork will be produced in sow stall-free farms.74 This is surely a step in the right direction for retailers, and one that consumers and those within the pig industry can consider.

71 Malcolm Caulfield, above n 1, 4-6.

Unfortunately, these facts could not be verified on the Woolworths Ltd website. The website states that ‘all of our fresh pork meat is sourced from farms that only use stalls for less than 10% of the sows’ gestation period’. See Woolworths Limited, Animal Welfare (2012) <http://www.woolworthslimited.com.au/page/A_Trusted_Company/Responsibile_Sourcing/Animal_Welfare/>. 

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8 Conclusion

Intensively farms pigs are subjected to horrific and tortuous conditions – being housed in sheds, kept in cages, subjected to inhumane practices and never seeing daylight. Animal welfare legislation provided by State and Territory statutes does little to protect pigs. Despite the Commonwealth providing a national Model Code of Practice outlining the care and husbandry requirements for pigs, it is not a legally binding document. Some States, therefore, have adopted these standards in their legislation, whilst others have amended them or ignored them altogether.

Whilst there has been some recent legislative initiatives, the pig farming industry is in need of an urgent overhaul in order to stop the institutionalised cruelty inflicted on farmed pigs. Implementing uniform legislation for the States and Territories appears to be the logical solution, with all animals being treated equally, regardless of their status, and exemptions being abolished.

Other countries have managed to prohibit some of the crueller practices that are still permissible in Australia. What is required is greater public involvement, scrutiny, awareness and education in terms of industry practices. Consumers also need to be aware of the impact their dietary choices have on both the animals and on the industry. It is through public demand, and through stances taken by such companies as Coles and Woolworths, that pressure can be brought to bear on the Government and the pig industry in order to end these horrific and barbaric practices.
Bibliography

Articles/Books/Reports


Seymore, George, ‘Animals and Us’ (2011) 36 Dissent 50

Sharman, Katrina, ‘Farm Animals and Welfare Law: An Unhappy Union’ in Peter Sankoff, Steven White, Celeste Black (eds), Animal Law in Australasia (Federation Press, 2nd ed, 2013) 61


Legislation

*Animal Care and Protection Act 2001* (Qld)

*Animal Welfare Act 1992* (ACT)

*Animal Welfare Act 1999* (NT)

*Animal Welfare Act 1993* (Tas)

*Animal Welfare Act 2002* (WA)

*Animal Welfare Code of Practice – Commercial Pig Production 2009* (NSW)

*Animal Welfare (Pig Industry) Regulations 2010* (WA)

*Animal Welfare Regulations 2000* (SA)

*Animal Welfare (Pigs) Regulations 2013* (Tas)

*Australian Constitution*

*Livestock Management Act 2010* (Vic)

*Livestock Management Regulations 2011* (Vic)

*Prevention of Cruelty to Animals Act 1979* (NSW)

*Prevention of Cruelty to Animals Act 1985* (SA)

*Prevention of Cruelty to Animals Act 1986* (Vic)

*Prevention of Cruelty to Animals (General) Regulation 2006* (NSW)

Other

Animals Australia, *Behind 60 Minutes: The Hidden Truth*  

Aussie Pig Farmers, *Looking after our pigs* (March 2013)  
http://www.australiananimalwelfare.com.au/content/about-aaws


Hatten, Ruth, *Minister backflips on sow stall ban* (9 November, 2012) Sydney Morning Herald  


Pig Progress, *RESEARCH: Boar taint vaccination affecting pig prices* (21 November 2013)  


Vidot, Anna, *Welfare grants frozen as government chases savings* (15 November 2013) ABC Rural News  


1 Introduction

Every year around the world, millions of animals are used in various types of scientific research. A comprehensive global estimate for this figure is 115.3 million. Australia appears to rank highly both in terms of absolute laboratory animal usage figures, and per capita use, being ranked fourth largest in the world in 2005. The most recent statistics available suggest Australian usage figures in the order of 7 million animals.

3 Ibid.
The extent of this use, the purported benefits to the Australian public, and the fact that the majority of biomedical research is government funded, 5 make this a public policy issue. As with other animal welfare issues the surrounding debate is polarised, and involves complex cultural, social and personal beliefs. 6 The government has sought to respond to this ethical minefield by creating a framework designed to address concerns around this issue, but allowing such use in ways which it believes are broadly acceptable to the community. 7 Accordingly, does the current system adequately protect animal welfare, or does a cloak of intransparency 8 hide serious underlying actual, or potential animal welfare concerns?

This paper does not attempt to discuss the pros or cons of research using animals. It assumes the practice exists with conditional approval of the wider population. As such, the regulatory system in place must protect animal welfare to the greatest extent possible within this paradigm.

The legal framework surrounding the use of animals for scientific purposes within Australia will be discussed, and contrasted with some international jurisdictions. The author will then discuss some key issues with the current system based on personal observation, international comparison and literature review. This list is by no means exhaustive. Finally, an examination of potential reforms will be undertaken. The author will argue that the system at present fails to protect welfare and that reform is required.

6 Margaret Rose and Elizabeth Grant, ‘Australia’s ethical framework for animals used in research and teaching’ (Paper presented at AAWS International Animal Welfare Conference) <http://www.daff.gov.au/animal-plant-health/welfare/aaws/aaaws_international_animal_welfare_conference/australias_ethical_framework_for_animals_used_in_research_and_teaching>. 7 Ibid.
2 The Australian Regulatory Framework

Under the Australian federal system, animal welfare responsibility is devolved to the states. 9 All states and territories have statutes designed to protect animals from cruelty, and in more recent times to promote welfare. 10 This overarching legislation covers all fields of animal use. Additionally, most of these acts have specific clauses pertaining to research animals. 11 NSW adopts a different legislative framework to all other states and territories by the use of a separate statute dedicated to the regulation of research animal use. 12 This delegation of authority is provided for in the primary act by allowing a defence to prosecution for a cruelty offence should the provisions of the Animal Research Act 1985 (NSW) be followed. 13 Statutory interpretation of the opening wording of this section, which states that the defence applies ‘in the course of, and for the purpose of carrying out animal research’ suggests that there may be situations where the infliction of cruelty directed towards a research animal, which can be established as being outside the parameters of the research project, may still be prosecuted under the PoCtAA. However, no case authority for this assertion exists.

Whilst there does appear to be considerable variability in the extent of statutory provisions relating to animals in research across the jurisdictions, 14 unity is provided by referral to a compulsory code of practice, the Australian code for the care and use of animals for scientific purposes (‘the Code’). 15 In general, this document receives its regulatory power by adoption under the

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9 Under the Australian Constitution s 51 there is no head of power for animal welfare.
10 Prevention of Cruelty to Animals Act 1979 (NSW); Prevention of Cruelty to Animals Act 1986 (Vic); Animal Care and Protection Act 2001 (Qld); Animal Welfare Act 1985 (SA); Animal Welfare Act 2002 (WA); Animal Welfare Act 1993 (Tas); Animal Welfare Act 1992 (ACT); Animal Welfare Act (NT).
15 National Health and Medical Research Council (NHMRC), Australian code for the care and use of animals for scientific purposes (Canberra, 8th ed, 2013) (‘NHMRC Code’).
state’s delegated animal welfare legislation, or through administrative controls, for example referral to it in licenses issued to research establishments. Administrative controls in this area of animal use abound, and can include the issuance of mandatory research licences to individuals or institutions, and mandatory prior approval by an ethics committee. The legislation and code seek to achieve a balance which acknowledges that animal interests are subjugated to human interests, but attempts to limit their use and suffering through safeguards provided in the various regulatory provisions. Thus, the jurisprudential ethical foundation is incontrovertibly utilitarian. One other ethical framework features highly in this area, with particularly frequent mention in the code. The Three R’s refers to ‘replacement’ of animals with non-sentient alternatives, ‘reduction’ of animal use, and ‘refinement’ of procedures to minimise suffering.

2.1 Regulatory models

Regulatory styles form a continuum ranging between punitive forms aimed at deterrence, and persuasive forms where cooperation and education predominate. Compromise is achieved through using a combination of these. Enforced self-regulation operates towards the persuasive end of this scale and is the system adopted in Australia. The theory suggests that institutions should take an active role in drawing up the rules under which they will operate, and be responsible for ensuring compliance with them, with

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16 See, eg, Animal Welfare Regulations 2012 (SA); Prevention of Cruelty to Animals Regulations 2008 (Vic); Animal Care and Protection Regulation 2012 (Qld).
17 Animal Experimentation, above n 13, 34.
18 Margaret Rose, above n 5.
19 Jeremy Bentham, A Fragment on Government; being an Examination of what is delivered on the Subject of Government in General, in the Introduction to William Blackstone’s Commentaries: with a Preface in which is Given a Critique of the Work at Large (London, 1 ed, 1776).
22 Ibid.
little government intervention. 24 The only governmental role is in verification that the internal controls are adequate by the use of government inspections, and in New South Wales through site visits and inspections by the Animal Research Review Panel. 25 In practice, researchers assume primary responsibility for animals on their studies, with a degree of vicarious responsibility taken by their employers.

Central enforcement activities differ between states but may include inclusion of government appointed personnel on code external review panels, 26 or routine accreditation visits by government inspectors or review panels. 27

3 The International Regulatory Landscape

3.1 The European Union

The EU has two documents concerning the use of animals in research. These include EU Directive 2010/63/EU, 28 and the European Convention for the protection of vertebrate animals used for experimental and other scientific purposes. 29 The former document is not directly binding on member states in this format but requires adoption into domestic legislation. Unlike EU Regulations, Directives are only binding as to their outcomes and the member state can ascertain the optimal way to achieve such outcomes. On this basis, it is evidently feasible for member states to adopt standards which are higher than those required by the Directive. Hence the harmonisation brought about through this regulatory format merely provides a minimum threshold or level

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24 Animal Experimentation, above n 13, 34.
25 Ibid.
26 NHMRC Code, above n 14, s 6.
The Convention has been ratified by the EU as a whole and several other states, acting through the Council of Europe. Despite the extension beyond EU borders, providing a farther-reaching effect, it has no legislative credence and essentially forms a set of guidelines to follow. However, the text of the Directive does largely follow that of the Convention.

The Directive clearly sets out the type of animals to be covered, which includes all non-human vertebrates and cephalopods as well as foetal forms. It provides a detailed description of the type of procedures encompassed by the term ‘experimental and other scientific purposes’, doing so by using an exclusionary approach which lists those areas of animal use not covered by the provisions. ³⁰ It also sets itself a lofty goal of representing:

an important step towards achieving the final goal of full replacement of procedures on live animals for scientific and educational purposes as soon as it is scientifically possible to do so. ³¹

However it fails to use commonly recognised terminology surrounding ethical review of projects and institutions. There is however provision of this through the ‘animal welfare body’ which comprises of animal care personnel, a scientist and the designated veterinarian. ³²

³¹ Ibid para 10.
3.2 The United Kingdom

Whilst adopting EU legislation as a foundation, the UK animal research legislation has been considered the most rigorous in the world. The Animals (Scientific Procedures) Act 1986 (UK) provides for a centrally administered licensing system which authorises scientific procedures at three levels, namely authorisation of: the person carrying out the procedures, the program of work and the establishment where animals are held and procedures performed. A special inspectorate are responsible for granting licences and inspecting premises.

The system has been criticised for its complexity and bureaucratic nature with concern that, through exclusion of ethics committee involvement, it renders the decision making capacity in the hands of those with little ethical training, who are distanced from the true issues. However, an ethical review process is required to be established. Whilst the form of this is not dictated it is likely to be represented by a committee with designated members, similar to other countries’ ethics committees. In reality all protocol applications are required to be considered by this process prior to submission to the Home Office, and there is mention of balancing the input arising from this review with those of the inspectorate. The advantages provided by this central oversight in terms of uniformity of decision-making is considerable. This uniformity would be expected to create clear minimum welfare standards, and enhance transparency to the general public.

33 Directive 2010/63/EU.
34 Animal Experimentation, above n 13, 38.
35 The UK Home Office is charged with establishing the inspectorate and administering the Act.
37 United Kingdom, Guidance on the Operation of the Animals (Scientific Procedures) Act 1986 (TSO, Norwich, 2000) app J.
38 Ibid.
3.3 United States of America

With the adoption of a self-regulation model and the federal system, the US is an excellent comparative model for Australia. On the face-of-it the system appears relatively simple with animal use being governed by two federal acts; the Animal Welfare Act 1966 (AWA) \(^{39}\) and the Health Research Extension Act 1985. \(^{40}\) However, scratching beneath the surface reveals a complex array of policies, codes and guidance documents covering different animal species, types of institutions and funding arrangements. \(^{41}\)

The advantages brought about by a federal system of governance are largely negated by the complexity and overlapping nature of these additional documents, and the fact that the majority of animals used in research are exempted from protection. This includes cold-blooded animals such as fish, and rats and mice through exemption under the delegated legislation. \(^{42}\) Additionally, the AWA is only concerned with the care of protected animals in research establishments, as opposed to the scientific validity of procedures performed upon them. \(^{43}\) Inspectors are appointed to provide central oversight and control. \(^{44}\)

Much criticism of the US system has been advanced based on the variable protection afforded to different animal species, the lack of prescriptive regulation, and the absence of ethical review. However, whilst this assertion is correct based on consideration of statutory requirements, the use of self-enforcement also plays an important role. In the US the main medical

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\(^{39}\) 7 USC 2131-2157 (1966).
\(^{40}\) 42 USC 289d (1985).
\(^{43}\) Animal Experimentation, above n 13, 44.
\(^{44}\) The Animal and Plant Health Inspection Service (APHIS), a division of the United States Department of Agriculture (USDA), oversees compliance with the Animal Welfare Act see <http://www.aphis.usda.gov/>. 
research funding body is the National Institute of Health which administers the Public Health Service (PHS) policy. Non-compliance with this renders the institution at risk of losing access to this valuable funding source, and hence acts as the ‘carrot’ for compliance. PHS policy requires the formation of an ethics committee equivalent, the Institutional Animal Care and Use Committee (IACUC), plus adherence to a detailed and prescriptive manual pertaining to research animal care and use, the ‘Guide’. 45 Thus, in conjunction with the AWA, this policy effectively brings most species and animal procedures under control of an IACUC. It is also of note that a large majority of US research facilities are members of a strict voluntary accreditation scheme. 46

4 Adequacy of the Animal Welfare Framework

4.1 The Code

The Code in this area of animal use appears to provide refreshing simplicity and uniformity to Australia’s complex state-based animal protection system. As a document drafted with input from the industry itself, as well as animal welfare groups, and refined in light of public consultation, surely use of this document represents best practice in animal research? However, a closer look at the primary legislation in a number of jurisdictions suggests that there are a range of legal loopholes and inconsistencies which suggest that the Code may not actually be as compulsory as first thought. For instance in NSW, ‘the regulations may prescribe a Code of Practice’ 47 contra an ‘animal research authority shall not authorise, or purport to authorise, the carrying out of animal research otherwise than: …..in accordance with the Code of Practice’ . 48 The amended regulations do however stipulate the Code as the

46 Association for Assessment and Accreditation of Laboratory Animal Care (AAALAC), <http://www.aaalac.org/accreditation/index.cfm>.
47 Animal Research Act 1985 (NSW) s 4(1).
48 Ibid s 26 (2)(b).
prescribed one for the purposes of this Act. 49 Yet, the regulations may allow this to be adopted ‘wholly or in part, and with or without modification’. 50

Similarly in South Australia, the sole mention of the Code in the primary act refers to licensing and again implies a discretion by use of the word ‘may’. 51 This clause (as in NSW) suggests that the Minister may take a piecemeal approach to code incorporation. Additionally in this jurisdiction the Code is not one listed as a prescribed code under the regulations. 52 Similar referrals to regulations and use of discretionary language is also seen in other states. 53 Whilst this finding is disappointing in terms of its effect on public transparency and country-wide harmonisation, it could simply have arisen out of political motivation to retain the state’s legislature-making ability. It should also be considered that for large academic institutions the risk of loss of government funding due to non-Code compliance may be a bigger stick than any penalty applied under the relevant state legislation. Not so perhaps for non-government funded bodies?

Setting aside the above and turning to the document itself, a cursory glance reveals an abundance of well-considered principles and reassuringly definitive statements e.g.‘…the use of animals for scientific purposes must have scientific merit’. 54 However, it is not quite so clear how this document ensures that these admirable sentiments are achieved. Without even delving into the substance of the document it is evident that there are two general problems which have both legislative and practical effect. Firstly, the language used is littered with the terms ‘must’ and ‘should’ which to the ordinary lay person are often regarded as synonymous. 55 However, the Code uses the former to imply an obligation and the latter to imply a strongly recommended provision.

