

Australian Animal Protection Law Journal



**AUSTRALIAN  
ANIMAL PROTECTION LAW  
JOURNAL**

# **AUSTRALIAN ANIMAL PROTECTION LAW JOURNAL**

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# **Australian Animal Protection Law Journal**

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The AAPLJ is Australia's first animal law journal. It is a forum for principled consideration and spirited discussion of the issues of law and fact affecting the lives of non-human animals. The greatest threat to animals is passivity and ongoing acceptance of the status quo; a status quo most easily maintained through silence.

In this issue of the AAPLJ:

- Keely Boom and Elizabeth Ellis look critically at how animal welfare law enforcement operates in NSW, with a particular focus on the *Prevention of Cruelty to Animals Act 1979*.
- Dr Nik Taylor and Dr Tania Signal report on a study of community attitudes to current penalties for animal abuse, concluding that, at least in the case of cats and dogs, public opinion would support a more harsh response by the criminal justice system.
- Brent Salter completes his two-part consideration of the legal status of animals in Australia's first colonial courts. The first part appeared in (2009) 2 AAPLJ 35.
- Lynden Griggs considers whether existing consumer protection legislation can provide the sort of purchasing information that consumers of animal-based products should know, and proposes "a hierarchical development of civil and criminal sanctions to ensure that consumers are able to make decisions that accord with their own sense of values".

The AAPLJ is intended for general information. Where possible, references are given so readers can access original sources or find more information. Information contained in the AAPLJ does not represent legal advice. Liability is limited by a scheme approved under the Professional Standards legislation.

Concise letters in reply to any of the articles published are always welcomed

The AAPLJ logo was drawn by Christine Townend who, in 1976, convened the first meeting of Animal Liberation (Australia). - JM.

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# Enforcing Animal Welfare Law: The NSW Experience

*Keely Boom and Elizabeth Ellis\**

## Introduction

As animal law in Australia is a relatively new field, there has been little research into the operation of State and Territory animal welfare legislation. Yet to understand any area of law requires not only knowledge of the relevant legislation and cases but also an appreciation of how the law ‘in the books’ is interpreted and applied. This is particularly important in a field where the regulatory subjects lack any direct legal claim and are unable to articulate their own experience. The abdication by governments of responsibility for much of the law enforcement in this field makes it even more crucial that the practical operation of the law be subject to scrutiny.

This article aims to contribute to this process by examining some aspects of the operation of the *Prevention of Cruelty to Animals Act 1979* (NSW). The first part situates the Act within the legal and regulatory framework governing animal welfare in NSW, while the second part provides data with respect to its enforcement. The final part seeks to identify general issues in relation to animal law enforcement arising from the first two sections. The article does not purport to be an exhaustive study of animal welfare law enforcement in NSW but to identify some of the matters that merit further discussion and research. While the focus of the study is NSW, the discussion is likely to have relevance for animal law enforcement in Australia more generally.

## Part 1: Legal and Regulatory Framework NSW

In Australia, the States and Territories have primary responsibility for animal welfare. In NSW, the principal animal welfare provisions are found in the *Prevention of Cruelty to Animals Act 1979* (‘POCTAA’) and the *Prevention of Cruelty to Animals (General) Regulation 2006* (NSW) (‘POCTAR’). This penal legislation is supplemented by two animal cruelty offences in the *Crimes Act 1900* (NSW). Complicating this legal framework are national model codes of practice for the welfare of animals, only some

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of which have been adopted for the purposes of POCTAA, as well as NSW codes of practice incorporated by POCTAR which operate with different legal effect to the national codes. In addition, there are statutes which regulate animal use in specified contexts, in particular the *Animal Research Act 1985* (NSW) and the *Exhibited Animals Protection Act 1986* (NSW). Finally, there is legislation directed at more general ends but which incorporate animal welfare provisions. A notable example is the inclusion of animal welfare standards in relation to abattoirs in food safety laws. These different legislative contexts are outlined below.

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

The objects clause of POCTAA is expressed exclusively in terms of preventing cruelty to animals and promoting their welfare.<sup>1</sup> This is supported by the Long Title which states that it is an Act for the prevention of cruelty to animals. Section 5(1) makes it an offence to commit an act of cruelty upon an animal. In addition, a person in charge of an animal shall not authorise the commission of an act of cruelty upon an animal<sup>2</sup> or fail to take certain steps to prevent cruelty, alleviate pain or provide veterinary treatment.<sup>3</sup> The maximum penalty in each case is 250 penalty units for a corporation and 50 penalty units or imprisonment for 6 months, or both, in the case of an individual. Section 6(1) of POCTAA further provides that a person shall not commit an act of aggravated cruelty upon an animal. Aggravated cruelty is an act of cruelty that results in death, deformity or disability or such injury or condition that it is cruel to keep the animal alive.<sup>4</sup> This offence carries a maximum penalty of 1,000 penalty units in the case of a corporation and 200 penalty units or imprisonment for two years, or both, in the case of an individual. Offences under s5(1)-(2) and s6(1) do not require proof of mens rea.<sup>5</sup> In addition to these general cruelty offences, ss7-23 contain a range of specific animal cruelty offences. Specific offences include failing to provide animals with food, drink or shelter,<sup>6</sup> confining an animal without providing adequate exercise,<sup>7</sup> administering poison to a domestic animal<sup>8</sup> and using an animal for coursing and similar activities.<sup>9</sup> Further offences are created by POCTAR. Importantly, POCTAA provides various exemptions and defences, particularly in relation to stock animals, but also including the use of animals in connection with hunting, religious

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<sup>1</sup> Section 3.

<sup>2</sup> Section 5(2).

<sup>3</sup> Section 5(3).

<sup>4</sup> Section 4(3).

<sup>5</sup> *Pearson v Janlin Circuses Ltd* [2002] NSWSC 1118, 7, 8; *Fleet v District Court of NSW* [1999] NSWCA 363, 48. See also *Bell v Gunter* (NSW Supreme Court, Dowd J, 24.10.97, unrep.).

<sup>6</sup> Section 8.

<sup>7</sup> Section 9(1). This section does not apply to stock animals, other than horses.

<sup>8</sup> Section 15.

<sup>9</sup> Section 21.

practices, animal research and the feeding of predatory animals.<sup>10</sup> Exceptions to various offences are also prescribed by POCTAR.<sup>11</sup>

### *Codes of Practice*

POCTAA incorporates codes of practice of two different kinds. First, s34A (1) provides that the regulations may prescribe guidelines, or may adopt a document in the nature of guidelines or a code of practice as guidelines, relating to the welfare of species of farm or companion animals. Pursuant to this section, reg24 of POCTAR currently adopts eight documents, including seven Model Codes of Practice for the Welfare of Animals.<sup>12</sup> These are national codes in relation to livestock developed by the Animal Welfare Working Group under the auspices of the Primary Industries Ministerial Council.<sup>13</sup> Compliance with the prescribed Codes is not compulsory in NSW or in most other States and Territories.<sup>14</sup> Instead, in NSW, compliance or noncompliance with any guidelines prescribed or adopted by the regulations pursuant to s34A is admissible in proceedings as evidence of compliance, or failure to comply, with POCTAA or the regulations.<sup>15</sup> This contrasts with most other jurisdictions in Australia where compliance with the Code provides a defence.<sup>16</sup>

A number of the national codes are not incorporated into POCTAA, for example the *Model Code of Practice for the Welfare of Animals: Livestock and Poultry at Slaughtering Establishments* and the *Model Code of Practice for the Welfare of Animals: Pigs*. As a result, the status of these codes is unclear. While they are not adopted by the legislation, the NSW Department of Primary Industries has stated that unincorporated codes are ‘still regarded as the minimum standard by which livestock should be kept.’<sup>17</sup> Nonetheless, the exclusion of some codes from POCTAA contributes to the uncertainty and lack of coherence which characterise the legal

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<sup>10</sup> See, eg, ss9, 24.

<sup>11</sup> See, eg, reg 6 which prescribes circumstances in which tail docking is permitted.

<sup>12</sup> *Model Code of Practice for the Welfare of Animals: Domestic Poultry, Model Code of Practice for the Welfare of Animals: Farmed Buffalo, Model Code of Practice for the Welfare of Animals: Animals at Saleyards, Model Code of Practice for the Welfare of Animals: The Goat, Model Code of Practice for the Welfare of Animals: The Sheep, Model Code of Practice for the Welfare of Animals: The Farming of Deer, Model Code of Practice for the Welfare of Animals: Cattle, and National Guidelines for Beef Feedlots in Australia.*

<sup>13</sup> This article does not attempt to deal with the larger issues of policy and governance associated with the development and content of these Model Codes of Practice. For more detailed discussion, see, eg, Arnja Dale, ‘Animal Welfare Codes and Regulations – The Devil in Disguise?’ in Peter Sankoff and Steven White (eds) *Animal Law in Australasia: A New Dialogue* (2009, Federation Press) 174 and Caulfield M, *Handbook of Australian Animal Cruelty Law* (2008, Animals Australia) ch3.

<sup>14</sup> For details of relevant legislative provisions in all jurisdictions, see Caulfield, above n13.

<sup>15</sup> POCTAA s34A(3).

<sup>16</sup> See, eg, *Animal Care and Protection Act 2001* (Qld) ss38, 40 and *Animal Welfare Act 2002* (WA) s25.

<sup>17</sup> Department of Primary Industries, *National model codes of practice for the welfare of livestock* <[www.dpi.nsw.gov.au/agriculture/livestock/animal-welfare/codes/general/national](http://www.dpi.nsw.gov.au/agriculture/livestock/animal-welfare/codes/general/national)> at 9 June 2009.

framework in relation to animal welfare in NSW. Some changes are underway, however, in relation to the national codes. As part of the Australian Animal Welfare Strategy endorsed by the Primary Industries Ministerial Council in 2004, the existing model codes are to be converted into national standards and guidelines. The aim is to re-write the existing livestock codes to incorporate national animal welfare standards and industry guidelines, with the standards to be implemented by regulation in the States and Territories.<sup>18</sup>

In addition to the national Model Codes of Practice, reg19, sch2 of POCTAR incorporate Codes of Practice relevant to prescribed animal trades. The codes of practice prescribed under sch2 are developed in NSW by the Animal Welfare Branch of the NSW DPI, for example the *Animal Welfare Code of Practice – Animals in Pet Shops*, 2008. By operation of reg20 of POCTAR, it is an offence, inter alia, for the proprietor and managers of an animal trade to fail to take all reasonable steps to comply with the provisions of the relevant prescribed code.

### *Crimes Act 1900 (NSW)*

While the *Crimes Act 1900 (NSW)* is a general penal statute it contains two offences with respect to animals, both inserted by the *Crimes Amendment (Animal Cruelty) Act 2005 (NSW)*. Section 530 creates a serious animal cruelty offence, whereby a person who, with the intention of inflicting severe pain tortures, beats or commits any other serious act of cruelty on an animal, and kills or seriously injures or caused prolonged suffering to the animal, is guilty of an offence. The maximum penalty is five years imprisonment. Section 531 provides that a person who intentionally kills or seriously injures an animal used for law enforcement is guilty of an offence, for which the maximum penalty is five years imprisonment. The element of intention significantly distinguishes these offences from an act of cruelty under s5 and an act of aggravated cruelty under s6 of POCTAA. A person is not criminally responsible for an offence under s530 if the conduct occurred in accordance with an authority conferred by or under the *Animal Research Act 1985* or any other Act or law.<sup>19</sup> A further exception is provided where the conduct occurred in the course of or for the purposes of routine agricultural or animal husbandry activities, recognised religious practices, the

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<sup>18</sup> Australian Animal Welfare Strategy, *Development of Australian Standards and Guidelines for the Welfare of Livestock, Business Plan*, February 2009. The first national standards to be developed apply to the land transport of livestock and replace the existing Model Codes of Practice covering livestock transport by road and rail. These standards were endorsed by the Primary Industries Ministerial Council in May 2009 with a view to their implementation by the States and Territories in 2010 <[www.animalwelfarestandards.net.au/transport.htm](http://www.animalwelfarestandards.net.au/transport.htm)> and <[www.daff.gov.au/animal-plant-health/welfare/model\\_code\\_of\\_practice\\_for\\_the\\_welfare\\_of\\_animals](http://www.daff.gov.au/animal-plant-health/welfare/model_code_of_practice_for_the_welfare_of_animals)> at 17 June 2009.

<sup>19</sup> Section 530(2)(a).

extermination of pest animals or veterinary practice.<sup>20</sup> These exceptions are broadly consistent with the exceptions and defences in POCTAA.

### *Animal Research Act 1985 (NSW) and the Exhibited Animals Protection Act 1986 (NSW)*

While cruelty to stock/production animals falls generally under POCTAA's provisions, two other areas of animal use are primarily regulated through separate statutory animal welfare regimes. These two areas are the use of animals in connection with research and the exhibition of animals at marine or zoological parks, circuses and other places. The relevant statutes are the *Animal Research Act 1985 (NSW)* and the *Exhibited Animals Protection Act 1986 (NSW)* respectively. A detailed description of the provisions of these statutes is beyond the scope of this article but a few points are salient. First, by contrast with POCTAA, the focus of each of these statutes is not penal but regulatory that is, they provide for certain uses of animals subject to licensing and other forms of regulation. In the case of the *Animal Research Act*, licence holders are authorised to use animals for specified purposes, subject to certain conditions. Failure to comply with the required conditions can lead to suspension or cancellation of a licence and, without a valid licence, the animal use is unlawful. Although the express object of the *Animal Research Act* is to protect the welfare of animals used in connection with research,<sup>21</sup> its function is to reduce or mitigate the occurrence of cruelty, rather than to prevent it entirely. That the regulatory scheme encompasses cruelty is evidenced by s24(1)(e) of POCTAA which provides that a person has a defence if the act or omission was in the course of, and for the purpose of, carrying out animal research or supplying animals for use in connection with animal research in accordance with the provisions of the *Animals Research Act 1985*. The regulatory position with respect to exhibited animals is different again. While the *Exhibited Animals Protection Act* also creates a licensing regime, the protections it affords are additional to those provided by POCTAA.<sup>22</sup>

The above two Acts are listed as animal welfare legislation on the NSW DPI's website. But there are also other statutes in NSW that relate to animals and which contain provisions relevant to animal welfare. Examples are the *Companion Animals Act 1998 (NSW)*<sup>23</sup> and the *Game and Feral Animal Control Act 2002 (NSW)*.<sup>24</sup> These statutes may provide for how they are to operate in conjunction with POCTAA.<sup>25</sup>

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<sup>20</sup> Section 530(2)(b).

<sup>21</sup> Section 2A.

<sup>22</sup> Siobhan O'Sullivan, 'Australasian Animal Protection Laws and the Challenge of Equal Consideration' in Peter Sankoff and Steven White (eds) *Animal Law in Australasia: A New Dialogue* (2009, Federation Press) 108, 119-120.

<sup>23</sup> Section 4 provides that the protection of native birds and animals is an objective of animal welfare policy in NSW. Cats and dogs are prohibited from wildlife protection areas under ss14, 30.

## *Food Safety Legislation*

POCTAA also operates within the context of statutory regimes whose general purposes are not related to animals yet which may contain provisions with respect to their welfare, notably the *Food Act* and *Food Regulation*. It is important to refer to this legislation because of the inherently violent nature of slaughter. Despite the violence of the process, the relevant national code of practice is not adopted by POCTAR and the only specific provision in POCTAA relevant to slaughter is the defence contained in s24(1)(b)(ii).

The *Food Act 2003* (NSW) is designed to ensure food safety and to regulate the handling of food for sale. The inclusion of its animal welfare provisions appears to be on the basis that “animal welfare objectives ... impact on food safety and on public expectations as to wholesomeness.”<sup>26</sup> The *Food Regulation 2004* (NSW) prescribes the *Australian Standard for the hygienic production and transportation of meat and meat products for human consumption* (‘Australian Standard’) as both minimum standards<sup>27</sup> and operational standards for abattoirs.<sup>28</sup> While breaches of the animal welfare provisions of these Standards are unlikely to constitute the serious offences relating to food and some other offences under the Act, they could lead to the commission of an offence under s104. Section 104(1) of the *Food Act* states that a person who handles or sells food in a manner that contravenes a provision of the food safety scheme is guilty an offence. The maximum penalty is 500 penalty units in the case of an individual and 2,500 penalty units in the case of a corporation. An abattoir is defined to mean premises used for or in connection with the slaughtering of animals for human consumption.<sup>29</sup> The slaughtering of animals for human consumption would appear to fall within the definitions of ‘food’ and ‘handling of food’ in ss4 and 5 of the Act. Clauses 66 and 67 of the *Food Regulation* prescribe the Australian Standard as the minimum standards and operational standards for abattoirs under the meat food safety scheme. Accordingly, a person who contravenes the Australian

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<sup>24</sup> Compliance with mandatory animal welfare provisions under a ministerial code of practice is a condition of a game hunting licence: s 24; *Game and Feral Animal Control Regulation 2004* (NSW) sch 2.

<sup>25</sup> See, eg, *Game and Feral Animal Control Act 2002* (NSW) s6(b).

<sup>26</sup> Australia and New Zealand Food Regulation Ministerial Council, *The Australian Standard for the hygienic production and transportation of meat and meat products for human consumption*, iv.

<sup>27</sup> Regulation 66.

<sup>28</sup> Regulation 67. The Australian Standard provides for the minimisation of the risk of injury, pain and suffering and the least practical disturbance to animals in slaughter. Specifically, Part 7 provides various standards for the welfare of animals.

<sup>29</sup> Regulation 60.

Standard's animal welfare provisions is arguably guilty of an offence under s104(1) *Food Act*.

In addition, s104(3) provides that the holder of a licence granted under the regulations who contravenes or fails to comply with a condition of the licence is guilty of an offence. The maximum penalty is 500 penalty units in the case of an individual and 2,500 penalty units in the case of a corporation. Clause 63 of the Regulation sets out the classes of activity that may be licensed for the carrying on of a meat food business, including the operation of an abattoir. The holder of a licence is required to ensure that the provisions of the Act, the Regulation and the Food Standards Code are complied with.<sup>30</sup> The Regulation prescribes the Australian Standard as the minimum standards and operational standards for an abattoir,<sup>31</sup> making compliance with the Australian Standard a condition of the licence of an abattoir operator. Where an abattoir operator fails to comply with the animal welfare provisions of the Australian Standard, the holder of the licence may have committed an offence under s104(3) *Food Act*.

Although providing animal welfare standards for the operation of abattoirs, the *Food Act* and *Food Regulation* do not refer to POCTAA; nor does POCTAA contain any reference to this legislation. Relevantly, POCTAA provides that where an animal has been destroyed, or prepared for destruction, for the purpose of producing food in a manner that inflicted no “unnecessary pain” upon the animal, the accused person will have a defence.<sup>32</sup> A person involved in the slaughter of animals in a manner that inflicted “unnecessary pain” would fall within the scope of the **legislation**. Thus there is substantive overlap between POCTAA and the *Food Act* and *Food Regulation*.

