



The Animal Law Toolkit

SECOND EDITION

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About Voiceless

Voiceless is an independent non-profit think tank dedicated to raising awareness and alleviating the suffering of Australian animals in factory farming and the commercial kangaroo industry.

Voiceless:

- Creates and fosters networks of leading lawyers, politicians, business people, professionals and academics to influence law, policy, business and public opinion;
- Conducts quality research on animal industries, exposing legalised cruelty and informing debate;
- Creates a groundswell for social change by fortifying the Australian animal protection movement with select Grants and Prizes;
- Grows animal law as a mainstream practice area to advocate for change in courts and legislation; and
- Informs consumers and empowers them to make animal-friendly choices.



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“Eventually the wave of individuals passing through law schools will have their full effect on legal institutions. As they become legislators, judges and community leaders, the issues of animal welfare will rise on the national agenda.”

David S Favre, 'The Gathering Momentum' (2005) 1 *Journal Animal of Law* 6.

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Introduction

In 2009, Voiceless prepared the first edition of *The Animal Law Toolkit* to introduce students, academics, practitioners, law firms and animal advocates to key issues in animal law. As its name suggests, that Toolkit was intended to provide the tools needed to better protect the billions of animals left with inadequate protections under our current legal framework.



Since its release, that Toolkit has been commended for its contribution to building the knowledge base of the Australian legal community and the broader public on animal law issues. It was a beginners' guide to a complex field of law, which has since expanded and evolved significantly. Hence, we welcome you to this updated edition of *The Animal Law Toolkit*.

As canvassed in the pages that follow, animals continue to suffer immensely at the hands of humans. This suffering occurs in the course of providing our food, clothes, cosmetics or entertainment; furthering our scientific knowledge or curiosity; conserving native fauna and flora, or preserving our religious or cultural norms.

Societies justify animal exploitation on the bases of economics, culture, politics or human dominion over all other living species. This justification is facilitated – if not perpetuated – by existing legal paradigms. In Voiceless's view, as it is the law that permits animals to suffer, law reform is essential to bring this suffering to an end.

It is for this reason that Voiceless has worked tirelessly to build animal law in Australia over the years. When Voiceless was founded in 2004, animal law was a novel field in Australia, with only one university teaching the subject. There were no dedicated Australian textbooks or academic journals, and only a handful of lawyers practising animal law.



Over the last decade, Voiceless has:

- Lobbied for universities to teach animal law, as well as funded workshops and conferences for both aspiring and practising animal law lecturers and academics;
- Funded Australia's first animal law textbook, *Animal Law in Australasia*, and helped develop Australia's first animal law academic journal, the *Australian Animal Protection Law Journal*;
- Assisted community legal centres specialising in animal law; and
- Provided over \$380,000 in grants and prizes for a number of other animal law related initiatives.

Our work, and the work of the animal protection movement, has been successful in creating an army of intelligent, passionate and compassionate animal advocates.

At the time of writing, there were 14 Australian universities either teaching or planning to teach animal law, with class sizes growing each year. There has been a proliferation of scholarly writing on the subject, the publishing of multiple Australian textbooks, an increased number of academic conferences, and an ever-expanding list of individuals and organisations dedicated to animal law. The

respective law societies of New South Wales and South Australia have also established dedicated animal law committees, reflecting the relevance of animal law in the legal profession.

Animal protection is now in the mainstream, and so too is animal law.

This second edition of *The Animal Law Toolkit* provides an overview of the evolving animal law landscape over the last six years, including a snapshot of emerging animal law issues, summaries of new animal law cases (both in Australia and abroad), as well as new resources and materials for students, teachers and practitioners.

We hope that as debate and discussion about the institutionalised suffering of animals continues to grow, this Toolkit will serve as a helpful starting point for those seeking to provide animals with the justice they deserve.

Ondine Sherman and Brian Sherman AM Hon Litt D (UTS)

Voiceless Managing Directors and Co-founders

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Jurisdictional Abbreviations

ACT	Australian Capital Territory	QLD	Queensland	VIC	Victoria
NSW	New South Wales	SA	South Australia	WA	Western Australia
NT	Northern Territory	TAS	Tasmania	Cth	Commonwealth



1. Animal Law

1.1 What is Animal Law?

'Animal law' is the field of law that seeks to govern the interactions between human and nonhuman animals. It covers a diverse array of domestic and international legal issues, arising in statutory, judicial, executive, regulatory and theoretical contexts.

As our understanding of animal behaviour and intelligence has increased, so too has the acceptance in the scientific community that animals are sentient creatures who should be able to live free from suffering and abuse.¹ Unfortunately, we live in an era where more animals are suffering than ever before. The law has an important role to play in protecting animals from exploitation and cruelty. The current legal regime, however, is proving grossly inadequate.

Both Australian statutory and common law classify animals as 'things'.² This is the same classification given to objects or personal property. Humans, on the other hand, are classified as 'legal persons'. This distinction is crucial as legal personhood determines who 'counts' for legal purposes.³ Only legal persons are given a voice in our legal system and afforded protection through the possession of legal rights. Things, being unable to possess rights, are the property of legal persons and are vulnerable to human exploitation.

In recognition of this problem, two main streams of animal law theory have developed that aim to provide animals with greater protection:

Animal welfare law

Animal welfare is a philosophy concerned with regulating the use of animals to reduce unnecessary or unreasonable pain and suffering. Most animal welfarists do not seek to question the status of animals as property.⁴ Rather, welfarists argue that animals should be treated humanely within the existing paradigm of animal use.⁵ To this end, the primary goal of welfarists is to improve existing anti-cruelty statutes.

Animal rights law

Animal rights law seeks to question the entrenched property status of animals, with a view to securing legal personhood, and accordingly, fundamental rights for some or all animals. Animal rights advocates do not argue that animals should be given the same rights as humans. Rather, they argue that different animals are deserving of specific rights depending on their interests, needs and capabilities.⁶ The fundamental tenet of animal rights law is that the law should not treat animals as mere things. This is based on the assumption that unless animals have rights, they will continue to be treated by the law as resources that can be exploited to satisfy any human wants and needs.

To learn more about different philosophical approaches and nuances in the above approaches to animal law, see Chapter 2 in *Animal Law in Australasia*.⁷

1.2 Practice Areas in Animal Law

Animal Law is a diverse field that requires practitioners to draw on many legal disciplines. Below is a list of relevant practice areas and examples of how they may be applicable to animal law.

PRACTICE AREAS

Administrative Law	Challenging decisions or actions of a government official, agency rules or regulations that affect the interests of animals.
Animal Rights Law	Challenging the “thinghood” of animals through strategic litigation in order to obtain legal personhood, and accordingly, legal rights for certain animal species.
Companion Animal Law	Representing ‘death row dogs’ that are deemed a danger to the community and pursuing laws to regulate animal breeding.
Competition Law	Ensuring fair trading between companies that produce animal-derived products, including issues relevant to cartel conduct and boycotts.
Constitutional Law	Defending activists’ constitutional freedom of political communication, seeking constitutional recognition of animal sentience and seeking increased federal power to regulate animal welfare nationwide.
Consumer Protection Law	Pursuing companies who engage in misleading or deceptive advertising and labelling of animal-derived products.
Criminal Law	Defending animal activists accused of criminal activity and prosecuting breaches of anti-cruelty statutes.
Environmental Law	Granting legal protections to certain species and defending natural habitats and ecosystems, particularly native or endangered species of fauna and flora.
Estate Planning Law	Assisting with wills and estates in order to accommodate or provide for animals or animal protection charities.
Family Law	Assisting in companion animal custody disputes and addressing issues of domestic abuse.
Intellectual Property Law	Working on disputes related to patented animals, animal-based research and, in some cases, production methods.
Litigation	Running cases to enforce animal protection legislation, pursuing public interest matters or test cases to expand the scope of animal protection, and advising on issues of admissibility of evidence.
Property Law	Assisting with disputes regarding ownership of animals (personal property) or disputes regarding animals and tenancy (real property).
Tort Law	Defending animal activists or assisting in veterinary malpractice suits.

2. Animal Law Framework

The animal law framework in Australia is overly complex, involving multiple layers of government, legislation, regulations and non-legislative policies, strategies and guidelines. This chapter summarises the framework, with case studies provided to highlight the sort of animal protection issues that arise in the practice of animal law. This outline is by no means exhaustive, and further information can be obtained in the books listed in Section 6: Additional Reading.

2.1 Federal Legislation

Commonwealth regulation of animals is limited to external trade (encompassing live export, trade in wildlife and quarantine) and enforcing international treaty obligations. These powers are conferred upon the Commonwealth under section 51 of the Constitution.

In 2005, the Commonwealth introduced the *Australian Animal Welfare Strategy* (AAWS). Under the leadership of the Commonwealth, the AAWS was intended to function as a blueprint for the development of animal welfare standards and policies across Australia.⁸

In 2013, the Commonwealth announced its intention to withdraw funding from the AAWS, leaving responsibility for its implementation to state and territory governments. This was followed by the Commonwealth disbanding the Federal Australian Animal Welfare Advisory Committee and the animal welfare subdivision within the Department of Agriculture, among other initiatives intended to improve the welfare of animals nationally.⁹

The absence of clear federal leadership in the animal protection space has prompted calls for the establishment of an Independent Office of Animal Welfare. See 'Independent Offices of Animal Welfare', p 22.

2.2 State Legislation

The law relevant to animal welfare in Australia is primarily legislated by state and territory governments, with each enacting their own separate legislation,¹⁰ associated regulations¹¹ and industry guidelines. Local council

regulations may also be relevant, such as in the management of companion animals or circuses.

Anti-cruelty statutes (and their associated regulations) in each state and territory:

- *Animal Welfare Act 1992* (ACT)
- *Prevention of Cruelty to Animals Act 1979* (NSW)
- *Animal Welfare Act 1999* (NT)
- *Animal Care and Protection Act 2001* (QLD)
- *Animal Welfare Act 1985* (SA)
- *Animal Welfare Act 1993* (TAS)
- *Prevention of Cruelty to Animals Act 1986* (VIC)
- *Animal Welfare Act 2002* (WA)

Under anti-cruelty statutes, there are generally two types of offences: committing an act of cruelty to an animal,¹² or breaching a duty of care to animals.¹³ Only the anti-cruelty statutes in NT, QLD and TAS impose a duty of care on persons in control of animals.

Though this legislation generally focuses on preventing gross acts of animal cruelty or neglect, as indicated throughout this Toolkit, it fails to appropriately ensure the welfare of animals in a number of material respects.

In addition to anti-cruelty statutes, certain jurisdictions include provisions for serious animal cruelty in their respective Criminal Codes.¹⁴

Case Study 1: Animal cruelty and criminal intent

Mens rea, an intention to commit a criminal offence, is often a necessary element of a criminal offence. The following case considers whether animal cruelty requires the establishment of criminal intent.

***Bell v Gunter* (unreported judgment of the Supreme Court of NSW, 24/10/97, BC 9708066)**

FACTS The Respondent was charged with an aggravated cruelty offence towards a cow under section 6(1) of the *Prevention of Cruelty to Animals Act 1979* (NSW). The cow was discovered severely malnourished and unable to stand, resulting in her euthanasia on veterinary instruction. The specific issue referred to the Supreme Court was whether *mens rea* was an element of the offence.

OUTCOME At first instance, the Magistrate held that the offence required proof that the Respondent acted either with knowledge of the pain inflicted or intended to cause pain. On appeal to the Supreme Court, Dowd J considered the wording and intention of the statute, and held that the offence was one of strict liability. That is, it did not require *mens rea* to be proved, as committing the act prima facie imports the offence. Dowd J held further that the defence of honest and reasonable mistake of fact was available to individuals charged under the Act, on account of the severity of the potential penalties. Accordingly, the offence was not considered to be one of absolute liability, for which the defence of honest and reasonable mistake of fact is not available.



Exclusions

Under anti-cruelty statutes, companion animals receive the most protection while animals used for food and pest species are afforded the least, largely because they are excluded from a number of protections under these laws. For example, the statutes of WA and SA expressly exclude fish in their definition of 'animals',¹⁵ meaning these animals are entirely unprotected from cruelty.

Farm animals are also exempt from some basic protections. In NSW, for instance, it is legal to castrate young cows, sheep, goats and pigs without anaesthetic, but it would be unlawful to do so to a dog or cat.¹⁶

In this way, the law operates under a double standard by affording unequal protection to certain kinds of animals, based not on their capacity to suffer, but on economic imperatives. See also 'Speciesism', p 26.



Industry guidelines legalise a raft of otherwise cruel practices, including keeping animals in extreme confinement, mutilating animals without anaesthetic, and slaughtering animals using brutal methods.

Industry Guidelines

State and territory anti-cruelty statutes are significantly undermined by operation of relevant Model Codes of Practice for the Welfare of Animals (Codes) and Australian Animal Welfare Standards and Guidelines (Standards and Guidelines), together referred to in this Toolkit as 'industry guidelines'.

Industry guidelines are provided for each animal use industry, and outline minimum recommendations for the proper care and management of animals.

Industry guidelines exist for a variety of animal use industries,¹⁷ and largely operate in favour of protecting the interests of producers over those of animals. This is partly due to the fact that industry guidelines are not developed by parliament, but by government department sub-committees that are heavily influenced, represented and often funded by animal industry groups.¹⁸

Under most anti-cruelty statutes, compliance with an industry guideline may operate as a defence to or exemption from a cruelty prosecution. As a result, industry guidelines legalise a raft of otherwise cruel practices, including keeping animals in extreme confinement, mutilating animals without anaesthetic, and slaughtering animals using brutal methods.

In an attempt to provide consistency across Australian jurisdictions and greater enforceability, the existing Codes

are being reviewed for conversion into Standards and Guidelines.¹⁹ Of these Standards and Guidelines, 'standards' are intended to be adopted as mandatory requirements under relevant state and territory anti-cruelty statutes, whereas 'guidelines' will be non-mandatory. If provisions are not incorporated into relevant laws, compliance will be voluntary.

Of the draft Standards and Guidelines proposed, there continues to be significant concern around the partiality of the standard-setting process, the continued use of 'welfare words' and their sanctioning of cruel industry practices.

Welfare Words

Both anti-cruelty statutes and industry guidelines permit pain and suffering to be inflicted on animals, provided it can be deemed 'reasonable', 'necessary' or 'justifiable'.²⁰ These welfare words are highly subjective and there is wide scope for courts to determine their meaning in any given situation.

For example, courts may be required to consider whether it is justifiable to castrate a pig without anaesthetic for pig meat production; reasonable to repeatedly whip race horses for entertainment purposes, or justifiable to kill bobby calves by means of blunt force trauma as part of milk production.

Case Study 2: ‘Necessary cruelty’ and the proportionality test

***Ford v Wiley* (1889) 23 QBD 203 (Divisional Court of Queen’s Bench Division, England)**

FACTS A producer dehorned cows in his herd and was prosecuted for animal cruelty, despite his argument that the practice was necessary for economic agricultural purposes. As the term ‘cruelly’ was not qualified in the relevant statute, this case represents one of the earlier considerations by a court of what constitutes animal cruelty. At the time, the practice of dehorning had been discontinued in England and Wales, and therefore, the court had to determine whether the practice could be deemed necessary in this circumstance.