49 Animal Research Regulation 2010 (NSW) s 4.
50 Animal Research Act 1985 (NSW) s 4(2).
52 Animal Welfare Regulations 2012 (SA) sch 2.
53 See, eg, Prevention of Cruelty to Animals Act 1886 (Vic) s 7; Animal Care and Protection Act 2001 (Qld) s 15; Animal Welfare Act (NT) s 34.
54 NHMRC Code, above n 14, s 1.
55 See, Charrow, Veda R, Erhardt, Myra K and Charrow, Robert P, Clear & Effective Legal Writing (Aspen Publishers, 4th ed, 2007) 183-4. The term ‘should’ is not quite as contentious as the term ‘shall’ in legal circles but to non-legal scholars is likely to be confusing.
Other expressions used include: *regularly, suitable, essential, adequate,* and *necessary* and they are never defined. 56 Secondly, the document is a classic example of a performance-based document, 57 in character with the self-regulatory enforcement model it operates under. Such documents provide the outcomes that need to be achieved and allow the responsible personnel to decide the optimal way of achieving this. For example: ‘animals must be provided with accommodation, physical and social environmental conditions, food, water and care to meet species-specific or strain-specific physical and behavioural needs’. 58 This can be contrasted with a prescriptive document such as the US Guide which provides tables of specific data on numerous husbandry issues, including the temperature at which different species should be housed, and the minimum cage floor required by different weight of rodent. 59

Advocates of the performance-based model cite advantages such as reduced regulatory burden, consideration of local factors, and the fostering of a culture of care through active staff involvement. 60 It is also clear that in such a system it is feasible for standards above that of the minimum to be implemented. However, the reverse also applies, and it would be exceptionally valiant to mount a legal challenge for non-compliance based on the Code wording above. The behavioural needs of animals are widely disputed by eminent animal welfare scientists, 61 is it reasonable to expect researchers and animal carers to be fully cognisant of these needs, and readily able to implement provisions to safeguard them? Interestingly, the EU Directive, perhaps in recognition of this issue, has created a new statutory role for a person ‘to ensure that staff dealing with animals have access to information specific to the species housed in the establishment’. 62

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58 NHMRC Code, above n 14, s 2.13.
60 Klein and Bayne, above n 56.
use of performance-based documents requires not only a highly educated and experience workforce, clear reporting lines and an exemplary organisational culture of care, but an efficient system of outcome monitoring and improvement. Are we secure in the knowledge that this is present in most scientific institutions in Australia?

4.2 Ethics Committees

Animal Ethics Committees (AECs) are of paramount importance in this system of governance. They have been designed to provide community accountability by the inclusion of a ‘lay’ member and a person with a demonstrated commitment to animal welfare. This committee composition may make our AECs superior to those internationally.

AECs are sanctioned to evaluate research proposals to determine the fundamental question of their necessity. However, there are numerous factors which affect their ability to do this. This includes the quality of the protocols submitted, the individual ideologies of members, and the willingness of members to voice their concerns. More troublingly members are being asked to make decisions involving complex scientific procedures and statistical validity which are far outside their expertise. The nature of today’s scientific pursuits is so variable and specialised that even the scientist member is unlikely to bring detailed knowledge on every protocol considered. The lack of centralised oversight leads to a number of other concerns. Firstly, different committees’ decisions can be highly variable and one proposal may receive different outcomes on consideration by each. Since committees are

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63 Ibid.
64 NHMRC Code, above n 14, s 2.2.4. The category D member on the AEC is often described as a ‘lay’ member whilst the category C member is committed to furthering the welfare of animals.
65 The US IACUC composition varies depending on the document perused but ‘the Guide’ requires four members which include one public member and one non-scientist, the EU ‘animal welfare body’ only requires a minimum of an animal carer, scientist and input from the designated veterinarian.
66 Animal Research Act 1985 (NSW) s 14(1); NHMRC Code, above n 12, ch 2.3.
67 Sharman, above n 55.
made up of individuals who bring their own experience and prejudices to the table this result is hardly surprising. It does however do little for public accountability. The lack of detailed prescriptive guidelines on minimum recommendations or refinements does not aid the situation. The status quo when there is disagreement amongst members is also unclear. The Code requires that decisions are made on the basis of consensus. 68 This, it seems provides a good welfare safeguard and allows all members a voice. However, this safeguard is defeated, since ‘if consensus cannot be reached after compromise, then decisions can proceed by majority’. 69 Still, the broad stated aim of the Code that, ‘the use of animals for scientific purposes must have scientific or educational merit; must aim to benefit humans, animals or the environment; and must be conducted with integrity…’ 70 renders it unlikely that a consensus in decision-making could not be achieved.

Despite AECs functioning as government-appointed committees under most state acts, their retention of independence may also be called into question especially when chairs and members may be senior university officials responsible for other conflicting portfolios. This was raised as a potential issue in a recent animal welfare scandal at Charles Darwin University. 71

4.3 Training and Competence

A key determinant in promotion of animal welfare (and scientific outcomes) during research procedures is the competence of the research personnel carrying out the procedure. Competence is defined in the Code as ‘the consistent application of knowledge and skill to the standard of performance required regarding the care and use of animals. It embodies the ability to transfer and apply knowledge and skill to new situations and environments’. It

68 NHMRC Code, above n 14, s 2.3.11.
69 Ibid.
70 Ibid 1.
71 Jane Bardon, ‘Not enough done to prevent cattle starvation: ombudsman’, ABC News, 29/10/10 <http://www.abc.net.au/news/2010-10-28/not-enough-done-to-prevent-cattle-starvation/2315928>. The ombudsman reported an irreconcilable conflict of interest held by the AEC Chair due to also being deputy vice-chancellor of research, and that this had led to reports being changed prior to review by the vice-chancellor.✔
has however been suggested that the main element of ‘competency’ is a person’s behavioural characteristics which underlie their competent performance.\(^{72}\) Attainment of competence is likely to come about through a combination of formal training, supervision and experience which are elements that legislation can only impact upon minimally. However, law can provide the tools to mandate formal training requirements, and for implementation of systems for its review.

The Code requires that all people who use and care for animals must be competent in the procedures performed or supervised by others with the requisite competency.\(^{73}\) Some responsibility for this is devolved to the institution which must ensure that they provide ‘adequate resources for appropriate education, training, and assessment of competence of investigators, and certification of such competence to the satisfaction of the AEC.’\(^{74}\) There is no further elucidation on what topics should be considered as part of training programs or how competency outcomes should be measured. Also of concern is that on closer analysis of the Code wording surrounding training it is clear that the Institution’s main responsibility is to offer training to investigators, and not to ensure that they have availed themselves of it.\(^{75}\) As already discussed, the use of undefined terms such as ‘adequate’ and ‘appropriate’, and the outcome requirement of being to the ‘satisfaction of the AEC’ provides a large degree of flexibility and variability in terms of what resources may be offered and processes accepted under the Code. This contrasts with the European model which appears relatively advanced by the requiring of a person(s) on site with responsibility for ‘ensuring that staff are educated, competent and continuous trained’.\(^{76}\) In addition, investigators should be supervised until they have demonstrated the requisite competence. The UK has formalised this requirement by the creation of a new statutory

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\(^{73}\) NHMRC Code, above n 14, s 1.29.

\(^{74}\) Ibid s 2.1.8(ii).

\(^{75}\) See also NHMRC Code, above n 14, s 2.1.2 (v).

\(^{76}\) Directive 2010/63/EU, art 24.1(c).
role, the ‘Named Training and Competence Officer’. 77 The EU Directive requires that member states publish their minimum requirements with respect to education and training and their requirements for obtaining, maintaining and demonstrating competence. 78 A list of topics for inclusion as part of educational programs is also provided. 79

Another interesting and relatively unexplored area is the requirements for attainment of surgical competence during research procedures, and even the ability of researchers to be able to legally perform surgery on a research animal. Ordinarily, the performance of surgery on an animal could be construed as an act of cruelty since this would be expected to cause pain. 80 It would be expected that the general defence to cruelty for procedures conducted in the pursuance of research outcomes would apply to research surgical procedures. 81 This however requires consideration of this exemption in the relevant state legislation governing veterinary practitioners and the practice of acts of veterinary science. This is provided for in NSW, 82 but does not appear to be provided for specifically in all jurisdictions. 83

Given the previous discussion, and that the legality of performance of surgery on research animals appears to be a grey area, the mandating of surgical training for researchers should receive even greater priority. It however receives no greater emphasis in the Code than any other forms of training despite the serious adverse welfare outcomes that can arise due to negligent performance of it. In the centralised UK system of governance all those researchers wishing to perform surgery on animals must provide evidence of completion of a specific surgical training course in order to satisfy the Home

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77 The Animals (Scientific Procedures) Act 1986 Amendment Regulations 2012 (UK), s 2C (5) (d).
78 Directive 2010/63/EU, art 23.3.
79 Directive 2010/63/EU, annex V.
80 Prevention of Cruelty to Animals Act 1979 (NSW), ss 4-5.
81 Ibid, s 24 (1)(e).
82 Veterinary Practice Act 2003 (NSW), s 9 (2) (e).
83 See e.g. Veterinary Surgeons Act 1936 (Qld) s 25M (2)(b); Veterinary Practice Act 2003 (SA) s 39 (2).
Office requirements for issuance of a personal licence. 84 The wording of the US Guide in respect to training is analogous to the Code requiring that investigators are trained and competent, however it does provide specific recommendations for training or qualifications that should be expected of various types of staff members involved in research. Nonetheless, many of these requirements are listed in conjunction with the ‘should’ terminology. 85

4.4 Veterinary Care

Somewhat uniquely, in comparison to international counterparts, there is no requirement under either primary or delegated legislation to appoint a dedicated veterinary surgeon who is responsible for the health and wellbeing of research animals. Instead there is a Code requirement for institutions to ensure ‘availability and access to veterinary advice for the management and oversight of a program of veterinary care, quality management and project design to safeguard animal wellbeing’. 86 There are other parts of the Code where veterinary input is suggested, for example in providing advice on animal health protocols, 87 or in veterinarians fulfilling roles as animal facility managers, 88 and the Institutions should consider appointment of personnel with veterinary qualifications, but at no point is there a requirement for an appointed individual with a relatively fixed set of responsibilities. This contrasts with the statutory appointed Named Veterinary Surgeon role in the UK, the designated veterinarian of the EU and attending veterinarians in the US. 89 It must be considered that the public has a general duty of care to seek veterinary advice for sick animals in their charge under relevant State animal protection legislation, 90 and it would be expected that a parallel duty would exist for animals in research. This is probably provided for by the wording of the Code used above, but given the characteristic separation of research

84 Draft guidance on the Operation of the Animals (Scientific Procedures) Act 1986 (as amended), 31. Module 4 training is specifically designed to cover anaesthetic and surgical procedures on animals.
86 NHMRC Code, above n 14, s 2.1.5 (vi).
87 Ibid s 3.2.1 (iv).
88 Ibid s 2.5.14.
90 For example, Prevention of Cruelty to Animals Act 1979 (NSW), s 5.
animal regulation from all other animal uses, it would be beneficial to specifically establish this duty to seek advice, and strengthen the role of the veterinarian in research environments. The role of the Named Veterinary Surgeon in the UK is well-defined by the use of supportive guidance notes issued by the Veterinary Surgeons professional body. 91 This not only aids those acting in the role, but provides another impetus to perform the role competently; the bringing of the role under the remit of professional conduct rules. Other international jurisdictions also make reference to the specific expertise required of laboratory animal veterinarians and training programs which allow attainment of this. 92 This, no doubt included, in recognition of the diverse range of species and husbandry practices encountered in laboratory animal practice, as distinct from routine veterinary general practice.

4.5 Enforcement

Effective enforcement requires mechanisms for detecting legislative breaches and a readiness to respond appropriately. This may be through administrative sanction (suspension or revocation of licenses) or criminal prosecution. 93 The Code sets out institutional requirements for dealing with complaints or non-compliance in its principles-based fashion. However, what remains largely uncertain is the process for detecting issues in the absence of whistle-blower reports. The majority of states, with NSW as the notable exception, employ little use of outside inspectors and rely on internal monitoring of compliance. 94 Institutions rarely report on the format used for their internal monitoring of compliance. The Code notes that compliance must be achieved through the AEC, 95 but as a committee composed of a range of internal and external members that may meet only several times a year, it is unlikely that they

93 Sharman, above n 55.
94 Animal Experimentation, above n 13, 34.
95 NHMRC Code, above n 14, s 2.1.5.
would have the day-to-day level of oversight required to ensure compliance. In most cases then, the role of detecting and investigating compliance or welfare issues falls to animal facility staff, and the facility veterinarian (often called the animal welfare officer). This latter individual occupies no statutory role, in contrast with the UK, 96 and is merely a suggested institutional appointment under the Code. 97 There also appears to be an inherent conflict of interest in using such internal compliance models. Firstly, these people work closely with the researchers and may lose their impartial decision-making ability. Additionally, in order to safeguard animal welfare and prevent animal suffering we need researchers to consult veterinarians for advice, and not fear punitive action should they do so. This has been resolved in some large US institutions by employing clinical veterinarians, in addition to compliance officers. 98

AECs are required to participate in facility inspections but this is at a frequency to be determined by themselves, 99 and in reality is unlikely to be greater than semi-annually. These visits are usually announced due to planning requirements. Visit outcomes may show inconsistency across time and across institutions. 100 Committee members are not trained auditors, and with no checklist of criteria, outcomes will largely be dependent on individuals’ knowledge and biases. This issue would be resolved if the legislation was more prescriptive in nature, or if institutions adopted established audit templates such as that provided by AAALAC. 101

96 Under the Animals (Scientific Procedures) Act 1986 (UK) the Named Veterinary Surgeon (NVS) and Named Animal Care and Welfare Officer (NACWO) are required roles under the Act.
97 NHMRC Code, above n 14, s 2.1.5 (vii).
98 See, eg, John Hopkins University, Animal Care and Use Committee <http://web.jhu.edu/animalcare/about.html>; University of Missouri, Care and Use of Vertebrate Animals as Subjects in Research and Teaching <http://www.umsystem.edu/ums/rules/collected_rules/research/ch400/400.020_care_and_use_of_vertebrate_animals_as_subjects_in_research>.
99 NHMRC Code, above n 14, s 2.3.21.
100 Animal Experimentation, above n 13, 37.
101 Association for Assessment and Accreditation of Laboratory Animal Care (AAALAC) International, Accreditation < http://aaalac.org/accreditation/resources.cfm>.
Whilst most state acts empower inspectors to perform both routine and unannounced inspections, it is not clear how often this occurs in respect to research establishments. Given that this role is delegated to the RSPCA and the resource constraints of this organisation it is unlikely to be a frequent occurrence. The Code puts in place a system of external review that must be conducted at least once every four years. Whilst this is a useful form of assessment for the institution and could improve practice, there is no requirement for recommendations to be implemented.

The greatest test of enforcement strength is perhaps seen in the number of prosecutions or legal proceedings commenced. Proceedings have been commenced in NSW in relation to animal supply for research, but on no other grounds. The previously mentioned Charles Darwin University case may have been prosecuted under the Northern Territory Act, but the time limit for mounting proceedings was missed. Aside from this no other case law in this area could be sourced. It has been suggested that if such low prosecutions levels were occurring in other areas of self-regulation, that serious concerns would be raised about the efficacy of monitoring and enforcement.

5 Areas for Reform

The critique above provides a number of areas for possible reform. These range between being evidently possible, to requiring some significant shift in political and legal thinking. A number are considered below.

If we are set on the use of a document such as the Code it should at least be given true legal effect in its entirety to allow national harmonisation of the system. States need to trust in the system of code writing and consultation,
and remove clauses in their primary acts which allow them to retain decision-making power relating to its implementation. Rendering compliance with the Codes mandatory through the use of administrative means such as licensing arrangements would achieve a similar goal. Although, this would not allow the range of enforcement mechanisms currently available under statute. A superior solution, although requiring considerable jurisprudential development, would be to bring the provisions of the Code out of the delegated legislation and place them in the state’s primary animal protection act.

Again, controversial, but it is asserted that the principles-based format of the Code is not effective at safeguarding welfare in the current research management climate within Australia. Consideration should be given to creating a more prescriptive-based document based on science-based recommendations used overseas. Indeed there is precedent for this, with such a document already existing in Victoria. 110 Provision of more rigid training guidelines within the Code should be a priority and consideration should turn to the administrative systems that would aid their implementation. Strengthening the role of the veterinarian would also further benefit animal welfare and scientific outcomes.

The cost-benefit analysis role of AECs would be made easier by the inclusion of a mandatory statistician and data-mining role on the committee. Mandating a pre-review of applications for scientific validity by a well-constituted committee of expert scientists would also be beneficial. The background of the AEC chair needs further consideration by institutions and committee-appointment personnel in government, to ensure that the individual can maintain institutional independence, yet is positioned well-enough to receive institutional support in their role.