### *Enforcement Agencies*

The NSW DPI has the primary role in the administration of animal welfare legislation. In addition to this administrative function, the Animal Welfare Branch of the DPI is involved in enforcing the *Animal Research Act* and the *Exhibited Animals Protection Act*. The complex enforcement arrangements arising under these two Acts are beyond the scope of this article. Note, however, that the regulatory scheme governing animals in research is one of enforced self-regulation and

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<sup>30</sup> *Food Regulation 2004* (NSW) reg 12.

<sup>31</sup> Regulations 66-67

<sup>32</sup> Section 24(1)(b)(ii).

relies heavily on the work of animal ethics committees and the involvement of the Animal Research Review Panel.<sup>33</sup>

By contrast with the *Animal Research Act* and the *Exhibited Animals Protection Act*, the DPI has no active role in the enforcement of POCTAA.<sup>34</sup> This is not due to any statutory limitation. Comprehensive enforcement powers are given to officers appointed as inspectors in accordance with s24D. Inspectors are police officers or officers (other than a police officer) holding an authority issued by the Minister or Director-General or Deputy Director-General of the DPI. ‘Officer’ is defined in s4 to mean (a) a member of the police force or an inspector within the meaning of the *Animal Research Act 1985*, (b) an officer of an approved charitable organisation who is a special constable within the meaning of the *Police Offences Act 1901*, or (c) a public servant who is appointed by the Minister, as an officer for the purposes of this Act.<sup>35</sup> An approved charitable organisation is one that has been approved by the Minister in accordance with s34B of POCTAA and must report annually to the Minister with respect to the matters set out in reg25 of POCTAR.<sup>36</sup> The Royal Society for the Prevention of Cruelty to Animals NSW (‘RSPCA’) and the Animal Welfare League NSW (‘AWL’) are currently the only approved charitable organisations. In practice, almost all enforcement functions in relation to POCTAA are carried out by the RSPCA,<sup>37</sup> whose powers include entering certain land, detaining vehicles and seizing animals.<sup>38</sup> In 2006 and 2007, for example, the RSPCA brought 90% of prosecutions under POCTAA.<sup>39</sup> This unusual arrangement means that a charitable organisation (the RSPCA) is the principal enforcement agent for the primary penal animal welfare legislation in NSW.

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<sup>33</sup> For information about the regulatory scheme governing animals used in research see, eg, Paula Gerber, ‘Scientific Experimentation on Animals: Are Australia and New Zealand Implementing the 3Rs?’ in Peter Sankoff and Steven White (eds) *Animal Law in Australasia: A New Dialogue* (2009, Federation Press) 212 and Siobhan O’Sullivan, ‘Transparency and Animal Research Regulation: An Australian Case Study’ (2006) IV *Animal Liberation Philosophy and Policy Journal* 1.

<sup>34</sup> Apart from the requirement under s8(4) of POCTAA for consultation with the Department of Agriculture with respect to certain stock animals.

<sup>35</sup> POCTAA s24D provides that an inspector appointed under POCTAA may not exercise powers in relation to animal research carried out in accordance with the *Animal Research Act 1985* on designated land within the meaning of that Act unless the inspector is also an inspector within the meaning of that Act.

<sup>36</sup> POCTAA ss4(1), 34B(3).

<sup>37</sup> Established by members of the community in 1873, RSPCA NSW is an incorporated company governed by an elected Board of Directors, with paid staff for its core administrative, inspectorial and shelter work. As with other State and Territory RSPCAs, the NSW Society is a member of RSPCA Australia, which formulates national animal welfare policies. For information about the history of the RSPCA in Australia and the development of its prosecutorial function in Britain see [www.rspcansw.org.au/who\\_we\\_are/history](http://www.rspcansw.org.au/who_we_are/history) and Bradford M, *Animal Welfare Law in Britain: Regulation and Responsibility* (2001, Oxford University Press) 40-42.

<sup>38</sup> In accordance with the requirements of POCTAA Part 2A.

<sup>39</sup> NSW, *NSW Legislative Council Hansard: Prevention of Cruelty to Animals Amendment (Prosecutions) Act 2007 (NSW) Second Reading Speech*, 29.11.07, 3 (Penny Sharpe).

Authority to prosecute under POCTAA is provided under s34AA only to approved charitable organizations ('ACOs'), inspectors within the meaning of Division 2 of Part 2A, police officers, the Minister or the Director-General of the Department of Primary Industries, persons with the written consent of the Minister or the Director-General, or any other person or body prescribed by the regulations for this purpose. Section 34AA was only recently inserted to preclude private prosecutions. Prior to the enactment of the *Prevention of Cruelty to Animals Amendment (Prosecutions) Act 2007* (NSW), anyone could initiate a prosecution under POCTAA.<sup>40</sup> In introducing the amendment, the Government expressed concern that without limiting the power to prosecute, POCTAA encouraged persons to engage in trespass and posed a threat to the bio-security of farms.<sup>41</sup>

Although the police have a very limited role in the enforcement of POCTAA, their involvement in relation to some animal cruelty matters has recently increased. Following a number of violent and publicised attacks on kittens in 2005, the NSW Government established an Animal Cruelty Taskforce to consider animal cruelty offences, the applicable penalties, how those offences may be prevented and the recording of animal cruelty offences in the police criminal records system.<sup>42</sup> Among the Taskforce's findings was that where matters were prosecuted by the RSPCA or the AWL, with no involvement of the police in the investigation, it was not guaranteed that cruelty offenders would be fingerprinted or that their offence would be recorded on their criminal record.<sup>43</sup> As a result, the *Crimes Amendment (Animal Cruelty) Act 2005* amended the *Crimes Act, Criminal Procedure Act 1986* and the *Law Enforcement (Powers and Responsibilities) Act 2002* to address this procedural problem. Section 134 of the *Law Enforcement (Powers and Responsibilities) Act 2002* now provides that a court may order the particulars of a person convicted under s5 or s6 of POCTAA to be taken at a police station, including their photograph, fingerprints and palm-prints. A person who fails to comply with this order may be arrested and taken into custody for their particulars to be taken.<sup>44</sup>

The *Crimes Amendment (Animal Cruelty) Act 2005* also inserted s530 and s531 into the *Crimes Act* which means that the police are responsible for enforcement of the serious animal cruelty offence and the offence of killing or seriously injuring an animal used in law enforcement. The police powers to enforce the *Crimes Act* are provided in the *Law Enforcement (Powers and Responsibilities) Act* which includes various powers

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<sup>40</sup> *Criminal Procedure Act 1986* (NSW) s14 enables any person to institute criminal proceedings in respect of an offence under an Act unless the right to do so is expressly conferred on a specified person or class of persons by the Act.

<sup>41</sup> NSW, *Prevention of Cruelty to Animals Amendment (Prosecutions) Act 2007 (NSW) Second Reading Speech*, Legislative Council, 29.11.07, 2 (Penny Sharpe).

<sup>42</sup> NSW, *Parliamentary Debates*, Legislative Assembly, 18.10.05 (Morris Lemma).

<sup>43</sup> *Ibid.*

<sup>44</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* s134(4).



to arrest, search premises, investigate, question and take identification particulars. Sections 530 and 531 are indictable offences that are triable summarily.<sup>45</sup> The procedure for these offences is dealt with by the *Criminal Procedure Act 1986* (NSW).

In view of the relevance of the *Food Act* to animal welfare in the context of slaughter, the enforcement provisions of that Act are also worthy of mention. Enforcement of the animal welfare provisions is the responsibility of the Food Authority, enforcement agencies appointed by the Food Authority,<sup>46</sup> authorised officers appointed under the Act, food safety auditors and the police.<sup>47</sup> The Food Authority has appointed each NSW local council and the NSW Department of Environment and Climate Change as enforcement agencies for the purposes of the Act.<sup>48</sup> Proceedings are to be dealt with summarily before a Local Court or before the Supreme Court in its summary jurisdiction.<sup>49</sup> Penalty notices may be issued under s120 by authorised officers, which refers to police officers, the Director-General of the NSW Food Authority and persons appointed as authorised officers by an enforcement officer under s114.

Auditing of food businesses under the Act is carried out by food safety auditors. The Food Authority may authorise a person who is a member of staff of the Food Authority, or approve any other natural person, to be a food safety auditor for the purposes of the Act if the Food Authority is satisfied that the person is competent to carry out this role.<sup>50</sup> Food safety auditors are given a number of enforcement duties under the Act, to carry out audits and carry out follow-up action (including further audits).<sup>51</sup> Enforcement agencies determine the priority classification of individual food businesses and the frequency of auditing of food businesses.<sup>52</sup> The overlap between POCTAA and the *Food Act* may also be seen in enforcement as approved charitable organisations are required to report, inter alia, on the number of routine inspections they carry out, including inspections of abattoirs.<sup>53</sup>

## Part 2: How POCTAA is enforced

The fragmented nature of the legal and regulatory framework governing animal welfare makes examination of the enforcement of all relevant provisions beyond the scope of this article. Accordingly, this section is restricted to an examination of the

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<sup>45</sup> *Criminal Procedure Act 1986* (NSW) sch 1, Table 2, Pt 2A, cl4C.

<sup>46</sup> *Food Act 2003* (NSW) s111.

<sup>47</sup> *Food Act 2003* (NSW) s4, s111, s114.

<sup>48</sup> NSW Food Authority, *Enforcement agency appointments*

<<http://www.foodauthority.nsw.gov.au/localgovernment/list-of-enforcement-agencies/>> at 10.2.09.

<sup>49</sup> *Food Act 2003* (NSW) s118.

<sup>50</sup> *Food Act 2003* (NSW) s87.

<sup>51</sup> *Food Act 2003* (NSW) s94.

<sup>52</sup> *Food Act 2003* (NSW) s93.

<sup>53</sup> POCTAR reg25(2)(c).

enforcement of POCTAA. As this is the primary animal welfare statute in NSW, findings in relation to POCTAA may also yield insights into animal welfare law enforcement more generally.

Some data is readily available from the annual reports of the approved charitable organisations charged with the enforcement of POCTAA. The Annual Reports of the NSW RSPCA have generally provided data with respect to the number of complaints received (by type of complaint and type of animal), number of prosecutions (by type of offence)<sup>54</sup> and number of defendants. Some additional RSPCA data is available in the form of national statistics published online. The Annual Reports of the AWL provide data with respect to the number of animal cruelty complaints received, 'official cautions' issued and details of criminal proceedings commenced and finalised. In addition, data is available from the NSW Bureau of Crime Statistics and Research ('BOCSAR') about penalty notices and those matters that reach the court stage of the criminal justice process.

Despite this data, various problems arise in trying to ascertain how POCTAA is enforced in NSW. The problems fall broadly into two camps: gaps in the availability of data and difficulty in interpreting the data that is available. Each of these problems is noted below in the context of information about routine inspections, notices issued, prosecutions and outcomes.

### *Routine inspections*

The reports of ACOs must include a statement of the number of visits or investigations made by officers of the organisation that were unrelated to received complaints, such as routine inspections of abattoirs, veterinary practices, pet shops or sale yards.<sup>55</sup> While the NSW RSPCA Annual Reports include reference to inspections by animal type in their complaint statistics it is unclear to what extent these complaints were the result of routine inspections as opposed to being undertaken in response to complaints. According to the RSPCA National Statistics, 527 routine inspections were carried out by the RSPCA in Australia in 2006-2007, with 45 of these conducted in NSW. The figures for 2007-2008 are 575 and 50 respectively.<sup>56</sup> While the National Statistics list examples of the types of establishments subject to routine inspections by the RSPCA, no information is provided as to the types of establishments actually visited or the basis

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<sup>54</sup> The RSPCA NSW Annual Report 2007-2008 does not provide information on the types of offences prosecuted.

<sup>55</sup> POCTAR reg 25(2)(c).

<sup>56</sup> These statistics do not include the Northern Territory. RSPCA Australia, *National Statistics 2006-2007*, Table 4; RSPCA Australia, *National Statistics 2007-2008*, Table 5 <<http://www.rspca.org.au/resource/Stats2008.pdf>> at 7 December 2008.

on which those inspected were chosen.<sup>57</sup> Upon request, RSPCA NSW provided the following data about the number of routine inspections and types of establishments visited for the last two years.<sup>58</sup>

**Table 1**            **Number of routine inspections**

<b>Type of establishment</b>	<b>2006-2007</b>	<b>2007-2008</b>
Animal park	2	3
Circus	2	1
Feedlot	2	1
Board/breeding kennel	3	8
Pet shop	25	27
Poultry inspection	3	3
Saleyard	4	5
Rodeo	4	3
<b>Total</b>	<b>45</b>	<b>51</b>

*Statutory notices*

POCTAA provides enforcement options other than prosecution, in the form of notices authorised by s24N and s33E. These sections, which provide for two different kinds of notices, were inserted by the *Prevention of Cruelty to Animals Amendment Act 2005* (NSW) and commenced operation on 25.11.05. Where satisfied on reasonable grounds that a person is contravening a provision of the Act or regulations, s24N allows an inspector to give a written notice requiring specified action in relation to the care of an animal. Section 33E allows an inspector to serve a penalty notice where it appears that an offence prescribed for this purpose against the Act or regulations has been committed. Regulation 23 of POCTAR prescribes the offences and penalties set out in sch3. This schedule currently lists 27 penalty notice offences in relation to the Act and 22 penalty notice offences in relation to the regulations.<sup>59</sup> As already noted, approved charitable organisations must report annually to the Minister with respect to the matters set out in reg25 of POCTAR. The various matters that the report must address include notices issued, the number of notices issued under s24N and the number of penalty notices issued.<sup>60</sup> While the RSPCA provides this data to the Department of Primary

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<sup>57</sup> The AWL Annual Report 2006-2007 states that there were 49 inspections of animal trade establishments and the AWL Annual Report 2007-2008 states that there were 13 inspections of animal trade establishments although it is unclear whether these were routine inspections or in response to complaints.

<sup>58</sup> Email from David O’Shannessy to AUTHOR, 6.2.09.

<sup>59</sup> Although the *Prevention of Cruelty to Animals (General) Amendment (Laying Fowl) Regulation 2007* (NSW) repealed reg16 of POCTAR, it omitted to delete this clause from the penalty provisions set out in sch3.

<sup>60</sup> Regulations 25(1)(c), 25(2)(f), 25(2)(g).

Industries, there is no information about notices in the RSPCA NSW Annual Reports. On request, however, the following data was made available by RSPCA NSW with respect to cautions and notices issued by that organisation since the amendment of POCTAA in 2005.<sup>61</sup>

**Table 2 Notices issued**

	<b>Letters of caution<sup>62</sup></b>	<b>Section 24N notices</b>	<b>Penalty notices<sup>63</sup></b>
2005-2006	9	8	0
2006-2007	4	10	0
2007-2008	3	10	44

Of the 44 penalty notices issued by the RSPCA in 2007-2008, 32 were for companion animals, eight were for production/stock animals and four for animals used in a commercial context.<sup>64</sup>

There is no information about either s24N notices or s33E penalty notices in the Annual Reports of the AWL, although it is planned to include penalty notice data in 2008-2009 as the AWL has now started issuing them.<sup>65</sup> According to the 2006-2007 Annual Report, nine ‘official cautions’ were administered by the AWL. The 2007-2008 AWL Annual Report provides that two people received official cautions in relation to five offences.

### *Prosecution data*

Subject to their charging policy (see Part 3 below), data is available from BOCSAR in relation to those matters which come before the courts. Interpretation of this data is complicated, however, by differences between the RSPCA and BOCSAR statistics. The following illustrates the difficulties. According to RSPCA NSW, there were 704 charges approved to commence by court attendance notice for alleged breaches of POCTAA and POCTAR in 2006-2007.<sup>66</sup> If the 14 matters falling under POCTAR are

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<sup>61</sup> Email from David O’Shannessy to AUTHOR, 6.2.09.

<sup>62</sup> Although reg25(2)(e) of POCTAR requires ACOs to report on the number of persons cautioned, POCTAA makes no specific provision with respect to cautions.

<sup>63</sup> All but three of the penalty notice offences with respect to a breach of the regulations were only inserted recently, by the *Prevention of Cruelty to Animals (General) Amendment (Laying Fowl) Regulation 2007* (NSW) and the *Prevention of Cruelty to Animals (General) Amendment (Animal Trades) Regulation 2008* (NSW).

<sup>64</sup> The production/stock category includes horses; the four penalty notices in the commercial category related to one company. Email from David O’Shannessy to AUTHOR, 6.2.09.

<sup>65</sup> Keely Boom, interview with Paul Johnston, Senior Inspector NSW AWL, (telephone interview, 3.2.09).

<sup>66</sup> Email from David O’Shannessy to AUTHOR, 6.2.09.

discounted the number of charges is 690. According to BOCSAR, however, there were only 468 charges finalised in relation to POCTAA in 2006-2007.<sup>67</sup> Both the RSPCA and BOCSAR give a breakdown of these figures by the relevant section of the Act, but this does not shed any light on the matter. For example, the RSPCA lists 215 offences under s8(1) failure to provide food, water or shelter for 2006-2007, while BOCSAR gives 101 finalised charges for the same section for the same period. Some discrepancy is to be expected due to the difference in what is counted (charges commenced and charges finalised) but the size of the difference is difficult to reconcile.<sup>68</sup>

According to the RSPCA NSW Annual Reports, the number of ‘offences’<sup>69</sup> under POCTAA and POCTAR between 2000-2001 and 2006-2007 were as follows.

**Table 3 No. of offences (RSPCA data)**

2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
239	346	442	656	1784	1092	704

According to BOCSAR, the number of finalised charges brought under POCTAA for the same period is as follows. Note that the BOCSAR data does not include charges under the regulations.<sup>70</sup>

**Table 4 No. of finalised charges (BOCSAR data)<sup>71</sup>**

2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
291	378	406	457	401	409	468

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<sup>67</sup> BOCSAR, NSW Local Courts Statistics, No. of finalised charges brought in the Local Courts under the Prevention of Cruelty to Animals Act 1979 by outcome, July 2006- June 2007.

<sup>68</sup> The BOCSAR data includes the small number of finalised charges brought by the AWL. The AWL NSW Annual Report lists 12 finalised matters for 2006-2007.

<sup>69</sup> The RSPCA NSW Annual Reports appear to use the terminology ‘offences’ in relation to charges. See the Annual Report 2006-2007, 8, 10-11.

<sup>70</sup> These would generally constitute a very small proportion of charges. For example, the RSPCA NSW Annual Report 2004-2005 lists 6 offences under the regulations out of a total of 1784 charges for that year.

<sup>71</sup> BOCSAR, NSW Local Courts Statistics 2001-2007, No. of finalised charges brought in the Local Courts under the Prevention of Cruelty to Animals Act 1979. Note that the data in Tables 1 and 2 relates to charges not persons.

In relation to the finalised charges in Table 4, the following convictions were secured:

**Table 5 No. of finalised charges where offence proven or defendant convicted in their absence<sup>72</sup>**

2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
241	282	304	299	316	311	368

*Pleas*

Of those charged with breaches of POCTAA, there appears to be a high proportion of not guilty pleas compared with other summary offences. For all finalised charges under POCTAA in the period January 2001-December 2007, the not guilty plea rate ranged between approximately 17% and 23%. In relation to the general cruelty offences in s5(1) and s6(1) the proportions were even higher as the following table illustrates.