OUTCOME The Queen’s Bench held that cruelty is unlawful unless the act is ‘reasonably necessary’. Hawkins J held that “no owner is compelled by any necessity to turn his horned into dishorned or artificially-polled cattle”. Hawkins J noted that what amounts to necessity will depend on an examination of a number of factors on a case by case basis, including the amount of pain caused, the intensity and duration of the suffering and the intended purpose.

In each case, however, the beneficial or useful end sought to be attained must be reasonably proportionate to the extent of the suffering caused, and in no case can substantial suffering be inflicted, unless necessity for its infliction can reasonably be said to exist.

On this basis, the practice of dehorning was held to be “a cruel, unreasonable, and unnecessary abuse of the animals operated on”.

Note: Certain methods of dehorning are permitted in Australia, as are other husbandry practices which offer an economic incentive. The rise of intensive agriculture appears to have shifted the threshold of ‘necessity’ since the days of *Ford v Wiley*.

***‘Noah’ (The Israeli Federation of Animal Protection Organisations) v The Attorney General, The Minister for Agriculture, The Egg and Poultry Board, Moshe Benishty and 31 Colleagues* (Supreme Court of Israel, August 2003)**

FACTS An Israeli animal protection group challenged a regulation which controlled the force-feeding of geese for the production of foie gras, on the basis that it breached clause 2(a) of the *Animal Welfare (Animal Protection) Law 1994*. The clause provided that “no one shall torture an animal, treat it cruelly or abuse it in any manner”.

OUTCOME The majority found that there is a distinction between basic foods and delicacies according to their necessity. It was held that there was no proportionality between the harm inflicted on the geese and the purpose of that harm. After careful analysis of animal protection philosophies and legislation, the Supreme Court of Israel held that the regulation which permitted the force feeding of geese did not comply with the statute, and deviated substantially from fulfilling the intent of the law. Accordingly, the court held that the regulation was annulled and the practice of force-feeding geese was to be phased out.

Note: Subsequent attempts by the Israeli Ministry of Agriculture to alter this decision have been unsuccessful.²¹

2.3 Enforcement and Prosecution

Enforcement of Anti-Cruelty Statutes

Although police have the power to enforce anti-cruelty statutes, a considerable proportion of animal law enforcement in Australia is carried out by the Royal Society for the Prevention of Cruelty to Animals (RSPCA) in each jurisdiction.²² This can be problematic because the RSPCA is a private charitable organisation, which is not accountable to the public.²³ It is under no statutory obligation to investigate or prosecute cruelty offences and cannot be compelled to do so.²⁴ Additionally, the RSPCA does not receive adequate government funding to effectively carry out its inspection and prosecution functions, relying largely on charitable donations.²⁵ This means it may be reluctant to, or incapable of, readily pursuing test cases or a greater number of cruelty complaints.²⁶

Another key body responsible for enforcing anti-cruelty statutes (generally in relation to farm and wild animals) is the department of primary industries or agriculture, or its equivalent in each jurisdiction. These government departments operate with a conflict of interest, as their main function of fostering the growth of primary industries is, in many respects, incompatible with the promotion and protection of animal welfare.²⁷

A solution to this problem is for the enforcement of anti-cruelty statutes to become the responsibility of independent statutory bodies, such as Independent Offices of Animal Welfare, at both a state and federal level.²⁸ See Section 2.4: Independent Offices of Animal Welfare.

Another option would be for the police to establish a special animal cruelty taskforce. This would more effectively enable investigations of animal cruelty matters that currently fall beyond the powers granted to RSPCA inspectors. At the time of writing, dedicated police units are in operation in the Netherlands and Sweden, with Norway recently commencing a three-year trial.²⁹

Detecting Animal Cruelty

It can be difficult to commence criminal prosecutions as

animal cruelty often occurs on private property. This is particularly the case on factory farms, but also in other animal use industries, such as those that conduct scientific research on animals or rear animals for use in the racing industries.

Most anti-cruelty statutes require RSPCA inspectors to believe on reasonable grounds that a cruelty offence is occurring before they can enter premises.³⁰ It is difficult to satisfy this requirement without a thorough investigation or assistance from a whistleblower or covert investigator. Notably, RSPCA inspectors do not have the power to conduct covert surveillance. Consequently, gross cruelty can remain undetected, or there may be a substantial delay before an inspector can establish reasonable grounds for suspicion.

Some jurisdictions, such as VIC and SA, give RSPCA inspectors the power to routinely inspect commercial premises.³¹ The effectiveness of such provisions is limited by the fact that inspectors are generally required to give reasonable notice before an inspection is to take place.³²

Gathering Evidence

Undercover surveillance has long been used by animal advocates in Australia to uncover cruelty in animal enterprises.³³ Such surveillance can be both lawful and unlawful. There are numerous examples where undercover surveillance has resulted in investigations and/or criminal prosecutions under anti-cruelty statutes,³⁴ closure of operations due to bad business practice,³⁵ proceedings being brought by the Australian Competition and Consumer Commission (ACCC) under consumer protection legislation,³⁶ and policy and law reform.³⁷

In Australia, courts have various discretionary powers under statutory and common law to include or exclude evidence. The way in which evidence is obtained may be relevant to that discretion. For example, the Uniform Evidence Acts give a court discretion to admit surveillance evidence in civil or criminal proceedings, even if it was obtained by improper or unlawful means. In exercising their discretion, courts will consider the probative value of the evidence, the importance of the evidence and whether the evidence could have been obtained legally.³⁸

Case Study 3: Difficulties in prosecuting animal cruelty

Wally's Piggery

Undercover footage taken at the commercial facility Wally's Piggery revealed buckets of dead piglets and pigs being kicked and beaten to death with sledgehammers. Subsequent investigations resulted in 53 charges being laid against Valent and Stephanie Perenc (owners) and WSL Investments Pty Ltd (financial backers). After intensive media coverage and public outrage, Wally's Piggery and the associated Tennessee Piggery in NSW were shut down in early 2013.

The parties pleaded not guilty in Yass Local Court. RSPCA NSW dropped the charges, stating that it had doubts as to the admissibility of the undercover footage. This was despite NSW Courts having a discretion to determine whether to admit unlawfully obtained evidence.³⁹ The additional evidence gathered from first hand investigations by Yass Police, the NSW Food Authority, RSPCA NSW and the Department of Primary Industries was not explicitly addressed in RSPCA NSW's public statements on the matter.

The video footage captured at Wally's Piggery showed horrific breaches of the *Prevention of Cruelty to Animals Act 1979* (NSW). The dropping of charges in this case highlights a number of failings in the present animal protection law enforcement model, including the over-reliance on unlawfully obtained activist footage, the lack of powers of entry and covert surveillance for the RSPCA, as well as the fact the RSPCA has a discretion as to whether to pursue cases of animal cruelty.

Ag-gag Laws

The term 'ag-gag' describes a variety of laws that seek to hinder or 'gag' animal protection advocates, whistleblowers and journalists by preventing them from recording the operations of commercial animal enterprises. Such laws may:

- criminalise the taking or publicising of covert footage documenting animal cruelty within animal enterprises;
- require that any footage be immediately surrendered to enforcement agencies; and/or
- require potential employees in the industry to disclose any ties to animal protection groups.

Australian animal advocates have become increasingly effective in gathering and releasing undercover footage taken in agricultural facilities. As a result, some jurisdictions have considered introducing ag-gag



legislation⁴⁰ following the introduction of such laws in the United States.⁴¹

Opponents of ag-gag argue that such laws infringe freedom of speech (or in Australia, the constitutionally implied freedom of political communication), stifle transparency in the operation of animal enterprises and permit unacceptable and potentially unlawful practices to continue unchecked. Without undercover footage, the realities of animal use industries can be concealed from consumers and the general public.



Case Study 4: Animal activism and criminal trespass

Mark, Stoner, Setter and Pearson v Henshaw (1998) 155 ALR 118

FACTS Animal activists entered a battery hen facility in the ACT to provide the hens with medical assistance and generate publicity. They chained themselves to the cages and called the police to investigate allegations of cruelty. The activists were prosecuted for trespass under the *Public Order (Protection of Persons and Property) Act 1971* (Cth).

At first instance the Magistrate found in favour of the activists on the basis that they had a 'reasonable excuse' to enter the premises. The matter was overturned on review by the ACT Supreme Court. The activists appealed to the Federal Court of Australia.

OUTCOME On appeal, the Full Federal Court held that the reasonableness of the activists' conduct must be determined objectively, with reference to community standards. They held that the activists entered the premises for the dominant purpose of advancing their cause against battery hen farming, rather than assisting the hens. They concluded that this did not qualify as a reasonable excuse, to find otherwise would have been to deny the occupier of the premises its rights to receive protection from the law in carrying on a lawful activity and "would mean that any dissident might be at liberty to enter his or her opponents' premises in pursuit of a cause. It was held that "society cannot afford to allow private citizens, no matter how well-meaning, to assume the role of the law-enforcers".

Freedom of Political Communication

A limited right to freedom of political communication is implied under the Australian Constitution.⁴² The ability of animal protection organisations and individuals to speak out against animal cruelty is an important element in effectively advocating for the protection of animals.⁴³

Case Study 5: Free speech and animal protection

Animal Liberation (VIC) Inc v Gasser [1991] 1 VR 51

FACTS Animal Liberation conducted demonstrations outside a circus protesting against the use of animals, and published materials highlighting the cruelty circuses inflict on animals. The circus commenced proceedings in defamation, malicious falsehood and nuisance. The circus was granted an injunction to prevent the protests and publication of such material. Animal Liberation appealed.

OUTCOME The Supreme Court of VIC held that the injunction against publishing the material could not stand as appropriate weight had not been given to Animal Liberation's right to free speech, nor "to the importance to the community of exposing acts of cruelty to animals". Of particular consideration was the fact that Animal Liberation believed the statements to be true.

While the court overturned the injunction that prevented Animal Liberation from performing demonstrations on the basis that the scope of the injunction was too unclear, it held there was sufficient evidence to grant a more specific injunction to curtail the demonstrations as their intimidating nature amounted to the tort of nuisance.

Levy v State of Victoria (1997) 189 CLR 579; 146 ALR 248

FACTS Levy, an animal protection activist, entered a duck-shooting area to be filmed protesting against the duck hunt and offering veterinary assistance to injured birds. Charged with entering a hunting area under the *Wildlife (Game) (Hunting Season) Regulations 1994* (VIC), he commenced proceedings alleging that the regulations were invalid because they interfered with his constitutionally protected freedom of political communication.

OUTCOME The High Court held that the graphic televised images that Levy had hoped to present were within the constitutionally protected realm of political communication. Applying the test of validity from *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, however, the court held that the regulation was valid as it was appropriate and adapted to serving the legitimate end of enhancing public safety. That is, there was no greater curtailment of the constitutional freedom than was reasonably necessary to serve the public interest in ensuring the safety of persons.

Australian Broadcasting Corporation v Lenah Game Meats [2001] HCA 63

FACTS Animal protection activists broke into a brush-tail possum slaughterhouse and filmed the stunning and killing of possums. The Australian Broadcasting Corporation (ABC) intended to broadcast the footage. The Supreme Court granted an interlocutory injunction to prevent the broadcast. The ABC appealed to the High Court.

OUTCOME The injunction was set aside on numerous grounds. Gaudron, Gummow and Hayne JJ held that broadcasting the tape would not infringe any legal or equitable rights; Kirby J concluded that proper weight had not been given to the Appellant's constitutional freedom of political communication. Importantly for the animal protection movement, Kirby J acknowledged that animal welfare issues are legitimate matters of public debate in Australia at [217]: "[m]any advances in animal welfare have occurred only because of public debate and political pressure from special interest groups. The activities of such groups have sometimes pricked the conscience of human beings".



Standing

In the context of animal law, standing refers to the ability of an individual or group to commence legal proceedings on behalf of animals.

Any person can commence a prosecution for a public wrong, provided there is no statutory prohibition.⁴⁴ Thus, individuals in the ACT, NT, QLD, SA and TAS can commence cruelty proceedings under their respective Acts.⁴⁵ In NSW, VIC and WA the right of individuals to initiate cruelty proceedings has been curtailed by legislation.⁴⁶ In NSW, for example, individuals can only commence proceedings with the permission of the Minister for Primary Industries or the Director-General of the Department of Primary Industries.⁴⁷ This imposes a significant hurdle for animal advocates and compounds the deficiencies in the current enforcement regime outlined previously.

Animal advocates are often hindered by the common law rules of standing. The current test of standing was articulated in *Australian Conservation Foundation v Commonwealth of Australia*.⁴⁸ Here the court held that a person must have a special interest in the proceedings to have standing.

Gibbs J (at 270) described such an interest as follows:

“[A]n interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*.”

Further, the High Court case of *Onus v Alcoa of Australia Ltd*⁴⁹ confirmed the test that in order to establish standing, an individual or organisation must have a “special interest above that of an ordinary person”. It is difficult for animal protection groups and individuals to argue around this rule, as the interest they wish to protect is not their own but that of animals.

The following cases outline some of the more relevant tests for establishing standing in animal protection matters, in particular the findings of *Animals’ Angels e.V. v Secretary, Department of Agriculture*.⁵⁰

Importantly for the animal protection movement, Justice Kirby acknowledged that animal welfare issues are legitimate matters of public debate in Australia.

Case Study 6: Standing principles

Australian Conservation Foundation v Minister of Resources (1989) 19 ALD 70

FACTS The Australian Conservation Foundation (ACF) sought review of the decision of the Minister for Resources to grant a licence to the second respondent, Harris-Daishowa (Australia) Pty Limited (HDA), for the export of woodchips which would affect National Estate forests.

OUTCOME In determining that the ACF had standing, Davies J distinguished this particular case from an earlier decision (*Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493), in which the ACF was found to have lacked standing.

To determine standing, it was considered necessary to take current community perceptions and values into account. It was highlighted that the ACF was the major national conservation organisation in Australia and received substantial annual funding from the Commonwealth and state governments. It was also noted that in the decade since the initial ACF decision, public interest in conservation and the need for bodies like the ACF had increased considerably.

The ACF played a leading role in campaigning for the protection of National Estate forest and was established and financially supported by the Commonwealth and state governments to specifically deal with that issue. As it went to the core of its activities, it was held that the ACF had a special interest in the case and therefore had standing.

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

FACTS Animal Liberation sought an injunction to prevent the aerial shooting of goats and pigs in two nature reserves. The injunction was sought on the basis that aerial shooting leaves wounded animals to die a lingering death, thus breaching section 5 of the *Prevention of Cruelty to Animals Act 1979* (NSW).

OUTCOME Hamilton J distinguished this case from *Animal Liberation v National Parks and Wildlife Service* [2003] NSWSC 457 (see note) on two grounds: first, the evidence showing the potentiality or likelihood of cruelty to animals in the previous case was of a higher quality, and secondly, the Defendant in the previous case took no objection to the standing of the Plaintiff to seek an injunction.

Hamilton J relied on the test of standing laid down in *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 and held that Animal Liberation had no standing. It was not enough that they were concerned for the welfare of the animals, as the required special interest is not established by “a mere intellectual or emotional concern”. To establish standing Animal Liberation needed to show that they would be personally advantaged or disadvantaged by the outcome of the case.