110 Department of Environment and Primary Industries Victoria, *The Code of Practice for the Housing and Care of Laboratory Mice, Rats, Guinea Pigs and Rabbits* (Department of Primary Industries, 2004). This is a mandatory code under the *Prevention of Cruelty to Animals Act 1986* (Vic).
The Code should be more prescriptive about how compliance may best be monitored. Suggestions include independent compliance inspectors, increased frequency of AEC facility visitations, and the use of specific checklists when visiting facilities to ensure standards are in-keeping with international best practice. In terms of public accountability, government resourcing of more external inspections, (and the reporting of these) or encouraging organisations to join voluntary best-practice accreditation schemes would be welcomed. The latter may be achieved through some agreed-upon trade-off in terms of reduced governmental intervention. Greater use of the punitive criminal sanctions available in the framework for cases of clear animal cruelty, would help assure the public about the use of animals in research, and would reduce the risk of regulatory capture occurring. ¹¹¹

6 Conclusion

Whilst the sentiments expressed above appear pessimistic, it is not intended to suggest that the system is all bad, that issues are widespread or in fact that Australia is any worse than other jurisdictions. Many issues are experienced overseas, or are in fact problems in animal law in general. The very nature of self-regulation suggests that some institutions will have better standards than others due to a variety of factors. However, law should create an equal playing-field, even if that merely sets minimum standards, which are arguably preferential to no enforceable standards. It is concluded that there are inadequacies in the current system which have the potential to impact on animal welfare. Additionally, in many cases these issues could be easily rectified if the forces for change were present.

¹¹¹ Regulatory capture was described in George Stigler, ‘The Theory of Economic Regulation’ (1971) 2 Bell Journal of Economics 3. The concept describes the process by which regulatory agencies, formed in the public interest, eventually come to be dominated by the industries they were charged with regulating.
Bibliography

Articles/Books/Reports

Ayres, I and Braithwaite, J, Responsive regulation: Transcending the Deregulation Debate (Oxford University Press, 1992)

Bentham, Jeremy, A Fragment on Government; being an Examination of what is delivered on the Subject of Government in General, in the Introduction to William Blackstone’s Commentaries: with a Preface in which is Given a Critique of the Work at Large (London, 1 ed, 1776)


Department of Environment and Primary Industries Victoria, The Code of Practice for the Housing and Care of Laboratory Mice, Rats, Guinea Pigs and Rabbits (Department of Primary Industries, 2004)


Guillén, Javier (ed), Laboratory Animals-Regulations and Recommendations for Global Collaborative Research (Elsevier Academic Press, 2014)

Institute of Laboratory Animal Resources, Guide for the Care and Use of Laboratory Animals (National Academies Press, 2011)

Klein HJ, Bayne KA, ‘Establishing a culture of care, conscience, and responsibility: addressing the improvement of scientific discovery and animal welfare through science-based performance standards’ (2007) 48 ILAR Journal 3

National Health and Medical Research Council (NHMRC), Australian code for the care and use of animals for scientific purposes (Canberra, 8th ed, 2013)

Office of Laboratory Animal Welfare, Public Health Service Policy on Humane Care and Use of Laboratory Animals (US Department of Health and Human Services, Washington DC, 2002)


Sankoff, Peter, Steven White and C Black (eds), Animal Law in Australasia (Federation Press, 2nd ed, 2013)


Taylor K et al, ‘Estimates for worldwide laboratory animal use in 2005’ (2008) 36 Alternatives to Laboratory Animals 327


Woodruffe, C., ‘Competent by any other name’ (1991) 23 Personnel Management 30

Legislation

Animal Care and Protection Act 2001 (Qld)
Animal Care and Protection Regulation 2012 (Qld)
Animal Research Act 1985 (NSW)
Animal Research Regulation 2010 (NSW)
Animals (Scientific Procedures) Act 1986 (UK)
The Animals (Scientific Procedures) Act 1986 Amendment Regulations 2012 (UK)
Animal Welfare Act 1966 7 USC 2131-2157
Animal Welfare Act 1985 (SA)
Animal Welfare Act 1992 (ACT)
Animal Welfare Act 1993 (Tas)
Animal Welfare Act (NT)
Animal Welfare Act 2002 (WA)
Animal Welfare Regulations 7 U.S.C. 2131-2159
Animal Welfare Regulations 2012 (SA)
Australian Constitution

Health Research Extension Act 1985 42 USC 289d
Prevention of Cruelty to Animals Act 1979 (NSW)
Prevention of Cruelty to Animals Act 1986 (Vic)
Prevention of Cruelty to Animals Regulations 2008 (Vic)
Veterinary Surgeons Act 1936 (Qld)
Veterinary Practice Act 2003 (SA)

Other

Animal and Plant Health Inspection Service (APHIS)  
<http://www.aphis.usda.gov/>

Animal Research Review Panel  

Association for Assessment and Accreditation of Laboratory Animal Care (AAALAC) International, Accreditation <http://aaalac.org/accreditation/resources.cfm>

Australian Research Council (ARC), About ARC (18th September 2013) <http://www.arc.gov.au/>


John Hopkins University, Animal Care and Use Committee <http://web.jhu.edu/animalcare/about.html>

National Health and Medical Research Council (NHMRC), About (16th December 2013) <http://www.nhmrc.gov.au/>


Rose, Margaret and Elizabeth Grant, `Australia's ethical framework for animals used in research and teaching’ (Paper presented at AAWS International Animal Welfare Conference) < http://www.daff.gov.au/animal-plant-health/welfare/aaaws/aaaws_international_animal_welfare_conference/australiasethical_framework_for_animals_used_in_research_and_teaching>

University of Missouri, Care and Use of Vertebrate Animals as Subjects in Research and Teaching <http://www.umsystem.edu/ums/rules/collected_rules/research/ch400/400.020_care_and_use_of_vertebrate_animals_as_subjects_in_research>
Human Exceptionalism and the Use of Non-Human Animals in Scientific Research

Jessica Stanley

http://www.nature.com/news/best-way-to-kill-lab-animals-sought-1.13509

“Models”, “test systems”, “research tools”, “products”; euphemisms for animals. They are called anything but living, feeling, sentient creatures."¹

1 Introduction

The utilisation of non-human animals in scientific and medical research is controversial terrain; there are myriad differing, and opposing, viewpoints in terms of the justification

As such, the following discussion will consider the assumptions that inform the justification for the use of non-human animals in research with reference to the regulatory frameworks in place in New South Wales and the effectiveness of such regulation in protecting the interests of animals.

2 The Regulatory Framework

2.1 The Research Code

The central form of regulation of the use of non-human animals in research is that provided by the National Health and Medical Research Council (NHMRC) in the Australian Code of Practice for the Care and Use of Animals for Scientific Purposes (the Code). The Code ‘provides an ethical framework and governing principles to guide decisions and actions of all those involved in the care and use of animals for scientific purposes’ and details the responsibilities of all people involved in the care and use of animals including investigators, institutions, animal carers and animal ethics committees. Importantly, in the Introduction of same, the Code indicates that it is underpinned by an obligation to respect animals.

The Code has been incorporated into the Animal Research Act 1985 (NSW), thus ensuring that all animal use for scientific purposes is conducted in compliance with the Act and, therefore, the Code.

At first glance, the Code seems to be a comprehensive document dealing with all aspects relevant to the use of animals in research. It ‘appears to require a reasonable
ethical assessment of proposed research protocols, appears committed to the implementation of the 3Rs, and its scope appears broad.\(^9\) In addition, Section 3 of the Code is entitled ‘Animal Wellbeing’\(^{10}\) and thus appears to regulate issues affecting the wellbeing of animals in research.\(^{11}\)

‘This code of practice acts as a practical guide for institutional animal ethics committees (AECs)\(^{12}\) in approving, modifying or rejecting research proposals put to them.\(^{13}\)

Deeper analysis of the Code reveals, however, that the Code is unlikely to amount to adequate protection of the welfare and interests of non-human animals as there are several shortcomings within same. Firstly, the Code specifies at clause 1.5 that ‘evidence to support a case to use animals must demonstrate that… the project has scientific or educational merit, and has potential benefit for humans, animals or the environment’.\(^{14}\) It is not difficult to draw from this statement the conclusion that there would be few research projects determined to have not advanced scientific knowledge to some extent- except perhaps where, for example, results are not obtained from the experiment or the results are unreliable.\(^{15}\) Accordingly, it seems that this requirement falls short of demonstrating adequate protection for the interests of animals given little justification is truly necessary for research to meet this criterion.

Moreover, whilst clause 1.10 of the Code successfully confirms the necessity to recognise that non-human animals experience pain and suffering alike humans, and indicates that decisions relating to an animal’s wellbeing must consider the animal’s

\(^{9}\) Peter Sankoff, Steven White and Celeste Black, above n 7, 279.

\(^{10}\) National Health and Medical Research Council (2013) Australian Code of Practice for the Care and Use of Animals for Scientific Purposes, 8th ed, Section 3.


\(^{13}\) Ibid.

\(^{14}\) National Health and Medical Research Council (2013) Australian Code of Practice for the Care and Use of Animals for Scientific Purposes, 8th ed, 1.5.

\(^{15}\) Peter Sankoff, Steven White and Celeste Black, above n 7, 280.
capacity to experience pain and distress,\textsuperscript{16} it is important to also consider whether animals are relieved of pain and distress in accordance with clauses 1.11 to 1.14 and 3.3.8 to 3.3.15 of the Code.\textsuperscript{17}

Despite the guidelines of the Code providing for the alleviation of pain and suffering of animals, it has been reported that ‘analgesic and anaesthetic modalities remain under-utilised, partly due to concerns… that their use may alter experimental outcomes’;\textsuperscript{18} Literature has confirmed that whilst ‘post-operative pain can be controlled by pain relieving medicines… sometimes they may interfere with experiments on pain and may not be given’.\textsuperscript{19} This is not only problematic in terms of protecting the wellbeing of animals but, in addition, where the wellbeing of animals is compromised, a plethora of issues become prevalent in terms of the usefulness and reliability of the data sourced from such research;\textsuperscript{20} it has been reported that physiological and behavioural responses to distress or pain (which are not those responses being tested) can lead to greater variability in data sourced, the absence of data points, reduced credibility of information and can result in the data obtained being unpublishable.\textsuperscript{21} Thus, where this occurs, not only is the wellbeing of animals compromised but, additionally, there is little justification for the research given the possible effects on the data produced. Clearly this is a significant issue that needs to be rectified, and rectification will be addressed in a later part of this discussion.

In terms also of animal welfare, the Code lacks regulation relating to environmental enrichment which is vital to promoting the wellbeing of animals held for the purposes of research.\textsuperscript{22} Environmental enrichment is also central to the avoidance of

\begin{footnotesizes}
\begin{enumerate}
\item National Health and Medical Research Council (2013) \textit{Australian Code of Practice for the Care and Use of Animals for Scientific Purposes}, 8th ed, 1.10.
\item Ibid, 1.11 to 1.14, 3.3.8 to 3.3.15.
\item Peter Sankoff, Steven White and Celeste Black, above n 7, 284.
\item Nuffield Council on Bioethics, \textit{The ethics of research involving animals} (Nuffield Council on Bioethics, 2005), 137.
\item National Health and Medical Research Council, \textit{Guidelines to Promote the Wellbeing of Animals used for Scientific Purposes – The Assessment and Alleviation of Pain and Distress in Research Animals} (Australian Government, 2008).
\item Ibid.
\item Peter Sankoff, Steven White and Celeste Black, above n 7, 284.
\end{enumerate}
\end{footnotesizes}
physiological and behavioural responses of animals which, as has already been discussed, can result in issues with data obtained.  

2.2 Animal Ethics Committees

Furthermore, there are problems associated with the use of Animal Ethics Committees (AECs) which are provided for in the Code, which are to some extent explored by Andrew Knight. Knight states that the requirement by the Code for an AEC to comprise of Category A-D members ‘should lead to a reasonably balanced committee’ although, as Knight purports, there should still be measures in place to fix the proportion of members of each category in order to promote this balance. Other authors, however, have explored problems inherent in the idea of AECs, including the presence of confidentiality agreements put to members of AECs, which limits outsiders’ understanding of the deliberations involved, so ‘neither the institution nor the public can be sure that the committees really are working to approve only that research which is essential and justified’. Without much analysis here it is not difficult to determine that this causes there to be a limited ability to perform checks and balances on the operation of AECs.

Moreover, whilst the Code specifies that the Category D member/s must not be employed by or otherwise associated with the institution and who has never been involved in the use of animals in scientific or teaching activities it has been reported that it is common for the Category D members to come from the institution running the committee for reasons such that such members can be found within the institution with greater ease. The practice of appointing truly independent members is not widespread and accordingly, it can be considered that bias and reluctance to make

23 National Health and Medical Research Council, above n 20.
24 Peter Sankoff, Steven White and Celeste Black, above n 7, 281.
25 Ibid.
26 Ibid, 282.
28 National Health and Medical Research Council (2013) Australian Code of Practice for the Care and Use of Animals for Scientific Purposes, 8th ed., 2.2.4.
29 Denise Russell, above n 27,127-142.
judgement on issues is likely to be present in many AECs. Furthermore, the inclusion of *additional members* who are ‘responsible for the routine care of animals within the institution’\(^{31}\) as well as any other members the AEC sees fit\(^{32}\) further induces the aforementioned issues of a loss of partiality.\(^{33}\) Clearly this is detrimental to the interests and welfare of animals as issues prevalent within AECs discredit the justification process which is expected to be thoroughly conducted by such committees.

Additionally, even where Category D members are in fact independent of the AEC institution, there can be no guarantee that such members bring ‘a completely independent view to the AEC’\(^{34}\) given the presence of personal viewpoints based on experience and knowledge\(^{35}\) and, in fact, bias is indeed a founded issue within AECs internationally.\(^{36}\) Thus, the *independency* of the independent members of AECs is not a measure that can be assumed to offer adequate protection of the interests of animals.

Whilst the Code recognises the need to *replace* the use of animals with other means of gaining scientific knowledge\(^{37}\) the Code does not promote the replacement principle to a significant extent in that there is no provision in the Code for scientists who are not animal researchers to form part of the AECs; Category B members must be have ‘substantial and recent experience in the use of animals for scientific purposes’.\(^{38}\) Therefore, the Code through this part does not promote the replacement principle or an understanding among members of AECs as to the alternative methods of research and, hence, does not afford adequate protection to the interests of animals.

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31 National Health and Medical Research Council (2013) *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes*, 8th ed, 2.2.5.
32 Ibid, 2.2.6.
33 Peter Sankoff, Steven White and Celeste Black, above n 7, 282.
34 National Health and Medical Research Council (2013) *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes*, 8th ed, 2.2.4.
35 Denise Russell, above n 27, 133.
36 C Schuppli and D Fraser, ‘Factors influencing the effectiveness of research ethics committees’ (2007) 33(5) *Journal of Medical Ethics* 294-301.
37 National Health and Medical Research Council (2013) *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes*, 8th ed, 1.1.
38 Ibid, 2.2.4 (ii).
It must be recognised that, despite the above critique, the Code does go some way in protecting the interests of non-human animals in that it provides a framework which appears to have the interests of animals as one important factor. It is in practice, however, that the current regulatory framework fails to address the current issues facing animals in research, such as their wellbeing or the necessity for them to be involved in such research.

3 Assumptions informing the regulatory framework

The Australian Association for Humane Research Inc. (AAHR) considers that '[t]he major problem with legislation, codes of practice, ethics committees and the 3Rs principal is that they serve to endorse the belief that animal experiments are necessary, rather than challenge its validity.'39 The AAHR has suggested that the reason that animal research is viewed as a necessary evil is because of the superiority placed on humans by humans; ‘we are dismissed as caring more for animals than for people’.40

This viewpoint resonates within the approach of Tzachi Zamir,41 who contends that the regulatory framework in this area is be based on the overriding assumption ‘that humans are more valuable than non-human animals’.42 This assumption clearly informs the regulatory framework, being the Code, as well as many other frameworks where regulation of animal related activities occur.

Some have come to identify this theory as the human superiority complex43 but really; this notion parallels utilitarian philosophical theory. Whilst literature and society has shown some acceptance of this notion, in political and moral debate surrounding this issue there is some reluctance to declare human superiority ‘and thus that animal

40 Ibid, 3.
42 Ibid, 17.
experimentation to advance medical science is not a necessary evil, but a moral good.'\textsuperscript{44}

Whilst this assumption of human superiority is based on utilitarian theory, the balancing of human and non-human animal interests with respect to scientific experimentation on animals for human benefit clearly does not adhere strictly to the theory: it is 'only possible to conclude that such research is ethically justified if a profoundly unequal weighting is applied in which relatively minor or infrequent human benefits are considered more important than the significant adverse impacts commonly experienced by laboratory animals'.\textsuperscript{45} Consideration of this in light of Singer’s utilitarian theory which recognises that humans and non-human animals are sentient beings and are thus entitled to \emph{equal consideration},\textsuperscript{46} it becomes evident that the regulatory framework is plagued by the assumption of human superiority which has become embedded in a present day approach to utilitarianism.

This must be considered in light also of evidence which suggests the inapplicable nature of animal \emph{models} given the many intricate differences between human and non-human species.\textsuperscript{47} ‘Thus, it makes no logical sense to test a theory about humans using animals’\textsuperscript{48} and so the balancing of costs and benefits will rarely justify research in any event given the limitations of such benefits.

Given that utilitarian theory generally, along with the assumption of the greater value of humans, also informs societal norms and many other areas of regulation, it is difficult to see the subject regulatory framework shifting to a point where same is informed by alternative theories, such as a rights based approach, although this would be ideal.