**Table 6 Not Guilty Pleas as a proportion of finalised charges<sup>73</sup>**

	2001	2002	2003	2004	2005	2006	2007
s5(1)	22%	22%	25%	33%	33%	26%	28%
s6(1)	22%	27%	32%	19%	19%	21%	19%

By contrast, for *all* charges finalised in Local Courts in the period 2001-07, the not guilty plea rate was between approximately 8% and 10%.<sup>74</sup>

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<sup>72</sup> BOCSAR, NSW Local Courts Statistics 2001-2007, No. of finalised charges brought in the Local Courts under the Prevention of Cruelty to Animals Act 1979 by outcome. For the years 2002-2005 and 2006-2007 there were also a small number of arrest warrants issued.

<sup>73</sup> BOCSAR, NSW Local Courts Statistics 2001-2007, No. of finalised charges brought in the Local Courts under the Prevention of Cruelty to Animals Act 1979 by plea. Rounded to the nearest 0.05%.

<sup>74</sup> BOCSAR, NSW Local Courts Statistics 2007, No. of charges finalised in the NSW Local Courts by plea. Rounded to the nearest 0.05%.

## Sentencing

With respect to those against whom a conviction was secured for an offence under POCTAA, sentencing outcomes for the calendar years 2001-07 were as follows:

**Table 7 No. of persons convicted under POCTAA as their principal offence by principal penalty<sup>75</sup>**

	2001	2002	2003	2004	2005	2006	2007
Imprisonment	2	2	3	2	4	3	8
Home detention					1		
Periodic detention					2	1	
Suspended sentence with supervision	2		1	1	2	3	
Suspended sentence without supervision	5	2	5	3	5	5	
Community service order	6	5	8	6	5	3	5
Bond with supervision	1	5	2	2	4	3	2
Bond without supervision	14	15	16	21	28	19	33
Fine	119	93	107	86	109	98	110
Nominal sentence						1	
Bond with no conviction	6	4	18	11	14	10	9
No conviction recorded	20	12	19	16	12	13	12

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<sup>75</sup> BOCSAR, NSW Local Courts Statistics 2001-2007, No. of persons convicted of an offence under the *Prevention of Cruelty to Animals Act 1979* who received a principal penalty of imprisonment or fine by average duration of imprisonment or average fine amount. A person's principal offence is the offence for which he/she receives their most serious penalty.

For the calendar years 2001-07, the following charges resulted in a penalty of imprisonment:

**Table 8      Offences resulting in imprisonment<sup>76</sup>**

Offence	Number of persons
s5(1) Commit an act of cruelty	6
s5(3) Being in charge of an animal fail to exercise	1
s6(1) Commit an act of aggravated cruelty	14
s8(1) Fail to provide proper and sufficient food	3

For those who received a principal penalty of imprisonment for their principal offence, the average duration of imprisonment was as follows:

**Table 9      Average duration of imprisonment<sup>77</sup>**

2001	2002	2003	2004	2005	2006	2007
2 months	1 month	5 months	4 months	4 months	9 months	4 months

The average duration of imprisonment in the case of aggravated cruelty is similar, with the average for each of the years 2001-2007 being respectively four months, two months, five months, four months, five months, nine months and four months.

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<sup>76</sup> BOCSAR, NSW Local Courts Statistics 2001-2007, No. of persons convicted under the Prevention of Cruelty to Animals Act 1979 as their principal offence by principal penalty.

<sup>77</sup> BOCSAR, NSW Local Courts Statistics 2001-2007, No. of persons convicted of an offence under the Prevention of Cruelty to Animals Act 1979 who received a principal penalty of imprisonment or fine by average duration of imprisonment or average fine amount.



For those whose principal penalty was a fine for their principal offence, the average fine amount was as follows:

**Table 10.1 Average amount of fine all principal offences<sup>78</sup>**

2001	2002	2003	2004	2005	2006	2007
\$652	\$753	\$719	\$707	\$871	\$731	\$738

A fine was overwhelmingly the most frequently imposed penalty for offences under POCTAA. This was so even for those convicted of an act of aggravated cruelty under s6(1). In relation to persons convicted under s6(1) as their principal offence during 2001-2007, 6% received a penalty of imprisonment and 48% a fine. Where a fine was imposed for s6(1) as the principal offence, the average amount was as follows:

**Table 10.2 Average amount of fine for s6(1) principal offences**

2001	2002	2003	2004	2005	2006	2007
\$1,061	\$1,286	\$993	\$725	\$1,871	\$1,203	\$976

The current maximum penalties under POCTAA are 250 penalty units in the case of a corporation and 50 penalty units or imprisonment for six months, or both, in the case of an individual, for most offences. A lesser penalty applies for an offence under s12A and s31(3), while the current maximum penalty with respect to an offence under s6(1), s15(2) or s21(1) is 1,000 penalty units in the case of a corporation and 200 penalty units or imprisonment for 2 years, or both, in the case of an individual. Note that the *Prevention of Cruelty to Animals Amendment (Penalties) Act 2003* (NSW) doubled the number of maximum penalty units for offences under s6(1), s15(2) and s21(1) from 500 to 1,000 in the case of a corporation and from 100 to 200 for an individual.

*Court orders: s31(1)(b)*

Section 31(1) of POCTAA allows a court to make certain orders in addition to any penalty where a person has been convicted of an offence under Part 2 of the Act or an offence against the regulations involving the way in which an animal was treated. Where satisfied that the convicted person would be likely to commit another such offence, the court may, inter alia, order that the person is not to purchase or acquire, or

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<sup>78</sup> BOCSAR, NSW Local Courts Statistics 2001-2007, No. of persons convicted of an offence under the *Prevention of Cruelty to Animals Act 1979* who received a principal penalty of imprisonment or fine by average duration of imprisonment or average fine amount.

take possession or custody of, any animal within such period as specified.<sup>79</sup> BOCSAR has advised that they do not collect data on orders made under s31.<sup>80</sup> While the RSPCA holds this information in its complaint and prosecution database, the statistics are not easily generated<sup>81</sup> and are not available in the Annual Reports. In response to a request by the authors, however, the RSPCA advised that the following individuals had restrictions placed on them in accordance with section 31(1)(b) of the POCTAA for matters commenced by the RSPCA between 1/7/2006 and 30/6/2007 and 1/7/2007 and 30/6/2008.<sup>82</sup>

<b>Total prohibition</b>	<b>2006-2007</b>	<b>2007-2008</b>
1 year	9	
2 years	5	3
3 years	1	2
5 years	5	
10 years	4	4
20 years	1	
Lifetime		1

**Restriction on Type or Number of Animals                      2006-2007**

No cats for 3 Years	1
Only possess 1 dog for 6 months.	1
No more than 10 cattle for 2 years (under appeal)	1
No companion animals for 2 years	1
Only possess 3 cats and 1 dog for 10 years	1

**Restriction on Type or Number of Animals                      2007-2008**

No Dogs for 5 years	1
Stock at RLPB Stocking Rate for 5 years	1
Possess no animals except cats for 5 years	1
Possess maximum of 21 dogs for 3 years	2

According to the RSPCA, orders made under s31(1)(b) are primarily enforced in two ways. First, the details are entered into their cruelty database so they are picked up when complaints are logged. In addition, the RSPCA conducts unannounced random

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<sup>79</sup> Section 31(1)(b).

<sup>80</sup> Email from BOCSAR to AUTHOR, 28.8.08.

<sup>81</sup> Email from David O’Shannessy to AUTHOR, 6.2.09.

<sup>82</sup> Ibid.

inspections during the period of prohibition. Local Councils do not have access to the RSPCA database, however, and there is currently no provision for the cross-referencing of prohibition orders with animals registered under the *Companion Animals Act 1998* (NSW).<sup>83</sup> There does not appear to be any mechanism to prevent a person against whom a prohibition order has been made from purchasing or otherwise acquiring an animal from a shelter which lacks access to the RSPCA database, or from a pet shop, market, registered breeder, backyard breeder or private owner.<sup>84</sup> Moreover, while s31(3) makes it an offence to fail to comply with a s31(1) order, the maximum penalty is only 25 penalty units.

### **Part 3: Issues**

The above overview of animal welfare law enforcement in NSW suggests that the following matters would benefit from government attention and further research. Although discussed primarily in relation to POCTAA, these issues are typical of problems more generally with the enforcement of animal welfare legislation.<sup>85</sup>

#### *Access to information*

The most basic requirement in evaluating the operation of law is access to comprehensive and reliable data. In the case of POCTAA, information about enforcement is not available on the website of the Animal Welfare Branch of the NSW Department of Primary Industries which administers the Act; nor are details provided in the Department's Annual Reports. The data routinely made available by the ACOs in their Annual Reports is insufficient to allow more than a cursory appraisal of complaints and prosecutions. Nor do the ACOs keep statistics on s530 and s531 of the *Crimes Act* as the police are primarily responsible for these matters. Some data is obtainable from BOCSAR, for example information about penalty notices and detailed data on court outcomes, but accessing this data has its own difficulties. First, court statistics in relation to animal cruelty are not listed under a separate head so they are not identifiable from a general perusal of BOCSAR's publicly available statistics. Instead, breaches of POCTAA are included under the unlikely classification of 'disorderly conduct', a sub-category of 'public order offences' because, according to BOCSAR, this is the Australian Standard Offence Classification used by the Australian

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<sup>83</sup> Ibid.

<sup>84</sup> In 2007, the independent NSW MP, Clover Moore, introduced a private member's bill, the *Animals (Regulation of Sale) Bill 2007*, into the NSW Parliament in an attempt, inter alia, to ban the sale of mammals in pet shops and markets. This Bill was withdrawn in 2008 and replaced with a more limited version, the *Animals (Regulation of Sale) Bill 2008* which restricts the prohibition on sale only to cats and dogs.

<sup>85</sup> For example, there are major problems in accessing data about the operation of the *Animals Research Act* and the *Exhibited Animals Protection Act*.

Bureau of Statistics.<sup>86</sup> Secondly, as of August 2008, BOCSAR introduced a policy of charging for requests that take more than 30 minutes to complete. Accordingly, any request for data which forms part of more detailed or systematic research into animal welfare enforcement in NSW may incur charges.<sup>87</sup> Thirdly, BOCSAR does not keep data with respect to all relevant matters, for example prohibition orders under s31(1)(b). Finally, there is the difficulty of trying to reconcile the apparent anomalies in prosecution data provided by BOCSAR and the RSPCA.

If governments are serious about improving animal welfare law, they need to ensure easy access to reliable and more detailed information as to how various enforcement options are being used. As it stands, it is difficult to monitor even the basic operation of POCTAA, let alone investigate more complex enforcement issues. The latter includes the way in which agencies interpret key sections of POCTAA (and the relationship between POCTAA and other animal welfare provisions), why different enforcement options are chosen in particular circumstances and how these choices are affected by agency culture. In relation to penalty notices, for example, the Government claimed that their introduction would ‘greatly increase the efficiency of the Act’s administration’ while the new power to issue directions would ‘provide a new, more appropriate tool for inspectors to use in the care of animals’.<sup>88</sup> It is impossible, however, to assess the operation of the penalty notice and directions regimes without knowing the number of notices served, to whom they were issued and for which offences or concerns.<sup>89</sup> As already noted, ACOs are required to provide the Minister with more comprehensive information than is available in their Annual Reports. A more complete picture of enforcement activity could be obtained if the DPI acted as a single source of comprehensive, publicly available data for all animal welfare statistics. This would be consistent with the DPI’s responsibilities in relation to the enforcement of the *Exhibited Animals Act* and the *Animals Research Act*.

### *Enforcement activities*

During 2006-2007, the RSPCA received 11,812 complaints and commenced charges against 140 defendants in relation to 704 offences. BOCSAR data lists 468 finalised charges brought in the Local Court under POCTAA for that period. According to the RSPCA Annual Report 2007-2008, 835 charges were brought against 129 defendants

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<sup>86</sup> Email from BOCSAR to AUTHOR, 24.4.07.

<sup>87</sup> Sentencing data is also available from the Sentencing Information System of the Judicial Information Research System but access is via subscription. See [www.judcom.nsw.gov.au/sentencing/jirs.php](http://www.judcom.nsw.gov.au/sentencing/jirs.php)

<sup>88</sup> NSW, *NSW Legislative Assembly Hansard: Prevention of Cruelty to Animals Amendment Bill Second Reading*, 9 November 2004, 2400 (Alison Megarrity).

<sup>89</sup> The NSW Government Review Group recommended the expansion of enforcement options to include penalty notices for offences of ‘a minor nature’, in which category they included failure to provide food, water or shelter and abandonment. NSW Government Review Group, *Review of the Prevention of Cruelty to Animals Act 1979*, Final Report, February 2003, 26.

in a year when it received 13,649 complaints. As some complaints relate to more than one animal, the total number of animals involved may be considerably greater than the number of recorded complaints.<sup>90</sup> Not all complaints are substantiated and, where they are, prosecution is not necessarily the appropriate response.<sup>91</sup> For example, the AWL Annual Report states that of the 391 animal cruelty complaints received in 2007-2008, only 97 were substantiated, with only three people being prosecuted. Further, some enforcement options, for example penalty notices, are of relatively recent origin and it may be that their use will increase over time. In addition, the small proportion of complaints which result in formal proceedings is partly a function of resources, as discussed below. Nevertheless, the number of finalised charges compared to the number of animals subject to a complaint raises questions about how the enforcement task is being approached and whether current strategies are the most effective. For example, it is known that agencies tend to impose their own ideas about culpability when deciding what enforcement action to take, including in cases where there is no mens rea requirement in the relevant legislation.<sup>92</sup> Meaningful debate about complex issues like this requires qualitative research, as well as access to considerably more information than is available at present.

One problematic aspect of enforcement is the very limited number of routine inspections of commercial premises. As noted above, RSPCA NSW conducted only 50 routine inspections in 2007-08. This is roughly comparable to the other jurisdictions listed in the National Statistics, with the exception of Queensland which conducted 361 inspections in the same period. The inadequacy of 50 routine inspections of commercial premises has to be seen in the context of the large number of establishments using animals and the huge number of animals involved. In NSW, for example, there are hundreds of pet shops alone, yet this is only one of many different kinds of commercial premises routinely keeping and using animals. Indeed, the RSPCA National Statistics list 22 types of establishments as examples of those subject to routine inspections. In 2008, POCTAR was amended to prescribe the 2008 *Animal Welfare Code of Practice – Animals in Pet Shops* and to allow an offence under reg20 to be dealt with by way of a penalty notice. This means that a pet shop which fails to comply with a requirement of the 2008 Code may be liable to a \$200 penalty notice. Although pet shops are included in routine inspections, those visited constitute only a small proportion of all pet shops in NSW. In this context, it is interesting to

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<sup>90</sup> Since 2003, complaints have been logged by the RSPCA on the basis of address not the number of animals.

<sup>91</sup> Note that the complaints data in the RSPCA NSW Annual Reports also includes animals that required rescue.

<sup>92</sup> David Farrier, "Constituting Criminal Law" in Wilson G (ed), *Frontiers of Legal Scholarship: Twenty Five Years of Warwick Law School* (John Wiley & Sons, 1995), 83. See also Hunter R, Ingleby R and Johnstone R, *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (Allen & Unwin, 1995), 162-165.

note that the RSPCA NSW Annual Report 2007-2008 (p49) lists a total of 480 complaints in relation to Pet Shop Inspections in its cruelty complaints statistics.

At least some of what happens in shops is subject to scrutiny by members of the public. By contrast, commercial premises such as intensive farms and abattoirs are largely hidden from any public gaze. For the most part, those likely to be aware of the occurrence of cruelty have a vested interest in the establishment, as owner, manager, employee or service provider. In these circumstances, routine inspections are a critical tool in the enforcement process.<sup>93</sup> Unlike some jurisdictions,<sup>94</sup> there appears to be no legislative restriction with respect to this kind of enforcement activity in NSW. While s24E(2) of POCTAA confines an inspector's power to enter a dwelling, absent the owner's consent, to circumstances in which there are reasonable grounds for believing that an animal is at risk or a search warrant has been obtained, the ordinary meaning of this provision in the context of the Act limits it to residential premises.<sup>95</sup> By contrast, s24G empowers inspectors generally to enter land used for commercial purposes involving animals in order to ensure compliance with POCTAA. A broad power to conduct routine inspections of commercial premises is also consistent with reg25(2)(c) of POCTAR which includes abattoirs as examples of routine inspections, reports of which the clause requires. Note, also, that in 2007, POCTAR was amended to prescribe 18 offences in relation to the confinement of laying fowl as penalty notice offences. Again, the efficacy of so providing would seem to depend upon routine inspections of these premises. While poultry inspections are included in the RSPCA's routine inspections, only three inspections were conducted in each of 2006-2007 and 2007-2008.

### *Responsibilities and resources*

Evaluating animal welfare enforcement is complicated where the law governing the activity is unclear or where responsibilities are duplicated or divided between different agencies.<sup>96</sup> An example is animal welfare in the context of slaughter. As noted in Part 1, the *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering*

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<sup>93</sup> In practice, exposure of cruel practices may depend upon animal activists, as for example in Tasmania in May 2009 where the owner of a piggery was charged with cruelty offences after video footage obtained by a local activist was aired on the ABC. See Paul Carter, 'Woolworths standing by pork supplier' Nine News, 11.5.09 <http://news.ninemsn.com.au/national/812308/woolworths-standing-by-pork-supplier> at 9.6.09.

<sup>94</sup> See, eg, the *Prevention of Cruelty to Animals Act 1986* (Vic) Part 2A.

<sup>95</sup> This interpretation is supported by the Explanatory Note to the Prevention of Cruelty to Animals Amendment Bill 2004 sch1[15](e).

<sup>96</sup> Enforcement is further complicated where Commonwealth legislation intersects with State animal welfare laws because of the operation of s109 of the *Constitution*. See, eg, *Department of Local Government and Regional Development v Emanuel Exports Pty Ltd* (Magistrates Court of Western Australia, 8.2.08, un.). Note that the magistrate's decision in that case has been questioned. See [www.vicbar.com.au](http://www.vicbar.com.au)

*Establishments* has not been adopted in NSW. In any case, adoption of a code pursuant to s34A simply enables it to be tendered in evidence in proceedings under POCTAA or POCTAR. The threshold question, therefore, is what enforcement action is taken in relation to abattoirs that might lead to prosecution. According to the RSPCA, limited resources mean that inspections of abattoirs are only conducted in conjunction with the investigation of a complaint.<sup>97</sup> As set out in Part 1, however, animal welfare standards are also relevant to the *Food Act* and *Food Regulation* even though this legislation is primarily concerned with food safety.<sup>98</sup> According to the RSPCA, there are no formal cooperative arrangements between it and the bodies which enforce the *Food Act* although there is an exchange of information in relation to individual jobs from time to time.<sup>99</sup> According to the Food Authority, each abattoir in NSW is audited every six months and identification of animal welfare problems can result in a ‘corrective action request’ and follow up visits. A failure to comply with a request may lead to the issue of an improvement notice or penalty notice or, in more serious cases, prosecution under s104 of the *Food Act*.<sup>100</sup> The Food Authority also advised that information on penalty notices served on abattoirs is included on the Authority’s Name and Shame website but a check of this online register failed to find any notices in relation to abattoirs.<sup>101</sup> The Food Authority further advised that information about improvement notices should be sought via a Freedom of Information application because of concerns about confidentiality but that the abattoirs would be likely to object to its release.<sup>102</sup>

As described in Part 1, POCTAA is only part of a complex legal and regulatory framework governing animal welfare. The example of slaughterhouses illustrates how fragmented responsibility and lack of information make the most basic evaluation of animal welfare enforcement time consuming and difficult. It also suggests that the principal enforcement agency, the RSPCA, is seriously under-resourced. In 2006-07, the RSPCA received \$424,000 from the government for its inspectorial functions and the same amount again in 2007-08.<sup>103</sup> Its 2006-07 Annual Report states that the RSPCA had 31 full time and six honorary inspectors for the whole of NSW. No

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<sup>97</sup> Email from David O’Shannessy to AUTHOR, 6.2.09.