Note: In *Animal Liberation Ltd v National Parks and Wildlife Service* [2003] NSWSC 457, Animal Liberation sought an injunction to restrain the proposed aerial shooting of wild goats in a national park. On the issue of standing, the Defendant had conceded, for the purpose of this application only, that Animal Liberation had standing to bring the proceedings and make the application.⁵¹

***Animals' Angels e.V. v Secretary, Department of Agriculture* [2014] FCA 173; [2014] FCA 398**

FACTS Animals' Angels sought judicial review of two decisions regarding a live export voyage in 2008 from Australia to Malaysia. The Federal Court held that Animals' Angels lacked standing because, as a registered German charity, it lacked presence and proximity to the Australian industry; had limited recognition by the Australian government; lacked any evidence as to its commitment of financial resources to animal welfare; did not cooperate with established Australian animal welfare bodies, and its objectives were too broad and global in nature to apply to the specific purposes of live export regulation in Australia. Animals' Angels appealed.

OUTCOME On appeal, the Court held that Animals' Angels did have standing, but that its appeal should otherwise be dismissed on consideration of the decisions upon which it had sought review.

On the question of standing, the Court held that the matters relied on by the primary judge did not adequately convey the duration and quality of Animals' Angels involvement in the Australian live export trade. Considering the Australian Government's recognition of Animals' Angels specific status in regard to live export, and taking its constituting documents into account, the objectives of the organisation and its activities in Australia showed that it did have a special interest in the matter before the Court. Each of the primary judge's reasons for a lack of standing was countered by the Full Federal Court at [120]. Further, the Court noted that "standing requires a sufficient interest, not one which is a unique interest or the strongest interest compared with others who may have an interest" at [121].

Penalties, Sentencing and Prosecution Rates

As anti-cruelty statutes are state and territory based, the sentencing options and penalties applicable to acts of animal cruelty differ widely in each jurisdiction.

While empirical data and academic research is lacking in this area, a review of the case law over recent years and reports of those in the field show the vast majority of animal cruelty cases typically result in sentences on the lower end of the penalty scale.⁵² Even in the face of horrific incidents of animal cruelty and neglect, courts repeatedly avoid imposing sentences or fines anywhere near the available maximum penalties.⁵³

Animal lawyers seek to address this issue by pushing for appropriate penalties to reflect the fact that animals are sentient creatures and cruelty against them should be taken seriously.⁵⁴



The RSPCA is limited in which cases it can pursue by the sheer quantity of complaints it receives.⁵⁵ During the financial year 2013-2014, for example, only 236 prosecutions were finalised out of 58,591 cruelty complaints.⁵⁶ Although not all complaints warrant prosecution, it is arguable that significantly more cases could be pursued if more resources were available to enforcement agencies.

2.4 Independent Offices of Animal Welfare

The governance and regulation of animal welfare is currently the responsibility of the Commonwealth Department of Agriculture and the equivalent state or territory departments of primary industry. These departments, however, are simultaneously responsible for promoting animal welfare and the profitability of primary industries. To a large extent these two interests are incompatible, and when in competition, economic interests usually win.⁵⁷

This conflict of interest also manifests in the development of animal welfare science and research. Although the Department of Agriculture allocates a substantial amount of public funds to statutory research and development corporations (RDCs), these RDCs are comprised of representatives from the major animal use industries.⁵⁸

This means that most research relied upon by policy makers, such as during the animal welfare standard-setting processes, is largely coordinated, commissioned and/or funded by representatives of animal use industries.

Introducing independent offices of animal welfare (IOAWs) at federal, state and territory levels would resolve these issues. Ideally, such IOAWs would be statutory authorities entirely separate from the Department of Agriculture or equivalent state and territory departments of primary industry. Creating IOAWs that are solely devoted to promoting animal welfare would provide for legitimate governance and leadership on animal protection issues, whilst addressing some of the underlying conflicts of interest inherent in the role and function of the existing government departments. Each IOAW could also have the responsibility of commissioning independent animal welfare research.

At the time of writing, the Australian Greens and the Australian Labor Party have expressed support for the establishment of a Federal IOAW.

Case Study 7: Political representation for animals

A number of political parties have been established around the world with the principal aim of advancing the interests of animals. At least 12 countries have established animal welfare parties, including Australia, Cyprus, Finland, France, Germany, the Netherlands, Portugal, Spain, Sweden, Turkey, the United Kingdom, and the United States.⁵⁹ At the time of writing, the following parties have had members successfully elected:

- In 2011, Marianne Thieme of the Dutch Party of the Animals was successfully elected, followed by two more representatives from the same party.⁶⁰
- In 2014, the European Union elected two people to the European Parliament on an animal protection platform.⁶¹
- In 2015, Mark Pearson of the Australian Animal Justice Party, was elected to the NSW Legislative Council.⁶²



3. Key Issues in Animal Law

This section provides examples of some key issues that animal law seeks to address. Case summaries are provided to highlight the practical application of animal law. The list is by no means exhaustive, and more issues are addressed in the books listed in Section 6: Additional Reading.

3.1 Foundational Concepts

Animals as Property

The law's relegation of animals to the status of property is key to their continued abuse and exploitation. As property, animals are classified as things with no personal interests. Although wild animals are considered unowned until captured, they are also classified as objects under the law. While animals are granted certain protections under the law, these are couched in terms of human obligations or responsibilities, not rights. Only legal persons have the capacity to bear legal rights. As such, many animal lawyers argue that animals must be elevated above the status of property and granted legal personhood if the law is to properly acknowledge and protect their intrinsic value.⁶³

Personhood for animals is possible, as not all legal persons are human. Nonhuman entities such as corporations, partnerships, religious texts⁶⁴ and ships have been granted legal personhood for various purposes.⁶⁵ Furthermore, the fact that animals are already regarded as property does not prevent them from being reclassified as legal persons. For example, civil libertarians successfully fought for the removal of the property status of human slaves, women and children.⁶⁶





The law's relegation of animals to the status of property is key to their continued abuse and exploitation. As property, animals are classified as things with no personal interests.

Case Study 8: The case for nonhuman rights

United States advocacy group, the Nonhuman Rights Project (NhRP), aims to establish animal legal personhood in order to liberate certain nonhuman animals from ownership or 'slavery'. The NhRP has developed a similar legal argument to that which successfully liberated human slaves in the United Kingdom, based on the common law writ of *habeas corpus*.⁶⁷

Drawing on decades of scientific research, the NhRP claims certain species have complex cognitive abilities which are sufficient to establish legal personhood for the purposes of petitioning for a writ of *habeas corpus*. The NhRP therefore focuses on animals proven to possess complex cognitive abilities, such as the Great Apes (chimpanzees, gorillas, bonobos and orangutans), elephants and cetaceans.⁶⁸

In December 2013, the NhRP filed three cases on behalf of four chimpanzees in the State of New York, applying for common law writs of *habeas corpus*.⁶⁹ In the first case of its kind, a New York judge in April 2015 issued a 'show cause' notice requiring captors to justify the confinement of two chimpanzees, Hercules and Leo. The case was heard in May 2015, with the court finding Hercules and Leo did not have legal personhood, in line with precedent established in the NhRP case brought on behalf of Tommy the chimpanzee.⁷⁰

In the Tommy case, it was held, among other things, that chimpanzees are incapable of bearing the legal responsibilities and societal duties that are integral to legal personhood.

At the time of writing, the NhRP had announced an intention to appeal these decisions.⁷¹

Speciesism

Animals are treated unequally under the law. This inequality can be seen both between human and nonhuman animals, and also between different species of nonhuman animals.

‘Speciesism’⁷² is a term used to describe the prejudice underpinning this inequity. The term is akin to racism or sexism, and occurs when human interests are prioritised over that of animals based purely on our species. Membership of a given species is an entirely improper and irrelevant determinant of moral significance, and accordingly, speciesism is an invalid justification for our current treatment of animals.⁷³

A subset of speciesism is ‘carnism’, which seeks to explain the law’s unequal treatment of certain groups of animals over others based on how we use them.⁷⁴ This inconsistency can be present between different species (such as the treatment of meat chickens versus companion dogs), as well as within species (such as the treatment of companion dogs versus dogs who are used for scientific research).

Sentience

Sentience is the ability to perceive and feel things. Animals and humans are considered sentient if they are capable of being aware of their surroundings, their relationships with others, and of sensations in their own bodies, including pain, hunger, heat or cold.⁷⁵

Legislative recognition of animal sentience is important, as it recognises animals as more than inanimate objects. In 1997, European law first referred to animal sentience in the Treaty of Amsterdam. Subsequently in 2009, the Treaty of Lisbon included an article recognising that animals were sentient beings, requiring the European Union and its Member States to “pay full regard to the welfare requirements of animals” when implementing policies on agriculture, transport, research and technological development.⁷⁶

Similar moves have also been made in France⁷⁷ and New Zealand,⁷⁸ with a distinct category of civil law existing for animals in Germany,⁷⁹ Austria⁸⁰ and Switzerland.⁸¹

Although Australian law does not yet recognise animals as sentient, the *Australian Animal Welfare Strategy* (AAWS) had the aim of protecting and promoting the humane use of “all sentient animals in Australia”, which it describes as “animals that have feelings and experience suffering and pleasure”.⁸²

While legal recognition of animal sentience is obviously an important development, such recognition alone will result in limited practical benefits for animals unless this sentiment is further reflected in the laws that govern human-animal relations.

Membership of a given species is an entirely improper and irrelevant determinant of moral significance, and accordingly, speciesism is an invalid justification for our current treatment of animals.

Case Study 9: Wild animals as property

Nakhuda v Story Book Farm Primate Sanctuary [2013] ONSC 5761 (Oshawa Superior Court)

FACTS	Nakhuda illegally purchased a macaque, named Darwin, who subsequently escaped and was picked up by Toronto Animal Services (TAS). On refusal by TAS to return Darwin, Nakhuda signed a form surrendering Darwin. Story Book Primate Sanctuary then signed the relevant papers to adopt Darwin. Nakhuda brought a claim for recovery against the Sanctuary, based on her alleged property rights over Darwin.
OUTCOME	Wild and domestic animals attract different property rights. In this instance, the judge found that Darwin was not a domesticated animal on account of his behaviour. Wild animals are considered to be 'owned' only when in possession by a person, and are therefore no longer the property of that person if they escape. The sanctuary therefore retained Darwin and Nakhuda's action was dismissed. This case highlights the property status of animals, as well as the law's unequal treatment of different classes of animals.

3.2 Animals Used in Agriculture

Factory Farming

In Australia, hundreds of millions of animals are confined in intensive factory farms.⁸³ In these production systems, animals are kept in a state of permanent confinement, crammed together in cages or sheds where they are unable to express many of their natural behaviours. To increase their productivity, animals are fed unnatural diets and selectively bred, often to the detriment of their welfare. To facilitate high stocking densities, baby animals are mutilated without pain relief because it is practical, cheap and lawful to do so.

The law permits this institutionalised abuse by classifying farm animals as 'stock animals' and thereby excluding them from basic protections under anti-cruelty statutes. In NSW, for example, section 9 of the *Prevention of Cruelty to Animals Act 1979* (NSW) makes it an offence to fail to provide an animal with adequate exercise. Stock animals, such as cows, sheep, goats, deer, pigs and domestic fowl, are expressly exempt from this requirement.⁸⁴

In most jurisdictions, cruelty offences are only established where an act or omission is considered 'unreasonable', 'unnecessary' or 'unjustifiable'.⁸⁵ In effect, these qualifications serve as a potential shield for producers, as the law often deems cruel farming practices both reasonable and necessary in order to supply a growing population with cheap animal-derived food products (see 'Welfare Words', p 12).

Additionally, the operation of industry guidelines significantly undermines the limited protections afforded under anti-cruelty statutes. These industry guidelines:

- Institutionalise cruel standards for raising and keeping farmed animals, such as the use of sow stalls and farrowing crates for pigs, cages for chickens and intensive systems for all other livestock;
- Sanction husbandry practices involving the mutilation of farmed animals, such as teeth clipping pigs, de-horning cows and beak trimming chickens; and
- Function to effectively exclude farmed animals from the protections afforded under anti-cruelty statutes, as compliance with a particular industry guideline may be relied upon as an exception or defence to a charge of animal cruelty (see 'Industry Guidelines', p 12).⁸⁶



Thus, when it comes to farmed animals, it would seem that the very laws designed to prevent cruelty actively facilitate it. This is an area in need of significant reform.

Labelling of Animal-Derived Food Products

It is not mandatory for animal products to be labelled according to their production system in Australia,⁸⁷ except in the case of eggs in the ACT.⁸⁸ Accordingly, consumers may find it difficult to make ethical choices about the food they purchase, particularly as many animal-derived products carry slogans and images that imply high animal welfare standards were used by the producer (known as 'credence claims').⁸⁹ For example, positive imagery and ambiguous marketing terms like 'farm fresh' or 'nature's way' can be used by producers to mask the realities of their factory farm systems, and to persuade consumers to buy into potentially cruel husbandry practices.⁹⁰

Case Study 10: Factory farming and animal cruelty

McDonald's Corporation and McDonald's Restaurants Limited v Steel and Morris [1997] EWHC QB 366 ('McLibel') (The High Court of Justice, Queen's Bench Division)

FACTS McDonald's (United States) sued two individuals for defamation in relation to a number of claims made about the business practices of McDonald's. The claims were published in leaflets that were distributed to the public. One such claim was that McDonald's supported cruel farming practices.

OUTCOME The Court found that not all of the animal cruelty claims published in the leaflet were proved by the Defendants. Namely, it did not consider the following practices cruel if performed correctly: the maceration of unwanted chicks, the manual debeaking of chicks, teeth clipping, tail docking, castration of pigs and the permanent indoor housing of battery hens, broiler chickens and sows.

Overall, however, the Court found there was sufficient justification for upholding the Defendants' general claim of animal cruelty in the leaflet. This is because the Court found McDonald's to be responsible for such cruel farming practices as keeping chickens in battery cages; keeping broiler chickens in severe confinement during the last few days of their lives; keeping pregnant pigs in sow stalls, and slaughtering chickens in such a way that their throats may be cut whilst fully conscious.

The Defendants were found guilty of defamation with regards to the unproved cruelty claims, a ruling that was upheld on appeal.

Case Study 11: Consumer protection cases

Australian Competition and Consumer Commission v C.I. & Co Pty Ltd [2010] FCA 1511

FACTS This was the first case brought by the ACCC against egg producers for misleading and deceptive conduct. The ACCC alleged that C.I. & Co Pty Ltd, Antonio Pisano and Anna Angela Pisano each misled consumers by marketing cage eggs as 'free range' or 'fresh range-omega 3'. Although not all eggs were produced by caged hens, the ACCC claimed that a substantial portion of the products were. The ACCC argued that the same price could not have been obtained for caged eggs, and that the use of the word 'fresh' gave a false impression.

OUTCOME The Court described the conduct as "a cruel deception on consumers who mostly seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by doing so". In addition to issuing a financial penalty on Antonio Pisano of \$50,000, the Federal Court prohibited the Respondents from continuing to misrepresent their products, ordered them to publish an apology and explanation to all customers, and ordered Anna Angela Pisano to pay \$15,000 towards the ACCC's legal costs.

The Court acknowledged the relatively small penalty applied, but was satisfied it would act as a deterrent for similar industry practices. The Court noted that the ACCC believed that this type of conduct "is a problem within the egg industry" and that the case "represents the first attempt by the applicant to ensure that such conduct is not allowed to continue".