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\begin{itemize}
    \item \textsuperscript{44} Helene Guldberg, \textit{Animals are less valuable than human beings} (2006) <http://www.spiked-online.com/newsite/article/355#-UsDq_pHw7GQ> (at 14 December 2013).
    \item \textsuperscript{45} Peter Sankoff, Steven White and Celeste Black, above n 7, 276.
    \item \textsuperscript{46} Ibid, 40.
    \item \textsuperscript{47} Choose Cruelty Free, above n 1.
\end{itemize}
4 A better way forward: Options for reform

The preceding discussion has revealed many problematic features of the current regulatory framework governing the use of non-human animals in research. It is evident, upon analysis of these problematic features, that reform is not only desirable, but is necessary if the framework is to protect the interests and wellbeing of animals to the extent that the Code proposes to.49 Accordingly, the issues currently evident within the framework have been considered in light of options for reform to change the face of the framework.

It has become evident that there are few circumstances where animal research could be said to have no scientific merit and accordingly, there is often little justification needed for such research.50 In order to address this problem and provide a more even basis on which scientific merit is determined, it is suggested that guidelines and/or factors to be considered when determining scientific merit should be inserted into the Code. In this way, scientific justification would no longer be evident merely where there may be some benefit which results from research, but where, for example, certain thresholds of potential benefit are met. Of course, there may be some issues in determining the factors which carry greater weight or the extent of a threshold of benefit, however same should be considered in light of the fact that the current regulation is far from sufficient in protecting the interests of non-human animals.

Also prominent is the under-utilisation of analgesic and anaesthetic medication for animals in research, which it is reported is due to the potential problems associated with the reliability of data obtained where such substances have been administered.51 In turn, it has been recognised that where animals suffer pain or distress, this too can result in issues with the usefulness of data obtained. Clearly, either way, there is the potential for both animal suffering and a resultant lack of credibility of information52 so there is much need for reform in this issue. Accordingly, it is suggested that the Code

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50 Peter Sankoff, Steven White and Celeste Black, above n 7, 280.
51 Nuffield Council on Bioethics, above n 19, 137.
52 National Health and Medical Research Council, above n 20.
should explicitly state that such substances should be administered wherever possible where pain and distress are likely to result from the subject experimentation.\footnote{Peter Sankoff, Steven White and Celeste Black, above n 7, 284.}

Moreover, the lack of regulation in the Code relating to environmental enrichment for animals in research leaves much room for improvement of same. ‘Environmental enrichment is an important component of the animal’s physical, nutritional and social environment and contributes to meeting their physiological and psychological needs\footnote{National Health and Medical Research Council, above n 20, Part 3 (E).} and is thus vital in promoting the wellbeing of animals used for research purposes. Accordingly, environmental enrichment should be more prominent in the Code and such provisions should also be more explicit in the standards required for housing and husbandry.\footnote{Peter Sankoff, Steven White and Celeste Black, above n 7, 285.} For example, the Guidelines to Promote the Wellbeing of Animals used for Scientific Purposes\footnote{National Health and Medical Research Council, above n 20, Part 3(E).} provides explicit guidelines for the environmental enrichment of various species of animals, and the components of the environment are divided into social, human-animal, food, physical environment, olfactory stimulation and provision for natural behaviours so that all aspects of environmental enrichment are addressed.\footnote{Ibid.} In this report, the National Health and Medical Research Council has recognised that different species have specific requirements that ensure the promotion of their wellbeing,\footnote{Ibid.} and a strategy to ensure these are implemented into the Code might exist by including such information as standards in a Schedule annexed to the Code. In this way, the Code would provide specific rather than general standards and thus non-compliance with such standards would be simple to identify.

As previously addressed, there exist various problems with the way that AECs are currently comprised and currently operate - and these issues need to be addressed given the centrality of AECs to the regulatory framework.

\footnotesize{\begin{itemize}
\item \footnote{Peter Sankoff, Steven White and Celeste Black, above n 7, 284.}
\item \footnote{National Health and Medical Research Council, above n 20, Part 3 (E).}
\item \footnote{Peter Sankoff, Steven White and Celeste Black, above n 7, 285.}
\item \footnote{National Health and Medical Research Council, above n 20, Part 3(E).}
\item \footnote{Ibid.}
\item \footnote{Ibid.}
\end{itemize}}
Firstly, as Knight has suggested\textsuperscript{59} ‘fixed and equal numbers in each membership category must be fundamental to AEC composition to eliminate obvious potential for bias’.\textsuperscript{60} Clearly, though, bias can never be \textit{eliminated} but this strategy should serve to minimise same. As such it is suggested that the Code contain provisions regulating the balance of the members within an AEC.

Despite the introduction of such measures, however, given there are issues with the independency of Category D members in that they often come from the AEC institution, it is suggested that this practice be explicitly prohibited by the Code. Also, the Code should not allow \textit{additional members} to be appointed as an AEC sees fit as this simply allows for greater bias and partiality. It is hoped that such changes would attempt to promote an independent viewpoint within AECs. There may be some difficulty associated with monitoring compliance, however, given the limited checks and balances available for AECs.

The limitations of checks and balances for AECs is also problematic; due to confidentiality agreements, and limitations in the Code in that all complaints are to be resolved within AECs with the exception of referring a complaint to an external person or agency,\textsuperscript{61} people outside of the AEC have no way of monitoring compliance with the Code to ensure that animals’ interests are being protected. Thus, the NHMRC should establish a body within the Council which has the role of providing this checking function of the practices of AECs. Providing this method of monitoring is the only way the framework can improve without abolishing AECs and establishing a new model, because improvements in the Code are to some extent useless whilst ever there is no monitoring of compliance.

Furthermore, reform is required in terms of promoting the 3Rs, particularly replacement as it has been reported that there are several replacement options often available for research, including ‘the use of less - (or non-) sentient organisms… the

\textsuperscript{59} Peter Sankoff, Steven White and Celeste Black, above n 7, 282.
\textsuperscript{60} Ibid.
\textsuperscript{61} National Health and Medical Research Council (2013) \textit{Australian Code of Practice for the Care and Use of Animals for Scientific Purposes}, 8th ed, 5.8.
use of in vitro techniques... the use of non-biological replacement alternatives... [and] human studies'. 62 It is considered that reform by way of solidly reinforcing consideration of the 3Rs within AECs given would be most successful, as it is within AECs that decision-making process comes to the ultimate decision. Additionally, it has been evidenced that there is currently little room within AECs for members who specialise in research not involving animals, but instead by other means.63

In response to this flaw in the current composition of AEC members, it is suggested that the Code be amended to provide for members of Category E, being members who specialise in the utilisation of alternative methods for research. It is expected that the inclusion of such members will allow these members to provide significant input into the decision making process of the approval of research in terms of replacement options, and in the long term it would be desirable for all committee members to come to a better understanding about replacement techniques and their usefulness in avoiding the use of animals in research.

Whilst the above suggestions for reform would likely improve the current regulatory framework with a view of promoting the interests and wellbeing of animals, the ultimate method of reform would be to adopt an equal consideration approach to the balancing of costs and benefits in justifying animal research. Such reform would truly change the face of this important issue, and would likely afford animals the greatest form of interest and wellbeing protection available to them. This option for reform, however, is unlikely to become a reality given the prevalence of the human superiority complex in modern society and in regulatory frameworks relating to animals.

5 Conclusion

Conclusively, the current framework regulating the utilisation of animals in research - despite its intentions to afford animals some protection - is somewhat problematic in several ways. The assumption of human superiority, however, is the most prominent issue with the framework, although rectification of this issue is unlikely to occur in

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62 Vaughn Monamy, above n 8, Chapter 6.
63 Denise Russell, above n 27, 133.
modern day society. Thus, reforming the other flaws of the framework is vital for the purpose of attempting to afford adequate protection to the interests and wellbeing of non-human animals.
Bibliography

Books/Articles/Journals


National Health and Medical Research Council, Guidelines to Promote the Wellbeing of Animals used for Scientific Purposes – The Assessment and Alleviation of Pain and Distress in Research Animals (Australian Government, 2008)


Rosser, Helen, Animal Experimentation – a “necessary evil”? (Australian Association for Humane Research Inc, 2007)

Russell, Denise, ‘Why animal ethics committees don’t work’ (2012) 15(1), Between the Species 131-132

Sankoff, Peter, White, Steven and Black, Celeste, Animal Law in Australasia (The Federation Press, 2nd ed, 2013)

Schuppli, C and Fraser, D, ‘Factors influencing the effectiveness of research ethics committees’ (2007) 33(5) Journal of Medical Ethics 294-301


Cases/Legislation

Animal Research Act 1985 (NSW)
National Health and Medical Research Council (2013) *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes, 8th ed*

**Other**


1 Introduction

The exploitation of animals by humans the world over takes many forms. Animals are used and abused on an international scale for food, clothing, sport and entertainment and in scientific research. The legislation claiming to protect these animals is often inadequate or non-existent. But for animals declared a ‘pest’ the future is even more dire as legislation not only condones but encourages the killing of these animals. This is the fate of the Australian Dingo. Throughout Australia the Dingo is listed as a pest requiring eradication.
Generally the exploitation of animals is justified in legislation as animals are the property of their owners. This however, is not true for wild animals. Under common law wild animals in their natural habitats are owned by no one.\(^1\) In NSW all native birds, reptiles, amphibians and mammals (except the dingo) are protected under the *National Parks and Wildlife Act 1974* (NSW).\(^2\) However, the dingo is given no protection as it is labelled a wild dog under the *Rural Lands Protection Act 1998* (NSW). Under this legislation wild dogs are declared ‘noxious animals’.\(^3\) Instead of being protected the dingo is ‘controlled’ by poisoning, trapping and shooting them.

People have been subjecting wildlife to lethal control for centuries. Where wildlife cause - or are perceived to cause - serious damage to human livelihoods, a common response has been to kill them.\(^4\)

Animals are sentient beings. ‘This means they are capable of being aware of sensations and emotions, of feeling pain and suffering, and of experiencing a state of well being’.\(^5\) Wild animals are no different from any other animals in this regard. However, in the case of wild animals that are labelled by society as being a ‘pest’ or ‘feral’ or ‘noxious’ or ‘invasive’, such as the Dingo, it is often forgotten that this group of animals has the same capacity to suffer as any other animal. Since colonisation the dingo has been subjected to large-scale extermination to protect agricultural animals. The methods used to eradicate the dingo population often inflict immense pain and suffering on the animals.

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Due to widespread farming and urban development wild animals are forced to compete with humans, domestic animals and each other for survival. The biggest threat to wildlife is from habitat loss and degradation. As the human population spreads the destruction of habitat is inevitable; urban development displaces wildlife and forces them to relocate or adapt. Wild animals are forced into smaller habitat areas and consequently come in closer and more frequent contact with humans and domestic animals.

As a result the phrases ‘animal damage control’, ‘problem wildlife management’, and ‘wildlife damage management’ have become commonplace in our society.\(^6\) Often action is taken to ‘manage’ wildlife to reduce economic losses. In order to ‘manage’ the dingo it has been labelled a wild dog and declared a noxious pest and now it is under threat of extinction.

**Background**

Australia is home to more than one million plant and animal species, many of which are found nowhere else on Earth.\(^7\) Since Australia was colonised in 1788, some 125 plant and animal species or subspecies are known to have become extinct.\(^8\) More mammals have died out in Australia in the last 200 years than in any other continent.\(^9\)

Prior to the arrival of Europeans, dingoes inhabited all of mainland Australia.\(^10\) Today however, the overall distribution of dingoes has been reduced by the long history of control and use of exclusion fencing.\(^11\)

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2 The Dingo

Canis lupus dingo, more commonly known as the Australian Dingo also labelled wild dog, feral, noxious and pest. The Dingo is a medium sized dog with a bushy tail and red to yellow coat. Dingoes do not bark, they howl.12 The dingo does not need to live in a pack and be taught to hunt to survive.13 Unlike the domestic dog, pure dingoes only breed once a year. Mostly they are a cautious and shy animal that try to avoid contact with humans.

The Dingo is distinctive from the domestic dog. 'There is a broad misinterpretation that the dingo was once a domestic dog before it went wild in Australia ... this is totally incorrect'.14 Extensive research and DNA testing has revealed that the pure Dingo has no domestic dog ancestry.15 To date there has been very little scientific research or biological studies undertaken to document the uniqueness of the dingo, other than to seek simpler means of exterminating them.16

2.1 Dingo Populations in Jeopardy

There are three main processes that threaten remnant dingo populations. These are:

- loss of habitat;
- genetic dilution with domestic dog genes through hybridisation; and
- wild dog control.17

13 Dingo Discovery & Research Centre, Dingoes are not dogs, http://www.dingodiscovery.net/notdogs viewed 23 December 2013.
14 Dingo Discovery & Research Centre, Dingoes are not dogs, http://www.dingodiscovery.net/notdogs viewed 23 December 2013.
16 Dingo Discovery & Research Centre, Dingoes are not dogs, http://www.dingodiscovery.net/notdogs viewed 23 December 2013.
For many Australians the Dingo is a cultural icon, but for sheep and cattle farmers, the wild dog is considered a pest because it is believed that they prey on livestock. However, research has shown that domestic stock are not an important source of food for dingoes; it is estimated that stock makes up between one and seven per cent of a dingo's diet.

Dingoes can have a positive impact on the environment. Predation by wild dogs can suppress the abundance of herbivores (both native and introduced) which may be important for reducing over-grazing. Dingoes eat a wide variety of animals, but their predominant food source are kangaroos and wallabies which make up 50 per cent of their diet. Dingoes also eat rabbits, possums, rats and marsupial mice. Furthermore ‘[w]ild dogs may also suppress smaller exotic predators (cats and foxes) with potential benefits for a broad suite of small to medium-sized ground-dwelling mammals and ground-nesting birds’.

Although domestic livestock do not usually play a major part in the diet of the dingo, they are often blamed for attacks on stock by feral dogs or dog/dingo hybrids. Due to cross-breeding with wild domestic dogs pure dingoes are now extremely rare and deserve our protection not persecution.

Nevertheless, due to the growth of the agricultural industry in Australia, together with habitat destruction, and the belief that dingoes prey heavily on domestic stock, the Australian Dingo is under threat of extinction and was

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18 McDonald, C., *Dingo Documentary aims to expose myths and truths*, ABC Rural, 6 December 2013.
listed as vulnerable on the International Union for Conservation of Nature (IUCN) Red List of Threatened Species in 2008.\textsuperscript{25}

2.2 The Legal Status of Dingoes

The status of dingoes in NSW is confusing to say the least. In NSW the dingo is considered to be both a pest and a pet. The dingo is the only native mammal that is not protected in NSW.\textsuperscript{26} It is also the only native mammal that can be kept as a pet without a licence.\textsuperscript{27}

The keeping of dingoes as pets further exacerbates the problem of conserving the dingo population in Australia. The National Parks and Wildlife Service NSW asserts that:

Domestication is unlikely to assist the conservation of wild dingo populations and it would almost certainly lead to a reduction in genetic variation in the captive population because there would be selective breeding to produce characteristics which make them attractive as pets.\textsuperscript{28}

3 Legislative Framework

The protection of wild animals in Australia is provided by both State and Commonwealth Legislation. All States and Territories have legislation which provides protection for animals. Commonwealth legislation provides for the protection of threatened species of animals.\textsuperscript{29}

However, currently there is no legislation in Australia that offers comprehensive protection to the Australian Dingo. Dingoes are declared

\textsuperscript{28} National Parks & Wildlife Services NSW, Wild Dog Policy, May 2005, Department of Environment & Climate Change NSW.
pests throughout Australia, but are given limited protection within some National Parks and on Fraser Island in Queensland where they are 'managed as protected wildlife under the Nature Conservation Act 1992'.30 All current legislation is ambiguous and/or has a dual competing purpose in relation to the dingo.

Although the Dingo is not technically a dog it has been labelled a wild dog under the law. In New South Wales the control of wild dogs, including dingoes, is legislated by the Rural Lands Protection Act 1998 (NSW).31

3.1 Commonwealth

The Environment Protection and Biodiversity Conservation (EPBC) Act 1999 (Cth) provides for the protection of species not individual animals. Under the EPBC Act, any action that is likely to have a significant impact on a threatened species needs to be referred to the Australian Government Environment Minister.32 Activities that are likely to require approval by the Minister include large-scale 1080 baiting. 1080 baiting is one method authorised for the control of wild dogs across NSW.

3.2 New South Wales

3.2.1 Prevention of Cruelty to Animals Act 1979 (NSW)
The Prevention of Cruelty to Animals Act 1979 (NSW) requires the humane treatment of animals by humans. However s 24 provides that a person is not guilty of an offence if the harm done to the animal was:

(b) in the course of, and for the purpose of:

31 Livestock Health and Pest Authority, Wild Dog Management in the Northern Rivers.
32 National Parks & Wildlife Service NSW, Wild Dog Policy, May 2005, Department of Environment & Climate Change NSW.
(i) hunting, shooting, snaring, trapping, catching or capturing the animal. ³³

Shooting and trapping are other measures authorised for the control of wild dogs in NSW.