<sup>98</sup> In addition, abattoirs which slaughter animals for export are subject to Commonwealth regulation although there are constitutional limits on the scope of Commonwealth power with respect to intrastate trade. See *O’Sullivan v Noarlunga Meats* (1954) 92 CLR 565 and *Swift Australian Co Pty Ltd v Boyd-Parkinson* (1962) 108 CLR 189 where this issue was raised in the context of animal slaughter.

<sup>99</sup> Email from David O’Shannessy to AUTHOR, 6.2.09.

<sup>100</sup> Keely Boom, Interview with John Fallon, Senior Food Safety Officer (telephone interview, 10.2.09).

<sup>101</sup> NSW Food Authority, ‘Register of penalty notices’ <<http://www.foodauthority.nsw.gov.au/penalty-notices/>> at 14.2.09. Note, however, that this is not an easy task as those penalised are listed by company name not by industry.

<sup>102</sup> Keely Boom, interview with Anne McIntosh, Support and Development Officer (telephone interview, 10.2.09).

<sup>103</sup> RSPCA NSW Annual Report 2007-08, 46-47. In 2008, the RSPCA received an additional government grant of \$10,818 for its shelters.

information about the size of the inspectorate is included in the 2008 Annual Report. While government funding has increased since 2004-2005,<sup>104</sup> current funding remains severely limited given the size and complexity of the enforcement task. No information is provided in its Annual Report about income apart from bequests but the AWL advises that \$54,000 was received in government funding in 2006-2007 for their inspectorate.<sup>105</sup> Although recent years have seen various amendments to POCTAA, POCTAR and the *Crimes Act*, these initiatives are unlikely to improve animal welfare unless they are matched by a significant increase in resources for their enforcement.

### *Penalties*

When the offence of serious animal cruelty was inserted into the *Crimes Act* in 2005 the Government asserted that '(u)nwarranted and unjustified cruelty to animals is unacceptable to our society and the Government wishes to send a strong message that such unacceptable actions will be dealt with as serious criminal offences and offenders can be assured of strong enforcement of these new laws.'<sup>106</sup> Similarly, in 2003 the Government stated that the doubling of maximum penalties for offences under s6(1), s15(2) and s21(1) demonstrated its 'commitment to protecting the welfare of animals by increasing the range of monetary penalties available to the courts for the most serious offences provided under the Act.'<sup>107</sup> Table 10.2 reveals, however, that, while the average amount of fines was higher in 2005, the increase in maximum penalties does not appear generally to have affected the quantum of fines with respect to s6(1) aggravated cruelty. Moreover, there were very few convictions under s15(2) and no convictions under s21(1) between 2001 and 2007. The only s15(2) offence listed as the principal offence during this seven-year period was in 2005 and received a bond without supervision as the principal penalty.<sup>108</sup> In relation to the *Crimes Act*, there were no s530 charges in 2005.<sup>109</sup> In 2006, there were five charges resulting in three findings of guilty and in 2007 seven charges with three guilty outcomes.<sup>110</sup> The sentencing data obtained from BOCSAR only relates to persons convicted of their principal offence and therefore does not include all relevant penalties and/or offenders. According to this data, one person was convicted of a s530 offence in 2006 where that offence was their principal offence and received a penalty of imprisonment. In 2007, three persons were convicted of a s530 offence where that offence was their principal

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<sup>104</sup> RSPCA NSW Annual Report 2005-06, 46-47.

<sup>105</sup> Keely Boom, interview with Paul Johnston, Chief Inspector NSW AWL (telephone interview, 13.2.09).

<sup>106</sup> NSW, *NSW Legislative Assembly Hansard: Crimes Amendment (Animal Cruelty) Bill Second Reading*, 9.11.2005, 19387 (Sandra Nori).

<sup>107</sup> NSW, *NSW Legislative Council Hansard: Prevention of Cruelty to Animals Amendment (Penalties) Bill Second Reading*, 15.10.03, 3650 (Ian MacDonald).

<sup>108</sup> BOCSAR, NSW Local Courts Statistics 2001-07, No. of persons convicted under the *Prevention of Cruelty to Animals Act 1979* as their principal offence by principal penalty.

<sup>109</sup> Email from BOCSAR to AUTHOR, 10.2.09.

<sup>110</sup> BOCSAR, NSW Higher Criminal Courts Statistics 2006-07, No. of finalised charges for selected sections of the NSW *Crimes Act 1900* relating to animal cruelty by jurisdiction and outcome.



offence. Of these three persons, one received a suspended sentence without supervision, one received a bond with supervision and one received a bond without supervision.<sup>111</sup> While sentencing is a complex process, it is difficult to reconcile these outcomes with the stated intention of governments,<sup>112</sup> particularly as resource limitations mean that prosecution is likely to be reserved for the most serious cases. Harsher penalties are not necessarily the best way of dealing with animal cruelty but there is a legitimate debate to be had with respect to sentencing issues without recourse to an unthinking and punitive law and order response.<sup>113</sup>

## Conclusion

This study suggests the following matters have relevance for the enforcement of animal welfare laws in NSW:

- While POCTAA is the primary animal welfare statute, the wide range of other legislative provisions and codes means the law lacks coherence and certainty.
- The spread of responsibility for the enforcement of animal welfare across different agencies creates difficulties with communication and accountability.
- Successive governments have not only delegated the crucial task of law enforcement in large measure to private charities but have failed to resource these bodies adequately.
- The difficulty of obtaining detailed information means the community has little basis on which to evaluate the efficacy of current animal welfare law enforcement or legislative change with respect to it. On the available evidence, however, there appear to be significant gaps in enforcement activity.
- The high proportion of those charged under POCTAA who enter a not guilty plea suggests many accused fail to view their conduct as wrong and/or think they have a good chance of escaping conviction and/or that the wrong people are being targeted for prosecution.
- Sentencing data indicates judicial officers may be failing to give effect to the legislature's stated intent with respect to penalties.
- Governmental reforms tend to focus on symbolic initiatives, such as increasing penalties, rather than politically less popular strategies that might help to change cultural attitudes and behaviour in the longer term, such as banning the sale of animals in pet shops.

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<sup>111</sup> BOCSAR, NSW Local Courts Statistics 2006-07, No. of persons convicted of their principal offence under selected sections of the NSW *Crimes Act* 1900 relating to animal cruelty by penalty.

<sup>112</sup> They also raise issues about the relationship between *Crimes Act 1900* (NSW) s530 and the general cruelty offences in POCTAA.

<sup>113</sup> See Annabel Markham, 'Animal Cruelty Sentencing in Australia and New Zealand' in Peter Sankoff and Steven White (eds) *Animal Law in Australasia: A New Dialogue* (2009, Federation Press) 289.

Each of these factors is problematic on its own but, taken together, they tend to construct a view of animal cruelty as different from, and less serious than, other criminal conduct. Even within a welfare paradigm that accepts the routine use of animals for human ends, much more is required if animals are to receive meaningful protection.

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# Lock ‘em up and Throw Away the Key? Community Opinions Regarding Current Animal Abuse Penalties

*Dr Nik Taylor<sup>114</sup> and Dr Tania Signal<sup>115</sup>*

Using data drawn from a sample of the general community in Central Queensland (n=1237) the aims of the present study were threefold. Firstly, to assess public opinion regarding the need for the criminal justice system (CJS) in Australia to take animal abuse seriously, secondly, to assess opinions regarding the appropriateness of current penalties for deliberate animal harm (that results in the death of the animal in question), and thirdly to assess factors that may impact upon these opinions. Over two-thirds of the sample indicated that they thought it very or extremely important for the CJS to take this type of crime seriously. The majority of people also indicated their belief that the current penalties for deliberate animal abuse are not strong enough. Variables which affected these responses included the status of the abused animal, i.e. whether respondents deemed them to be members of the family or not, whether respondents considered the animal in question to be a ‘pet’ or a ‘pest,’ gender, occupation and income of respondent. Following a discussion of the need for the CJS to respond more harshly to animal abuse, the authors conclude that the public would be in favour of such a move.

## Introduction

That animal abuse harms animals is axiomatic. However recent decades have seen large amounts of research and scholarship regarding the broader harms of animal abuse. That is, there is increasing testimony to the fact that animal abuse has deleterious effects on humans who perpetrate and/or witness it. This often manifests in the form of a generalised normalisation of violent and callous attitudes<sup>116</sup> towards both humans and animals as well as in the form of links

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<sup>116</sup> Piers Beirne, ‘From animal abuse to interhuman violence? A critical review of the progression thesis’ (2004) 1 *Society & Animals* 39.

between companion animal abuse, domestic violence and/or child abuse. For example, companion animal abuse has been deemed a good indicator of inter-human family dysfunction<sup>117</sup> Beyond this, there is also a growing body of scholars who argue that animal abuse is the outcome of a belief in human superiority/anthropocentrism which, in turn, is deemed linked to environmental destruction/degradation.<sup>118</sup> For some, this stems from the same hierarchical worldview which leads to racist and sexist attitudes towards, and oppressions of, other humans.<sup>119</sup>

Given such broad reaching consequences of animal abuse, it is important that it be taken seriously on both animal and human welfare levels. Despite this, many argue that current legal penalties for animal abuse are inadequate.<sup>120</sup> Some scholars argue that the current legal system - where protection to animals is extended on the basis of their status as the property of humans – is fundamentally unable to protect animals other than at a superficial level.<sup>121</sup> As Francione argues, it is not possible to secure legal rights for animals within a legal system which designates them as property and where it is a “fundamental premise” (1995, below, p.4) that property cannot have rights. Francione points out that the legal system requires that, in assessing the treatment of animals, human interests be balanced against animal interests. The human interests he refers to are those protected by rights in general and in particular by the right to own property. He concludes that “when we are faced with a human/animal conflict and use the prescribed ‘balancing method’ to determine whose interests should prevail, the answer is determined from the outset” – animals will necessarily lose.

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<sup>117</sup> Fiona Becker & Leslie French, ‘Making the links: child abuse, animal cruelty and domestic violence’ (2004) 13 *Child Abuse Review* 399; Clifton Flynn, ‘Battered women and their animal companions: Symbolic interaction between human and non-human animals’ (2000) 8 *Society & Animals* 99.

<sup>118</sup> Bruno Latour, *Politics of Nature: How to Bring the Sciences into Democracy* (tr. by Catherine Porter, 2004).

<sup>119</sup> Charles Patterson, *Eternal Treblinka: Our Treatment of Animals and the Holocaust* (2002); Marjorie Spiegel, *The Dreaded Comparison: Human and Animal Slavery* (1988).

<sup>120</sup> Joseph Sauder, ‘Enacting and enforcing felony animal cruelty laws to prevent violence against humans’ (2000) 6 *Animal Law* 1; Gary Francione, *Animals, Property and the Law* (1995); Steven Wise, *Rattling the Cage: Toward legal Rights for Animals* (2000).

<sup>121</sup> Ibid; Steven Wise ‘Hardly a revolution: The eligibility of nonhuman animals for dignity-rights in a liberal democracy’ (1998) 22 *Vermont Law Review* 793; Francione, above n5.

However, the fact remains that any redress of animal harm in the current climate must be sought from the criminal justice system (CJS) within current legal paradigms. The current paper reports on an investigation into public opinion regarding the response of the criminal justice system to certain forms of animal cruelty. Here, the CJS is taken to mean the general system of law enforcement which encompasses apprehension, prosecution, sentencing and supervision of those suspected of or charged with criminal offences.

The first section provides some context by detailing animal cruelty cases brought to court by the RSPCA in Queensland during the 2007-2008 period. After that, an overview of research into public attitudes towards animal cruelty is presented, followed by specific details of the current study. The paper concludes with a discussion of the issues raised in the study.

### **Responses to Animal Cruelty: A Snapshot**

In Queensland, animal cruelty is prohibited by the *Animal Care and Protection Act 2001* (ACPA). The maximum penalty for an individual convicted of cruelty to animals is \$100,000 or two years imprisonment. During 2007-2008, the RSPCA Qld sought to prosecute 51 new (i.e. not held over from previous years) cases of serious animal cruelty. Of the 51 cases, one resulted in imprisonment (a one month sentence); one offender was given a six month probationary period; one offender was sentenced to 120 hours community service; one offender could not be located; six cases were pending; four were withdrawn; one was dismissed and the remaining 36 cases were resolved by the imposition of a fine. Of these 36, the highest fine given was \$6,000, the lowest was \$500, and the remaining spread is shown in the following table.

**Table 1**

**Fines imposed during 2007-08 following RSPCA prosecutions**

<b>Fine</b>	<b>Frequency</b>	<b>Percentage</b>
Under \$1000.00	5	13.9%
\$1000 - \$1999	11	30.6%
\$2000 - \$2999	12	33.3%
\$3000 - \$3999	4	11.1%
\$4000 - \$4999	2	5.6%
\$5000+	2	5.6%

**Public Opinion Regarding Animal Abuse.**

The last two decades have seen increased public agitation regarding issues of animal welfare. This has led to many jurisdictions introducing (or seeking to introduce) new legislation which allows harsher penalties for animal abuse (e.g. the *Animals Legislation Amendment (Animal Care) Bill 2007* in Victoria, Australia which doubled the maximum penalties that may be applied for animal abuse). Similarly, the Humane Society of the United States operated a campaign throughout the 1990s encouraging individual states to adopt animal cruelty legislation which would elevate animal abuse from a misdemeanour to a felony. By 2004, 41 states and Washington DC had done so.<sup>122</sup> Public opinion also seems to be supportive of harsher sentences within existing laws for animal abuse. For example, BLEATS (Brisbane Lawyers Educating and Advocating for Tougher Sentences) - whose major aim is to focus attention on the “apparent unwillingness or seeming inability of Magistrates to wield their powers under the Animal Care and Protection Act 2001” - have an online petition aimed at encouraging magistrates to more forcefully exercise their powers “in accordance with the intention of the Animal Care and Protection Act 2001 and enforce the maximum penalties upon the perpetrators of animal cruelty.” In December 2009, BLEATS reported that 14,500 people had signed the petition (<http://www.bleats.com.au/indexF.html>).

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<sup>122</sup> Michael Allen et al, ‘Human to animal similarity and participant mood influence on punishment recommendations for animal abusers’ (2002) 10 *Society & Animals* 267.

Survey research indicates that people find animal cruelty problematic. For example, Hills in a survey of 300 people found 99% agreed cruelty towards animals was unacceptable.<sup>123</sup> Similarly Braithwaite and Braithwaite in an assessment of Australian university students' attitudes to animal suffering found there was a general distaste for any animal abuse/suffering. This distaste was stronger for abuse/suffering deemed 'unnecessary' (e.g. companion animal abuse) than for that deemed 'necessary' (e.g. medical experimentation).<sup>124</sup> However, this is complicated by various factors including a lack of a concrete definition regarding animal cruelty and various situational and contextual factors.<sup>125</sup> For example, previous research shows a consistent gender difference in attitudes towards most animals with females more supportive of animal welfare and wellbeing and more likely to be critical of the various uses and abuses of animals.<sup>126</sup>

In a recent study examining beliefs regarding appropriate punishments for animal abuse, researchers reported that participant gender was one of the strongest predictors of harshness of recommended punishment, female participants being more likely to endorse harsher punishments for animal abuse than males.<sup>127</sup> An exception to this pattern is that gender does not seem to affect attitudes towards animals deemed pest species.<sup>128</sup> This suggests attitudes towards animals categorised as pest species are qualitatively different than towards other categories; that companion animals and viable animals are accorded some 'welfare' related attitudes but that pest species are not.<sup>129</sup> In the development of a scale which discriminates between attitudes towards 'pet', 'pest' and 'profit' animal species, Taylor and Signal point out that research into attitudes towards animals is generally limited to an investigation of attitudes towards animals which are deemed to have value to humans, as opposed to pest animals, which by their very name are generally seen as superfluous (or even detrimental) to human lives.

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<sup>123</sup> Adelma Hills, 'Motives underlying attitudes toward the use of animals in teaching and research' (1994) 7 *ANZCCART News* 3.

<sup>124</sup> John Braithwaite and Valerie Braithwaite, 'Attitudes towards animal suffering: An exploratory study' (1982) 3 *International Journal for the Study of Animal Problems* 42.

<sup>125</sup> Adelma Hills and Nathan Lalich, 'Judgments of cruelty towards animals: Sex difference and effect of awareness of suffering' (1998) 11 *Anthrozoos* 142.

<sup>126</sup> Hal Herzog, 'Gender differences in human-animal interactions: A review' (2007) 20 *Anthrozoos* 7.

<sup>127</sup> Valerie Sims, Matthew Chin and Ryan Yordon, 'Don't be cruel: Assessing beliefs about punishments for crimes against animals' (2007) 20 *Anthrozoos* 251.

<sup>128</sup> Nicola Taylor and Tania Signal, 'Pet, pest, profit: Isolating differences in attitudes towards the treatment of animals' (2009) *Anthrozoos* in press.

<sup>129</sup> *Ibid.*

The specific species (as opposed to ‘category’) of the animal in question may also play a part in determining responses to animal cruelty.

Cameron, Johnstone and Plous found research participants were more distressed when watching the abuse of animals deemed more similar to humans than watching those deemed less similar.<sup>130</sup> In a more recent study, Allen et al measured the effect of human-to-animal similarity on recommended punishments for animal abuse. They found that there was a consensus between the amount of fine and jail time recommended and the type of animal being abused. Specifically, respondents thought that the abuse of animals least similar to humans (insects and fish) should attract less punishment and the abuse of animals most closely associated with humans (primates) should attract a higher level of punishment.<sup>131</sup> Similarly, Sims et al reported that harsher punishments were endorsed for acts of cruelty involving a companion animal (specifically a puppy) than when the victim was not a companion animal, in this case a chicken. They suggested that when considering appropriate punishments, individuals focus more on the type of animal involved than the type of cruelty engaged in (or the sex of the perpetrator). Sims et al therefore suggest a need for research to focus on differences in attitudes to appropriate punishment for deliberate acts of cruelty against animals in the same ‘category’, specifically companion animals such as cats and dogs.<sup>132</sup>

If attitudes towards animal cruelty punishments differ according to animal category (eg ‘pet’, ‘pest’, or ‘profit’ species), and/or by the given animals similarity to humans, then this has implications for policy initiatives aimed at securing general animal wellbeing. It may be that public support will be limited to legislation aimed at securing better welfare for companion and commercial animals but not pest species. A difference in attitudes to different animal categories (and attendant punishment for cruelty to them) has broader implications.