When it comes to farmed animals, it would seem that the very laws designed to prevent cruelty actively facilitate it.



As the federal consumer watchdog, the ACCC, has initiated a number of successful proceedings against domestic fowl producers whose marketing material constituted misleading and deceptive conduct under the *Australian Consumer Law* (or the former *Trades Practices Act 1974* (Cth)).⁹¹ In addition to holding misleading and deceptive producers to account, the ACCC proceedings have been successful in highlighting the cruel realities of factory farming in the chicken, duck and pig meat industries and the egg industry.

A number of third party certification programs have arisen that promise free range and organic standards. In the absence of mandatory labelling laws, however, these standards are inconsistent and provide limited clarity for consumers.⁹² The enactment of adequate, enforceable, and nationally consistent truth in labelling legislation is the only way that consumers will have the potential to make informed food choices.⁹³

Jurisdictional Inconsistencies

As farmed animal welfare is largely regulated by state and territory governments, inconsistencies across the various anti-cruelty statutes make it difficult for individual jurisdictions to effectively introduce animal welfare reforms.

For example, in 2014 the ACT Government banned some of factory farming's cruellest practices, including the use of sow stalls and farrowing crates for pigs, battery cages and enriched cages for egg laying hens, and the de-beaking of chickens.⁹⁴ By operation of the *Mutual Recognition Act 1992* (Cth), however, the ACT Government is unable to prevent the sale of products from other jurisdictions that have not introduced a similar ban.⁹⁵

This means that any legislated improvement in animal production methods in one state might be undermined by the continued sale of products from other states that have not introduced similar improvements. A nationally consistent approach to banning sow stalls, farrowing crates, battery cages and other cruel animal husbandry practices will overcome this impediment.

3.3 Live Animal Export

Millions of cows, sheep and goats are exported live from Australia to be slaughtered overseas each year. Almost all cow and sheep exports occur by sea, while goats and some dairy cows can be transported by air.⁹⁶ A significant number of Australian animals are also live exported for other purposes, such as camels used for sport.⁹⁷

Before leaving Australian shores, animals may be subject to lengthy land transportation, as well as exposure to overcrowding, heat stress, and food and water deprivation. Once on-board a vessel, animals are often kept in confinement for multiple weeks, and may suffer illness and/or death from poor ventilation, high levels of toxic ammonia gas, extreme heat stress and unfamiliar feed.⁹⁸

While little has been reported about export via air,⁹⁹ sea voyages expose animals to shocking conditions and many are expected to die en route. These deaths are accepted as an inevitable part of live export. For example, exporters are only required to report onboard deaths if the mortality rate exceeds two percent of sheep and goats on a voyage, or one percent of cows and buffalo on a voyage longer than 10 days.¹⁰⁰

On arrival, the surviving animals may be subject to further welfare concerns and/or cruelty in importing countries that do not have, or fail to implement, adequate animal welfare legislation.¹⁰¹

Regulatory Framework

Live export is governed by a complex regulatory framework, with different legislation, orders and standards applying to each stage of the process. Under the *Export Control Act 1982* (Cth), consignments of live animals will only be approved if the exporter holds a valid licence. The *Australian Meat and Livestock Industry Act 1997* (Cth) provides the relevant licensing regime, and requires licence holders to comply with the *Australian Standards for the Export of Livestock (Version 2.3) 2011* (ASEL).

ASEL regulates animal welfare from the farm gate up to the point an animal is unloaded at an overseas destination. Within Australian borders, anti-cruelty statutes and industry guidelines are also relevant, particularly during land transport.

Introduced in 2011, the *Exporter Supply Chain Assurance System* (ESCAS) applies once the animals disembark at an overseas destination. Breaches of ESCAS, as well as gross animal cruelty and neglect, have been repeatedly documented in destination countries, including Egypt, Indonesia, Israel, Gaza, Jordan, Kuwait, Lebanon, Malaysia, Mauritius, Pakistan, Qatar and Turkey.¹⁰²



Many welfare concerns are inherent in exporting live animals, and cannot be regulated away.

Case Study 12: Live export cruelty

Investigations by animal protection groups have produced evidence of routine and systemic animal cruelty in importing countries. Two particularly notorious investigations were presented by the ABC's *Four Corners*: 'A Bloody Business' in 2011 and 'Another Bloody Business' in 2012.¹⁰³ These broadcasts exposed the brutal cruelty inflicted on Australian animals in Indonesian and Pakistani slaughterhouses, respectively.

The cruelty depicted in the Indonesian exposé, 'A Bloody Business', revealed breaches of animal welfare guidelines at 11 different abattoirs. The footage showed animals being subjected to eye gouging, tendon slashing, kicking, tail breaking and slaughter using a traditional rope method without pre-stunning, resulting in animals remaining fully conscious whilst having their throats cut numerous times. The public outcry that ensued resulted in a month long suspension of the trade to Indonesia, and the introduction of ESCAS.

The Pakistani exposé, 'Another Bloody Business', followed 20,000 sheep who were rejected at port by Bahraini officials due to concerns that the sheep had scabby-mouth disease. The sheep were redirected to Pakistan, although the exporter failed to advise the Pakistani Government of the history and concerns of the shipment. Upon discovery of the disease concerns, the sheep were offloaded in Pakistan to be stabbed and clubbed to death, with many sheep buried alive in muddy trenches. The Australian exporter was not penalised for the incident, despite failing to put in place appropriate contingency measures.



Image: Joanne McArthur / We Animals

Some of the core legal issues associated with live exports include the following:

- Australian laws cannot be enforced on individuals in foreign jurisdictions.
- Many of the welfare concerns are inherent in exporting live animals, and cannot be resolved via regulation.
- Mortality rates alone is a poor indicator of welfare, and fails to take into account the inherent value of animals as sentient individuals.
- The Australian Government's efforts to monitor and enforce the regulatory framework has proved entirely ineffective.
- Exporter breaches of live export regulatory requirements have yet to result in any penalties being handed down on Australia exporters, including repeat offenders.
- The World Organisation for Animal Health (OIE) Standards, which are prescribed by ESCAS, do not require animals to be pre-stunned prior to slaughter.
- ESCAS does not apply to the export of breeder animals, such as dairy cows.

Given the difficulties in regulating, monitoring and enforcing the live export trade, a number of bills have been introduced into Federal Parliament to ban live export. To date none have been successful.¹⁰⁴ Significantly, New Zealand banned live export of slaughter animals in 2007 on welfare grounds.¹⁰⁵ New Zealand does, however, continue to export a large number of breeder animals.¹⁰⁶

Case Study 13: Live export cases

Department of Local Government and Regional Development v Emanuel Exports Pty Ltd & Ors (Perth Magistrates Court, 8 February 2008)

FACTS Emanuel Exports was prosecuted for animal cruelty arising from their export of live sheep to the Middle East. It was argued that the way the sheep were transported, confined and fed caused unnecessary harm under WA's anti-cruelty statute, the *Animal Welfare Act 2002* (WA). Uniquely, section 19 of this Act extends the scope of what constitutes an act of cruelty to include actions that are 'likely' to cause harm.

OUTCOME While Magistrate Crawford agreed that a charge of cruelty had been made out, it was held that there was an operational inconsistency between the *Animal Welfare Act 2002* (WA) and the Commonwealth legislation regulating live export, concluding that the Act was invalid to the extent of the inconsistency. Accordingly, the exporters were acquitted.

Rural Export & Trading (WA) Pty Ltd v Hahnheuser [2009] FCA 678¹⁰⁷

FACTS Hahnheuser fed pig meat to a group of sheep in an attempt to prevent their live export to the Middle East. The pig meat made the sheep unacceptable to Muslim countries whose Halal standards forbid the consumption of pig meat. Civil proceedings were brought against Hahnheuser under section 45DB of the *Trade Practices Act 1974* (Cth) (TPA) for hindering trade.

OUTCOME Section 45DD(3)(a) of the TPA provides a defence to hindering trade if it is for the dominant purpose of 'environmental protection'. Gray J of the Federal Court held that the defence was made out, stating ([2007] FCA 1535, at 64) that:

Farm animals are as much a part of the environment as are wild animals, feral animals and domestic animals. There is no reason why the protection of the conditions in which farm animals are kept should be excluded from the concept of environmental protection.

This interpretation was overruled on appeal. The Full Federal Court held that Hahnheuser's actions did not amount to environmental protection because his protest was against live export rather than the preservation of the sheep in their environment (*Rural Export & Trading (WA) Pty Ltd v Hahnheuser* [2008] FCAFC 156, at [24]-[25]). The Court held at [37]:

Rather, the context in which the artificial introduction of human activity, such as the breeding of plants or animals for food, shows that particular part of the environment has been created for a particular purpose from which it does not need protection. It is not naturally occurring or individually unique...

The Court ordered the case to be reheard on the question of damages.

Note: Hahnheuser was also charged with criminal offences under the *Crimes Act 1958* (VIC) which provided that it was an offence to contaminate goods with the intent to cause economic loss. Hahnheuser argued that his intention was to prevent animal suffering, not to cause economic loss. He was cleared by a jury in the Geelong County Court.¹⁰⁸ In response, the VIC Parliament amended the *Crimes Act* to make it an offence to recklessly cause economic loss. This amendment makes it easier for activists like Hahnheuser to be convicted.¹⁰⁹

3.4 Animals Used for Scientific Purposes

Medical Testing

Every year, millions of Australian animals are exploited in the name of science, with the latest statistics estimating that at least 6.7 million Australian animals were used in research and teaching in 2013.¹¹⁰

State and territory governments have enacted animal welfare legislation specifically dealing with the use of animals in research.¹¹¹ Further, all research conducted in Australia that is funded by the National Health and Medical Research Council (NHMRC) must comply with the *Australian Code for the Care and Use of Animals for Scientific Purposes* (the Code), which has been incorporated into legislation in all Australian jurisdictions.¹¹²

The Code requires a consideration of the '3Rs' at all stages of experimentation. That is, the *replacement* of animal usage with alternatives where possible; *reduction* of the number of animals used, and *refinement* of procedures in order to safeguard animal welfare.¹¹³

Unfortunately, this legal framework conforms to the existing paradigm that animal suffering is justified so long as it is deemed 'necessary'. For example, the Code provides categories for ethics committees to assess whether an experiment is necessary.¹¹⁴ These categories permit almost any experiment that has some arguable human benefit.

As a result, the framework fails to prohibit procedures that cause long-lasting pain, suffering or distress to animals; cause animals deliberate neurological impairment, or experiments that will inevitably result in the animal's death.¹¹⁵ Further, the Code provides leeway for untrained or unqualified people to conduct surgery, so long as they are 'competent'.¹¹⁶

Cosmetic Testing

Although there is no cosmetic testing on animals in Australia, the majority of imported cosmetics or their ingredients are tested on animals in other jurisdictions.¹¹⁷ For example, it is estimated that thousands of mice, guinea pigs, rats and rabbits legally suffer and die at the hands of the cosmetics industry every year in the United States alone. This includes testing cosmetics for skin or eye sensitisation or corrosion; acute oral, dermal or inhalation toxicity, or carcinogenicity, among other tests.¹¹⁸

The *Industrial Chemicals Notification and Assessment Act 1989* (Cth) provides national standards for cosmetics in Australia, the importation and manufacture of which is regulated by the *National Industrial Chemicals Notification Assessment Scheme* (NICNAS).

While these mechanisms do not require cosmetics to be tested on animals, they do not expressly prohibit it, nor do they prohibit the sale of imported products or ingredients that have been tested on animals from other jurisdictions. Critically, testing industrial chemicals on animals continues to be recommended by NICNAS.¹¹⁹

There has been an increase in lobbying against testing on animals and the sale of cosmetics that have been, or contain ingredients, tested on animals, with both being successfully banned in the European Union in 2009 and more recently in Israel and India.¹²⁰ New Zealand banned cosmetics testing on animals in May 2015.¹²¹

In 2013, the Australian Labor Party held a national consultation on cosmetics and animal testing, which found the overwhelming majority of Australians support a ban on cosmetic testing on animals.¹²² At the time of writing, the *End Cruel Cosmetics Bill 2014* (Cth) was before the Senate, which intends to ban the importation of animal-tested cosmetics and animal testing in Australia.

3.5 Animals Used for Leather, Wool and Fur

Each year, tens of millions of animals are killed as part of the international leather, wool and fur trades. Animals may be either hunted or farmed (some in factory farm conditions - see also 'Factory Farming', p 27), and may be slaughtered by means of electrocution, gassing or having their necks broken. These methods are used in order to keep the animals' pelt intact. Some overseas suppliers have been found to skin animals alive.¹²³

Globally, certain species are hunted to the point of extinction or severe endangerment, while in Australia, hunting kangaroos for their skins has put critical pressure on kangaroo populations (see 'Commercial Killing of Kangaroos', p 45).¹²⁴

Leather and fur products sold in Australia are either imported from specialised farms overseas, or are co-products of the Australian meat and dairy industries. Dedicated leather farms exist in Australia for crocodile skin,¹²⁵ in addition to farms that produce sheepskin and wool. In 2012, Australia accounted for two thirds of the world's wool exports.¹²⁶

Each jurisdiction in Australia has localised welfare regulations for the production and sale of leather, wool and fur. In addition to the application of state and territory anti-cruelty statutes, the trade is regulated by Codes of Practice for each individual species, which are adopted largely as voluntary guidelines.¹²⁷

Although Australia banned the importation of dog and cat fur in 2004,¹²⁸ some international investigations have revealed that fur products from China are frequently mislabelled.¹²⁹ While fur farming is not expressly banned in Australia, it is currently banned in Austria, Croatia and the UK, and it is intended to be phased out by 2024 in the Netherlands.¹³⁰ The trade in seal products has been banned in the EU since August 2010.¹³¹



Case Study 14: Investigations into the Australian wool industry

In 2013/14, People for the Ethical Treatment of Animals (PETA) released undercover footage showing violent and cruel mistreatment of sheep in 19 shearing sheds across NSW, VIC and SA. In addition to highlighting routine and systemic animal cruelty across the shearing industry, the investigation also demonstrated the absence of effective monitoring and enforcement of anti-cruelty statutes, as well as the need for greater transparency, in animal use industries.

Although the footage prompted an RSPCA inquiry and an industry review of welfare standards, it did not result in prosecutions nor in any practical changes to the way the industry is regulated.¹³²

3.6 Animals Used for Entertainment

Circuses

Wild and domestic animals continue to be used in Australian circuses solely for the purpose of entertainment. Circus animals spend much of their lives travelling in cramped conditions and are deprived of a natural environment. They can also lawfully be subjected to cruel training regimes.

Although positive reinforcement for training is encouraged within the industry, allegations of punitive and cruel training methods are commonplace.¹³³ As the shows are mobile, it is also difficult to provide for the animals' most basic psychological, emotional or physical needs.

The regulation of circus animals varies across states and territories, with the majority of action taken at the local government level.¹³⁴ Some jurisdictions have incorporated the *Recommended National Circus Standards 2005* to varying degrees into legislation,¹³⁵ while others have established statutes or codes specifically directed at exhibited animals.¹³⁶

Numerous local councils in Australia have banned circuses that involve exotic animals.¹³⁷ The ACT Government has enacted a total ban on such circuses.¹³⁸ Although all animals are ill-suited to the circus, the use of domestic animals in circuses – such as dogs, horses and camels – is rarely subject to council bans.