### 3.2.2 National Parks and Wildlife Act 1974 (NSW)

The main objective of the National Parks and Wildlife (NPW) Act 1974 (NSW) is to conserve nature. ³⁴ However, s 171 of the NPW Act states that an authorised officer may issue a licence to harm protected fauna within a National Park. ³⁵ Furthermore, Clause 12 of the National Parks and Wildlife Regulation 2002 allows for a person to be authorised to trap, poison, bait, capture or destroy an animal on lands acquired or reserved under the NPW Act. ³⁶ Clause 19 of the Regulation allows for a person to be authorised to carry a firearm on lands acquired or reserved under the NPW Act. ³⁷

In accordance with the Rural Lands Protection Act 1998 (NSW) the National Parks & Wildlife Service has a statutory obligation to control wild dogs (including dingoes) on lands acquired or reserved under the National Parks and Wildlife Act 1974 (NSW). ³⁸

³⁴ Section 2A National Parks and Wildlife Act 1974 (NSW).
³⁵ Section 171 National Parks and Wildlife Act 1974 (NSW).
³⁶ National Parks & Wildlife Service NSW, Wild Dog Policy, May 2005, Department of Environment & Climate Change NSW.
³⁷ National Parks & Wildlife Service NSW, Wild Dog Policy, May 2005, Department of Environment & Climate Change NSW.
³⁸ National Parks & Wildlife Service NSW, Wild Dog Policy, May 2005, Department of Environment & Climate Change NSW.
3.2.3 Threatened Species Conservation Act 1995 (NSW)

The main objective of the Threatened Species Conservation (TSC) Act 1995 (NSW) is to conserve biological diversity. The TSC Act provides for the listing of threatened species, populations and ecological communities.

3.2.4 Game and Feral Animal Control Act 2002 (NSW)

The focus of the Game and Feral Animal Control Act 2002 (NSW) is the promotion of responsible and orderly hunting of game animals and pest animals.

Section 17 of the Act provides that:

(1) A game hunting licence is not required under this Division in respect of the following:

(d) a person who is hunting animals listed in Part 2 of Schedule 3 in accordance with a duty imposed on the person (or on any corporation of which the person is an office or employee) under the Rural Lands Protection Act 1998 or the Wild Dog Destruction Act 1921 to suppress and destroy the animals (other than a person assisting any such person in the performance of that duty), ...

The animals listed in Part 2 of Schedule 3 include Dog (other than dingo), however Pest Control Order Number 17 enacted under the Rural Lands Protection Act 1998 (NSW) states that ‘wild dog’ means any dog, including a dingo. Furthermore, the Wild Dog Destruction Act 1921 (NSW) defines ‘wild dog’ as follows:

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39 National Parks & Wildlife Service NSW, Wild Dog Policy, May 2005, Department of Environment & Climate Change NSW.
40 National Parks & Wildlife Service NSW, Wild Dog Policy, May 2005, Department of Environment & Climate Change NSW.
41 Section 17 Game and Feral Animal Control Act 2002 (NSW).
42 New South Wales Government Gazette No. 125, Pest Control Order Number 17, Official Notices, Department of Primary Industries, 11 September 2009.
‘Wild dog’ includes any dingo or native dog, or any dog which has become wild, or any dog which apparently has no owner and is not under control.43

The legislation is ambiguous as it appears to exclude the dingo from unlicensed hunting when actually it is condoning it.

3.2.5 Rural Lands Protection Act 1998 (NSW)44

Wild dogs have been declared pests by way of Pest Control Order Number 17. Pest Control Order Number 17 was made pursuant to Part 11 and clause 27(2) of Schedule 7 of the Rural Lands Protection Act 1998 (NSW). This Order was published in the NSW Government Gazette in September 2009 and declares that:

‘Wild dog’ means any dog, including a dingo, that is or has become wild but excludes any dog kept in accordance with the Companion Animals Act 1998, the Exhibited Animals Protection Act 1986 and the Animal Research Act 1985 or any other legislation made in replacement of any of those Acts.45

3.2.6 Companion Animals Act 1998 (NSW)

The principal object of the Companion Animals Act 1998 (NSW) is to 'provide for the effective and responsible care and management of companion animals'.46

Furthermore, ‘companion animal’ is defined as being:

43 Section 3 Wild Dog Destruction Act 1921 (NSW).
44 The Rural Lands Protection Act 1998 (NSW) was repealed in late 2013 and was replaced with the Local Land Services Act 2013 (NSW). However, Pest Control Order 17 which was made under the RLP Act remains in force until September 2014. Pest Control Orders are now managed under Part 10 Division 2 s 130 of the Local Land Services Act 2013 (NSW).
45 New South Wales Government Gazette No. 125, Pest Control Order Number 17, Official Notices, Department of Primary Industries, 11 September 2009.
46 Section 3A Companion Animals Act 1998 (NSW).
The Companion Animals Act 1998 (NSW) defines dog as:
‘dog’ means an animal (of either sex, or desexed, and whether or not domesticated) of a species with the scientific name *Canis familiaris*, *Canis lupus familiaris*, *Canis lupus dingo*, *Canis Familiaris dingo*, or *Canis dingo*, or a synonym of any of those names, and including a hybrid of any of those species.48

Consequently, it appears that a dingo kept as a pet is exempt from the Pest Control Order.

However the Act further states that:

The Wild Dog Destruction Act 1921 continues to apply to dingoes in the Western Division within the meaning of the Crown Lands Act 1989. Section 26 of the Wild Dog Destruction Act 1921 creates an offence if a person has in the person's possession any dingo or half-breed dingo without the written authority of the Wild Dog Destruction Board.49

Legislation regarding the dingo is both misleading and ambiguous. The extensive use of the term ‘wild dog’ is deliberately misleading. On the face of it the legislation appears to be for the control of domestic dogs that have gone wild, however on closer examination of the legislation it becomes clear that the term ‘wild dog’ not only includes but targets the dingo stating that it should be eradicated by any lawful method.50

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47 Section 5 Companion Animals Act 1998 (NSW).
48 Section 5 Companion Animals Act 1998 (NSW).
49 Section 5 Companion Animals Act 1998 (NSW).
4 Wild Dog Management Programs

The primary goal of wild dog management is to reduce livestock losses. Under this program wild dogs are divided into three groups:

- Dingoes;
- Feral Dogs: wild living domestic dogs; and
- Hybrids: Dogs resulting from cross-breeding of a dingo and a domestic or feral dog.

The Wild Dog Pest Control Order imposes a general destruction obligation requiring the occupier of controlled land to eradicate wild dogs by any lawful method. Under the Pest Control Order public land managers are required to prepare wild dog management plans with the purpose of conserving dingoes in National Parks and State Forests while destroying wild dogs to the extent necessary to minimise attacks on livestock. ‘The irony is that the Pest Control Order defines the dingo as a wild dog and so it also must be ‘fully and continuously suppressed and destroyed’ as well as conserved’.

4.1 Control Methods

A range of methods may be used for wild dog control including poisoning, trapping, shooting and exclusion fencing (dog proof and electric type fences).

4.1.1 Baiting

The most common technique used to destroy wild dogs is the toxin sodium monofluoroacetate (1080 baiting). Wild dog poisoning with 1080 in NSW is regulated by the Pesticide Act 1999 and can be carried out only under the

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55 National Parks & Wildlife Service NSW, Wild Dog Policy, May 2005, Department of Environment & Climate Change NSW.
conditions set down in the current 1080 Pesticide Control Orders. 1080 is the most common form of wild dog control as it is the most cost effective means of control.

Although the use of 1080 is banned in most countries, it is still used throughout Australia to control so-called pest species. 1080 baiting is a 'cruel and indiscriminate poison used to remove unwanted populations of animals'.

Symptoms observed in animals that have ingested 1080 poison include: restlessness; diarrhoea; excessive salivation; bouts of vocalisation; sudden bursts of violent activity; seizures; convulsions; vomiting; trembling and rapid but laboured breathing.

1080 poison inflicts great pain and suffering on affected animals. Aside from the physical pain endured over many hours before death, the terror, fear and anxiety felt by these animals is unimaginable.

Although the primary use of 1080 is the control of pest species it can be ingested by any animal occupying the area. 1080 bait not only has devastating consequences for the animals who directly consume it, but it can also affect the inhabitants of the surrounding environment as scavengers can be killed through secondary poisoning.

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Section 5(1) of the *Prevention of Cruelty to Animals Act 1979* (NSW) states that "[a] person shall not commit an act of cruelty upon an animal." Section 15 of the Act stipulates that poisons are not to be administered to animals. However, this only applies to domestic animals. Wild animals are not afforded any such protection.

### 4.1.2 Trapping

Trapping in NSW must be carried out in accordance with the Department of Primary Industries’ Vertebrate Pest Control Manual, or as specified in government approved standard operating procedures. Landholders are encouraged to use traps in conjunction with other control techniques. It is illegal to use steel-jaw traps in NSW. Instead soft-jaw traps and treadle snares are utilised. These types of traps are considered to be more humane than the traditional steel-jaw traps.

Trapped animals feel pain, fear and anxiety to the point where they will chew off their own appendages to escape the trap. Whilst traps are set mainly for dingoes/wild dogs and foxes they are also a hazard for non-target animals, such as kangaroos, wombats, possums, birds and lizards.

### 4.1.3 Shooting

Shooting needs to be carried out in accordance with the DEC Firearms Management Manual. Shooting of wild dogs can be undertaken by
government vertebrate pest control officers, landholders and professional or experienced amateur shooters.  

Whether or not shooting is a humane method of control is dependent upon the skill and judgement of the shooter. If properly carried out, it is considered to be one of the most humane methods of destroying wild dogs. However, if not properly carried out shooting can result in wounding which may cause considerable pain and suffering to the animal.

**4.1.4 Barrier Fencing**

Barrier fencing such as conventional or electric fencing is often used by landholders to keep wild dogs out of their property. Barrier fencing is only effective if it is properly maintained. Barrier fencing often has a negative effect on other wildlife as it is designed to restrict the movement of wildlife. The fences act as a barrier not only to wild dogs but also to other native animals. Wildlife can get entangled and caught in barrier fences when trying to get through. Trapped animals caught on the wire die a slow and painful death.

**5 The Need for Protection**

The oldest Dingo fossils are dated at about 4000 years. The Dingo is an indigenous animal under the *Threatened Species Conservation Act 1995* (NSW) because the Dingo was established in New South Wales before European Settlement. Until its repeal by the *Environment Protection and
**Biodiversity Conservation Act in 1999** the dingo was considered an Australian native species under s 4 of the *Endangered Species Protection Act 1992*. 76

Furthermore, the Dingo has been nominated for listing under the *Threatened Species Conservation Act 1995* (NSW) by the Colong Foundation for Wilderness.

The reason cited for nomination is:

*The remnant Dingo populations have been hybridised to such a critical level that these populations are in immediate danger of extinction.*77

Despite this, the dingo is still considered a pest and labelled as an ‘invasive’ species and is subjected to extensive eradication throughout Australia. Due to hybridisation and human control measures the pure Australian Dingo is under threat of extinction and it is imperative that it be listed as a threatened species and protected from further maltreatment.

Pure dingoes are not easily identifiable in the wild, and for that reason ‘wild dog management must be adjusted to preserve and maintain the genetic integrity of the remaining populations’.78

Once an animal is listed as a threatened species, their protection is governed by the *Threatened Species Act 1995* (NSW) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).79

76 Section 4 *Endangered Species Protection Act 1992* (Cth).
6 Proposed Reforms

6.1 Model Code of Practice for the Humane Control of Wild Dogs

A National Model Code of Practice for the Humane Control of Wild Dogs has been proposed and drafted. The aim of this code of practice is to provide information and recommendations to vertebrate pest managers responsible for the control of wild dogs. The code of practice endeavours to introduce an ethical approach to pest control and gives recognition and attention to the welfare of all animals affected directly or indirectly by control programs. Although the introduction of a National Code of Practice is a step in the right direction and is aimed at reducing the pain and suffering of target animals it does not address the issue of the continued extermination of one of Australia's most iconic wild animals, the Australian Dingo.

7 Conclusion

'For the last 200 years the dingo has been, and probably still is, the most persecuted animal in the history of Australia'. Current wild dog management programs aim to prevent stock losses, not protect the dingo populations. Continued baiting programs within core dingo habitat areas not only depletes the number of pure dingoes in Australia, but is also likely to increase hybridisation further threatening the existence of the pure Dingo.

Despite the fact that the Dingo was classified as vulnerable on the IUCN Red List of Threatened Species in 2008 it continues to be eradicated throughout

80 Sharp, T. and Saunders, G., Model code of practice for the humane control of wild dogs, DOGCOP revised 3 September 2012.
81 Sharp, T. and Saunders, G., Model code of practice for the humane control of wild dogs, DOGCOP revised 3 September 2012.
82 O'Neill, A., Living with the Dingo, Envirobook.
83 Muir, K., Nomination of Populations of Dingo (Canus lupus dingo) for Schedule 1 Part 2 of the Threatened Species Conservation Act 1995, Colong Foundation for Wilderness.
84 Muir, K., Nomination of Populations of Dingo (Canus lupus dingo) for Schedule 1 Part 2 of the Threatened Species Conservation Act 1995, Colong Foundation for Wilderness.
Australia. It is a travesty that the Dingo is targeted and considered a pest animal just because it is perceived to be a threat to agricultural livestock. If immediate action is not taken then the Dingo may be lost forever. Only when we put away the poison baits and concentrate on rehabilitating our environment as a whole, will our endangered species have any hope of survival.86

Bibliography

Articles/Books/Reports


Dingo Discovery & Research Centre, Dingoes are not dogs, http://www.dingodiscovery.net/notdogs viewed 23 December 2013.


Livestock Health and Pest Authority, Wild Dog Management in the Northern Rivers.
McDonald, C., *Dingo Documentary aims to expose myths and truths*, ABC Rural, 6 December 2013.


NSW Environment & Heritage, *Dingo*,

NSW Environment & Heritage, *Native Animals*,

NSW Environment & Heritage, *Protected Species*,


**Legislation**

*Companion Animals Act 1998 (NSW).*

*Endangered Species Protection Act 1992 (Cth).*

*Environment Protection and Biodiversity Conservation Act 1999 (Cth).*

*Game and Feral Animal Control Act 2002 (NSW).*

*National Parks and Wildlife Act 1974 (NSW).*

*Nature Conservation Act 1992 (Qld).*

*Pesticide Act 1999 (NSW).*

*Prevention of Cruelty to Animals Act 1979 (NSW).*

*Rural Lands Protection Act 1998 (NSW).*

*Threatened Species Conservation Act 1995 (NSW).*

*Wild Dog Destruction Act 1921 (NSW).*
Welfare or Conservation? Indigenous cultural practices relating to turtle and dugong hunting in Northern Australia

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http://cornucopiacorner.wordpress.com/tag/dugong/

1 Introduction

This essay investigates the tension between animal welfare and animal conservation with reference to the legislative and policy frameworks governing the hunting of turtle and dugong by indigenous people in Australia. Specifically, it explores the regulatory regimes relating to indigenous rights, traditional hunting, marine animal conservation and animal welfare in the context of dugong and turtle ‘harvesting’ in an area extending 24,000 km along the northern Australian coastline. Deficiencies in these regimes are examined, together with suggestions for legal reform.
2 The Context of Indigenous Hunting Rights

2.1 The International Context

Australia is signatory to the UN Declaration on the Rights of Indigenous Peoples which recognises that indigenous peoples have the right to traditional cultural expressions, and that States must afford legal recognition to such practices.¹ In addition, the Indigenous and Tribal Peoples Convention includes provisions relating to the protection of cultural traditions² and the 1992 Convention on Biological Diversity dictates that contracting parties shall ‘preserve and maintain…practices of indigenous communities embodying traditional lifestyles relevant to conservation and sustainable use of biological diversity’.³ These international commitments reinscribe a human rights paradigm in which animal welfare issues are largely absent.