Research has suggested that those who are deliberately cruel to certain animal species may have an elevated propensity for violence and be more likely to develop anti-social and aggressive behaviours later in life.<sup>133</sup> Even though much of this research has been conducted with

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<sup>130</sup> Scott Plous, ‘Psychological mechanisms in the human use of animals’ (1993) 49 *Journal of Social Issues* 11.

<sup>131</sup> Allen et al, above n7, 267.

<sup>132</sup> Sims et al, above n14, 251.

<sup>133</sup> Suzanne Tallichet and Christopher Hensley, ‘Rural and urban differences in the commission of animal cruelty’ (2005) 49 *International Journal of Offender Therapy and*



incarcerated samples utilising self-reports of childhood experiences of animal cruelty (with the inherent risks involved in this type of retrospective methodology), researchers are consistently reporting that those who engage in animal cruelty from a young age often target cats specifically.<sup>134</sup> Tallichet et al also reported that those who begin harming animals at a young age also reported engaging in more instances of animal cruelty than those who reported cruelty offences from a later age.<sup>135</sup> Similarly, researchers have reported that males convicted of the most violent human-related offences are significantly more likely to abuse both pets and stray (or pest) animals.<sup>136</sup> So, it's important when assessing attitudes towards CJS responses to animal abuse to try to discriminate by animal category, as well as species, where possible.

As outlined above, it's reasonable to assume the public will be less supportive of legislation designed to punish those who are cruel to pest species than those who are cruel to companion species. Given the evidence cited above, regarding the links between high levels of human directed violence and harm across animal categories (including pest species), this lack of public support may need addressing in the early stages of any pressure to change legislation.

A further factor which may play a role in determining public support for harsher animal cruelty penalties is the perception of a given actor's own awareness of the cruelty of their actions.

Utilising 501 undergraduate business students (252 female, 249 male) Hills examined attitudes towards animal cruelty. She specifically assessed the effect an actor's own awareness of causing suffering to an animal had on participants' judgments about the cruelty of that person as well as the cruelty of what happened. She found that "judgments of what happened were made independently of judgments about the cruelty of the person responsible for what happened. Awareness of suffering

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*Comparative Criminology* 711; Suzanne Tallichet et al 'Targets for cruelty: Demographic and situational factors affecting the type of animal abused' (2005) 18 *Criminal Justice Studies*, 173.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Linda Merz-Perez, Kathleen Heide and Ira Silverman, 'Childhood cruelty to animals and subsequent violence against humans' (2001) 45 *International Journal of Offender Therapy and Comparative Criminology* 556.

clearly influenced judgments about the cruelty of the person, but had little effect on judgments about the cruelty of what happened”.<sup>137</sup>

Similarly, public opinion about appropriate penalties for animal cruelty are subject to contextual and individual factors. Vollum, Buffington-Vollum and Longmire analysed the results of several questions regarding animal abuse contained within the 2001-2002 Texas Crime Poll. Results of particular relevance to the current study included the fact that for “*Intentionally running over a cat or a dog with a car*” 40% of respondents endorsed jail time; 57.2% endorsed either a fine or probation; and only 2.8% endorsed no punishment. For “*Intentionally harming or killing another person’s pet*” 66.7% of respondents endorsed jail time; 32.1% endorsed a fine or probation; and only 1.2% endorsed no punishment.<sup>138</sup>

In summary, international research seems to indicate that animal abuse should be taken seriously for the associated welfare/wellbeing of humans. Moreover, given that animals clearly suffer when abused there is a need to take animal abuse seriously for the wellbeing of the animals themselves.

Extant research also demonstrates that the public in general is supportive of increasing penalties for animal abuse. Furthermore, any research into this area has to make allowances for difference in opinion vis a vis an animal’s status (e.g. as a ‘pet’ or ‘pest’) and/or the species of the animal concerned as well as various human personality and contextual variables. Whilst the latter is beyond the scope of the current study, save for an investigation into certain demographic variables, the aim of the current study is to assess the general public’s opinions regarding both the need for the CJS to take animal abuse seriously and the suitability of current penalties for deliberate animal harm. In order to begin to tap into differences regarding animal category and species, the questions were written to elicit differences in opinion regarding the severity of animal abuse for both cats and dogs. These two species were chosen because dogs in Australia are firmly considered to be ‘pet’

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<sup>137</sup>Hills, above n12, 146.

<sup>138</sup> Scott Vollum, Jacqueline Buffington-Vollum and Dennis Vollum ‘Moral disengagement and attitudes about violence toward animals’ (2004) 12 *Society & Animals* 209.

species whilst cats have a more ambiguous status in that many believe them to be a pest species<sup>139</sup>.

### **The Current Study**

A telephone survey was administered by the Centre for Social Science Research at Central Queensland University to a random sample of 3171 adults over 18 who were residing in Central Queensland at the time. The survey resulted in a sample of 1237 valid responses from 619 males and 618 females. This represents a 39% response rate. As part of the annual Central Queensland Social Survey (CQSS), researchers were invited to contribute up to 10 questions which reflected their research interests. The survey instrument consisted of three components: a standardized introduction, demographics, and researcher-contributed questions. Demographic questions included: gender, age, marital status, strength of religious belief, length of time living in the current community, income, and political beliefs.

Further demographic information on the following was also collected:

- education level (Primary, Secondary, Tertiary - technical, Tertiary – university).
- current occupation (coded using major categories listed within an online job search engine ([www.seek.com.au](http://www.seek.com.au)) resulting in seven categories.
  - Primary Industries: Food (e.g., farmer, grazier, meat industry worker etc);
  - Primary Industry: Mineral (e.g., miner);
  - Education;
  - Healthcare;
  - White Collar;
  - Blue Collar;
  - Other.
- employment status (Unemployed; Pension, i.e., in receipt of other state benefit; Student; At Home; Employed).

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<sup>139</sup> [www.invasiveanimals.com](http://www.invasiveanimals.com)

The researcher directed questions were:

1. How important do you think it is for the CJS to take deliberate companion animal abuse seriously – when the victim is a DOG? [1=Not at all important, 2=Slightly important, 3=Important, 4= Very important, 5= Extremely important]
2. How important do you think it is for the CJS to take deliberate companion animal abuse seriously – when the victim is a CAT? [same answer options as Q.1]
3. If a companion animal dies due to deliberate abuse what kind of response from the CJS is appropriate if that animal is a DOG? [Jail time, Fine, Probation, Community Service or No response needed]
4. If a companion animal dies due to deliberate abuse what kind of response from the CJS is appropriate if that animal is a CAT? [same answer options as Q.3]
5. On a scale of 1-5, do you think that current legal penalties for deliberate companion DOG abuse are strong enough? [1=Not all strong enough, 2=Sometimes strong enough, 3=About right, 4=Usually too strong, 5=Always too strong]
6. On a scale of 1-5, do you think that current legal penalties for deliberate companion CAT abuse are strong enough? [same answers options as Q.5]
7. Do you consider companion DOGS to be members of the family? [YES/NO]
8. Do you consider companion CATS to be members of the family? [YES/NO]
9. Do you think that domesticated DOGS are pets or pests? [PET/ PEST]
10. Do you think that domesticated CATS are pets or pests? [PET / PEST]

The 2007 Central Queensland Survey sample was drawn from a telephone database using a computer program to select, with replacement, a simple random sample of phone numbers within the region. All duplicate, mobile and business numbers were removed from the computer-generated list. Nursing homes and other collective dwellings (e.g. youth hostels) were also deleted from the sample. Within the household, one person was selected as the respondent for the 20-minute interview based on gender and age in order to ensure a representative sample of the Central Queensland population.

## Results

Following receipt of the data set (in SPSS for Windows, v.15), data cleaning and consistency checks resulted in 1237 cases being utilised in the following analyses.

*How important do you think it is for the CJS to take deliberate companion animal abuse seriously when the victim is a dog/cat?*

Table 2 presents the distributions of responses to the above question. Although respondents generally endorsed the idea that it is important for the CJS to take this type of abuse seriously (approximately 72% and 67% very to extremely important when the animal involved was a dog or cat respectively) the pattern of responses was significantly different depending on the type of animal involved ( $t(2472)=-3.539$ ,  $p=0.000$ ). That is, respondents tended to see the deliberate harm of a companion dog as more worthy of concern than the abuse of a cat.

**Table 2**

**Percentage of respondents endorsing ‘How important do you think it is for the CJS to take deliberate companion animal abuse seriously when the victim is a dog/cat?’**

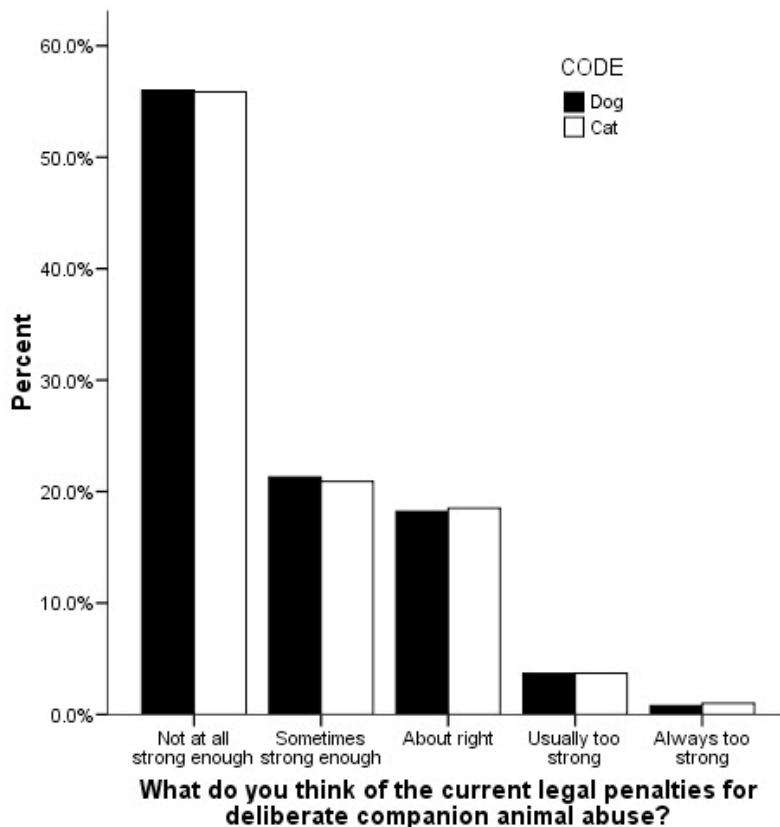
	DOG	CAT
	%	%
Extremely important	47.9	44.6
Very important	24.1	22.0
Important	21.7	22.8
Slightly important	4.7	5.7
Not at all important	<1	3.8
Don't Know/No response	<1	<1

Examination of the interactions between respondents' ratings for the above question and various demographic items (personal income level, occupation, education, age, gender, whether dog/cat is perceived as a 'member of the family' [yes/no]; whether dog/cat are seen as a pet or a pest) revealed that while education level had no observable effect ( $F_{DOG}(4,1224)=0.480$ ;  $p=0.750$ ;  $F_{CAT}(4,1223)=0.149$ ;  $p=0.963$ ) all of the other demographic variables significantly affected ratings of importance. That is, higher importance was ascribed to the CJS taking this type of abuse seriously by women ( $t_{DOG}(1223)=5.035$ ;  $p=0.000$ ;  $t_{CAT}(1146)=7.359$ ;  $p=0.000$ ); those on incomes of less than \$1,000/week ( $t_{DOG}(3,910)=3.982$ ;  $p=0.008$ ;  $F_{CAT}(3,906)=7.411$ ;  $p=0.000$ ); those employed in the Health sector vs. Primary Industry: Food and Minerals (cats only;  $F_{DOG}(6,775)=1.969$ ;  $p=0.068$ ;  $F_{CAT}(6,775)=3.201$ ;  $p=0.004$ ); those who perceive dog/cats as members of the family ( $t_{DOG}(1198)=-11.039$ ;  $p=0.000$ ;  $t_{CAT}(296)=-11.259$ ;  $p=0.000$ ) and those who perceive dog/cats as pets rather than pests ( $t_{DOG}(1177)=-5.925$ ;  $p=0.000$ ;  $t_{CAT}(196)=-10.188$ ;  $p=0.000$ ). While age proved to have a significant effect ( $F_{DOG}(5,1217)=2.538$ ;  $p=0.027$ ;  $F_{CAT}(5,1215)=2.794$ ;  $p=0.016$ ), post hoc analyses (Tukey's) showed that the source of the difference was between those participants in the 25-34 and 55-64 year old brackets, with the younger group endorsing a higher level of importance than the older group.

Significantly, while almost 20% of respondents felt that cats were not a member of the family, less than 10% said the same about dogs. Similarly over 14% of respondents considered cats a pest species while less than 2% thought the same about dogs.

*Attitudes towards the current legal penalties for deliberate abuse of a companion dog/cat*

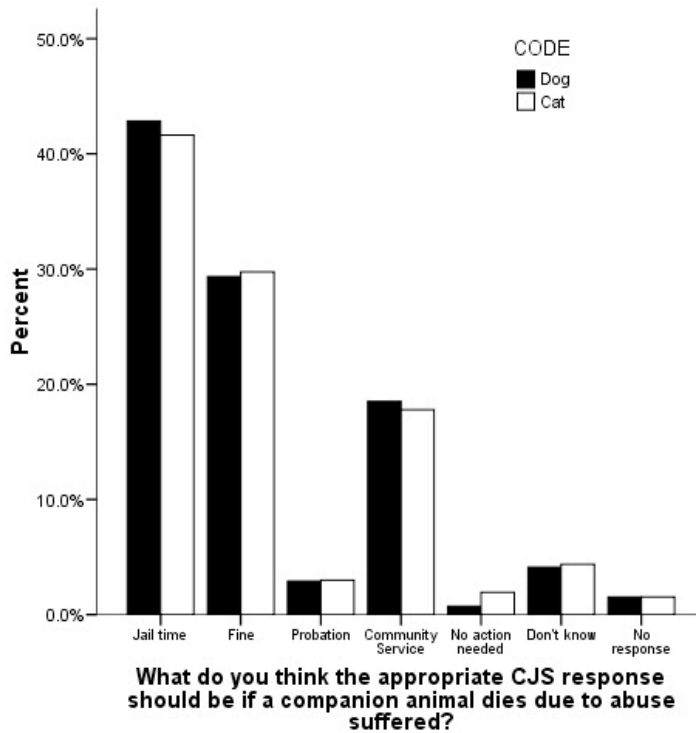
Despite the differences seen above, when participants were asked for their opinions regarding the current legal penalties for deliberate companion animal harm (i.e. not harm caused by neglect) there was no difference in the pattern of responding dependent on species. As can be seen in Figure 1, by far the largest cohort of respondents suggested that current penalties were 'Not at all strong enough', with less than 4% suggesting that current penalties were too strong (3.6% and 3.8% for dogs and cats respectively).



**Figure 1. Opinions of the current legal penalties for deliberate companion animal abuse (dog/cat)**

*Appropriate CJS response when a companion animal (dog/cat) dies due to deliberate abuse.*

Participants were given five possible CJS responses (Jail time; Fine; Probation; Community Service or ‘No action needed’) and asked which they thought would be the appropriate response in a situation where a companion animal (dog/cat) dies as a result of deliberate abuse. As can be seen in Figure 2, for both species the largest cohort of respondents suggested Jail time (42.8%, n=530; 41.6%, n=515 dog and cat respectively) followed by Fine (29.3%, n=363; 29.7%, n=368 dog and cat respectively). More respondents endorsed the ‘No action needed’ option when the animal involved was a cat (2%, n=24 vs 0.7%, n=9).



**Figure 2. Appropriate CJS response when a companion animal (dog/cat) dies due to deliberate abuse.**

### **Public Opinion, Animal Abuse and the Criminal Justice System**

The aims of the study were to assess public opinion (using a large, normative, community sample) on two aspects of animal abuse penalties. The first aspect was the need for the CJS to take animal abuse seriously and the second concerned the appropriateness of current penalties for deliberate animal harm that results in the death of the animal. The study aimed to assess some of the factors that may impact upon these opinions. More than two-thirds of the sample thought it very or extremely important for the CJS to take this type of crime seriously (regardless of animal type). This result mirrors that of



previous research and supports the calls of groups such as BLEATS for all members of the CJS to take instances of animal abuse seriously.<sup>140</sup>

Attitudinal variables that influenced respondents' ratings of importance included their belief in the status of the abused animal (i.e. whether respondents saw them to be family members, a 'pet', or a 'pest'). Following suggestions from previous research,<sup>141</sup> respondents' opinions were sought as to the CJS response to animal abuse across two species – cats and dogs – in order to differentiate between animals deemed by the majority to be pets (dogs) and animals which occupy a more ambiguous status in Australian society (cats). Where an animal was deemed a pest, or not a family member, average ratings on the importance of the CJS taking the abuse seriously were significantly lower. So, it may be that implementing harsher penalties for abuse of non-pet species (e.g. pest or stray/wild animals) will prove more problematic than for companion animals – or at least commonly accepted companion animals (i.e. dogs cf. cats). However, in light of emerging evidence of the elevated risk for interpersonal violence within cohorts that abuse across animal categories, and particularly 'stray' or 'pest' species, it's imperative that animal abuse is taken seriously by the CJS regardless of the status of the animal in question.<sup>142</sup> As Sauder argues, "prosecutors must treat even minor acts of cruelty seriously and recommend appropriate sentences and treatment as a condition of sentence and/or probation in order to prevent future violent conduct."<sup>143</sup>

Thus, given the compelling nature of various evidence to date, the State in all its manifestations has to be willing to clearly signal the unacceptability of *any* animal abuse. The CJS, and particularly the judiciary, have an important role here and need to make sure they take 'pest' and 'wild' animal abuse as seriously as companion animal abuse despite the former's more ambiguous status within the legal system. Recent cruel and abusive acts reported by the media, such as the slaughter of koalas at Kallangur and the bashing of a blind, elderly flamingo at Adelaide Zoo provide ample opportunity.

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<sup>140</sup> Sims et al, above n14, 251.

<sup>141</sup> Sims et al, above n14, 251.

<sup>142</sup> Tallichet and Hensley, above n20, 711; Tallichet et al, above n20, 173.

<sup>143</sup> Sauder, above n5, 1.

As with previous research regarding willingness to report instances of animal abuse and attitudes to animals, the study found gender was an important factor. Females were more likely to think it more important that the CJS take animal abuse seriously irrespective of the species of animal.<sup>144</sup>

Income was also a factor. Those in the lower income bracket thought it more important that the CJS take abuse seriously.