Internationally, a number of countries have enacted total bans, including Greece, Bolivia, Colombia, Costa Rica, Mexico, Paraguay, Peru, Israel and Singapore.¹³⁹

Ringling Bros. and Barnum & Bailey Circus, one of the largest circuses in the United States, has announced its intention to retire all 13 of its performing elephants by 2018 to a sanctuary which they run.¹⁴⁰ Their circuses will, however, continue to feature tigers, lions, horses, dogs and camels.



Circus animals spend much of their lives travelling in cramped conditions and are deprived of a natural environment.

Case Study 15: Circus cases

Pearson v Janlin Circuses Pty Ltd [2002] NSWSC 1118

FACTS Animal Liberation NSW took action against Stardust Circus in relation to the treatment of their elephant, Arna. Arna had been kept by the circus for a number of years without any contact with other elephants. In 2000 it was alleged by Animal Liberation that the circus authorised three elephants to be kept in close proximity to her for a number of hours before being removed.

Animal Liberation argued that as a result of this act Arna was unreasonably, unnecessarily or unjustifiably abused, tormented, infuriated or inflicted with pain in contravention of section 5(2) of the *Prevention of Cruelty to Animals Act 1979* (NSW). At first instance the Magistrate dismissed the proceedings on the basis that *mens rea* (criminal intent) was not established, although the Magistrate acknowledged that Arna became distressed and therefore was inflicted with pain within the terms of the Act. Animal Liberation appealed.

OUTCOME Windeyer J of the NSW Supreme Court followed *Bell v Gunter* (the case not being drawn to the attention of the Magistrate at first instance) and held that *mens rea* was not an element of the offence; rather the offence was one of strict liability (see Case Study 1). He ordered the matter to be reheard according to law. Upon rehearing, however, the case was dismissed as there was insufficient evidence adduced to prove that the Defendant was responsible for the removal of the elephants.

Note: In 2008, Arna was retired from Stardust Circus after causing the death of Ray Williams, a circus worker who was found dead with severe blunt trauma injuries.¹⁴¹

American Society for the Prevention of Cruelty to Animals, et al. v Feld Entertainment, Inc., 659 F.3d 13 (C.A.D.C., 2011) (United States Court of Appeals, District of Columbia Circuit)

FACTS Following allegations made by a former circus employee, cruelty proceedings were brought against Feld Entertainment Inc. The Plaintiffs argued that a number of the regular practices of Ringling Bros. and Barnum & Bailey Circus (a subsidiary company of Feld) mistreated Asian elephants and were in violation of the *Endangered Species Act of 1973* (US). The practices in question included the use of bull hooks and chains on elephants.

OUTCOME The litigation took place over 14 years, with a number of successive cases appealing against the original Court ruling that the Plaintiffs had no standing to bring their claims. Although evidence detailing the mistreatment of the elephants was presented at a six week trial in 2009, the merits of the claims were never ruled upon. Subsequent appeals in 2011 and 2012 reaffirmed earlier decisions and denied the Plaintiff's petition for rehearing. Subsequently, Feld brought two cases against the original Plaintiffs, seeking costs.

Note: In 2014, the remaining parties announced a settlement agreement resolving both actions, resulting in more than \$25 million in legal fees and expenses being paid to Feld over the course of the litigation.¹⁴² In 2015, Feld decided to phase out its use of elephants by 2018, claiming that their decision was a result of the lack of consistency between the laws governing animals in the 115 cities annually visited by the circus. Feld announced that the animals would be retired to a property owned by Feld, where they would take part in a breeding program.¹⁴³

Zoos and Aquaria

Some zoos and aquaria claim their primary aims are to conserve wildlife and educate the public. They are, however, commercial entertainment businesses which can conflict with conservation and education aims.

The current regulatory framework governing zoos and aquaria broadly permit animal captivity on the basis that it performs a valid function, provided the needs of animals are somewhat accommodated.¹⁴⁴ Captivity itself, however, can cause significant harm to wild animal species, particularly larger animals with complex cognitive abilities, such as elephants and cetaceans. Zoos and aquaria cannot provide for the physical, behavioural or emotional needs of these animals.¹⁴⁵

The laws governing zoos and aquaria are complex, and vary across states and territories. In NSW, for example, the *Exhibited Animals Protection Regulation 2010* (NSW) provides for a number of standards for animal display.¹⁴⁶ Of these, the *Standards for Exhibited Bottle-nosed Dolphins* has not been updated since it was published in 1994. In 2014, the Australian government called for public consultation on the development of a draft *Australian Animal Welfare Standards and Guidelines: Exhibited Animals* to improve national consistency.¹⁴⁷ It was yet to be finalised at the time of writing.

Racing Industry

The racing industry in Australia encompasses thoroughbred (both flat and jumps racing) and harness racing for horses, and greyhound racing. Horse and dog racing are extremely lucrative industries, with Australians wagering billions of dollars each year across these industries.¹⁴⁸

Significant welfare issues exist in horse racing, particularly around the use of whips;¹⁴⁹ the large number of animals deemed 'wastage' and slaughtered prematurely,¹⁵⁰ and the high injury and mortality rates, particularly in jumps racing.¹⁵¹ Notably, jumps racing is only permitted in VIC and SA.¹⁵²

Similar welfare concerns arise in greyhound racing, with high 'wastage', injury and mortality rates; greyhounds being confined off-track in barren cages; claims of underfeeding, and the use of illegal training techniques, such as doping and live baiting.¹⁵³

State and territory anti-cruelty statutes apply to the racing industry, as well as industry rules that are self-regulated by industry bodies. In addition, various state and territory governments have enacted industry specific legislation.¹⁵⁴ Horse racing, for example, is regulated at the federal level by the Australian Racing Board which administers the *Australian Rules of Racing*.¹⁵⁵ These rules have been incorporated into local rules by state and territory racing authorities, with local stewards responsible for compliance monitoring and enforcement.¹⁵⁶ A similar framework is established for greyhound racing.

Unfortunately, industry rules and anti-cruelty statutes have failed to address the welfare concerns inherent in racing. Using animals in wagering sports inevitably results in exploitation and abuse, and the present dependence on industry self-regulation has proved entirely ineffective in stamping out cruelty and corruption in the industry.



Captivity itself can cause significant harm to wild animal species, particularly larger animals with complex cognitive abilities, such as elephants and cetaceans.

Case Study 16: Zoos and aquaria cases

***Re International Fund for Animal Welfare (Australia) Pty Ltd v Minister for Environment and Heritage* [2006] AATA 94, 93 ALD 625**

FACTS The International Fund for Animal Welfare, Humane Society International and RSPCA Australia challenged the Federal Environment Minister's decision to grant a permit allowing the importation of eight Asian elephants into Australia to be kept at Taronga and Melbourne zoos. They argued that the importation breached the *Convention on International Trade in Endangered Species* (CITES) in that the housing and facilities were insufficient and would be detrimental to the welfare of the elephants.

OUTCOME The Administrative Appeals Tribunal allowed the importation, noting the differing views of the experts on the welfare of the elephants and the abilities of the zoos to meet their needs. The Tribunal did, however, impose numerous welfare conditions not provided for in the original permit. These included, but were not limited to: providing the elephants with more comfortable sleeping quarters; removing electric shock wiring from trees to allow the elephants to scratch and forage; providing the elephants with mud wallows and adequate opportunity to exercise and socialise, and monitoring the elephants via closed circuit TV. The zoos were also required to give undertakings to the Minister to the effect that they would comply with these conditions.

***Tilikum et al. v Sea World Parks & Entertainment Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012)**
(United States District Court, Southern District of California)

FACTS PETA brought proceedings on behalf of five captive orcas, including Tilikum, held by SeaWorld in Florida. PETA sought to establish that the orcas should be afforded constitutional protection from involuntary servitude or slavery, as conferred by the Thirteenth Amendment. To evidence the claim, PETA highlighted the physical and psychological stress faced by orcas in captivity, who typically have shorter lifespans than orcas in the wild.

OUTCOME The United States Federal Court considered the Thirteenth Amendment's plain and ordinary meaning, historical context and subsequent judicial interpretations and ruled that involuntary servitude and slavery could not be extended to a nonhuman animal, as they are uniquely human activities. The Court dismissed the case on a lack of subject matter jurisdiction. On the argument for the creation of new rights for orcas based on an expansion of the scope of the Thirteenth Amendment, the Court held the Amendment is not open to expansion as it targets a single issue: the abolition of slavery within the United States.

Case Study 17: Exposés into the greyhound racing industry

In 2013, ABC's *7:30* revealed that 'blood draining' is a common practice for unwanted greyhounds, which entails draining the blood of otherwise healthy greyhounds who are deemed too slow for racing, or unsuitable for breeding purposes.¹⁵⁷ It is estimated that about 18,000 greyhounds are prematurely slaughtered as part of the sport, with the industry relying on over-breeding to maintain a sufficient supply of high-performing racers.¹⁵⁸ Australian law does not prohibit blood-draining, nor prevent the premature killing of unwanted greyhounds.

In 2015, ABC's *Four Corners* revealed that live baiting is also common in the greyhound industry,¹⁵⁹ despite being expressly prohibited under various anti-cruelty statutes.¹⁶⁰ Live baiting involves tying live animals (such as possums, piglets, cats and rabbits) to a mechanical lure, which moves at very high speeds around a racetrack. The greyhounds are trained to chase and attack the lure, which inevitably results in live animals being mauled to death. Once exposed, some trainers involved in the practice faced criminal charges and were prosecuted,¹⁶¹ while the footage triggered a number of parliamentary inquiries and prompted legislative reform.¹⁶² The exposé highlighted the problem of industry self-regulation, and the need for independent monitoring and enforcement of anti-cruelty statutes.



3.7 Companion Animals

Puppy and Kitten Farms

Puppy and kitten farms are commercial breeding facilities. As with the factory farming of agricultural animals, animals kept in intensive breeding facilities may be subject to a host of welfare concerns, including overcrowding, ongoing confinement, overbreeding, early infant-mother separation, health complications, a lack of veterinary care and unhygienic housing conditions. In these factories, animals may be deprived of a natural life with their emotional, social and physical needs disregarded.¹⁶³

The conditions in puppy and kitten farms often violate the welfare standards prescribed by state and territory codes of practice for breeding animals¹⁶⁴ and anti-cruelty statutes. Despite this, puppy and kitten farms are not always illegal under local council permits. This is because

the existing regulations do not sufficiently identify or define the problem of puppy and kitten farms, nor provide for enforceable or stringent measures to ensure adequate animal welfare. Enforcement efforts are also hampered by the fact these facilities may operate in hidden or remote locations.¹⁶⁵

At the time of writing, it is estimated that about 95% of puppies in Australian pet shops come from puppy farms.¹⁶⁶ Puppy farms also distribute their animals via online classifieds, newspaper advertisements, or by setting up a false house as a shop front.¹⁶⁷

Although puppy farms are seemingly more prevalent than kitten farms in Australia, there are a variety of additional issues inherent in the breeding of cats. For example, the very large population of homeless cats has led to an excess of animals in impoundment facilities. Data collected in 2011 found that 64% of impounded cats were consequently killed.¹⁶⁸ Trap-Neuter-Release

programs are a humane and economical alternative to killing homeless cats, and programs to rehome these cats would remove the need for commercial breeding.

To date, only the ACT Government has criminalised intensive breeding facilities and introduced a companion animal breeder licensing regime.¹⁶⁹

Sale of Companion Animals

There are significant animal welfare issues with pet shops and other businesses that sell companion animals. These businesses provide a point of sale for companion animals from puppy and kitten farms, encourage impulse buying, and contribute to the number of unwanted animals in shelters.¹⁷⁰

At the time of writing, the VIC Labor Party promised to amend codes of practice so that pet shops will only be able to sell animals from a registered breeder, shelter or compliant facility.¹⁷¹ The NSW Labor Party has made similar promises, including the banning of puppy sales through pet shops and a limitation on the number of breeding cycles per mother dog.¹⁷² In SA, proposed

legislation would require breeders to register with the Dog and Cat Management Board or other approved organisation, and will make it an offence for non-registered breeders to sell animals.¹⁷³



Case Study 18: Dangerous dog case

Isbester v Knox City Council [2015] HCA 20

FACTS The Appellant was convicted of an offence under section 29 of the *Domestic Animals Act 1994* (VIC) after her Staffordshire terrier, Izzy, bit someone. Subsequently, the Domestic Animals Act Committee of Knox City Council ordered that Izzy be killed. On appeal to the High Court of Australia, the Appellant argued that the Committee's decision should be overruled because of bias, as a member of the Committee had also been involved in the prosecution of the charges.

OUTCOME In a unanimous decision, the appeal was upheld with costs. The High Court noted that section 84P(e) of the Act, enabling the Council to kill a dangerous dog, had a strong rationale in protecting public safety. At the same time, the High Court held it was essential for the Appellant to be afforded natural justice. On this basis, the High Court quashed the decision, as the participation of the Committee member in both the conviction and final decision regarding the Appellant was enough to create an apprehension of bias.

Although the High Court did not comment on the reasonableness of killing domestic animals for minor injury to humans, this is believed to be the first time the High Court has heard a case concerning a dog on death row.

Controls on Dogs

In Australia, local councils have the power to declare certain dogs to be dangerous or menacing under local laws.¹⁷⁴ Further, some jurisdictions have deemed certain species to be restricted breeds (such as the American pit bull terrier, Japanese tosa, dogo Argentino, fila Brasileiro, and Presa canario), which means they cannot be legally sold or bought in those jurisdictions.¹⁷⁵ Dogs whom have been declared to be dangerous, menacing or restricted are then subject to detailed conditions of care. Failure to comply with these conditions can result in loss of ownership or the dog being killed. As these declarations usually follow an incident involving an unprovoked attack, there is scope for animal lawyer involvement in appealing such declarations and in personal injury matters.

Companion Animal Custody

Despite companion animals being afforded the greatest protections under anti-cruelty statutes, the law considers them chattels or objects when it comes to dividing property after relationship breakdowns.¹⁷⁶ Since the future care and welfare of a sentient creature is at stake, treating animals the same as any other piece of property is inadequate.¹⁷⁷

For example, courts could further the interests of both the human and nonhuman parties by formulating a set of principles derived from family law, such as the principle that the best interests of the child is paramount in custody matters. Under such a model, consideration could be given to the 'best interests of the animal' above the property rights asserted by the human parties.¹⁷⁸ Cases addressing the issue of companion animal custody have reached American courts,¹⁷⁹ but are still relatively uncommon in Australia.¹⁸⁰

3.8 Deemed 'Pests'

Animals deemed under law to be pests, such as rabbits, foxes, and wild dogs (including dingoes), are often killed using methods that would be considered inhumane and unlawful under anti-cruelty statutes if they were applied to companion animals. For example, in some jurisdictions pests may be poisoned, infected with disease, hunted or caught in steel-jawed traps.¹⁸¹ Although these actions are cruel in their application and may negatively impact delicate ecosystems, they often fall outside the scope of anti-cruelty statutes. Species deemed pests may be specifically excluded from the operation of the statutes; be the subject of a statutory defence; be regulated through a Code of Practice, or their harm may be authorised by another piece of legislation.¹⁸² Non-lethal methods of control, such as fertility management and wildlife corridors, are preferable to the cruelty inflicted under existing laws.¹⁸³ See also Section 3.10: Wild Animals and Case Study 6.