2.2 The Australian Context

Australia ranks high amongst nations with recent extinctions and has a proportionately large number of endangered species. The Australian Bureau of Statistics reported that between 1995 and 2005 the number of terrestrial bird and mammal species listed as extinct, endangered or vulnerable rose by 41% from 120 to 169.⁴ Moreover, traditional hunting by indigenous people in Australia targets over 50 native wildlife species, including the dugong, the last of its kind

¹ UN Declaration on the Rights of Indigenous Peoples (2007). Articles 11, 26, 31

² ILO convention Indigenous and Tribal Peoples Convention No. 169 (1989) Articles, 5, 7, 8

³ Convention on Biological Diversity (1992) Article 8(j)
http://www.cbd.int/convention/text/

remaining in the family *Dugongidae*, and six species of marine turtles.⁵

As a consequence of the landmark *Mabo* decision, the High Court of Australia acknowledged the existence of native title rights including rights to hunting, at common law.⁶ While the *Native Title Act 1993* specifies that this right is limited to hunting for personal, domestic or non-commercial communal needs, it preserves traditional rights to hunt marine turtle and dugong in circumstances where such activities would otherwise be restricted by Commonwealth, State or Territory animal welfare and/or marine conservation legislation.⁷ Traditional fishing of dugong and turtle is also permitted under the *Torres Strait Treaty* between Australia and Papua New Guinea ⁸ and in Australia by the Commonwealth *Torres Strait Fisheries Act 1984*. ‘Traditional fishing’ is defined in both the Treaty and the Act as ‘the taking, by traditional inhabitants for their own or their dependents’ consumption or for use in the course of other traditional activities, of the living natural resources of the sea, seabed, estuaries and coastal tidal areas, including dugong and turtle.’ ⁹

3 The Legislative Framework

The relevant legislative and policy regimes of Indigenous management of traditionally hunted marine turtle and dugong encompass the areas of native title rights, cultural heritage protection, fisheries and biodiversity conservation. Indigenous cultural practices relating to the traditional harvest of marine animals

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6 *Mabo and Others v Queensland* (No. 2) [1992] HCA 23; (1992) 175 CLR 1

7 Section 211 *Native Title Act 1993* (Cth)


9 ss 3, 8(a) *Torres Strait Fisheries Act 1984* (C'th)
is enshrined in law via native title rights and international agreements and conservation legislation.

The current conservation status of the Dugong, *Dugong dugon*, under international, Australian and State/Territory Government legislation and conventions is as follows:

### 3.1 International
- The dugong is listed on Appendix I of the *Convention on International Trade in Endangered Species of Fauna and Flora*
- The dugong is listed as ‘vulnerable’ on the *International Union for Conservation of Nature and Natural Resources* Red List of Threatened Species
- The dugong is listed on Appendix II of the *Convention on the Conservation of Migratory Species of Wild Animals*

### 3.2 National

The current legal and policy framework for marine turtles and dugong in Australia incorporates several federal Acts including the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), *Antarctic Marine Living Resources Conservation Act 1981*, *Antarctic Treaty (Environment Protection) Act 1980*. The dugong is listed as a ‘marine and migratory species’ under the *Environment Protection and Biodiversity Conservation Act 1999*. Dugong, together with six species of turtles, are listed under the Act as protected migratory marine species and is an offence to kill such species without a permit. Despite this, traditional hunting is permitted under the Torres Strait Treaty, the Commonwealth *Torres Strait Fisheries Act* and the *Native Title Act* where the operation of s 211 recognises the role of indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity and exempts the traditional harvest of dugong and turtle.
In the Torres Strait, dugong and turtles are declared an Article 22 traditional fishery under the *Torres Strait Treaty 1985*, and traditional harvest is protected by the Treaty. However, the *Torres Strait Fisheries Act 1984* provides ‘Fishery Management Notices’ (FMN) which regulate the taking of turtles and dugong by traditional fishing. For example FMN 65 provides that ‘traditional fishing’ is allowed via use of a spear thrown by hand and FMN 66 restricts the carriage of turtles on vessels less than 6 metres.

3.3 State and Territory

In New South Wales, the dugong is listed as 'vulnerable' under the *Threatened Species Conservation Act 1995* (NSW).

In the Northern Territory, the dugong is listed as ‘protected wildlife’ under the *Territory Parks and Wildlife Conservation Act 2001*. However, s 122 of the Act recognises the rights of Aboriginal peoples to traditional hunting in accordance with Aboriginal tradition.

In Queensland the dugong is listed as ‘vulnerable’ under the *Nature Conservation Act 1992* (Qld). However the *Community Services (Aborigines) Act 1984* (Qld) and the *Community Services (Torres Strait) Act 1984* (Qld) authorise traditional residents to take marine products. Under these Acts, hunting is lawful under traditional right by a traditional owner or community member. Additionally, dugongs are protected species under the *Great Barrier Reef Marine Park Zoning Plan 2003*. The Plan, however, does not extinguish native title rights and does not affect the operation of section 211 of the *Native Title Act 1993*.

In Western Australia the Department of Conservation and Land Management has legislative responsibility to conserve wildlife under the *Conservation and Land Management Act 1984* and to protect fauna under the *Wildlife Conservation Act 1950*. The dugong is listed as ‘specially protected’ fauna and the six species of marine turtles as ‘rare or is likely to become extinct’ under the *Wildlife
Conservation Act 1950. However, s 23 of the Act allows indigenous harvest from Crown land for ‘customary purposes’. While regulation 63 of the Wildlife Conservation Regulations 1970 (WA) suspends section 23 in relation to ‘specially protected fauna’, the taking of dugong and turtles are exempt where an animal has been harvested for an Aboriginal customary purpose.

4 Conservation and Welfare Issues

While the issue of whether the traditional harvest of turtles and dugong is within sustainable levels has been a concern of Australian and international agencies, less attention has been paid to the issue of animal suffering caused by indigenous hunting practices. In addition, limited resources have been directed towards assisting Indigenous communities to protect turtles and dugongs – a fact recognised by the Indigenous Advisory Committee.10

Rather, the priority of Australian jurisdictions is to manage dugong and turtle ‘harvest’ by indigenous hunters, consistent with native title rights.11 As Dominique Thiriet observes however, native title legislation provides no direction regarding the issue of animal welfare and appears to enjoy tacit ‘approval’ by animal welfarists and conservationists alike.12 She acknowledges that while traditional hunting has


been considered thoroughly in the context of ecological sustainability and native title rights, the animal welfare dimension of traditional hunting practices has been largely ignored and that the welfare of native wild animals subject to traditional hunting is an issue that ‘has been left mostly untouched by the law and by public discourse.’ And a noted by Cameo Dalley, historical perspectives on traditional hunting demonstrate how it relates more to the ‘management of social relations guiding hunting’ rather than to species conservation.

This is a significant concern in light of evidence which suggests that that legal Indigenous hunting is now the greatest source of dugong mortality in northern Australia.

The treatment of animals targeted in traditional hunting highlights a tension between the rights of indigenous peoples to engage in traditional practices and contemporary standards of animal welfare. Thiriet notes that while some traditional hunting practices cause considerable suffering to marine animals such as dugong and turtles, there is no consistent regulation of these practices by animal protection legislation. This, she argues, can be attributed to the relativity of traditional hunting compared to animal cruelty in commercial contexts and to the politically sensitive issue of colonial guilt relating to the genocide of indigenous cultural practices. There is a concern, Thiriet suggests, that the promotion of animal welfare issues may deprive indigenous peoples of their traditions and violate legally enshrined


human rights principles. In the United States, for example, the Inuit people have described how their culture is being devastated by the 1972 *Marine Mammal Protection Act*, a U.S. law which bans seal products and curtails the capacity of the Inuit to use and trade local resources. They argue that the law disrupts the ‘sustainable ecological relationship’ that indigenous people have with the environment. 15

Jan Crase notes that Western law is shaped by cultural and societal expectations very different to those of Indigenous society. 16 Similarly, Julia Hartdaker notes that improving animal welfare in the Indigenous paradigm of remote communities differs vastly from approaches undertaken in the urban context, due to differing worldviews and a history of failed approaches. 17 For Indigenous Australians in remote areas of Northern Australia, traditional hunting of marine turtles and dugongs has an important cultural role, and is intricately entwined with a system for maintaining kinship obligations and social structures that dictate the management of commonly held food resources. 18

Crase observes that Western practice in dugong management in Australia has been based on the principle, supported by archaeological evidence of dugong


hunting in northern Australia for at least 4,000 years, that indigenous cultural practices involve stewardship responsibilities towards marine mammals and turtles that are sustainable in the long-run.\textsuperscript{19} However, as Anne Ross argues, the paradigm of traditional Aborigines as ‘archetypal conservationists’ belies evidence that traditional hunting contributed to the extinction of mega fauna on the Australian mainland.\textsuperscript{20}

The concerns expressed above suggest that while traditional hunting has been considered thoroughly in the context of ecological sustainability and native title rights, animal welfare concerns relating to traditional hunting practices have received less attention. Indeed, Thiriet and Smith argue argued that inconsistent legislation, inadequate enforcement and a lack of debate on the issue have contributed to the perpetuation of unnecessary cruelty towards hunted marine animals and that:

‘Much of the laissez-faire dugong management in Australia has been based on the deeply-rooted principle that Aboriginal and Torres Strait Islander peoples know best and that their practices are sustainable. It is time however to set aside romanticised beliefs of Indigenous people as good custodians of the land merely by virtue of their race or ancestry.’\textsuperscript{21}


\textsuperscript{21} Thiriet Dominique and Rebecca Smith, ‘In the name of culture: dugong hunting is simply cruel’, \textit{The Conversation}, 8 April 2013 \texttt{https://theconversation.com/in-the-name-of-culture-dugong-hunting-is-simply-cruel-12463}
While such sentiments may meet with an anthropocentric objection that the rights of indigenous peoples are of greater importance than the interests of animals, perhaps the central issue is whether dugong hunting can be justified on the basis that it is a cultural tradition. However traditional and contemporary Indigenous attitudes towards animals may vary greatly. Whilst some consider non-human animals as ‘intrinsically valuable’, others claim Aboriginal tradition neither prevents cruel treatment or is traditionally unconcerned with the welfare of individual animals. However, as Thiriet notes, the same can be said for non-Indigenous communities where recreational hunting activities often conflict with humane standards, endangered and native animals are provided more protection from cruelty than farmed animals, and care for native wildlife depends on the species and the value placed by people.

5 Traditional hunting in a contemporary context

As discussed above, the laws, policies and programs applicable to Indigenous rights impinge on the capacity of both animal welfare and conservation legislation. More specifically, issues relating to the protection of dugong and turtle in Australia have been informed by a policy of ensuring conservation and to enable sustainable Indigenous harvest rather than with animal welfare concerns.

In addition, judicial consideration of traditional hunting has been considered primarily in terms of the implications for native title rights, conservation or firearm use rather than as an animal welfare issue. Common law determinations relating


23 n 21

to native title over sea country have identified a non exclusive right by claimants to have free access for non-commercial ('customary') hunting and established Aboriginal marine tenure has been recognised in the same way as land tenure.25

In *Yanner v Eaton* the High Court considered the application of s 211 of the Native Title Act and the taking of species protected under the *Fauna Conservation Act 1974* (Qld). 26 It found that the operation of s 211(2) and s 109 of the Australian Constitution did not prohibit or restrict a native title holder from hunting crocodile for non-commercial purposes, and clarified that hunting as a practice remained consistent with Aboriginal tradition. The Court commented upon what constitutes 'traditional' hunting in response to concerns that the use of modern technology facilitates killing at a larger scale. It accepted that an activity is still 'traditional' as long as the purpose has not changed, regardless of the method used.

In addition, the cases of *R v Sparrow*, *Simon v The Queen*, and *Campbell v Arnold*, make it clear that in the absence of statutory provisions, indigenous people may use modern implements to carry out their traditional practices. 27 However, as Lauren Magnotti notes, the concern of the Courts in such cases was with harm to overall species of animals, rather than that caused to individual animals. 28

Suggestions that Indigenous people who rely on traditional rights should only use traditional weapons, as per regulations under the *Torres Strait Fisheries Act* that prohibits the taking of dugongs by any method other than with the use of a 'wap', a spear thrown by hand, may indeed be a direct assault on animal welfare. While traditional hunting may have had minimal impact on marine populations as a

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28 Lauren Magnotti, 'Pawing Open the Courthouse Door: Why Animals' Interests Should Matter ' (2006) 80 St. John's L. Rev. 455
whole, due to the ‘arduous’ nature of the use of dugout canoes and the wap, the suffering caused to individual animals such as dugong were often extreme and prolonged as they were harpooned, dragged until exhausted and drowned. Turtles, once caught, were frequently turned on their backs in the hot sun or have their flippers amputated to prevent escape.

Contemporary technology, such as vessels equipped with outboard motors, provide a more efficient means of harvest. While such technology may result in marine animals being killed in larger numbers, it arguably also provides more humane ways of hunting and slaughter. Humane killing occurs when an animal is either killed instantly or rendered insensible to pain until death supervenes. Where traditional methods such as spearing and drowning are employed to kill dugongs, humane killing is less likely to occur and animal suffering prolonged. As Thiriet argues, traditional hunting practices raise legitimate animal welfare concerns which are not adequately addressed by existing policy and legislation. 29

The fact sheet for the Queensland Department of Agriculture, Fisheries and Forestry recommends that marine animals receive a severe blow to the head using a heavy blunt object and while unconscious and less able to feel pain, bled out by cutting the animal’s neck to achieve a quick death. However, the fact sheet acknowledges that:

‘Large animals, such as dugongs, are difficult to make unconscious before they are killed. Most traditional and customary hunters kill dugongs by drowning. This may be the only method reasonably available to a hunter. Where use of a firearm is permitted, shooting dugongs through the brain is the preferred method and will cause less pain.

Animals, such as turtles, do not die quickly when bled out. A turtle can still be responsive and feel pain for a long time after being bled out or having its head cut from its body. For a turtle to die quickly, a hunter needs to know the part of the brain that is most important to destroy is below the eye.’ 30

29 Dominique Thiriet* Indigenous use of wildlife Out of the ‘too hard basket’- traditional hunting and animal welfare p75
30 Queensland Department of Agriculture, Fisheries and Forestry,
6 Animal Welfare Initiatives

The federal parliament does not have specific power to enact laws concerning animal welfare, the primary legislative responsibility for animal welfare resting with states and territories. Whilst there are variations between jurisdictions, animal welfare legislation does not exempt acts or omissions done in accordance with Aboriginal tradition or Islander custom from their operation. Under these laws, cruel treatment, including inflicting unnecessary pain or suffering on an animal, may constitute an offence. But because the Acts do not provide an exclusive definition of ‘cruel’ treatment or guidance on what constitutes ‘unjustifiable, unnecessary or unreasonable’ suffering, traditional hunting practices for dugongs and turtles such as drowning, may be justified as the only method reasonably available. While traditional killing should be carried out in a way that ‘causes as little pain as is reasonable’, the harpooning and drowning of dugongs may continue to be considered ‘reasonable’ under existing law.

In September 2012, in response to legitimate animal welfare concerns, the Queensland government introduced amendments to the Animal Care and Protection Act 2001 to protect dugong and turtles from unreasonable pain and suffering when hunted and killed in the course of indigenous customary harvesting. The changes removed the previous exemption from animal welfare obligations for Aboriginal people and Torres Strait Islander people, bringing Queensland’s animal welfare legislation in line with other states. Section 8 of the Act now provides that ‘a person does not avoid liability to be prosecuted for an offence under this Act only because the act or omission that constitutes the offence happens in the exercise or enjoyment of native title rights and interests.’

Section 41 A of the amended Act: ‘killing an animal under Aboriginal tradition, Island custom or native title’ sets out prohibited acts or omissions which are prohibited under the Act, including:

- injuring the animal to stop it escaping after it has been caught;

‘Animal Care and Protection During Traditional Hunting’ (2012)
• injuring the animal or prolonging its life to attract another animal;
• taking flesh from the animal for human consumption before the animal is dead
• doing a thing or omitting to do a thing that causes the animal to die from dehydration or starvation.

Changes were also made to the Nature Conservation Act 1992 (Qld), Aboriginal and Torres Strait Islander Communities (Justice Land and Other Matters) Act 1984 (Qld) and the Aurukun and Mornington Shire Leases Act 1978 to ensure Aboriginal people and Torres Strait Islander people authorised to hunt under these Acts are subject to animal welfare obligations.  

The Queensland Department of Agriculture, Fisheries and Forestry states that ‘the amendments only mean a change for the small number of Aboriginal people and Torres Strait Islander people who have been using unreasonable hunting practices' and recognises ‘the positive work’ already being done by many Aboriginal groups and Torres Strait Islander groups to protect dugong and turtle populations. It acknowledges that the implementation of changes to hunting methods should be community-driven and that indigenous communities ‘are encouraged to work with scientists, animal welfare interest groups and other stakeholders to agree on acceptable hunting practices based on science and practicality, while recognising tradition and custom.’

7 Conclusion: Indigenous Rights and Animal Welfare
The treatment of animals in the course of indigenous traditional hunting practices involves a conflict between enshrined rights to maintain traditional practices and

31 Once the amendment was introduced, there was a 12 month grace period for enforcement of the changes, during which time anyone found using cruel hunting methods, except for significant animal welfare breaches, was given a warning rather than face prosecution.

32 Queensland Department of Agriculture, Fisheries and Forestry, ‘New Laws to Protect Turtle and Dugongs’

contemporary standards of animal welfare. While dugongs and turtles are afforded some protection in terms of their conservation sustainability status, less legislative concern has been directed towards their intrinsic worth or individual welfare. The current legal and policy frameworks for marine turtles and dugong incorporate a myriad of competing interests that are in tension with international, national, state and territory objectives.