Occupation was also a factor. Those employed within the Health sector considered it more important than those in other sectors, and were significantly more likely to rate this type of crime as extremely serious than those employed within the Primary Industries – Food sector (for cats this difference also applied to Primary Industries – Mineral). This may well be because Health sector workers, on the frontline, are more likely to see consequences of links between animal abuse and familial abuse. Similarly, research consistently shows that those employed within primary industries display a more utilitarian and/or “dominionistic” attitude towards animals, which may account for their not considering it as important.<sup>145</sup>

Age affected opinions on a need for the CJS to take animal abuse seriously in that younger people (specifically 25-34 year olds) rated it more important. Although reasons for this are unclear, it may be related to the trend for 25-34 year olds to be living in single person dwellings where companion animals may take the place of traditional families. This would potentially elevate the proportion of those in this group who deem dogs/cats as family members – a variable shown to elevate the average importance ascribed to animal abuse.

The most surprising finding regarding the appropriateness of current applications of penalties for animal abuse, is that attitudinal differences due to the species in question disappear. That is, the majority of people considered current penalties were not strong enough irrespective of whether the animal in question was a cat or a dog. The fact that this overwrites previously demonstrated species differences suggests it is

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<sup>144</sup>Nicola Taylor and Tania Signal, ‘Community demographics and the propensity to report animal cruelty’ (2006) 9 *Journal of Applied Animal Welfare Science* 201; Tania Signal and Nicola Taylor, ‘Attitudes to animals: Demographics within a community sample’ (2006) 14 *Society & Animals* 147.

<sup>145</sup> Ibid 147; Stephen Kellert, ‘American attitudes toward and knowledge of animals: An update’ (1980) 1 *International Journal for the Study of Animal Problems* 87; Vollum et al, above n25 (wrong cross-reference), 209.

something strongly felt by the community, which in turn suggests that they would support measures designed to increase the penalties applied for deliberate animal abuse. Related to this, when interviewees were asked what they thought the appropriate response of the CJS was for animal abuse where the animal in question died, the most common response was 'Jail Time', again irrespective of whether the animal in question was a cat or a dog. This is in stark contrast to the 'normal' CJS applied penalty which tends to be a fine.<sup>146</sup> However, it is noted that more people endorsed the 'no action needed' option when the animal was a cat, again suggesting that the 'category' of animal involved is a factor in community opinion.

## Conclusion

In summary, it can be said that the general public are strongly in favour of the CJS considering the abuse of dogs and cats a serious crime which should attract serious penalties.

An increasing number of animal crimes occurring and/or being reported suggests the CJS may well have to rethink the approach to animal cruelty.

An RSPCA Qld spokesperson, Mr Michael Beatty, said recently that the organisation had investigated more than 12,000 cases of animal cruelty and neglect in a recent 12 month period. Given the levels of cruelty to animals involved and attendant animal suffering and the growing amount of evidence pointing to the potentials for deleterious effects for humans the pervasiveness of this type of abuse is concerning. One way to tackle this kind of abuse at its source is to firmly convey its unacceptability to the community as well as to the individual perpetrators. The CJS is "a powerful agency of public disapproval and reparation" and is uniquely placed to do just this.<sup>147</sup> Evidence presented from the current study suggests not only that the public wish to see this response from the CJS but that they are sufficiently concerned about animal cruelty to support any future initiatives aimed at extending punitive measures for animal cruelty. How extended punitive measures should play out is an open question. For example, whether the public

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[http://www.livenews.com.au/Articles/2008/10/21/Puppy\\_killing\\_the\\_worst\\_act\\_of\\_animal\\_cruelty\\_RSPCA](http://www.livenews.com.au/Articles/2008/10/21/Puppy_killing_the_worst_act_of_animal_cruelty_RSPCA)

<sup>147</sup> Robyn Holder, 'Domestic and family violence: Criminal justice interventions' (2001) 3 *Australian Domestic and Family Violence Clearinghouse Issues Paper* 2.

supports greater maximum penalties being introduced by parliament and/or higher sentences being imposed by the judiciary within prevailing laws is a matter for further research.

Finally, one major philosophical supposition of the paper must be discussed.

The aims of the study were to begin to assess the factors which affect community opinions about the abuse of two animal species - cats and dogs –who are, to a greater or lesser degree, accorded the status of companion animal. This deliberately excludes other species, such as farmed animals, who are routinely the victims of large scale institutionalised violence.<sup>148</sup> Whilst this leaves us open to the charge of ‘selective indignation’,<sup>149</sup> it was a deliberate methodological choice. Not only is the kind of animal abuse investigated in the current article more readily amenable to control and thus more ‘susceptible to correction and enforcement’<sup>150</sup> it is also readily identifiable to the majority of people who might question the very idea that farming practices constitute institutional violence. As such, the kinds of scenarios presented to our respondents were less likely to create controversy and more likely to be answered appropriately *within the confines of the current study*. Still needed is an assessment of community attitudes towards routine, institutional violence done daily to animals.

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<sup>148</sup> Piers Beirne, ‘For a Nonspeciesist Criminology: Animal Abuse as an Object of Study’ (1999) 37 *Criminology* 117-147.

<sup>149</sup> Geertrui Cazaux, ‘Beauty and the Beast: Animal Abuse from a Non-Speciesist Criminological Perspective’ (1999) 31 *Crime, Law & Social Change* 120.

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# **Possess or Protect? Exploring the Legal Status of Animals in Australia's First Colonial Courts:**

## **Part 2 - Seals, strays and sovereignty**

*Brent Salter* \*

In the previous issue of the *Australian Animal Protection Law Journal*, some of the earliest records involving the interaction between animals and the first criminal court of New South Wales were examined.<sup>151</sup> Part 2 continues to examine the extent to which animals appeared as prominent characters in the first courts of Australia in the context of the civil jurisdiction and some of the first cases to consider British sovereignty, citizenship and the reception of British law. Despite the central role of animals in the development of colonial law, Part 2 further explores the notion that the legal status of animals continued to be defined in terms of their utility as subjects of property rather than their personal protection.

### **III COMMERCE AND THE CIVIL COURT**

#### **a) The structure of the Court of Civil Jurisdiction**

The Court of Civil Jurisdiction, like the Criminal Court, was also established by the First Charter of Justice, although it was not mentioned in 27 Geo.3, c.2. Instead of a judge and civil jury as in the superior common law courts of first instance in England, it was composed of the Judge Advocate and two “fit and proper persons”, appointed by the Governor. These two assessors (as they came to be called) were not required to be military or naval officers. The court had a general civil jurisdiction to be exercised in a summary way over all commercial and personal pleas, including those over interests in land. It was also empowered to grant probate and issue letters of administration for deceased estates. The Charter did not mention equity, but the court

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<sup>151</sup> (2009) 2 AAPLJ 35

occasionally exercised equitable jurisdiction whether or not it was authorised to do so.<sup>152</sup>

Under the Charter, civil process was to commence by summons, or if the value of the demand was £10 or more, by pre-judgment arrest as was the practice in England. The court was to deliver judgment “according to justice or right”. Judgments were to be enforced by levy upon the goods and chattels of the judgment debtor (*feri facias*) and “for want of sufficient distress” by imprisonment for debt.

The Second Charter of Justice (Letters Patent, 4 February 1814) created a new civil court in place of the Court of Civil Jurisdiction. Confusingly, it was given the name Supreme Court, a name which was also used for the court which replaced it ten years later. The court had no jurisdiction over criminal cases, which remained to be heard by an unchanged Court of Criminal Jurisdiction.

The new Supreme Court was a court of record, with the same general civil jurisdiction as the Court of Civil Jurisdiction. However the new court had no jurisdiction in claims up to £50. It was headed by a Judge, who sat with two lay magistrates. Process was commenced by summons, followed by arrest if the defendant did not appear. Enforcement of judgment debts was to be the same as in the previous court (*feri facias* or imprisonment). Judgments were to be given “according to law and equity”. The court was explicitly a “Court of Equity” with equitable jurisdiction. In common law matters it was not to operate in a “summary way” as the previous court had done.

The Civil Court was generally a more progressive legal institution than the militarily constrained Criminal Court of Jurisdiction. Decisions often reflected the unique conditions of the colony in terms of trespass, debt and trade, and cases involving animals were, in many instances, at

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<sup>152</sup> See, e.g., *Ex parte Marsden and Hall* (1812) NSW Sel. Cas. (Kercher) 474 in B. Kercher and B. Salter (eds), *The Kercher Reports: Cases from the Superior Courts of NSW (1788-1827)* (2009) (hereafter “*NSW Sel. Cas. (Kercher)*”). Most of the cases cited in this paper are also available online at: *Decisions of the Superior Courts of NSW* available at: [www.law.mq.edu.au/scnsw/](http://www.law.mq.edu.au/scnsw/) (hereafter “*Decisions of the Superior Courts of NSW*”).



the forefront of some of the more progressive and flexible developments in the law. For example, both Collins and Atkins set a pattern of judgment debt enforcement which lasted until 1809 where animals would often be the commodity that settled the debt. Under the First Charter of Justice, there should have been only two remedies available when a judgment debtor failed to pay the amount due: the seizure and sale of goods under *feri facias*, and imprisonment for debt (*capias ad satisfaciendum*). The Charter stated that imprisonment was authorised “for want of sufficient distress”, which may have been intended to mean only when the seizure and sale of goods did not satisfy the claim.

Collins was more flexible than the Charter indicated. He allowed judgment debts to be satisfied by the assignment of crops, the assignment of labour and for the assignment of animals.<sup>153</sup> Collins was succeeded as Judge Advocate by Richard Atkins, who made similarly flexible orders, including instalment orders and orders to pay immediately in kind (often by chickens or pigs). The complete record of *Howell v Furber*<sup>154</sup> is as follows:

*Furber ats Howell*. Issued £1.15.8. Verdict for plaintiff 15s. 8d.  
To be paid in two hens or by execution.<sup>155</sup>

These orders were not authorised by the Charter. Atkins took the few cases which Collins had decided in this flexible way and extended them into a new method of debt recovery, one which was not authorised by strict law but which struck a balance between the parties and allowed debtors to remain on their farms and out of jail.<sup>156</sup>

## **b) Stray animals and other miscellaneous cases**

Richard Atkins took the opportunity to expand the law in other civil trials involving animals. In 1807 George Blaxland sued John Bennett for shooting his sow, seeking £5 compensation for his loss.<sup>157</sup> In his defence, Bennett claimed that Blaxland’s sow had repeatedly trampled over his crops and that he had previously

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<sup>153</sup> Only one defendant was imprisoned for debt on the first day of this flexible approach, John Sparrow.

<sup>154</sup> (1 September 1801, Court of Civil Jurisdiction Proceedings, July – October 1801, State Records NSW, 1097).

<sup>155</sup> See NSW Sel. Cas. (Kercher) 142.

<sup>156</sup> Ibid.

<sup>157</sup> *Blaxland v Bennett* (1807): *Decisions of the Superior Courts of NSW*.

warned Blaxland that he would shoot the pig if it continued to ravage his property. The highly creative, but often maligned, Judge Advocate Richard Atkins awarded the plaintiff the full value of the pig but also ordered Blaxland to pay the damages for the destruction of Bennett's crops. Kercher writes of the case:

[T]his was among the few cases in which the courts dealt with straying animals. Instead, these disputes were usually resolved by an elaborate system of official regulations and self-help remedies.<sup>158</sup>

Indeed, although grazing was tolerated, stray animals in the colony became so problematic, in an environment of barely grassed pastures, that private landholders would often take matters into their own hands. Land property owners issued threats in the *Sydney Gazette* warning stock owners that if their cattle strayed onto private land their animals would be impounded and the owners prosecuted.<sup>159</sup> Various Government initiatives were considered. The Rebel Court ordered that those who captured stray animals could keep them. Kercher writes Government orders in the very early years of the colony allowed for the shooting of pigs found in the streets (without rings or yokes) because they were dangerous to pedestrians, if left to freely roam, and a threat to the water system. Government orders also allowed for stray animals to be impounded – especially where they strayed onto private property.

These early orders failed to control some of the above problems, however. By 1810, Macquarie took tougher measures including orders that ownership of loose pigs and goats was to be forfeited, stray dogs shot and constables fined if they failed to impound animals.<sup>160</sup>

By the end of the first 40-year period after settlement, trespass issues involving animals were still the source of heated disputes and the subject of many civil matters. Where an animal trespassed and was killed in a civil matter the issue was usually the loss of property suffered by the plaintiff. For example, in *Lawliss v Knoffe, 1824* the plaintiff sought to recover the value of a dog killed by the defendant. Witnesses stated that the dog was a very faithful animal, “and worth at least ten pounds”. The defendant had ventured into the plaintiff's yard without

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<sup>158</sup> B. Kercher, *Debt, seduction, and other disasters : the birth of civil law in convict New South Wales* (1996) 108.

<sup>159</sup> *Ibid* 109.

<sup>160</sup> *Ibid* 110.

the plaintiff's consent. The dog attacked him and he plunged a butcher's knife into the animal's chest causing immediate death.

The new Chief Justice of the first Supreme Court, Francis Forbes, awarded the plaintiff £5 observing:

The plea of having killed the dog in his own defence was not a sufficient one, in as much as the defendant was a trespasser, and the plaintiff placed the dog in the yard as a protection against such persons.<sup>161</sup>

Animals continued to be a rich source for the development of civil law in other contexts. For example, in the 1810 decision of *Marsh v Julian* involving the death of a mare, the term negligence was used for the first time in an Australian superior court.<sup>162</sup> In that trial the plaintiff claimed the defendant's employee servant had improperly "put the mare to the stallion" which resulted in the death of the mare. The claim was described as an action on the case in negligence and the defendant awarded £80 damages.

The requisite standard of care in a civil action was considered in *Hynds v Byrne*, 1811. Thomas Hynds sued Andrew Byrne for the loss of two bullocks which had drowned on Byrne's property. Byrne agreed to allow Hynds's cattle to graze on his land for a fee of 3s. per week, but he argued that did not mean he accepted responsibility for the welfare of the bullocks. The Court agreed with the defendant and dismissed the plaintiff's claim.

A different conclusion was reached by a magistrate court two years earlier in *Anonymous case*, 1809. In that case, a demand was set up by herdsmen against the proprietor of several head of cattle in his charge on weekly pay at one shilling per head. It was objected that one of the cattle had, from neglect, strayed away, and the owner being obliged to pay 5s. to the finder, the like sum ought in justice to be "stopped out" of the demand for head-money. The Bench agreed and held as the owner had bargained to pay a certain price for his stock to be taken care of, they should not bear the cost consequent on the negligence of the person entrusted.

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<sup>161</sup> *Lawliss v Knoffe* (1824): *Decisions of the Superior Courts of NSW*.

<sup>162</sup> B. Kercher, *Debt, Seduction*, above n 7,114.

Disputes concerning the trade of animals also appeared prominently in the records of the first civil courts. *Noakes v Hayes*, 1821 was an action for damages for the delivery of only 105 sheep in a flock of over 500:

after three years keeping of 351, viz. 208 ewes and 143 wethers, under an agreement to be paid £2 per month for [assignment]”. The defendant converted for his own use, “ten or a dozen at one time, and 20 or 25 at another; and, in the middle of 1818, to have had 400 or 500 of the plaintiff’s sheep, besides the lambs.

The calculation of damages illustrates the complete commodification of animals in the trade process. No thought was given to the welfare of hundreds of unaccounted for stock. Indeed, the plaintiff claimed “he had lost the rest” of the cattle. The Court estimated “the damages upon the rate of increase of one lamb per annum, and valued all the sheep at 10 shillings. Deducting a balance of £22 for assignment, and 6 deaths proved, the verdict amounted to £462”.

### **c) The seal trade cases:**

Animal neglect is most strikingly evident in a collection of seal trade decisions from the first three years of Ellis Bent’s term as Judge Advocate (1810-1812). Seal killing was a lucrative business and the battleground for some of the most contentious civil disputes between workers and employers. When sailors joined seal-catching ships they were usually paid on the basis of a lay or share of the gross value of the catch at Sydney prices. Ordinary sailors usually received a one eightieth lay. Employee contractual rights to these skins were often narrowly interpreted by the courts.<sup>163</sup> In *Wood v Campbell*, 1812 and *O’Burne v Campbell*, 1812, Ellis Bent reduced claims of more than £700 to less than £20 despite an agreement, in the O’Burne case, that the plaintiff would receive a larger share of the profits and an additional payment if he kept the location of Macquarie Island, a seal-rich colony, secret. Ships’ Masters were also required to supply maintenance to their crew members and if they did not do so damages were payable. *Brady v Campbell*, 1811 shows the damages awarded were sometimes so small that there was little incentive for the Master to feed the crew properly.<sup>164</sup>

The only consideration for the courts in the sealing cases was the contractual dispute between employer and employee. The significant

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<sup>163</sup> Ibid 164-165.

<sup>164</sup> See NSW Sel. Cas. (Kercher) 447-448 ; B. Kercher, *Debt, Seduction*, above n7, 165.

animal welfare and environmental issues lurking in the background of these cases was the size and scope of a seal killing industry in sub-Antarctic islands south of Australia. The prosperity of the early colony was based partly on the slaughter of thousands of seals for their skins – an issue that goes unmentioned in hundreds of pages of court record minutes of proceedings.

In *Robinson v Hook*, 1810 a witness deposes:

I had left on the Isle of Wight, and who had I understood run away with the boat. I told them to touch at the Isle of Wight to see after some skins I supposed to be there. They told me when they came back that there were 2500 there.<sup>165</sup>

In order to account for the lay of profits in *Wood v Campbell*, 1812, the following details of two trips to Macquarie Island were admitted into evidence:

The two gangs jointly procured altogether 56974 skins. These are as follows,

2 March 1811

Brought up from Macquarie Island

by the *Elizabeth and Mary* 17037

31st October 1811 and per *Perseverance* 35740

Paid to Captain Wilkinson for a boat 166

Remaining on the island 4031<sup>166</sup>

56974

The plaintiff in *O' Burne v Campbell* claimed entitlement to a larger share of the profits if he kept the location of Macquarie Island secret.

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<sup>165</sup> *Robinson v Hook* (1810) N.S.W. Sel. Cas. (Kercher) 434.

<sup>166</sup> Therefore these 4031 skins were left to rot on the island.

The value of discovery of a new island is shown by the fact that 56,974 seals were killed at Macquarie Island in a short period. The size of the procurement illustrates the traders' willingness to exploit the situation without apparent concern for the sustainability of the seal colony.

#### **IV SOVEREIGNTY, CITIZENSHIP AND THE RULE OF LAW**

No clear path can be traced in the first 40 years of superior court decisions between a rudimentary court in 1788 and a sophisticated legal institution in 1824. The observation has been previously made that:

There was no straight line from amateurism to professionalism, from informal law to formal law, from locally created law to the strict imposition of English law, from incompetence to competence, from a politically engaged to a neutral judiciary, from bias to impartiality, from a dependent to an independent judiciary, from unsuccessful to successful judges. Over the long period, longer than these 40 years, that was the direction of change, but for each of these polar opposites there was fluctuation over time. The earliest amateur judges, Collins and Atkins, showed legal ignorance at times, yet each of them was successful in adapting the inheritance of English law to the colony's conditions. Each of them was frequently conscientious in applying English law to the benefit of accused prisoners, such as when they acquitted prisoners because of technical defects in criminal charges which they themselves had drafted.<sup>167</sup> Atkins was caught up in the politics of the period, but so were the barristers Barron Field and even Francis Forbes. All of the judges found that it was necessary to adapt English law to colonial conditions, much as their enthusiasm for that varied.<sup>168</sup>

Some of the most extraordinary cases in the colony involving animals question the nature of sovereignty, the expansion of territorial sovereignty, citizenship and to what extent English law was received, adapted or rejected in the early years after settlement.