3.9 Factory Fishing

Aquaculture

Just as agricultural animals are raised intensively, fish are factory farmed through aquaculture. Unlike agricultural animals, however, there is a general lack of public awareness about the welfare concerns inherent in factory fish farming.

Fish are hatched, relocated to land tanks or sea cages (which sometimes involves days of transportation without food),¹⁸⁴ and are then slaughtered.¹⁸⁵ Fish are commonly stunned using carbon dioxide, and are then either bled out, electrocuted, suffocated or spiked through the brain.¹⁸⁶

The welfare concerns in aquaculture are similar to those faced by factory farmed land animals, including the stresses associated with transportation, poor handling and methods of sorting,¹⁸⁷ unnatural feed, poor water quality and painful methods of slaughter.¹⁸⁸ Fish can also be kept at extremely high stocking densities in enclosed pens.¹⁸⁹



Exclusion From Protections

As anti-cruelty statutes are regulated by state and territory governments, not all jurisdictions define the term 'animal' in the same way. For example, the anti-cruelty statutes of WA and SA expressly exclude fish in the definition of 'animals'.¹⁹⁰ Recent studies show that fish possess a similar ability to experience pain as many mammals,¹⁹¹ although a scientific consensus is yet to be reached on the matter. Crustaceans also receive inadequate protection as in some jurisdictions they are only considered animals when kept at a place where food is sold.¹⁹²

Fish are covered by the relevant anti-cruelty statutes in most, but not all, jurisdictions.¹⁹³ Unfortunately, as they are unable to express their distress in ways that are easily identifiable to humans,¹⁹⁴ this protection is effectively rendered meaningless.

Australia is also yet to adopt any code or guideline for fish farming.¹⁹⁵ Their only other protection stems from the non-binding *Aquatic Animal Health Code* from the World Organisation for Animal Health (OIE). Consequently, fish are frequently excluded from conversations about the legal protection of animals.

Super Trawlers

Super trawlers are commercial fishing vessels, identified by their capacity to indiscriminately haul extremely large catches of marine wildlife. Large-scale fishing has attracted significant criticism for its negative impact on fragile marine ecosystems through overfishing and the widespread depletion of marine species, including endangered and threatened species killed as by-catch.¹⁹⁶

In 2012, a temporary ban was declared against super trawlers fishing in certain Australian waters. Technically, the conditions imposed would ensure that a super trawler has the same fishing quota as a smaller vessel.¹⁹⁷ The ban was directed at the FV Margiris (renamed the Abel Tasman), which at the time was the second largest trawler in the world, capable of processing 250 tonnes of fish per day.¹⁹⁸ Although the regulations sought to ban factory freezer vessels more than 130 metres in length,

there was scepticism about the effectiveness of applying the ban to vessels identified by length rather than fishing capacity and method. Despite these concerns, the Federal Government introduced a ban on trawlers over 130 metres in length in 2014.¹⁹⁹

Shark Killing

In January 2014, the WA Government began a controversial shark management program, despite significant public opposition.²⁰⁰ The program involved the use of drum lines or baited hooks approximately one kilometre off the WA coast, and sought to target great white, tiger and bull sharks. It was projected that about 300 sharks would be killed under the program, despite the fact that some shark species are included in the *Red List of Threatened Species* and are protected by the *Convention on International Trade in Endangered Species* (CITES).²⁰¹ At the end of the trial period, 68 sharks were caught and shot under the program.²⁰²

Usually, a permit must be obtained under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) prior to killing protected wildlife. The WA Government was granted a special exemption from gaining this permit by the Federal Environment Minister, meaning a full scientific environmental impact assessment was not performed prior to commencement of the kill.²⁰³

Sea Shepherd Australia took action against the WA Government in the Supreme Court, arguing that the exemption permitting the shark killing program was not properly documented in the Government Gazette, and sought judicial review into the process. The Court held that the exemption and the program were both valid.²⁰⁴ Since then the program has been discontinued, following a recommendation from the Environmental Protection Agency.²⁰⁵ Notably, drum lines are still used in QLD despite a lack of scientific evidence of the strategy's effectiveness.²⁰⁶

Case Study 19: Commercial fishing and endangered by-catch

Re Nature Conservation Council of NSW Inc v Minister for Environment and Water Resources [2007] AATA 1876, 98 ALD 334

FACTS The Nature Conservation Council of NSW (NCC) sought review of the Minister's decision to declare the NSW Ocean Trap and Line Fishery an approved Wildlife Trade Operation under section 303FN of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The Act provides that the Minister must not approve a Wildlife Trade Operation unless satisfied that it will not be detrimental to the survival of a taxon. The NCC argued that the fishery was detrimental to the survival of the critically endangered grey nurse shark and sought review of the conditions imposed on it.

OUTCOME The Administrative Appeals Tribunal acknowledged the population of grey nurse sharks off the east coast of Australia was in the vicinity of 500 to 1,500; that extinction of the species may well be inevitable, and that human activity (through commercial and recreational fishing and the use of shark nets at beaches) has contributed to their declining population.

The Tribunal held, however, that there were many factors impacting on the survival of grey nurse sharks and concluded that compared with other factors (such as the already depleted population and the biology of grey nurse sharks) the fishery was not so damaging as to warrant changing the conditions imposed on it. Further, the Tribunal was not satisfied that the proposed conditions would have a measurable impact on the species' survival. The decision of the Minister was therefore affirmed. The Tribunal noted, however, that urgent steps were required to ensure the survival of the grey nurse shark, but that such management falls outside the Tribunal's reach.

Fish are covered by anti-cruelty statutes, but as they are unable to express their distress in ways that are easily identifiable to humans, this protection is effectively rendered meaningless.

3.10 Wild Animals

Commercial Killing of Kangaroos

Kangaroo shooting is the largest commercial slaughter of land-based wildlife in the world.²⁰⁷ Between 2002 and 2012, it was estimated that 28 million kangaroos were killed commercially, with a by-catch of approximately eight million joeys.²⁰⁸ This figure does not include those killed unlawfully outside of authorised killing quotas and is therefore significantly lower than the actual number.

The commercial killing of macropods is governed by the *National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes* (Code) and it is a condition of commercial killing licences that the licence holder comply with this Code.

To date, however, the Code has failed to adequately protect kangaroos from suffering. For instance, under the Code, a ‘humane death’ is considered one where the animal dies instantaneously through a clean shot to the head. Yet the very nature of the kill which requires hunters to shoot small moving targets at night and in low light makes this method difficult.

Further, Section 5 provides that orphaned joeys must be slaughtered either by decapitation with a sharp blade,²⁰⁹ a forceful blow to the skull²¹⁰ (commonly referred to as ‘blunt trauma’) or a shot to the brain or heart.²¹¹

A majority of kangaroo killing occurs in remote locations and at night, making it virtually impossible for relevant authorities to ensure kangaroos are shot in accordance with the Code, and minimising any possibility of effective compliance monitoring and enforcement.

Due to poor regulation and processing standards, kangaroo meat has also come under repeated scrutiny due to contamination concerns, to the extent that the largest importer – Russia – temporarily banned the trade of kangaroo meat in 2008 and again in 2014.²¹² In 2015, documents obtained by Greens NSW MP John Kaye under a freedom of information request showed the NSW kangaroo meat industry failed to meet basic standards of hygiene, with the NSW Food Authority finding multiple breaches of the *Australian Standard for Hygienic Production of Game Meat*.²¹³

Given the above concerns and the inherent inability to monitor and enforce an industry that kills native wildlife in remote locations, commercial kangaroo killing must be banned.

Non-Commercial Killing of Kangaroos

The non-commercial or ‘ecological’ killing of kangaroos is justified by the perception that these animals are overpopulated to pest proportions, a view that is not adequately backed by scientific evidence for all kangaroo species in all locations.²¹⁴ Despite this, both legal and illegal non-commercial shooting of kangaroos occurs under the guise of sustainability.

Kangaroo management is the combined responsibility of the Commonwealth and state and territory governments. Classified as wild fauna, the non-commercial killing of kangaroos falls within Commonwealth jurisdiction, and though each state and territory must develop non-commercial kangaroo management plans, these must be approved by the Australian Government Department of Environment.

Glossary of terms – Kangaroo shooting

Commercial shooting	Individuals with a hunting licence who shoot kangaroos to sell for profit.
Non-commercial shooting	Government-ordered kills or individuals shooting on their own property with permission but who cannot sell kangaroo bodies for profit.
Legal Hunting	Shooting, whether commercially or non-commercially, with an approved licence.
Illegal Hunting	Shooting without an approved licence or on private property without permission.

The Government commonly claims that animal welfare is ensured through the *National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Non-Commercial Purposes* (the Code). It is a condition of licences that the licence holder complies with this Code. For the reasons outlined in ‘*Commercial Killing of Kangaroos*’ above, inadequacies in the Code itself, combined with difficulties around monitoring and enforcement, effectively render these protections meaningless. As with the commercial kangaroo industry, the inhumane killing of orphaned joeys is an unintended consequence of this practice.

A number of legal proceedings have been commenced in the ACT opposing the validity of relevant government decisions to permit the non-commercial killing of kangaroos.²¹⁵ This opposition has focused on the lack of scientific evidence justifying the kills; the uncertainty around survey data and methods of assessing kangaroo populations; the unsustainability of large-scale killing programs for kangaroo populations, and welfare concerns around the killing of orphaned joeys. While these proceedings have been met with varying levels of success in terms of awareness raising and suspending the kill, none have resulted in a government department decision being overturned.

Case Study 20: The ACT’s annual kangaroo kill

Animal Liberation ACT v Conservator of Flora and Fauna [2014] ACAT 35

FACTS Animal Liberation ACT (represented by the Animal Defenders Office) made an application to review a decision of the Conservator of Flora and Fauna to issue kangaroo killing licences pursuant to section 104(1)(a) of the *Nature Conservation Act 1980* (ACT). The licences were issued to kill approximately 1,606 eastern grey kangaroos in eight nature reserves in the ACT. The kill was focused on protecting native plant species in the reserve. Animal Liberation ACT successfully obtained an injunction, suspending the kill until the case was heard by the full bench of the ACT Civil and Administrative Tribunal (ACTAT).

Animal Liberation ACT questioned the grounds upon which the kill was based, arguing that the scientific reasoning supporting the kill was insufficient and was adduced by an expert with a perceived conflict of interest. Animal Liberation ACT also provided alternative evidence to show that kangaroos did not need to be killed for conservation, and highlighted the potential use of fertility control and translocation as alternative methods of population management.

OUTCOME The Tribunal found in favour of the Conservator, thus permitting the kill to continue. The decision was based largely on the quality of the evidence provided. The Tribunal acknowledged the potential for a conflict of interest, as the expert was involved in the decision-making process which resulted in the issuing of the licence, but held that the ultimate decision was made by the Conservator. The Tribunal was satisfied that attention to animal welfare is under constant review, and the system was designed to achieve the best possible animal welfare outcomes, especially considering that translocation and fertility control were not yet considered to be viable alternatives. As a result, 1,519 kangaroos and 514 pouch young were killed under the program.²¹⁶

Note: Animal Liberation ACT had previously contested the Conservator’s decision in relation to kangaroo killing in the ACT. In *Animal Liberation v Conservator of Flora and Fauna* [2009] ACAT 17, the Tribunal affirmed the Conservator’s decision to allow the killing of 7,000 kangaroos, and held that overgrazing by kangaroos had caused severe damage to endangered ecological communities and the habitat of threatened species within the contested area. Significantly, in 2014 it was reported that the ACT Government was considering issuing licences to kill kangaroos that were valid for five years in order to avoid annual interference from groups who oppose the kill.²¹⁷

The mouth of a kangaroo can be blown off, as can ears, eyes and nose; hind legs can be shattered. To deny that this goes on is just an exercise in attempting to fool the public.



Recreational Hunting

Hunting laws are regulated by state and territory governments. Consequently, the type of restrictions, permits, licences and categorising of animals that apply to recreational hunting will vary between jurisdictions.

Hunting may be limited by declared 'open seasons', the issuing of permits to hunt and a 'bag limit' that restricts the number of animals killed each day. Animals typically hunted for recreational purposes include, but are not limited to, different breeds of quail, duck and deer. Each jurisdiction also classifies some species as pests, and often allows them to be killed without requiring a hunting licence or permit.²¹⁸ Some animals declared as pests include wild rabbits, hares, foxes, goats, pigs, dogs, cats, camels, buffalo and donkeys (see Section 3.8: Deemed 'Pests').

The welfare of these animals is seriously compromised by the risk of inaccurate shooting in recreational hunts. A former kangaroo shooter has described what happens to animals who are inaccurately shot:

"The mouth of a kangaroo can be blown off and the kangaroo can escape to die of shock and starvation. Forearms can be blown off, as can ears, eyes and noses. Stomachs can be hit expelling the contents with the kangaroo still alive. Backbones can be pulverised to an unrecognisable state, etc., hind legs can be shattered with the kangaroos desperately trying to get away on the other or without the use of either. To deny that this goes on is just an exercise in attempting to fool the public."²¹⁹

Importantly, this description is derived from a professional shooter's experience, which sets a dire threshold for the accuracy of less experienced recreational shooters.

Although hunting is regulated by a statutory authority in each jurisdiction, such as the Game Management Authority in VIC, there is little to ensure effective monitoring and enforcement of existing hunting regulations.²²⁰ In NSW, for example, hundreds of forests are declared as public hunting lands, which limits the scope for effective monitoring.²²¹ Furthermore, hunting of certain non-indigenous animals on private lands may be acceptable provided the landowner has granted permission.²²²

Yet the fact remains that killing animals for sport is indefensible. Not only is the practice violent and unnecessary, but the inconsistent and unreliable nature of recreational hunting makes it an inappropriate means of managing so-called 'pest' species. Alternative non-lethal methods of population management would prove both more effective and ethical.

Pig Dogging

One particularly cruel form of recreational hunting is pig dogging. State and territory regulations vary in relation to pig dogging, but generally hunters are permitted to use dogs to track ('point and flush') wild pigs.²²³ In NSW, hunters may also use dogs to track and capture ('hold or bail') wild pigs,²²⁴ which raises serious welfare concerns for both the pigs and hunting dogs.



Pig dogging inevitably results in pigs experiencing fear, panic and distress during the hunt, as well as a painful and prolonged death. Although the regulations in NSW provide that 'necessary steps' must be taken to minimise 'unnecessary pain',²²⁵ dogs are not always able to be controlled in the heat of a hunt, meaning pigs may be attacked or mauled before being killed by knife or gun shot as required by law. Dogs are also at risk of injury during pig hunting, which if left untreated, could prove fatal.

While pig dogging is often 'justified' on conservation grounds, it has proved ineffective in managing wild pig populations.²²⁶ Further, such claims are undermined by the fact hunters have been found to permit sows and smaller pigs to escape so the sport can continue for future seasons. Hunters have also been found to remove the ears and tails of pigs to make future hunts more challenging.²²⁷ Pig dogging is unnecessarily cruel, and cannot be justified on environmental grounds.

Dogs are not always able to be controlled in the heat of a hunt, meaning pigs may be attacked or mauled before being killed by knife or gun shot as required by law.