As Thiriet and Smith point out, where illegal harvest or cruel practices occur, enforcement and compliance challenges include the dispersed and remote nature of many Indigenous communities of northern Australia, where law enforcement is difficult to maintain at sea, and identification of an individual’s legal right to hunt may be difficult to determine.33 And as the federal government noted in 2013, dugongs are susceptible to a range of threatening processes and the relative ‘importance of the various causes cannot be quantified’.34 Whilst native title rights should be appropriately recognised, the contexts of indigenous practices are not static and indigenous hunting practices should be in conformity with contemporary standards of animal welfare. Traditional indigenous hunting practices, regardless of their legal status, may be in tension with animal welfare legislation and contemporary social standards of humane animal treatment. It has been argued in this paper that when a cultural practice is inconsistent with such standards indigenous rights may require reassessment to ensure that animal welfare is incorporated as a legitimate and necessary element of traditional hunting practices and that comprehensive definitions of ‘cruelty’ and ‘unjustifiable, unnecessary or unreasonable’ treatment, needs to be unambiguously articulated and enforced to give substance to existing animal welfare legislation.

33 Sustainable Harvest of Marine Turtles and Dugongs in Australia – A National Partnership Approach 2005 p 6. Thiriet Dominique and Rebecca Smith, ‘In the name of culture: dugong hunting is simply cruel’, The Conversation, 8 April 2013  
https://theconversation.com/in-the-name-of-culture-dugong-hunting-is-simply-cruel-12463

Bibliography

Journals, Articles, Books


Australian Human Rights Commission. UN Declaration on the Rights of Indigenous Peoples, 2007


Department of the Environment, ‘Dugong dugon, Species Profile and Threats’
Accessed Sat, 14 Dec 2013


Kipuri Naomi, State of the World’s Indigenous Peoples, Chapter 2: ‘Culture’
UNICEF, 2007


Thiriet Dominique and Rebecca Smith, ‘In the name of culture: dugong hunting is simply cruel’, The Conversation, 8 April 2013
https://theconversation.com/in-the-name-of-culture-dugong-hunting-is-simply-cruel-12463


Wildlife Preservation Society of Australia, ‘Proposed changes to the existing legislation to better protect native wildlife from cruel and inhumane practices’

Cases

Commonwealth v Yamirr (2001-2002) 208 CLR 1
Dillon v Davies (1998) 101 ACrimR533;
Lardil Peoples v State of Queensland [2004] FCA 298
Mabo and Others v Queensland (No. 2) [1992] HCA 23; (1992) 175 CLR 1
Mason v Tritton (1993) 70 ACrimR 28
R v Sparrow [1990] 1 S.C.R. 1075
Simon v The Queen (1958), 43 M.P.R. 101; 124 C.C.C. 110
Stevenson v Yasso ([2006] QCA 40
Walden v Hensler (1987) 163 CLR 561
Yanner v Eaton (1999) 73 ALJR 1518; 166 ALR 258; 201 CLR 351
Yarmirr v Northern Territory [2001] HCA 56

Legislation

Animal Care and Protection Act 2001 (Qld)
Animal Care and Protection and Other Legislation Amendment Bill 2012 (Qld)
Animal Welfare Act 1985 (SA)
Animal Welfare Act 1992 (ACT)
Animal Welfare Act 1993 (Tas)
Animal Welfare Act 2002 (WA)
Animal Welfare Act 2007 (NT)
Antarctic Marine Living Resources Conservation Act 1981
Conservation and Land Management Act 1984 (WA)
Environment Protection and Biodiversity Conservation Act 1999 (C'th)
Fauna Conservation Act 1974 (Qld)
Great Barrier Reef Marine Park Zoning Plan 2003
Native Title Act 1993 (C'th)
Prevention of Cruelty to Animals Act 1979 (NSW)
Prevention of Cruelty to Animals Act 1986 (Vic)
Nature Conservation Act 1992 (Qld)
Territory Parks and Wildlife Conservation Act 2001
Torres Strait Treaty 1985
Wildlife Conservation Act 1950 ??

International Treaties and Conventions

http://www.cbd.int/convention/text/

UN Declaration on the Rights of Indigenous Peoples 2007

ILO Convention No. 169, Indigenous and Tribal Peoples Convention, 1989
The Promise and Pitfalls of Legal Standing for Animals

John Cronin

‘…do thyself no harm ….for we are all here together…’

John Denver

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 realise animals have a better

37 Note: name added as the real the name or sex of the detainee was not provided in the article.
life than we do in this place.’ 38 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.39 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 that 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 unsuccessf ully 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.40 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.’41 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

38 Hanson-Young above n2.
41 Ibid.
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 the gaining freedom for some illegally detained nonhuman animals.42 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,43 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.44

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43 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.
44 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)
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 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

51 Sankoff, above n14.
52 Ibid, 28
another person that may breach *Competition and Consumer Act* \(^{54}\), 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 law requirement, statutes in general require a plaintiff to be a “person aggrieved” or a “person affected” by the relevant decision or action.\(^{55}\)

3 The Human Plaintiff in Animal Law

‘All animals are equal, but some animals are more equal than others.’\(^{56}\)

Outside of the realm of private rights, questions of standing are most relevant in matters of ‘public law’ or ‘public interest’,\(^{57}\) 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.\(^{58}\) 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

\(^{54}\) *Competition and Consumer Act* (Cth) 2010


\(^{56}\) George Orwell, *Animal Farm*, 1945

\(^{57}\) See eg Preston, above n11.

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.\(^{59}\) 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 \textit{ACF v Commonwealth},\(^{60}\) 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 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.\(^{61}\) In \textit{North Coast Environment Council Inc. v Minister for Resources}\(^{62}\) 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\(^{63}\) 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 \textit{ACF}, and further clarified in \textit{Onus v Alcoa of Australia Ltd}\(^{64}\), 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 \textit{Lujan v Defenders of Wildlife}\(^{65}\) and \textit{Animal Lovers Volunteer Association v Weinberger}\(^{66}\) in US courts reinforce that Australian position that the human interest must be more than a notional one. In contrast in \textit{Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)}\(^{67}\) a union was held to have standing because of the special interest held by its individual members and in \textit{Executive Council of Australian Jewry v

\(^{59}\) Peter Bardon ‘What if trees could sue?’ ABC Environment 17 May 2011, accessed at \textless www.abc.net.au/environment/articles/2011/05/17/3216161.htm\textgreater

\(^{60}\) (1980) 146 CLR 493 (ACF).

\(^{61}\) Ibid.

\(^{62}\) (1994) 55 FCR 492.

\(^{63}\) Animal Liberation Ltd v Director-General, Department of Environment & Conservation [2007] NSWSC 221.

\(^{64}\) (1981) 149 CLR 27.

\(^{65}\) 504 US 555 (1992) 199.

\(^{66}\) 765 F.2d 937 (9th Cir. 1985).

\(^{67}\) (1995) 183 CLR 552.
Scully\textsuperscript{68} 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 \textit{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.\textsuperscript{69} Rhianne Grieve argues that the result in \textit{Glickman} provides opportunity to extend the range of human detriment that might be used to gain standing in cases geared towards the protection of animal rights.\textsuperscript{70} 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.’\textsuperscript{71}

\textsuperscript{68} (1998) 51 ALD 108.
\textsuperscript{69} 154 F.3d 426 (1998) (Glickman).
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.\(^\text{72}\) 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\(^\text{73}\) and Justice William O. Douglas\(^\text{74}\) 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*,\(^\text{75}\) the uncontested plaintiff status of the 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.\(^\text{76}\) While in a number of subsequent cases nonhuman animals have gained uncontested standing,\(^\text{77}\) once standing was contested in *Hawaiian Crow (‘Alala) v Lujan*\(^\text{78}\) and again in *Kama’s case*\(^\text{79}\) it was refused on the basis that the act in question conferred standing to ‘persons’ not ‘animals’.

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\(^{75}\) 649 F (Palila).


More recently *Cetacean Community v Bush* 80 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.81 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.82

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’.83 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 ‘person’ as ‘…an entity on which [the] legal system confers rights and imposes duties’84 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.85 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

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80 386 F.3d 1169 (9th Cir. 2004) (*Cetaceans*).
81 Ibid.
82 Ibid.
83 Ibid.
85 Wise above, n8, 2-3.
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 been accepted and are not considered to be ill-treatment…’ 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.’ Wise suggests that the thought of opening ‘…legal personhood to billions of nonhuman animals we eat…’ would be too much of a leap for any judge to legitimise. Furthermore the

86 Wise, above n6, 1281.
89 Ibid, 28: although in a specific reference to farm animals but perhaps I would argue with more general applicability.
91 Wise, above n6, 1286.
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.92 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’.93

92 See eg Sankoff, above n14, 5.
93 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, Nonhuman Rights to Personhood’ (2013) 30(3) Pace Environmental Law Review 1278

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 Legal Defence Fund Inc. v Glickman 154 F.3d 426 (1998)

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
A new movement is emerging. With an increasing number of animals being raised for international markets, and with a growing ability for people to watch previously unseen footage of animal handling, policymakers, businesspeople, nongovernmental organizations (sic), and ordinary citizens are showing greater interest in how animals are treated, wherever they may be. It is no longer sufficient for governments to be concerned for the welfare of animals within their own borders; animal welfare is quickly becoming an issue of international concern.¹

1 Introduction

The concentration of this essay is on the failure of humans to protect wild animals from harm through commercial exploitation, particularly in respect to international trade, by focusing on the controversial seal hunting debate and the potential new arena for promoting animal protection/welfare globally: the World Trade Organization (WTO).

By reviewing the current legislative and regulatory frameworks (nationally and internationally) and discussing the recent Seal Products case², it is argued that despite the inadequacy of these existing legislative and regulatory frameworks, the WTO is taking a leadership role in addressing public moral concerns and developing systematic change in animal welfare standards, globally.

2 Seal Hunting

Seal hunting in Australia occurred through 1798 to 1923, originating in the Bass Strait and spreading to a major operation in Macquarie Island. The demands of the industrial revolution increased the international market for both seal and whale products, particularly exporting oil and pelts to China and Europe.

As seals tend to congregate in large numbers during their breeding seasons, hunters took advantage of this behavioural pattern, herding seals together, preventing them from escaping to sea, while they were clubbed to death.³ ‘In the first 18 months of operations around 120,000 fur seals were killed. By 1815, the population of an estimated 250,000 animals had dramatically declined, with only 5,000 skins being taken during the entire season.’⁴

Australia’s commercial sealing industry ceased operations in 1920 when Douglas Mawson’s Australasian Antarctic Expedition successfully campaigned to declare

⁴ Ibid.
Macquarie Island a nature reserve.\textsuperscript{5} But the damage had already been done. Seal populations suffered a severe decline due to the indiscriminate harvesting.\textsuperscript{6} ‘Some breeding colonies, such as the Australian sea lion colonies in Bass Strait, were completely destroyed.’\textsuperscript{7}

Having appreciated the harm of over-exploitation, though not the harm caused through cruel methods of killing, the Commonwealth and State governments implemented legislative mechanisms to protect the 10 species of seals and sea lions found in southern Australian waters and Australia’s Antarctic Territory.\textsuperscript{8}

Under section 248 of the \textit{Environment Protection and Biodiversity Conservation Act 1999 (Cth)} (EPBC Act), it is an offence to kill, injure, take, trade, keep, or move all seals found in Australian Government land or in Commonwealth waters without a permit.\textsuperscript{9} The EPBC Act also lists three seal species\textsuperscript{10} as vulnerable,\textsuperscript{11} which provides additional protection.\textsuperscript{12} In addition, despite Australian fur seals not having bred in New South Wales for some time, the State\textsuperscript{13} has listed the Australian fur seal as a vulnerable species, particularly due to the threats of ‘commercial recreational fishing operations through by-catch mortality around Montague Island,’\textsuperscript{14} and the limited availability of prey items for seals visiting from their native breeding locations in Bass Strait.

\begin{itemize}
\item \textsuperscript{5} Ibid.
\item \textsuperscript{7} Ibid.
\item \textsuperscript{9} Seals are found in state jurisdictions are subject to the relevant state legislation.
\item \textsuperscript{10} Including the sub-Antarctic fur seal (\textit{Arctocephalus tropicalis}), the southern elephant seal (\textit{Mirounga leonina}) and the Australian sea lion (\textit{Neophoca cinerea}).
\item \textsuperscript{11} Section 178 of the EPBC Act.
\item \textsuperscript{12} For example, the sub-Antarctic fur seal and southern elephant seal have recovery plans in order to guide actions to help the species recover: see Sub-Antarctic fur seal and southern elephant seal recovery plan – 2004 and Biology, threats and conservation status of the sub-Antarctic fur seal and Southern elephant seal in Australian waters – 2004. In addition to the protective measures specifically afforded to seals, the EPBC Act requires that any action ‘that has, will have or is likely to have a significant impact on a threatened species must be referred to the Department of the Environment for assessment before the action goes ahead.’
\item \textsuperscript{13} Through the New South Wales Scientific Committee, established by the \textit{Threatened Species Conservation Act 1995 (NSW)}.
\item \textsuperscript{14} Above n 6.
\end{itemize}
Further, seals located 60° south of Australian waters are also protected under the *Antarctic Treaty (Environment Protection) Act 1980* and associated conventions including the Convention for the Conservation of Antarctic Seals.

Internationally, Australia is a signatory to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which aims to limit trade in endangered species between contracting parties. Although several Australian seal species are listed on Appendix II of CITES, their listing is of no direct consequence to their management as all species are protected by Commonwealth and State legislation, which prohibits seal trade in any event.

Notwithstanding the existence of domestic protective measures, seals occur naturally, internationally, in the wild.

Seal clubbing also occurs internationally, with Canada and Norway remaining the two largest commercial and customary sealing industries worldwide.

Canada and Norway’s commercial seal hunt has been the controversial subject of long-standing international political debate with the European Union (EU) citing conflicting values and ethics, competing claims of cultural rights and arguments of sustainable use and animal welfare.

Economics plays a dominant role in resisting change to Canada’s hunt. Commercial

15 Ibid.
16 Adopted on 1 June 1972 in London and entered into force on 11 March 1978.
17 A listing in CITES enables regulation of international trade through permit systems to ensure exports are sustainable and legal. For example, on 11 March 2013, five shark species were listed in CITES Appendix II due to the concerning decline in sharks killed/horribly mutilated through commercial fin exploitation, which fins can sell for as much as US$700 a pound: Environment News Service, *Sharks Win Protection at International Trade Conference*, (11 March 2013) International Daily Newswire <http://ens-newswire.com/2013/03/11/sharks-win-protection-at-international-trade-conference/>.
19 The methods of killing vary by country and hunter. The traditional method is by club or Norwegian ‘hakapik’ (a club with a metal spike) which is used to stun or crush the seal’s skull prior to ‘bleeding out’ and skinning. Firearms and underwater netting are also used.
20 Canadian media reports that 844 sealers participated in the 2013 commercial seal hunt with a landed value of approximately $2.9 million. ‘Most commercial sealers in Canada are fisherman for whom the seal hunt supplements their income.’ On these
profit is generated through the sale of seal products\(^{21}\) for the benefit of the Canadian businesses and government with reports of exports exceeding US $70 million.\(^{22}\)

Additionally, because seals consume fish,\(^{23}\) another economic interest, the desire to afford protection to a species which potentially affects a source of income, is low. Many commercial fishermen still believe that the seal is responsible for the collapse of the northern cod population. This is despite Canada’s Department of Fisheries and Oceans concluding in 1993 that ‘the collapse of northern cod can be attributed solely to overexploitation.’\(^{24}\) Clearly, seals are not the only ‘pillager’ of fish, with other predators including sharks, whales and other fish, together with badly managed fishing industries, impacting on the ecology.

By ‘granting commercial interests pre-eminence over animal welfare’\(^{25}\) animal protection laws for wild animals (if they exists for certain species at all) provides freedom to continue economic, political and cultural agendas whilst facilitating exploitation, suffering and slaughter.\(^{26}\) For example, the EU asserts that despite the existence of regulations aimed at promoting humane methods of killing seals,\(^{27}\) the figures, it would appear fishermen participate in the hunt out of love, rather than money: see Benjamin Fox, ‘WTO backs EU seal fur ban over ‘moral concerns’’, \textit{EU} Observer (online), 26 November 2013 <http://euobserver.com/economic/122237>.

21 Including skins, meat and traditional Chinese medicines (there are reports that the seal penis bone was more valuable than the price of a first grade seal pelt due to the Asian business market seeking out the bone for use as aphrodisiacs: \textit{An Introduction to the Canadian Seal Hunt}, Harpseals.Org \(<http://www.harpseals.org/about_the_hunt/index.php>\).

22 The DFO claims that despite the Regulation, between 2005 and 2011, Canada exported over US $70 million worth of seal products to more than 35 countries: Department of Fisheries and Oceans Canada, Government of Canada, \textit{Frequently Asked Questions} (21 March 2013) \(<http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/faq-eng.htm>\). These countries were not named.

23 The DFO claims that an individual harp seal can consume up to one tonne of food each year (mostly fish and invertebrates).


25 Peter Sankoff, Steven White and Celeste Black, \textit{Animal Law in Australasia} (The Federation Press, 2nd ed, 2013) 244.