##### **a) Stealing Crown property, sovereignty and territory**

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<sup>167</sup> See for example, *R. v Till and Bottom* (1793) NSW Sel. Cas. (Kercher) 89

<sup>168</sup> See B. Kercher and B. Salter, 'Introduction' NSW Sel. Cas. (Kercher).

When Government stock was stolen, the Crown would vigilantly protect its property holdings in the Criminal Court. As illustrated in *R v Davis, 1809*, above, the penalties for stealing Crown property were severe. Indeed, the records indicate that Davis was not the only prisoner sentenced to death or transportation for stealing or killing Crown stock. In the Van Diemen's Land trial *R v Peck and Ors, 1821*, Joshua Peck, William Peck, Joshua Peck and Thomas Peck, were placed on trial, charged with having feloniously killed ten sheep the property of "our Lord the King". Witness John Bourke deposed:

one afternoon after sun-down, he saw Joshua Peck, the younger, and Thomas Peck, bring in the carcasses of three sheep without heads; that, before day-light the next day, he saw them cut up in the house openly; that the Pecks asked him to tan the three sheepskins for them.<sup>169</sup>

Without many other details provided, the Court found all the prisoners guilty and sentenced them to 14 years transportation.

In *R v Love and Ors, 1816*, four men were arraigned for stealing a bull in the district of the Cow Pastures, the property of the Crown. Love and his cohorts asserted that the "wild" nature of the herd, alleged to be stolen, was grounds to dispute whether the animals could be identified as property of the Crown:

Many of the cattle composing what are denominated the wild herds, known to be the property of the Crown had been at different times slaughtered, and conveyed away by horses and carts to various parts of the settlement ... the defence set up on behalf of the prisoners, disputing the possibility of identifying in these cattle the property of the Crown.<sup>170</sup>

The key issue for the Criminal Court was not whether the prisoners had committed the act, but the fact that they had trespassed on Crown land:

The very acts of trespassing upon those pastures being known to be criminal, it must be necessarily inferred that no man would there trespass without a criminal intention.<sup>171</sup>

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<sup>169</sup> *R v Peck and Ors* (1821): *Decisions of the Superior Courts of NSW*.

<sup>170</sup> *R v Love and Ors* (1816): *Decisions of the Superior Courts of NSW*.

<sup>171</sup> *Ibid*.

Therefore, the act of trespassing on Crown land was intrinsically linked to an intention to steal cattle. As a consequence, the Court concluded: “the question of identity was far less difficult, because it was generally known that all the cattle in the place where the offence was committed belonged to the Crown”. The decision implies that where an animal – even a wild animal – grazes on Crown land, Crown ownership of that animal will naturally follow. In the words of Blackstone, animals were considered a feature or accompaniment of the land itself.

Despite the prisoner claiming that it was impossible to identify that the stolen cattle was Crown property, the mere fact that they were taken from Crown land was enough to establish the case for the prosecution. Three of the four prisoners were sentenced to death.

Trials such as *R v Love and Ors*, 1816, involving wild animals roaming on Crown land, would help shape the boundaries of British territorial sovereignty in the earliest criminal courts. The “wild” animal becomes the possession of the state by default: it is found on Crown land and therefore becomes the property of the Crown. The 1817 trial of *R v Fork and Ors* highlights the Crown’s significant expansion and claims to entitlement over unsettled regions of the colony, and the critical role that animals played in this expansion.<sup>172</sup> Three ordinary settler men, Fork, Brennan and Riley, killed some wild cattle populating the Cow Pastures which bordered the Nepean River on the western boundaries of settlement. They were charged before the Court of Criminal Jurisdiction with the capital crime of stealing government cattle. In their defence, Fork, Brennan and Riley argued that the Government had no right to charge them with theft because it did not own the animals. They were strays or *ferae naturae* which settlers could hunt at will. The Judge Advocate John Wylde argued in response that the Crown had a special property in the animals because they wandered on Crown lands:

the law gives [property in the cattle] to the *King, as the general owner and lord paramount of the soil*, in re-compence for the damage they have done therein. But in respect of occupation, absolute possession *ratione soli*, and as *bona vacantia*, an indefeasible right and property were clearly vested in the Crown;

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<sup>172</sup> See the recent important scholarship of L. Ford who argues that the case is “one of the first – and most complete – articulations of Crown sovereignty, property and jurisdiction over the unsettled regions of New South Wales”: L. Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in Georgia and New South Wales 1788-1836*, Ph.D. dissertation, Columbia University 2007, (forthcoming revised manuscript: Harvard University Press, 2010).



for possession of the land carries with it to the owner all of valuable property to be found on it.<sup>173</sup>

In what is one of the clearest articulations of the application of legal principle in the colonial records up to 1824, Wylde held, as reported in the *Gazette*:

the cattle in question could not at all be truly denominated animals *ferae naturae*, but were in every respect to be classed as of a tame and domestic nature. It had been proved on the trial, and was well known as the fact, that the government herds contained various particular marked original breeds, and that, although it might be true that naturalists might have in theory and history given credit to the existence of a genus of wild horned cattle, yet that never had any particular and distinguishing breed been as yet assigned to such, as was proved to exist in the government herds, such as the Surat and Cape class. That upon the doctrine of *partus sequitur ventrem*, the wild animal could have no such distinction, and that the suggestion of a significant breed immediately subverted all notion and character of the *ferae naturae*.<sup>174</sup>

The Court convicted the prisoners and followed a similar hard sentencing line to many other “Crown property” cases, transporting them “for the terms of their respective natural lives”.

## **b) Pigs, rule of law and citizenship**

A trial that started with the shooting of a pig, *Boston v Laycock*, 1795, is one of the most important colonial trials before 1800.<sup>175</sup> John Boston, a free settler, was at his Sydney home in October 1795 when he was told one of his stock – “a vey fine sow, considerably advanced in Pig” had been shot. Boston rushed to the place where he was told the pig was shot and proclaimed “Who is the damned rascal that shot my sow?” The damned rascal – a highly offensive phrase in the late 18<sup>th</sup> Century – was a Private in the NSW Corps, William Faithfull. The Private was advised by two superiors, which included Thomas Laycock, to avenge

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<sup>173</sup> *R v Fork and Ors* (1817) NSW Sel. Cas. (Kercher) 578-579.

<sup>174</sup> *Ibid* 580.

<sup>175</sup> See B. Kercher, *Debt, Seduction*, above n7, ch 2; See also T.G. Parsons, "Was John Boston's Pig a Political Martyr? The Reaction to Popular Radicalism in Early New South Wales" (1985) 71 *Journal of the Royal Australian Historical Society* 163.

the insult to the corps by beating Boston. A fight ensued between Boston and Faithfull. Other members of the Corps assembled with Boston making further claims including that he had been “very much hurt by a Parcel of Rascals” and stating “you are a pack of thieves all together”.

Boston sued Laycock and fellow members of the NSW Corps Neil Mackellar, private Faithfull and Eaddy, demanding damages of £500:

The Precept being read and the court duly sworn, Mr John Boston came before the court and stated that he had a complaint to allege against Mr Thomas Laycock, Mr Neil McKellar and William Faithful and William Eaddy, all of the New South Wales Corps, for assaulting his person on Thursday in the afternoon, of the 29th day of October last, and delivered a written paper, which he subscribed and swore to, before the said court, containing the particulars of the assault, praying for redress, and estimating the injuries he received at £500 sterling.<sup>176</sup>

The Court of Civil Jurisdiction was unsympathetic to Boston but awarded him damages of twenty shillings each against Laycock and Faithfull. Judge Advocate Collins was highly critical of Boston for not taking proper care of his pig. However, a member of the court, George Johnson, believed the insult was so great that the assault was justified:

[I]t is the duty and province of Courts of Justice to protect from personal outrage all those who are in the Kings peace...

It does not appear that anyone ordered the Soldier to make use of a loaded Musquet, as a weapon to beat the Plaintiff with - that act is therefore wholly his own - but to tell a man who has been brought up in Habits of Obedience to the Orders of an Officer, to beat another, while he had the Musquet in his hand, was unguarded and unadvised.<sup>177</sup>

Faithfull appealed to Governor Hunter who dismissed the action:

[M]y Judgement, the assault complained of has been fully proved, and that I do not only confirm the Verdict already found

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<sup>176</sup> *Boston v Laycock* (1795) NSW Sel. Cas. (Kercher) 108.

<sup>177</sup> *Ibid* 119.

by the Court in which this cause was tried, but I must add that I have thought it a lenient one.<sup>178</sup>

This landmark decision, which began with the shooting of a humble pig, is one of the first cases in the colony to touch on the issues of rule of law, military defendants, the civil appeal process, court structure and reform. Boston argued:

When the Respondent instituted this Action, his object was to vindicate the Public Justice of the Colony, to impress the Conviction that the Laws were equal to all, and that no rank in life could by impunity justify their violation.

This object in the Sentence is now under the review of your Excellency was fully accomplished: - Its consequences became important as they presented to the most humble, and the most friendless, the Idea of a well guarded security.<sup>179</sup>

The trial asks: was New South Wales merely a prison, controlled by the military? Or was it a place of law, in which everyone, soldiers included, were subject to the same basic law? Behind those questions was the challenge posed to the military by the independent figure of John Boston. Boston was a free settler, one of the first in the colony.

Governor Hunter's statements about the rule of law deserve a wide readership. He delivered a number of statements which might be called judgments, the first of which dealt in the abstract with the application of civil law to every person in the colony:

I have already said, in my observations upon the language and opinions held forth in the Appeal, all that I conceived necessary to impress upon the minds of those who may have been present a due respect of those laws by which everyone in this Colony is protected in his person and property, and to satisfy all who, altho' residing here at present, may hereafter live in some other part of His Majesty's dominions, that however distant from the Mother Country, they are nevertheless under the protection of the British

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<sup>178</sup> Ibid 130.

<sup>179</sup> Ibid 124.

laws, and they, whatever may be their rank or profession, amenable to them.<sup>180</sup>

The case also raises the question of whether convicts were able to give evidence in court, a question which later took on great importance during the Chief Justiceship of Francis Forbes.<sup>181</sup>

A pig would feature again four years later in the context of the first case to consider the notion of citizenship in the colony. In *Harris v Kemp*, 1799, John Harris, a former convict, took action against an officer of the New South Wales Corps, Anthony Fenn Kemp, in a joint action for assault and false imprisonment. A dispute over Kemp's pig being on Harris' land led to Harris being imprisoned for uttering an insult. Harris asserted that his emancipation meant that he could no longer be treated like a convict. This case thus concerns the issue of how free people should be treated in a convict colony. The provocative phrase citizen of the world carried hints of the French revolution:

Harris insisted he was free and a citizen of the world. If he was not free of this country he was free of Aldgate. I endeavoured to settle the business but it could not be done and Harris was discharged, declaring he would enter a prosecution against Mr Kemp for having been confined.<sup>182</sup>

Judge Advocate Richard Dore and his Civil Court found for Harris, awarding him twenty shillings damages. The decisions of Dore, the first legally trained judge in the colony, have often been criticised for their military bias.<sup>183</sup> However, the *Harris v Kemp* decision highlights that there were limits imposed on the military. Kercher writes of the decision:

[A]lthough New South Wales was a penal colony, it was not ruled by martial law. Soldiers were treated in the same way as civilians on most issues. The military were not able to deal with ex-convicts as if they were convicts or even enlisted soldiers,

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<sup>180</sup> Ibid 129-130.

<sup>181</sup> See for example, *R v Farrell and others* (1831): *Decisions of the Superior Courts of NSW*.

<sup>182</sup> *Harris v Kemp* (1799) NSW Sel. Cas. (Kercher) 204.

<sup>183</sup> See the trial of *R v Nicholls* (1799) NSW Sel. Cas. (Kercher) 155. The case and allegations of Dore's military bias are discussed in A.C. Castles, *Australian Legal History* (1982) ch4; C.H. Currey, *The Brothers Bent*, (1968) ch1; H.V. Evatt, *Rum Rebellion*, (1975).

because it was subject to a local version of rule of civil law... The decisions of the civil court show the great strength of the tradition of independence of civil law in the British legal system.<sup>184</sup>

#### **d) The Emu and the challenges of adaption**

Where *Harris v Kemp* might have illustrated the “great strength” of the independence of the British legal system, a case involving an emu, would provide unique challenges for that same legal institution. In *R v Lee*, 1830, a case of the new Supreme Court, John Lee was indicted for stealing two emus, value £10, belonging to Mr Joseph Thompson.

Before the Attorney General even began to state the case for the prosecution, Justice Dowling ruled against the indictment:

inasmuch as the birds were not described as being tame; for *prima facie* it was necessary to show they were otherwise than *ferae naturae*, or the indictment could not be sustained at all.<sup>185</sup>

The prisoner was indicted again two weeks later for stealing two tame emus, the property of Joseph Thompson, value £10. When the prisoner was apprehended, he stated that he purchased them, but would not tell from whom; and a day or two afterwards he escaped from the watch-house, and had been at large 11 months. In his defence, the prisoner endeavoured to prove that he purchased the emus for three dollars.

Mr Therry, acting for Lee, contended that the emus were “too base” to be subjects for felony at common law:

At the close of the prosecution, Mr. Therry rose, and contended that the indictment in this case was not sustainable, being at Common Law. Now it was in evidence that the emus were not kept for food, but whim and pleasure. 4. Blackstone, 336, laid it down, that stealing of animals, kept for whim or pleasure, in which the person had but a bare property, as dogs, &c. was not indictable at Common Law, but that the party so losing them had his action for damages, or criminally, under the statute. If the

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<sup>184</sup> See B. Kercher, *Debt, Seduction*, above n7, 37.

<sup>185</sup> *R v Lee*, 1830: *Decisions of the Superior Courts of NSW*; Dowling’s Report of the case is also available: T. Castle and B. Kercher (eds), *Dowling’s Select Cases 1828 to 1844* (2005) 19.

emus were not *ferae naturae*, they approached most nearly to that state, and therefore were not subjects for indictment, any more than ferrets, rabbits, rats, &c. Had the prisoner been indicted under the statute of Mr. Peel,<sup>186</sup> for such cases, made and provided, the case would have been different. But as it was, the indictment being at Common Law, could not hold good.<sup>187</sup>

A significant problem for the Court was that the emu was utterly unknown to the common law. As reported in *the Australian* “It was never even mentioned out of the mouth of a British Judge.”<sup>188</sup> Paula Byrne writes of the case “[w]hen a solicitor rose to address the court and argued that an emu could not be considered food under English law, he was arguing legal technicalities in an English mode.”<sup>189</sup>

The Attorney General for the prosecution argued that there was a law common to every country, and though emus might not have been protected by English Common Law, “yet here there was vested in them a certain right of property, which should make the possession as sacred as of any other.”<sup>190</sup>

In coming to a decision, Justice Dowling observed:

[T]hat in point of law, he considered it a Common Law offence to steal a tame emu, but he would take care to bring the question under consideration of the other Judges, although it had been laid down in East's Pleas of the Crown, that ferrets were of too base a nature to be the subject of a Common Law indictment, yet he would leave it for his learned colleagues to say, whether stealing a tame emu was or was not indictable at Common Law in this Colony.<sup>191</sup>

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<sup>186</sup> There was an express statute of Mr Peel's, 7 and 8, Geo. IV. C. 29, s31, bringing several description of game and animals within the provisions of an explicit enactment, the stealing of which, on conviction before two or more Magistrates, was made punishable by fine, not exceeding 20l. The statute made special provision for deer, "conies" and oysters.

<sup>187</sup> *R v Lee* (1830): *Decisions of the Superior Courts of NSW*.

<sup>188</sup> *Ibid*.

<sup>189</sup> P. Byrne, *Criminal Law and Colonial Subject: New South Wales 1810-1830* (1993) 286.

<sup>190</sup> *R v Lee* (1830): *Decisions of the Superior Courts of NSW*.

<sup>191</sup> *Ibid*.

Chief Justice Forbes agreed with Dowling that to steal a tame emu, kept for pleasure in an enclosed area, that was fit for eating, was larceny at common law and the prisoner was found guilty.<sup>192</sup> Therefore, despite the defendant arguing that there was strong English authority suggesting the indictment was not sustainable, the Court in this case decided to interpret the law, to some extent, in a way that adapted to colonial circumstances. The *Lee* case illustrates that reception of English law was not a simple process but one involving conscious and unconscious adoption, adaptation, and rejection of English principles. The case also illustrates that law was highly contested. The British legal empire at the turn of the 19<sup>th</sup> Century was, on occasions, remarkably flexible. Lawyers often assume that our law comes down from a sovereign above, from parliament, the courts and the executive. In a colonial context, all of that assumes an English above, that local law was always strictly ruled by imperial masters. Cases like *Lee* suggest otherwise, that at times colonial people and colonial customs managed to impose their views of law even on their imperial masters.

## V CENTRAL BUT INVISIBLE

Animals feature prominently in the records of the more than eight thousand cases heard in the first superior courts of New South Wales and Van Diemen's Land. In the criminal jurisdiction, before the end of the 18<sup>th</sup> Century, the archive records indicate that some of the most deplorable crimes involved animals. Sometimes bestiality trials resulted in acquittals<sup>193</sup> but sometimes they resulted in convictions with severe penalties.<sup>194</sup> There's also a vast collection of criminal cases involving the stealing and killing of animals that helped define the limits of criminal sentencing in the colony; whether that be transportation, lashes, and even on rare occasions, execution.

In the civil courts, animals play a vital role in the development of laws relating to trade and commerce, contract law, early forms of civil trespass and negligence, and laws involving the relationship between workers and employers.

Some of the most significant cases contemplating the role of the Government and the place of British law in the colony involve animals. These cases consider the theft of Crown property, the expansion of

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<sup>192</sup> See T. Castle and B. Kercher, *Dowling's Select Cases*, above n34, 19.

<sup>193</sup> See *R v Hyson* (1796) NSW Sel. Cas. (Kercher) 139.

<sup>194</sup> See *R v Reece* (1799) NSW Sel. Cas. (Kercher) 153.

territorial sovereignty, citizenship, felony attain, court structure and the appeal process, the rule of law and to what extent British law should be received, adapted or rejected.

Despite the central role animals play in the development of laws regarding criminality, commerce, private law and British sovereignty, there is a noticeable lack of consideration afforded to the welfare of the animals involved. **The thousands of pages of court records in the New South Wales State Record archives and the *Sydney Gazette* do not reveal one instance where the legal issue to be decided relates to animal suffering.**<sup>195</sup> [stress added – Ed.]