Traditional Hunting

Aboriginal and Torres Strait Islanders who engage in traditional hunting are sometimes exempt from anti-cruelty statutes or laws which operate to protect threatened or endangered species.²²⁸ By operation of the *Native Title Act 1993* (Cth), native title holders are permitted to exercise their native title rights or interests, which include hunting and fishing on traditional lands or waters for personal, domestic or non-commercial communal needs.²²⁹

Many traditional hunting practices have been found to cause substantial pain and suffering to wild animals. For example, some of the more concerning methods of traditional hunting have involved dugongs being harpooned and left to struggle for several hours before they are eventually killed; turtles having their flippers cut off or turned on their backs for weeks to prevent escape, and kangaroos having their legs broken, also to prevent escape.²³⁰

Both the Commonwealth and state and territory governments have the power to regulate the killing of traditionally hunted animals to ensure their sustainability. To date, meaningful protections are yet to be implemented.²³¹ For example, the QLD Government amended its *Animal Care and Protection Act 2001* (QLD) to require traditional killing be “done in a way that causes the animal as little pain as is reasonable”.²³² While the law provides examples of how animals should not be killed, it fails to properly instruct hunters on appropriate alternatives.²³³

Notably, not all Australian jurisdictions expressly address traditional hunting.²³⁴ In jurisdictions where traditional hunting is not exempt from anti-cruelty statutes, the fact that hunting occurs in remote locations with poor monitoring and enforcement mechanisms means people are rarely prosecuted for such practices.²³⁵

Whaling

The *International Convention for the Regulation of Whaling* (1946) (ICRW) was established to regulate commercial whaling operations and hunting for scientific research. The ICRW also established the International Whaling Commission (IWC), a body charged with administering the convention and overseeing international whaling.

In response to a serious decline in whale numbers in the 1970s, the IWC implemented a number of initiatives which effectively brought commercial whaling to a halt. This included the establishment of the Indian Ocean Whale Sanctuary in 1979, the moratorium on commercial whaling in 1986 and the Southern Ocean Sanctuary in 1994, all incorporated under the Schedule of the ICRW.²³⁶

Member nations of the IWC must comply with the ICRW, however, members can opt out of particular provisions under an objection or reservation. Norway, for example, continues to hunt under an objection to the moratorium, as does Iceland on the grounds it rejoined the IWC in 2002 under a reservation.²³⁷

Japan’s whaling activities continue under a special permit to whale for scientific purposes under the ICRW. From 1987 to 2005, Japan’s Antarctic research program, ‘Japanese Whaling Research Program under Special Permit in the Antarctic I’ (JARPA I), saw almost 7,000 minke whales killed for scientific purposes.²³⁸ In response to JARPA II, which commenced in 2005, the Australian Government argued that the special permit is not being used solely for scientific purposes, and brought proceedings at the International Court of Justice to contest the special permit. The Court found that the permit was not being used appropriately (see Case Study 21).²³⁹

Between Japan, Norway and Iceland, there is a yearly quota to kill over 2,700 whales.²⁴⁰ The issue of whaling highlights a number of legal issues, including the efficacy of international law and courts, the capacity to enforce international conventions or court orders, and the ability of Australia to regulate the treatment of animals beyond its territory.

Case Study 21: Whaling cases

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2008] FCA 3

FACTS Humane Society International sought an injunction against the Japanese whaling company, Kyodo Senpaku Kaisha Ltd, to prevent it hunting whales in the Australian Whale Sanctuary. Kyodo engaged in such activity pursuant to JARPA I issued under Article VIII of the ICRW which permits whaling for scientific purposes. The application was made under section 475 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) for injunctive relief, as whaling activities in the Australian Whale Sanctuary contravene sections 229-230 of the EPBC Act.

As Humane Society International is a public interest organisation, whose stated objectives include promotion of the “enhancement and conservation of all wild plants and animals”, it qualified as an ‘interested party’ pursuant to section 475(7) of the EPBC Act.

OUTCOME Allsop J of the Australian Federal Court granted the injunction on the basis that the whaling conducted under JARPA I breached sections of the EPBC Act. It was held that the potential difficulty (if not impossibility) of the Commonwealth Director of Prosecutions enforcing the injunction was not a valid reason to withhold relief.

The Court acknowledged that Japan disputes Australia’s sovereignty over the Australian Antarctic Territory. This was not regarded as a ground for invalidating the EPBC Act, as the question of sovereignty was not capable of being questioned by the Court.

Note: Despite the outcome of this case, whaling continued in the Australian Whale Sanctuary as the Federal Government did not enforce the Court Order.²⁴¹

Whaling in the Antarctic (Australia v Japan: New Zealand intervening) (International Court of Justice, General List No 148, 31 March 2014)

FACTS Australia and New Zealand instituted proceedings against Japan for its large-scale whaling program under JARPA II, which breached Japan’s obligation under the ICRW.

OUTCOME The Court found that the special permits granted in connection with JARPA II do not fall within the scientific purposes allowed by Article VIII of the ICRW. Some of the reasons given for its decision included the open-ended timeframe of JARPA II, the lack of co-operation between JARPA II and other domestic and international research institutions and that target sample sizes were not reasonable in relation to achieving the program’s objectives. The Court noted further that the scientific output was limited, given that JARPA II had been going on since 2005 and had involved the killing of about 3,600 minke whales.

On account of its whaling practices, Japan was found to have contravened its obligations under the ICRW. Consequently, Japan was ordered to refrain from authorising or implementing any further non-compliant special permits, to immediately cease the implementation of JARPA II and revoke any authorisation that allows JARPA II to continue.

Note: Despite the ruling, Japan announced further plans to continue whaling for scientific purposes. It has reportedly set an annual target of 333 minke whales for future hunts, with a 12-year timeline directly in response to the Court’s criticism around the open-ended time frame under the previous program.²⁴²

Dolphin Hunting

Although there is currently no incidence of dolphin hunting in Australia, Australians have been very vocal in their opposition to dolphin hunting overseas.²⁴³

Commercial hunting of dolphins still legally occurs in Japan, with the largest hunt taking place in Taiji. During the annual drive hunts which occur between September and March each year, dolphins are lured into a small cove in Taiji and penned in nets overnight. These dolphins are either sold to international aquariums and marine parks or slaughtered.²⁴⁴ According to veterinarians who have studied the Taiji drive hunts, the method of slaughter would register “at the highest level of gross trauma, pain, and distress”.²⁴⁵

The most commonly hunted species of dolphin in Japan are striped, spotted, risso’s, and bottlenose dolphins, with an annual government quota of mixed species set at around 2,000.²⁴⁶ According to statistics provided by Japanese Fisheries, between 2000 and 2013 approximately 17,686 dolphins were killed and 1,406 were captured for captivity.²⁴⁷

In May 2015, following international criticism and the threat of expulsion from the world’s leading zoo organisation, the Japanese Association of Zoos and Aquariums agreed to stop buying live dolphins from the town of Taiji.²⁴⁸

Drive hunts also occur in the Solomon Islands where dolphins are killed primarily for their teeth which are a form of local currency, and for sale to international aquariums. Concerns have been voiced regarding over exploitation of dolphins in the Solomon Islands, with 1,600 killed in one hunt alone in 2013.²⁴⁹

Non-commercial or illegal dolphin hunting occurs in a number of countries. Dolphin hunting is conducted regularly in the Faroe Islands alongside pilot whale hunts, but is described as traditional and non-commercial.²⁵⁰ In Peru and Taiwan, tens of thousands of dolphins are killed for sale on black markets each year, despite these countries prohibiting dolphin hunts in 1996 and 1989 respectively.²⁵¹ There have also been reports that dolphins illegally captured near Indonesia are described as ‘rescued’ and sold to resorts, aquariums and travelling dolphin circuses.²⁵²

Seal Hunting

Commercial seal hunting takes places in many countries, including Canada, Greenland, Iceland, Namibia, Finland, Sweden and Norway.²⁵³ In Australia, there have been calls for a shooting program to address growing fur seal populations in SA,²⁵⁴ with the SA Government investing in research into non-lethal deterrents.²⁵⁵

For several decades, seal hunting has come under criticism, particularly around methods of slaughter which can involve violently clubbing seals to death to avoid puncturing their pelt. The Canadian seal hunt is notoriously brutal, with concerns around the scale of the hunt, inaccuracy of slaughterers, the lack of legal protections for seals and the inability of authorities to monitor the hunt.²⁵⁶

The EU banned the trade of seal products from non-indigenous hunting in 2009. A group of seal hunters challenged the ban, which Canada appealed to the World Trade Organisation (WTO). In both cases the ban was



Image: Ashley Avci / Sea Shepherd



The international trade of poached and exotic animals undermines both domestic and international laws, and poses serious animal welfare concerns.

upheld, with the WTO finding that non-trade concerns, such as animal welfare, can restrict trade and still be in line with international trade law.²⁵⁷ The ban has had a serious effect on the value of pelts, with *The New York Times* reporting that the price had dropped from \$100 to as low as \$8 per pelt in 2010.²⁵⁸

Russia ended the hunting of seals in 2009 and banned the import and export of seal skins in 2011, which cut Canada's seal skin market by 90%.²⁵⁹ In late 2014, the Norwegian parliament voted to discontinue a subsidy which had previously provided 80% of revenue to hunters who killed an estimated 12,000 seals per year. This decision is likely to render the industry unviable into the future.²⁶⁰

International Poaching and the Exotic Animal Trade

Poaching involves the illegal hunting, killing or capturing of wild animals and is estimated to affect tens of millions of animals globally each year.²⁶¹ Poaching may involve hunting protected species, killing animals out of season or on closed lands, or using illegal weapons or hunting techniques.

The international trade of poached and exotic animals undermines both domestic and international laws, and poses serious animal welfare concerns. The export and import of animals or animal parts continues within Australian borders and internationally. This can take the form of purchasing live animals, dead animals, animal parts or animal products. For example, medicines containing endangered animal products are frequently found within Australia.²⁶²

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) regulates the export and import of wildlife, and ensures compliance with the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES). There are a number of other laws that are relevant to the exotic animal trade in Australia, including biosecurity laws, quarantine restrictions, international trading regulations, exotic pet regulations and compliance with the *Convention on Biological Diversity* (1992). For example, in 2014 the Federal Government issued a ban on all rhino body parts being imported into Australia, with a view to extending the ban to lion parts as well.²⁶³

The penalties prescribed by these laws in Australia are significant. As of early 2015 poachers will face fines of up to half a million dollars for non-traditional hunting of dugongs and turtles.²⁶⁴ These penalties, however, are rarely enforced to their full extent. Further, "these fines come nowhere near the value these species would have made if sold on the market".²⁶⁵

In recent years, the exotic animal trade has become more difficult to regulate as smugglers have access to better technology and use more complex tactics. Notably, only those least successful operations are detected, so prosecution statistics are "an unreliable measure of the total size of illegal activity".²⁶⁶



4. The Scope of the Animal Law Movement

4.1 The Movement

As canvassed in the introduction to this Toolkit, the animal law movement is growing rapidly both in Australia and overseas.

This chapter provides a list of the universities, organisations and academic conferences that focus on animal law in Australia and New Zealand. It also contains a list of the Australian and international academic journals that either focus on animal law or deal broadly with some of the animal protection issues dealt with in this Toolkit.

4.2 Courses in Animal Law

Universities which offer or have offered a course in Animal Law:

AUSTRALIA

- Australian National University (ACT)
- Bond University (QLD)
- Flinders University (SA)
- Griffith University (QLD)
- Macquarie University (NSW)
- Monash University (VIC)
- Southern Cross University (NSW)
- University of Adelaide (SA)
- University of Melbourne (VIC)
- University of New South Wales (NSW)
- The University of Sydney (NSW)
- University of Tasmania (TAS)
- University of Technology Sydney (NSW)
- University of Wollongong (NSW)



NEW ZEALAND

- Massey University
- University of Auckland
- University of Canterbury
- University of Otago

Contact your institution if you are interested in conducting postgraduate research on animal law.

4.3 Legal Organisations

AUSTRALIA AND NEW ZEALAND

- Animal Defenders Office (ACT and NSW)
- Animal Law Clinic, run by Lawyers for Animals and Fitzroy Legal Service (VIC)
- Animal Rights Legal Advocacy Network (NZ)
- Barristers Animal Welfare Panel (AUS)
- Brisbane Lawyers Educating and Advocating for Tougher Sentences (BLEATS) (QLD)
- Lawyers for Animals (VIC)
- Lawyers for Companion Animals (NSW)
- New Zealand Animal Law Association (NZ)
- Northern Rivers Community Legal Centre (NSW)
- NSW Young Lawyers Animal Law Committee (NSW)
- The Animal Law Institute (AUS)
- The Law Society of South Australia Animal Law Committee (SA)
- Voiceless, the animal protection institute (AUS)

4.4 Journals

AUSTRALIA

- *Australian Animal Protection Law Journal*
This is Australia's first and only law journal dedicated solely to animal law. It was launched in 2008 and is published biannually.
- *Animal Studies Journal*
A cross-disciplinary journal, published biannually by the University of Wollongong.

INTERNATIONAL

- *Animal Law Review*
Published by the National Centre for Animal Law, Lewis & Clark Law School, Oregon, USA.
- *Global Journal of Animal Law*
Published by Åbo Akademi University Department of Law, Åbo, Finland.
- *Journal of Animal and Environmental Law*
Published by the University of Louisville Brandeis School of Law, Kentucky, USA.
- *Journal of Animal and Natural Resource Law*
Published by Michigan State University College of Law, Michigan, USA.
- *Journal of Animal Law and Ethics*
Published by the University of Pennsylvania Law School, Philadelphia, USA.
- *Journal of Animal Welfare Law*
Published by the Association of Lawyers for Animal Welfare, London, United Kingdom.
- *Journal of International Wildlife Law and Policy*
Published by Taylor & Francis, United Kingdom.
- *Stanford Journal of Animal Law and Policy*
Published by Stanford University, Stanford, USA.

4.5 Australian Conferences

Ongoing Conferences

VOICELESS ANIMAL LAW LECTURE SERIES

Each year the Series features a leading international scholar or practitioner in animal law who is invited to Australia to deliver a series of lectures to lawyers, academics, students, and the broader community.

ANIMAL ACTIVIST FORUM

An annual event to teach activism skills, to showcase effective campaigns, to inspire activists to continue their work and to assist with networking. The event regularly includes animal law based presentations.

ANIMAL LAW CONFERENCE

The NSW Young Lawyers Animal Law Committee held Australia's first Animal Law Conference in 2007, called 'The Future of Animal Law in Australia'. The event included representatives from parliament, universities, animal welfare groups, law firms and public offices. The Committee's second conference was held in August 2015.

AUSTRALASIAN ANIMAL STUDIES GROUP (AASG) CONFERENCE

A biennial interdisciplinary conference covering a range of topics relevant to animal studies, including aspects of animal law.

AUSTRALIA NEW ZEALAND INTERVARSITY MOOT ON ANIMAL LAW (ANIMAL)

An annual knockout style moot competition based on topical animal law issues. The competition is presented by the Animal Law Institute and sponsored by Voiceless, and is open to law students and recent graduates undertaking a Graduate Diploma of Legal Practice in Australia and New Zealand. The competition also includes a range of presentations and Q&A forums with senior animal lawyers and academics.