26 For example, following recent human deaths in 2013, the Western Australian government has put out tenders to professional fisherman to kill sharks, including protected species, over three metres long and which venture near drum lines placed one kilometre offshore of the State’s most popular beaches. The controversial ‘shark mitigation’ program is a knee-jerk reaction and fear-based response aimed at immediately protecting tourism in the area, rather than investing time and funds into scientific research and education as to why more human deaths are occurring. Australia too contributes to this ‘convenient’ labelling system, facilitating the slaughter of kangaroos through their portrayal as ‘pest species’ (due to their abundance and damage caused to agriculture) in need of control or as a natural resource available for sustainable use: above n 26, 228.

27 \textit{Marine Mammal Regulations}. SOR/93-56 states that ‘every person who strikes a seal with a club or hakapik shall strike the seal on the forehead until its skull has been crushed, no person shall commence to skin or bleed a seal until the seal is dead, and a seal is dead when it has a glassy-eyed, staring appearance and exhibits no blinking reflex when its eye is touched while it is in a relaxed condition.’
effectiveness of the method used to kill seals is at least partially dependent on the abilities and competence of sealers and ‘...the profit-oriented nature of the hunt increases the risk that seals may be killed inhumanely.’ Although science can indicate a sense of suffering that will result from a particular killing method, it is ultimately the predominant moral beliefs of a particular society that will determine how much and what kinds of suffering are acceptable or unacceptable to that society, and therefore the level of protection it demands against animal suffering.

It is this moral/ethical concern of the EU public for the treatment of seals in hunting, rather than a concern for their vulnerability through commercial exploitation, which is the centre of the controversy.

The EU recognised its public’s concern toward seal clubbing and introduced Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (the Regulation), which prohibits the importation and marketing of all seal products obtained through commercial hunts, excluding seal products derived from hunts conducted by Inuit or indigenous communities and hunts conducted for marine resource management purposes (e.g. seal culls conducted to protect fish stocks), in the customs territory of the European Communities.
The preamble to the Regulation states that ‘seals are ‘sentient beings that can experience pain, distress, fear and other forms of suffering’ and that hunting seals ‘has led to expressions of serious concerns’ by members of the public and government sensitive to animal welfare considerations’. It is clear that the ultimate policy objective behind the Regulation is animal welfare.

Not surprisingly, Canada and Norway disputed the EU’s Regulation arguing the EU was basing the ban on animal welfare concerns (an illegitimate barrier to trade), and requested consultations with the EU through the WTO dispute settlement process (the Seal Products case).

3 The Seal Products Case

The WTO is the only international organisation which administers the global rules of international trade between its 150 member nations. The ‘rules’ are derived from the various agreements negotiated between members and ratified by their respective parliaments, covering several subjects, including (but not limited to) agriculture, textiles and clothing, industrial standards and product safety, food sanitation regulations and intellectual property.

The most notable WTO agreement is the GATT which underpins key principles to

seals, including meat, oil, blubber, organs, raw fur skins and fur skins, tanned or dressed, including fur skins assembled in plates, crosses and similar forms, and articles made from fur skins.’

33 Specifically, the EU public moral concerns as described are two-fold. ‘They include… the incidence of inhumane killing of seals and … EU citizens' individual and collective participation as consumers in, and their exposure to, the economic activity which sustains the market for seal products derived from inhumane hunts: see above n 2, [89].

34 European Communities (2009) – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/1, (4 November 2009) (Request for Consultations by Canada) and WT/DS401/1, (10 November 2009) (Request for Consultations by Norway).

35 A request for consultations formally initiates a dispute in the WTO and triggers the establishment of a panel by the WTO’s Dispute Settlement Body.


37 Ibid.

38 Ibid.

the WTO trading system, being doctrines of non-discrimination among trading WTO members, \(^{40}\) equal treatment between imported and locally-produced goods, \(^{41}\) liberalised trade through negotiations, \(^{42}\) promoting fair competition \(^{43}\) and encouraging development and economic reform.\(^{44}\)

Despite animals being a large feature of international trade, animal welfare issues are not specifically mentioned in WTO agreements but for the limited exceptions to the GATT, which provide for the protection of public morals, human and animal life and health, and the conservation of natural resources.\(^{45}\)

Animal welfare is a notable omission to the WTO agreements and GATT exceptions. Possible reasons for its absence may include the differing cultural, economic, and ethical views among WTO members as regards animal welfare/related issues or, more likely, animal welfare standards generally act as barriers to trade as the general sentiment is that only wealthy countries can afford to implement humane treatment standards, ‘leaving developing nations with restricted access to export markets and, consequently, negative impacts on their economic development’.\(^{46}\)

Disputes brought to the WTO typically concern commercial considerations. Historically, when member countries introduce bans on imports citing production methods/quality or require imports to meet certain standards, WTO dispute implications result as these measures are generally treated by the WTO as measures which restrict international trade.\(^{47}\)

\(^{40}\) The principle of ‘most-favoured-nation’.
\(^{41}\) The principle of ‘national treatment’.
\(^{42}\) The principle of ‘progressive liberalisation’.
\(^{43}\) The principle of the ‘free trade’ institution.
\(^{44}\) Above n 36.
\(^{47}\) Ibid.
The clear purpose of the EU’s Regulation was to impact on Canada and Norway’s inhumane seal clubbing practices by adopting a trade-restrictive measure that would ultimately reduce demand for seal products among consumers and consequently the need for seal hunting, thereby controlling a non-trade-related practice outside their borders and control.48

Such method has recently, and successfully, been used against Australia through Russia’s introduction of a trade ban in kangaroo products.49

According to the Australian Bureau of Agricultural and Resource Economics, in 2010, kangaroo meat (for human consumption) was worth approximately $11.7 million in exports, down from $29 million in the period 2008/09 and $36 million in the period 2007/09. Russia’s trade ban ‘was estimated to have cost the Australian industry $2 million a week’ and a loss of up to 2,000 jobs.50 This ban was permitted as it was based primarily on concerns relating to hygiene, a legitimate trade restriction under WTO rules and GATT exception – protection to human and animal life and health.

Historically, countries attempting to reach outside their borders by imposing their own ethical or moral standards for animal welfare on other countries through trade restrictions have been unsuccessful.51 The Canada/Norway WTO dispute with the EU is the first ‘test case’ for trade restrictions based on public moral concerns for animal welfare.


51 See, for example, United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products WT/DS381/AB/R (16 May 2012) and United States - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (12 October 1998), both cases concerning the protection of animal health and conservation, the WTO found that the limitations imposed by the United States were intended to prevent harm to animals by applying its own production standards to imports.
On 25 November 2013 the WTO released its panel report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (the report), finding that ‘the public concerns about seal welfare constitute a moral issue for EU citizens’ and resolved that the EU was justified in placing trade restriction measures on the importation and marketing of seal products … as the Regulation is ‘necessary’ to fulfil the objective of addressing the EU public moral concerns on seal welfare … and no alternative measure has been demonstrated to make an equivalent or greater contribution to the fulfilment of the objective as the [Regulation].

This finding is significant as this is the first time the WTO has supported a trade restriction based on concerns for animal welfare. The report is also promising as it appears the WTO is taking a leadership role in supporting animal welfare standards within the international trading system, a system whose ideology is grounded in unrestricted trade.

On 24 January 2014, both Canada and Norway filed notices of appeal against the WTO decision on points of law and legal interpretations developed by the panel. The Appellate Body has up to three months to conclude its report.

52 Members of the panel included Ms Mary Elizabeth Chelliah (Singapore) and Ms Patricia Holmes (Australia), chaired by Mr Luzius Wasescha (Switzerland). Argentina, Canada, China, Colombia, Ecuador, Iceland, Japan, Mexico, Namibia, Norway, the Russian Federation, and the United States notified their interest in participating in the panel proceedings as third parties.

53 Above n 2.

54 Above n 2, [118], citing historical legislative reforms toward animal protection and welfare based on public morals considerations etc. For example, the United States has long banned seal hunting and/or trade in seal products through the Fur Seal Act of 1966 (16 USC 1151-1187).


56 Canada and Norway argued that less restrictive measures such as labelling products or issuing certifications to confirm that the products had been produced in a humane manner were available however the EU responded that such measures were logistically difficult to implement and verify and would therefore not achieve the policy objective: Above n 2, [135].

57 Above n 2, [183].
For now, the *Seal Products* case should serve as a warning to other countries who continue to condone or turn a blind eye to animal cruelty within their borders that it can no longer be safely assumed that animal welfare measures are precluded by international trade law requirements and it is possible for countries to impose similar trade restrictions based on public moral concerns for animal welfare, a stance which may create a flow on effect to other industries, such as the poultry, pork and beef industries.

Because [wild] animal welfare issues are not exclusive to any one country, change needs to occur globally. It is encouraging to think that potentially, change and the promotion of animal welfare/protection can be orchestrated through the most instrumental global tool: the WTO.

4 The Inadequacy of the Law

The unique migratory patterns of seals and other wildlife mean their protection/welfare is an issue of international concern, an issue which is unfortunately vulnerable to human exploitation.

The legal status of seals (and other animals) as ‘wildlife’ differs from that of other animals in that the Australian common law recognises no absolute property in live wild animals. This legal status means that ‘their freedoms are subject to a regulatory scheme which enables them to be lawfully captured or killed.’ Internationally, wild

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58 Above n 26, 329.

59 Terry Audla, president of the Inuit Tapiriit Kanatami, criticised the WTO report stating ‘[the WTO are] basing [their decision] on public morals and, when you do that, you’re in danger of all the other industries being banned in the same way. I mean, who’s to say what’s more cruel? Industrialised agriculture? The poultry, pork and beef industry? Who draws the line?’: Suzanne Goldenberg, ‘World Trade Organisation upholds EU ban on imported seal products’, *The Guardian* UK (online), 26 November 2013 <http://www.theguardian.com/environment/2013/nov/25/world-trade-organisation-eu-ban-seal>.

60 For example, companion animals. Anne Schillmoller and Amber Hall, *LAW10487 Animal Law Study Guide* (Southern Cross University, 2nd ed, 2013) 208-209.


62 Above n 61, 208.
animals are also not the property of any one country. 63 Although technically ‘free’, Thiriet argues it is for this reason that the welfare of wild animals is compromised, sometimes severely, by intentional as well as incidental harm caused by a variety of human practices. 64 It is their unfortunate status as a ‘resource’ which renders them objects for human exploitation 65 globally. For example, whereas wild animals were historically a critical resource human survival by providing food, fur, and leather, more recently, wild animals have assumed high economic and cultural significance by providing entertainment in circuses, zoos and wildlife parks, international tourism attractions. Equally, wild animals can be seen as threatening to humans by, for example, damaging or consuming crops/commodities.

Compounded by this resource label is that countries wishing to effect systemic change/improvement to animal welfare/protection in international trade are consistently obstructed, largely for economic reasons and particularly for partisan governments resenting having their policy choices reviewed internationally. 66

Additionally, perceptions pose an added issue. For example, in respect to marine animals, it is arguable that many people would assume that so long as the ocean is blue and pretty then everything underneath must be fine and there is no urgency/desire to act when the reality is that action/management is critical. There is also a perceived preference for protecting and affording attention to animals which are considered ‘cute’ or attractive 67 and attention deferring through international hypocritical mud-slinging. For example, there are calls for Canada to retaliate against the EU’s Regulation by enacting a ban on French import of fois gras on the basis it is produced in an inhumane manner. 68

63 Andrew Linzey, ‘An Ethical Critique of the Canadian Seal Hunt and an Examination of the Case for Import Controls on Seal Products’ [2006] 87 Michigan State University College of Law Journal of Animal Law, 7.5 <http://www.animallaw.info/articles/arus2journalanimallaw87.html#_ftn71>

64 Above n 26, 226.

65 Above n 61, 208.

66 Above n 61, 329.

67 See Annexure 1 which is the face of the Seal Products case.

68 “We’re pleased to hear that the WTO will not endorse this slaughter” said European Trade Commissioner Karel De Gucht while scarfing down the organs of a goose who spent most of its existence inside a cage being force-fed. “Europe will continue to be the moral beacon for animals rights everywhere. I’m surprised that Canada would continue such backwards, inhumane practices.” See Alexander Huntley, EU officials celebrate upholding Canadian seal product ban with foie gras meal (25 November 2013) The
5 International Law Reform

The Seal Products case emphasises that countries facing scrutiny on animal welfare concerns must reform or cease the offending practices or risk international coercion. For example, rather than regulate trade outside its borders, New Zealand banned live export of animals for slaughter in 2007\textsuperscript{69} following ‘a combination of concern for animal welfare…and…the economic backlash from a reputational point of view…’\textsuperscript{70}

The WTO can also continue with its leadership role in supporting higher animal welfare standards within the international trading system by including animal welfare as a legitimate exception to international restrictions. Notwithstanding the ultimate decision in the Seal Products case, the push to include ‘animal welfare’ in WTO agreements is in its early (slow) stages of development. At the WTO Committee on Agriculture in June 2000, the EU submitted a proposal on animal welfare and trade in agriculture, arguing that the WTO should directly address animal welfare standards.\textsuperscript{71}

Finally, consumers are increasingly linking animal welfare indicators with food safety and quality, in addition to ethical or socially responsible preferences.\textsuperscript{72} The WTO Seal Products case demonstrates that there is increased community awareness and greater interest in how animals are treated. The case also proves that domestic community pressure directed toward systemic change will ultimately result in changes

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\textsuperscript{69} Customs Export Prohibition (Livestock for Slaughter) Order 2007 (NZ), superseded by the Customs Export Prohibition (Livestock for Slaughter) Order 2010 (NZ).


to domestic laws and international strongarming and trade embargoes can and should be applied to encourage animal law reform and welfare/protection globally.

6 Conclusion

Because [wild] animal welfare issues are not exclusive to any one country, their protection/welfare is an issue of international concern.

Wildlife’s envelopment in international trade means that an opportunity exists at this level to promote systemic change. The Seal Products case is pioneering a new avenue toward achieving future animal welfare (and other public policy) objectives on an international scale. The potential is available to also develop animal welfare/protection in other animal industries, particularly the livestock industry, if sufficient public policy concerns exist in these areas.

The Seal Products case is also inspiring in its recognition of the need to accommodate legitimate public policy concerns other than trade liberalisation and potentially, the promotion and development of systematic change in animal protection/welfare standards can be orchestrated through the most instrumental global tool: the WTO.
Bibliography

Articles/Books/Reports


Parks & Wildlife Service Tasmania, History of sealing at Macquarie Island (22 July 2008) Department of Primary Industries, Parks, Water and Environment


Department of the Environment, Seals and sea lions, Australian Government


John Livernois, ‘The economics of ending Canada's commercial harp seal hunt’ (2010) 1 Marine Policy, Marine Policy, Volume 34, Issue 1

Benjamin Fox, ‘WTO backs EU seal fur ban over 'moral concerns'', EU Observer (online), 26 November 2013

Jeffrey Hutchings and Ransom Myers ‘What Can Be Learned from the Collapse of a Renewable Resource? Atlantic Cod, Gadus morhua, of Newfoundland and Labrador’ (1994) 51 Canadian Journal of Fisheries and Aquatic Sciences

Peter Sankoff, Steven White and Celeste Black, Animal Law in Australasia (The Federation Press, 2nd ed, 2013)

Robert Howse and Joanna Langille, ‘Permitting Pluralism: The Seal Products Dispute And Why The WTO Should Accept Trade Restrictions Justified By Noninstruments moral Values’ (2012) 37 Yale Journal of International Law


Federal Service for Veterinary and Phytosanitary Surveillance, The Rosselkhознадзор detailed a kangaroo meat consignment of questionable quality (25 July 2013) Rosselkhознадзор
Michael Owen, *Kangaroo meat issue not about contamination or quality* (31 July 2013) The Australian


Anne Schillmoller and Amber Hall, *LAW10487 Animal Law Study Guide* (Southern Cross University, 2nd ed, 2013)

Andrew Linzey, ‘An Ethical Critique of the Canadian Seal Hunt and an Examination of the Case for Import Controls on Seal Products’ [2006] 87 *Michigan State University College of Law Journal of Animal Law*


**Cases**

*Yanner v Eato* [1999] HCA 53; (1999) 201 CLR 351

**Legislation**

*Environment Protection and Biodiversity Conservation Act 1999* (Cth)

*Threatened Species Conservation Act 1995* (NSW)

*Marine Mammal Regulations*. SOR/93-56 (Canada)

**Treaties/International Reports**


*Customs Export Prohibition (Livestock for Slaughter) Order 2007* (NZ), superseded by the *Customs Export Prohibition (Livestock for Slaughter) Order 2010* (NZ)

*Antarctic Treaty (Environment Protection) Act 1980*

Convention for the Conservation of Antarctic Seals

Convention on International Trade in Endangered Species of Wild Fauna and Flora

*European Communities* (2009) – *Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/1, (4 November 2009) (Request for Consultations by Canada) and WT/DS401/1, (10 November 2009) (Request for Consultations by Norway)

*United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* WT/DS381/AB/R (16 May 2012)