RSPCA QLD WORLD FARM ANIMAL DAY SYMPOSIUM

The one-day symposium looks at the many animal welfare challenges of intensive pig, chicken meat and egg production. The speakers offer a wide range of views from industry, academia, government and animal welfare on topics including animal law.

WILD LAW CONFERENCE

An ongoing conference convened by the Australian Earth Law Alliance (AELA), focused on the theory and practice of wild law and earth jurisprudence.

Past Conferences

ANIMAL LAW SYMPOSIUM 'TOMORROW'S LAW: THE FUTURE OF ANIMAL LAW'

The Centre for Legal Governance at Macquarie Law School partnered with RSPCA Australia to host a one-day conference in 2012. Presenters included Australian and international experts from a range of sectors, including government, industry, animal protection organisations and academics.

AUSTRALIAN EARTH LAWS ALLIANCE AND VOICELESS SEMINARS: PROTECTING OUR EVOLUTIONARY COMPANIONS, DO OUR LAWS MEASURE UP?

A half-day seminar held in 2014 in Sydney, Brisbane and Hobart, exploring the intersections and differences between Earth jurisprudence, environmental law and animal law.

AUSTRALIAN VETERINARY FORENSICS AND LAW CONFERENCE

A conference held in 2012 that looked at the three intersecting areas of animal law, veterinary forensics and human-animal interaction.

'FROM PADDOCKS TO PLEADINGS – FARM ANIMALS AND THE LAW'

A one-day seminar to introduce lawyers, barristers, in-house counsel, legal academics and law students to a range of legal issues which affect farm animals. The conference was an appendage to the Voiceless Lecture Series in 2007, hosted by the Law Society of NSW.

UNIVERSITY OF TASMANIA ANIMAL LAW CONFERENCE 'OUT OF VIEW: BRINGING ANIMAL WELFARE ISSUES INTO THE LEGAL SPOTLIGHT'

A 2013 conference, which attracted speakers and participants from a variety of disciplines and resulted in initiatives such as the introduction of the state's first animal law unit.

5. Take Action



Animal law groups are an ideal way of meeting fellow animal advocates and learning more about animal law and its practice.

5.1 Get Involved in Animal Law

Voiceless Law Talk

This discussion board is a meeting place for lawyers, law students, and academics with an interest in animal law. Voiceless Law Talk, which operates on Facebook, facilitates discussion on a number of animal law matters including the latest animal law news, cases, civil and criminal actions involving animals, and animal law events. See: www.voiceless.org.au/animal-law/voiceless-law-talk

Animal Law Groups

Animal law groups are an ideal way of meeting fellow animal advocates and to learn more about animal law and its practice. See Section 4.3: Legal Organisations. If there is no group in your area, consider establishing one at your university, law firm or within your state or territory law society or bar association.

Animal Law Courses

Animal law courses are offered at a number of Australian universities. A list of universities that offer a course in animal law can be found in Section 4.2: Courses in Animal Law. If your university does not offer an animal law course you can request one, see Section 5.2: Sample Petition Requesting the Establishment of an Animal Law Course. If you are a legal academic or practitioner, consider teaching a course in animal law.

Pro Bono Services

Many animal protection groups accept legal volunteers or interns. If you are a law student or lawyer who is able to offer pro bono legal services, you can contact animal protection groups such as Voiceless. Positions are usually advertised on Voiceless Law Talk. If you work at a large or mid-sized law firm, you may also be able to become involved in animal law through your law firm's pro bono scheme.

Submissions

Before Parliament enacts reforms to existing animal law, a call for submissions will usually be issued. When these inquiry periods are open to the public, anyone can write a submission expressing their opinion on the topic at hand. Well-researched and accurate submissions that express an animal welfare perspective can be influential in the decision to implement the reforms. A step by step guide on how to write a submission can be found in Section 5.3: How to Write a Submission.

Advocacy

There are many opportunities to advocate for greater legal protections for animals. These include writing a letter to your local council, or state or federal member of parliament; organising a petition; contacting a newspaper or radio station, or initiating an educational campaign at your university or workplace.

Animal Law Conferences

Animal law conferences are held in many Australian states and territories, and enable animal law enthusiasts to enhance their knowledge, as well as keep up to date with the latest developments in animal law. Law firms and law schools can host or sponsor events. See Section 4.5: Australian Conferences.

Animal Law Competitions

Various organisations or animal law bodies now host animal law competitions, such as moots, witness examinations, negotiation or essay writing competitions. Law students or recent graduates are encouraged to hone their legal skills and animal law knowledge by participating in these competitions. Law firms and law schools can also establish, host or sponsor an animal law competition.

Journal Articles

Writing journal articles in respected publications is critical to further developing the study and practice of animal law. Articles can be submitted to one of the animal law journals listed at Section 4.4: Journals. Alternatively, articles can be submitted to journals that specialise in your topic area. For example, a criminal law journal may be suitable for articles on animal cruelty.

Choosing Cruelty-Free

A powerful way to say no to animal cruelty is to reduce the amount of animal products in your lifestyle. You can assist others to make this choice by advocating for more vegetarian and vegan options at university or work functions, law society meetings, food outlets, conferences and events.



5.2 Sample Petition Requesting the Establishment of an Animal Law Course

SUPPORT FOR ADDING AN ANIMAL LAW COURSE TO THE LAW SCHOOL CURRICULUM

We, the undersigned, are writing to request the addition of an animal law course to the law school curriculum. Animal law is a cutting-edge area of law that looks at the treatment of nonhuman animals in our legal system, drawing on legislation and case law. Most animal law courses draw upon student's existing knowledge of administrative, criminal, contract, tort and property law, although philosophical and ethical questions relating to the treatment of animals in society may also be explored. Animal law is becoming increasingly popular amongst students and would be a welcome addition to the law school curriculum.

Animal law is currently being taught (or has been taught) at both an undergraduate and graduate level by fourteen Australian universities, including but not limited to, the University of Sydney, the University of Melbourne, the University of New South Wales and the Australian National University. Animal law is also offered extensively at universities overseas, including the highly regarded Harvard, Berkeley, Duke and Stanford Law Schools. The existence of the Australian Animal Protection Law Journal and a number of Australian animal law textbooks should speak to the discipline's growing popularity.

Additionally, prominent legal organisations have been established to focus on animal law, including but not limited to, the Barristers Animal Welfare Panel, Lawyers for Animals and the NSW Young Lawyers Animal Law Committee. The former President of the Australian Law Reform Commission, David Weisbrot AM, summed up animal law when he referred to it as "perhaps the next great social justice movement".²⁶⁷

As this movement grows it increasingly intersects with traditional areas of law such as tort, criminal, property, family, administrative and constitutional law. Examples of these areas include pet custody disputes, criminal proceedings for animal cruelty, veterinary malpractice suits, housing disputes involving 'no pets' policies and constitutional cases involving activists' rights to free speech. Most importantly, animal law raises important questions about the legal philosophy of rights. As students seeking academic excellence and leadership opportunities, we seek to engage in informed discussion and debate about these issues.

We are hopeful that you will provide students with the opportunity to learn more about animal law by developing an animal law course. The law school and law students – including animal advocates, the philosophical, the curious, the indifferent and the dissenters - would greatly benefit from a thought-provoking forum in which to debate the issues. Former High Court Justice, Michael Kirby AC CMG, remarked: "If only the people knew the pain, the unkindness, the cruelty that is done to sentient animals I think they would demand action".²⁶⁸

Should you require further guidance as to how to establish an animal law elective, please contact Voiceless for recommendations as to lecturers and course materials.

We would value the opportunity to learn more about animal law so we can take action. Thank you for your time and for considering this request.

Sincerely,
The Undersigned.



5.3 How to Write a Submission

When reforming or creating new policies and law, government agencies often invite submissions from the public to gauge community opinion. When these policies or laws impact on the lives and welfare of Australian animals, advocates can write a submission to help influence and shape government initiatives.

Background Research

When a call for submissions is released, the first step is to familiarise yourself with the terms of reference of the inquiry and any additional documents provided. It is important to research the history and current status of the topic of inquiry. Sometimes it might be relevant to consider international policies as a means of comparison.

Form and Structure

Some government consultations will provide rules for the structure, content or style requirements of the submission. Where a template is not provided, it is best to keep your submission as concise and clear as possible. Points should be easily identifiable and presented in a logical manner, using professional and objective language. It is also important to ensure that all materials are properly referenced.

Content

It is useful to briefly introduce yourself or your group, including any relevant education, experience or expertise in the topic area. The substantive part of your submission should detail and explain your key concerns with the topic. Where appropriate, it is useful to provide recommendations on why and how the government's proposal could be revised or amended. Any points should be supported by research where possible, such as domestic or international precedence.

Things to Avoid

To retain credibility, avoid aggressive or disrespectful comments. To keep the submission concise, avoid repetition of points and do not reiterate what the government has included in its consultation papers.

For further tips on writing a submission, or to view sample submissions, visit the Voiceless website at www.voiceless.org.au/animal-law/submissions

“If only the people knew the pain, the unkindness, the cruelty that is done to sentient animals I think they would demand action”

Former High Court Justice, Michael Kirby AC CMG

6. Additional Reading

The following provides a non-exhaustive list of books that deal with animal law and ethics.



GENERAL OR LOCAL PERSPECTIVE

Armstrong, Susan J and Botzler, Richard G (eds), *The Animal Ethics Reader* (Routledge, 2nd edition, 2008).

Bruce, Alex, *Animal Law in Australia: An Integrated Approach* (LexisNexis, 2012).

Bryant, Taimie, Huss, Rebecca and Cassuto, David (eds), *Animal Law and the Courts: A Reader* (Thomson, 2008).

Cao, Deborah, *Animal Law in Australia* (Lawbook Co, 2nd edition, 2015).

Cao, Deborah, *Animal Law in Australia and New Zealand* (Lawbook Co, 2010).

Caulfield, Malcolm, *Handbook of Australian Animal Cruelty Law* (Animals Australia, 2009).

Cavalieri, Paola and Singer, Peter (eds), *The Great Ape Project: Equality Beyond Humanity* (St Martins Press, 1993).

Eadie, Edward N, *Animal Suffering and the Law: National, Regional and International* (Seaview Press, 2009).

Favre, David, *Animal Law: Welfare, Interests and Rights* (Aspen Publishers Inc, 2nd edition, 2011).

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

Francione, Gary L, *Introduction to Animal Rights: Your Child or the Dog?* (Temple University Press, 2000).

Francione, Gary L, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press, 1996).

Francione, Gary L, *The Animal Rights Debate* (Columbia University Press, 2010).

Frasch, Pamela, *Animal Law in a Nutshell* (West, 2010).

Frasch, Pamela, Waisman, Sonia and Wagman, Bruce, *Animal Law* (Carolina Academic Press, 5th edition, 2014).

Garrett, Jeremy R (ed), *The Ethics of Animal Research: Exploring the Controversy* (MIT Press, 2012).

Kalof, Linda and Fitzgerald, Amy (eds), *The Animals Reader: The Essential Classical and Contemporary Writings* (Berg Publishers, 2007).

McEwen, Graeme, *Animal Law: Principles and Frontiers* (Barristers Animal Welfare Panel, 2011).

Nussbaum, Martha C, *Frontiers of Justice; Disability, Nationality, Species Membership* (The Belknap Press of Harvard University Press, 2006).

O'Sullivan, Siobhan, *Animals, Equality and Democracy* (Palgrave Macmillan, 2011).

Otomo, Yoriko and Mussawir, Edward (eds), *Law and the Question of the Animal: A Critical Jurisprudence* (Routledge, 2013).

Regan, Tom, *The Case for Animal Rights* (Routledge, 2004).

Sankoff, Peter J, White, Steven and Black, Celeste, *Animal Law in Australasia: Continuing the Dialogue* (The Federation Press, 2nd edition, 2013).

Schaffner, Joan, *An Introduction to Animals and the Law* (Palgrave Macmillan, 2010).

Singer, Peter, *Animal Liberation* (Pimlico, 2nd edition, 1995).

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- 28 *Ibid*; Voiceless, *Inspector General vs. Independent Office* (30 August 2013) <<https://www.voiceless.org.au/content/inspector-general-vs-independent-office>> accessed 27 March 2015; on 23 June 2015, the Australian Greens reintroduced the Voice for Animals (Independent Office of Animal Welfare) Bill 2015.
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- 31 See, eg, *Prevention of Cruelty to Animals Act 1986* (VIC) s24(1)(a); *Animal Welfare Act 1985* (SA) s31.
- 32 See, eg, *Animal Welfare Act 1985* (SA) s31. TAS is the only jurisdiction where an RSPCA inspector can conduct an unannounced routine inspection of intensive farming facilities, provided they have the Minister's authorisation to do so. See *Animal Welfare Act 1993* (TAS) s16(2).
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- 35 See, eg, the case of Wally's Piggery: *Voiceless*, 'Animal law in the spotlight: Wally's Piggery charges dropped' (26 November 2014) <<https://www.voiceless.org.au/content/animal-law-spotlight-wally-s-piggery-charges-dropped>> accessed 14 May 2015.
- 36 See, eg, *Australian Competition and Consumer Commission v Pepe's Ducks Ltd* [2013] FCA 570; *Australian Competition and Consumer Commission v Luv-a-Duck Pty Ltd* [2013] FCA 1136; *Australian*

- Competition and Consumer Commission v Turi Foods Pty Ltd* (No 5) [2013] FCA 1109; *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511.
- 37 In response to the 2015 live baiting exposé, for example, the NSW Greens have introduced the *Greyhound Racing Prohibition Bill 2015* (NSW); in response to the 2011 live export exposé, the Gillard government introduced the *Exporter Supply Chain Assurance Scheme* (ESCAS).
- 38 See, eg, *Evidence Act 1995* (Cth) s138; *Evidence Act 2008* (VIC) s138; *Evidence Act 1995* (NSW) s138.
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- 42 See *Australian Capital Television v Commonwealth* (1992) 177 CLR 10; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63.
- 43 See, eg, *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63 at [217]-[218].
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- 45 *Ibid.*
- 46 See *Prevention of Cruelty to Animals Act 1979* (NSW) s34AA; *Prevention of Cruelty to Animals Act 1986* (VIC) s24ZW; *Animal Welfare Act 2002* (WA) s82.
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- 48 (1980) 146 CLR 493.
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- 50 [2014] FCA 173.
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- 53 *Ibid.* 208-213.
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- 105 Currently, live export of slaughter animals is prohibited unless an exporter applies for and receives an exemption. No such exemptions have been granted since 2007, and the New Zealand Government intends to amend primary legislation to enforce a permanent ban. See Ministry for Primary Industries, *Exporting livestock for slaughter* <<http://www.mpi.govt.nz/exporting/overview/general-requirements/animal-welfare-export-certificates/exporting-livestock-for-slaughter/>> accessed 8 May 2015. In an interview, the former New Zealand Agriculture Minister who introduced the ban explained that domestic and international animal welfare concerns could have a serious backlash for New Zealand's reputation if live export continued, especially considering the dependence on agricultural exports in the country: see *ABC Radio National*, 'Live Animal Trade: the New Zealand Experience' (18 June 2011) <<http://www.abc.net.au/radionational/programs/saturdayextra/live-animal-trade-the-new-zealand-experience/2917316>> accessed 11 May 2015.
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