Notwithstanding the significant 19<sup>th</sup> Century advancements being made in England by the likes of Lord Erskine and Richard Martin in regard to the laws of animal protection examined in Part 1 [of this article], the early Australian experience was grounded in the language of mid-18<sup>th</sup> Century Blackstone and Nelson.<sup>196</sup> The *Martin Act* was introduced at the end of the first colonial period (1822), and therefore, any notion of animal welfare being recognised under the formalities of English law was still very much an aspiration rather than a reality. Animals were the subject of human possession: possession of the Crown, private possession – any loss to be disputed within the confines of the formal legal system of the colony would be limited to the loss suffered by the human owner.

In the criminal stealing and killing cattle cases examined in Part 1, the trial would always turn on the identification of the “property” and the act of depriving the Government or private owner of their stock. However, behind the primary narrative of possession hid the countless tales of animal cruelty. In *R v Riseby and Ors* comes the tale of sheep skeletons, heads and ears dumped in houses and pig styes; in *R v Crane*, evidence of “violent killings” of heifers being dragged from their pens and gutted; in *R v Donlan and Condron*, further evidence of the

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<sup>195</sup> This is based on the research undertaken for the production of the *Kercher Reports*. In saying this, the newspaper and court records are extensive, and many of the records are not indexed so there may be records that have been missed during the production of the book. But even when the next colonial period is examined (1828-1844), after the Martin reform’s had been enacted, there are no instances where animal protection law has been applied: (see animals Chap in *Dowling’s Select Cases*). In saying this, the focus of our research has been on the superior court records and there is still much research to be undertaken in the Magistrate Court archives that may reveal new findings.

<sup>196</sup> Despite numerous examples where the laws were able to adapt to the conditions of the colony in other contexts.



mutilation of sheep; in *Hynds v Byrne* bullocks drown; and in *R v McFadden*, evidence of the “slaughtering” of cattle.

In addition, the “unnatural crime” of bestiality, considered in Part 1, was not criminalised because of wanton animal cruelty, but because it was considered a crime against a normative standard of nature – the suffering of the animal is removed from the process of determining whether the activity is criminal or not. Indeed, *R v Reece*, 1799 ultimately turns back to the issue of animal possession. Extensive commentary in the case is devoted to the significant loss that the owner of the pig would suffer as a result of having to kill the sodomised pig and its litter.

In *R v Hyson*, 1796, the suffering of the dog also appears to be negligible in the court’s final determination. It is unlikely that the downgraded conviction from bestiality (or buggery) to assault is for an assault against the animal, but for a criminal trespass to the human “property owner” of the dog that was sodomised.

Animal welfare issues were just as noticeably absent in the civil court context as they were in the criminal jurisdiction. In the trespass case of *Lawliss v Knoffe*, where the property owner’s dog was killed with a butcher’s knife, considered thought was given to the trespass and the fact that the dog “was worth ten pounds”, but nothing devoted to the killing. In *Marsh v Julian* a considerable amount was awarded to the plaintiff for the negligence of a third party, but sitting silently in the background of the case was the significant suffering of the mare:

Shortly afterwards before she [the mare] got home, that she shivered much. She seemed very dull all the way home. She trembled very much before she was put in the stable, and would not eat...<sup>197</sup>

The most remarkable evidence of wanton cruelty in the civil cases can be seen in the trials involving the lucrative seal trade. The primary issue in dispute in the collection of seal trade trials is the contractual relationship between employer and worker, but behind the legal dispute screams evidence of the mass slaughter of seal colonies – negligible in relation to the trade and commerce issues at stake.

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<sup>197</sup> *Marsh v Julian* (1810) N.S.W. Sel. Cas. (Kercher) 422.

In the “sovereignty cases” there’s also indifference towards issues of animal cruelty. In cases where it’s argued that the animal is the property of the Crown, and that animal has been stolen or killed, there are accounts of the mutilation of sheep,<sup>198</sup> slaughtering of bulls,<sup>199</sup> and mistreatment of stolen cattle.<sup>200</sup> In *Boston v Laycock*, the pig was violently shot, but a primary concern for the court at first instance was reprimanding the pig’s owner for letting the pig run wild. And in the extraordinary trial of *R v Lee*, the court debated whether an emu was too base to be deserving of *any* form of legal status. The Court ultimately decided, *inter alia*, that an emu’s property status was valid because it was fit for eating and was privately enclosed.

Examining the status of animals in our first superior courts reveals their importance in the development of the law, but also their tragic invisibility in regard to their welfare. A closer examination of the trials involving animals provides a deeper insight into their dual existence as central characters and yet very much at the margins of colonial law. Animal welfare is appreciably compromised when their legal status is defined in terms of possession: possession of the State, private possession; possession defined in terms of criminality, commerce and sovereignty. This left scant opportunity for an animal protection jurisprudence to develop in the early years of the colony.

This infant period in Australian history was a time of famine, battles with indigenous people, convict rebellions, the beginnings of bush-ranging and the only military coup. There were rapid developments in trade. Although the laws of England were entrenched in the colony, they were not the simple notion they are sometimes assumed to be. Law was the subject of contest between amateurs with a fundamental grasp of legal principles and increasingly sophisticated English and Irish trained lawyers, and between English and colonial ideas about law. In an environment where legal identity was still being shaped, it would have been easy to lose sight of pioneering developments in animal protection taking place on the other side of the world.

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<sup>198</sup> *R v Peck and Ors* (1821) *Decisions of the Superior Courts of NSW*.

<sup>199</sup> *R v Love and Ors* (1816) *Decisions of the Superior Courts of NSW*.

<sup>200</sup> *R v Fork and Ors* (1817) NSW Sel. Cas. (Kercher) 576.

# A Consumer Based Regulatory Pyramid to Improve Animal Welfare

*Lynden Griggs\**

With much of the Australian population on a diet that includes animal-based products, the purpose of this paper is to explore how existing consumer protection legislation can provide the sort of purchasing information that consumers need to, or at least should, know. Having considered this, the next part of the paper examines additional measures required to establish a standard for animal welfare that is consistent with contemporary and progressive community norms. The regulatory pyramid suggested draws on a hierarchical development of civil and criminal sanctions to ensure that consumers are able to make decisions that accord with their own sense of values. Further, it seeks to ensure that consumer decisions are in response to the glare of accurate and full disclosure. Whilst the proposal may not please those arguing for the more interventionist development of an anthropomorphic view of animal rights, it does provide a workable and achievable response. Further, it has the potential to change the culture of farming practices, consumer habits and to make an immediate practical impact beneficial to the welfare of animals.

## Introduction

In Australia, animal welfare has largely been seen as the domain of legislature. For example, all jurisdictions have legislation dealing with prevention of cruelty to animals,<sup>201</sup> controls on the taking of wildlife,<sup>202</sup> and, in some States and Territories, statutory provisions relating specifically to dogs,<sup>203</sup> and cats.<sup>204</sup> Today, however, consumers are

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<sup>201</sup> (ACT) *Animal Welfare Act 1992*; (NT) *Animal Welfare Act 1999*; (NSW) *Prevention of Cruelty to Animals Act 1979*; (Qld) *Animal Care and Protection Act 2001*; (SA) *Prevention of Cruelty to Animals Act 1985*; (Tas) *Animal Welfare Act 1993*; (Vic) *Prevention of Cruelty to Animals Act 1986*; (WA) *Animal Welfare Act 2002*.

<sup>202</sup> (ACT) *Nature Conservation Act 1980*; (NT) *Territory Parks and Wildlife Conservation Act 1976*; (NSW) *National Parks and Wildlife Act 1974*; (Qld) *Nature Conservation Act 1992*; (SA) *National Parks and Wildlife Act 1972*; (Tas) *Nature Conservation Act 2002*; (Vic) *Wildlife Act 1975*; (WA) *Wildlife Conservation Act 1950*.

<sup>203</sup> (ACT) *Domestic Animals Act 2000*; (NSW) *Companion Animals Act 1998*; (SA) *Dog and Cat Management Act 1995*; (Tas) *Dog Control Act 2000*; (Vic) *Domestic*

increasingly making choices based on advertised claims of ethical behaviour for animal welfare. Similarly, support of animal advocacy is dramatically rising. Evidence of this is highlighted by the 400% increase over the three years from 2004 in the support base of Australia's peak animal protection body, Animals Australia,<sup>205</sup> and a recognised change in public sentiment, highlighted not only in Australia, but also internationally.<sup>206</sup> With the fundamental law of demand and supply now influencing the buying patterns of shoppers, producers/suppliers have had no option other than to respond. However, the purchasing power of the consumer, combined with the attachment of a premium price to goods produced in an animal friendly environment exposes an undeniable risk. It is the extent to which producers will inflate, through their advertising (with this being meant broadly to include labelling) claims of humane<sup>207</sup> production, when the underlying truth may be very different. An example of this inflation was provided by the actions of the Australian Competition and Consumer Commission (ACCC) against G.O. Drew Pty Ltd in respect of the substitution of conventional eggs in a carton labelled organically produced.<sup>208</sup> Over a two-year period, the corporate entity had substituted any shortfall in the supply of organic eggs with non-organic eggs. The court, in finding a breach of s52,<sup>209</sup> s53(a),<sup>210</sup> and s55<sup>211</sup> of the *Trade Practices Act 1974* restrained the company from supplying

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(*Feral and Nuisance*) *Animals Act 1994*; (WA) *Dog Act 1976*. In those jurisdictions where there is no specific legislation, authority is generally vested in the local authority (eg (NT) *Local Government Act 1993*; (Qld) *Local Government Act 1993*).

<sup>204</sup> (ACT) *Domestic Animals Act 2000*; (NSW) *Companion Animals Act 1998*; (SA) *Dog and Cat Management Act 1995*; (Tas) *Animal Welfare Regulations 1993*; (Vic) *Domestic (Feral and Nuisance) Animals Act 1994*.

<sup>205</sup> Voiceless, From Label to Liable: Scams, Scandals and Secrecy – Lifting the Veil on Animal-Derived Food Production Labelling in Australia, May 2007 [www.voiceless.org.au](http://www.voiceless.org.au), 7

<sup>206</sup> Voiceless, above n205, 7-8.

<sup>207</sup> To mean 'kind or merciful'. Collins Dictionary and Thesaurus, Harper Collins, Glasgow, 2005, 372

<sup>208</sup> *ACCC v G.O. Drew Pty Ltd* [2007] FCA 1246; See, ACCC Media Release 221/07, "Court finds egg packer substituted organic with conventional eggs", 20 August 2007.

<sup>209</sup> Section 52(1) *Trade Practices Act 1974*: A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.

<sup>210</sup> Section 53(a) *Trade Practices Act 1974*: A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services:

(a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have a particular history or particular previous use...

<sup>211</sup> Section 55 *Trade Practices Act 1974*: A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

eggs when they were claimed organic when this was not the case. The Company was ordered to pay the ACCC's court costs. Drew also set aside \$270,000 to assist in the development of a national standard for organic and biodynamic produce.<sup>212</sup>

The purpose of this article is to take this lead from the legislation and identify how the consumer protection provisions will influence progressive development and positive change in the advertising behaviour of suppliers. By imposing or mandating better disclosure, consumers will have the opportunity to choose based on full and accurate understanding of the production chain. If the law does not develop in this way, or if there is any lack of rigorous regulatory enforcement, the animal welfare and animal rights lobbyists<sup>213</sup> lose significant ground in the battle to change the anthropocentric view<sup>214</sup> that predominates in Australia today. If successful, the model proposed will improve consumer disclosure, ensure a far superior and more economically efficient market, as well as promote a more informed and open discussion about the treatment of animals. While it may not achieve the legal status or anthropomorphic view<sup>215</sup> of animals that some may seek,<sup>216</sup> the result would improve animal welfare. If one accepts the premise that the movement of money drives policy change, the willingness of producers to meet the changing patterns of consumer behaviour will achieve gains in animal welfare – economics, rather than law will be the driver. These gains will not occur if producers are able to mislead consumers by false statements, inaccurate descriptors, or

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<sup>212</sup> It should be noted that over 900 comments were received on a draft Australian standard for organic and biodynamic products. Previously, 60 comments had been considered a high number for a draft standard. As noted by the Organic Federation of Australia, "This unprecedented level of support shows that the Australian organic sector wants to ensure that this standard meets the needs of our complex industry as well as the expectations of our consumers." Media Release, "Record Number of Comments for Organic Standard", October 24, 2008 [www.ofa.org.au](http://www.ofa.org.au). The Australian standard on organic produce has just been released, see AS 6000-2009. Animal welfare aspects of this standard include a prohibition against the force-feeding of animals (see 2.14.2.3), as well as standards relating to the free ranging of animals, methods of slaughter and housing (see 2.16-2.17).

<sup>213</sup> For an overview of the issues surrounding animals and the heightened consciousness of consumer and community awareness in respect of this topic, see Australian Law Reform Commission, *Animals*, (2008) 91 *Reform*

<sup>214</sup> This phrase is used in the sense of seeing and interpreting conduct in the light of human values and experience.

<sup>215</sup> In this context, this phrase is used to describe the attribution of human values or characteristics to animals.

<sup>216</sup> See SM Wise, "An Argument for the Basic Legal Rights of Farmed Animals", (2008) 106 *Mich. L. rev. First Impressions* 133, 134.

half-truths as to the nature of the production process. “In a world of expanding free markets, ethical consumption may be the most effective means for social change, but it is not possible if sellers get the benefit of being able to dupe the consumer.”<sup>217</sup> Law and economics must meet in harmony. The law must be in a position to regulate the changing nature of demand and supply that is occurring in the market place. Law’s response must be proactive, rather than reactive. Part I of this article will examine the laws relating to consumer protection, with a focus on the critical, but often neglected topic of how a breach will be proven. Part II then evaluates this context to animal welfare litigation. Part III draws the threads together exploring the theme that if society is to change its way, and ultimately progress to living in harmony with all species, a progressive judicial interpretation of current legislation is required, together with more exacting legislative requirements (with the suggestion that this be modelled on country-of-origin guidelines). These measures provide an opportunity to ensure that community expectations of a just society towards animals will be met; and perhaps a more progressive understanding and appreciation that “Planet Earth” does not exist solely for human benefit. As noted by Kingwell:

“If you are going to eat animals, you must at least confront the truth of their lives – and deaths. We raise or hunt these creatures in order to eat them. The circumstances of their demise should not be a black box, decorated with lurid cartoons of them killing themselves.... Enjoying the fruits of choice, especially a violent or damaging one, without bearing any of its costs is one definition... It is taking comfort without responsibility.”<sup>218</sup>

However, there is no doubt that animal welfare is expensive. For example, Switzerland has some of the most animal-friendly rules in the Western world. Its agriculture is subsidised by up to 90% of the farmer’s income but, even with such a grant, Swiss pork chops are 600% more expensive than in Germany.<sup>219</sup> Long-term improvement in animal welfare is unlikely until dietary patterns change. The model suggested below is designed, not only to improve animal welfare, but to encourage the community to recognise moral and ethical dilemmas in current food production. For many who argue in favour of animal rights, the proposed changes would not go far enough. An animal

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<sup>217</sup> C. Dillard, “False Advertising, Animals and Ethical Consumption”, (2004) 10 *Animal L.* 25, 26.

<sup>218</sup> Kingwell, above n260, 15.

<sup>219</sup> DM Ibrahim, “A Return to Descartes: Property, Profit, and the Corporate Ownership of Animals”, (2007) 70 *WTR Law and Contemp. Probs.* 89, 108.

rights' contention might be that animals' fundamental rights should not depend on the disclosure of their life and death, that humans have no right to make this judgment on behalf of another species. A possible response is that without realistic, practical and achievable reform, animals will continue to be at the mercy of those who produce the food we eat. The approach suggested here is firstly to encourage disclosure through improved labelling showing consumers the life cycle of animals used in food production. Consumer empowerment is the aim. The second step, with increasing sanctions, I have labelled "empowerment and soft intervention" – guidelines for humane process and certification schemes with industry and animal advocacy groups working to provide a rating system, and administrative intervention where a concern is raised. The final level sees criminal sanctions for breaches egregious enough to attract the attention of the State. Consumer behaviour is changing; the flow of money towards animal welfare awareness should result in policy adaptation. The model suggested is an option for seeing that policy development accords with community anticipation.

## Part I – An Outline of the Legislation

The principal consumer protection measure is s52 *Trade Practices Act 1974*, replicated in state-based *Fair Trading* legislation.<sup>220</sup> It provides:

“A corporation shall not in trade or commerce engage in conduct that is misleading or deceptive or likely to mislead or deceive.”

This section requires proof<sup>221</sup> of the following elements:

- i) The *Trade Practices Act 1974* requires that the defendant be a corporation<sup>222</sup> (with the *Fair Trading* legislation extending this to natural persons);
- ii) The activities of the defendant must be in trade or commerce;<sup>223</sup>
- iii) The defendant must have engaged in conduct;<sup>224</sup>

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<sup>220</sup> *Fair Trading Legislation* equivalents: (Qld), s38; (NSW), s42; (Vic), s9; (ACT), s12; (Tas), s14; (SA), s56; (WA), s10; (NT), s42.

<sup>221</sup> The civil standard of proof applies; *Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23.

<sup>222</sup> The *Trade Practices Act 1974* can extend to non-corporate persons in some defined circumstances – for example where the trade or commerce extends across State or Territory borders. See s6 *Trade Practices Act 1974*.

<sup>223</sup> The major authority on this point is *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594.

- iv) And, most critically for present purposes, the conduct must be misleading or deceptive, or likely to mislead or deceive.

As noted, and central to advertising claims about humane production and supply methods, the key litigious aspect will be whether the assertions made by the supplier are misleading and deceptive to the consumer. With this undefined in the legislation, a voluminous case law has evolved to give content and meaning to the terms, though not in the milieu of animal welfare litigation. Where conduct is directed to the public at large,<sup>225</sup> the approach of the court has been at a relatively high level of abstraction involving a four-stage analysis.<sup>226</sup>

- i) Identify the relevant section of the public;
- ii) Consider the effect of the conduct on that section of the public;
- iii) In finding that conduct is misleading and deceptive, evidence of an actual erroneous conclusion is not necessary; and
- iv) Particularly important for remedial purposes, determine whether the misleading conduct is causative of the loss.<sup>227</sup>

These four principles were reinforced by the High Court which considered that in determining whether the conduct was misleading or deceptive, reference had to be made to the ordinary or reasonable member of that class.<sup>228</sup> In the context of animal welfare litigation, to decide whether impugned conduct has caused a shopper to be merely confused or left wondering, as against where the conduct has led to a purchasing decision, and is causative of loss, will be of considerable judicial difficulty.<sup>229</sup> Consider the following illustration. Chickens are labelled genetically modified (GM) free, yet they are fed something that

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<sup>224</sup> See s4(2) of the *Trade Practices Act 1974*, which defines the term ‘engage’.

<sup>225</sup> For conduct directed to a specified individual, see the analysis in *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592.

<sup>226</sup> Taken from *Taco Company of Australia Inc v Taco Bell Pty Ltd* [1982] ATPR 40-303, 43, 571.

<sup>227</sup> It is unnecessary to show loss or damage to prove a breach of ss52-55. However, they do not automatically lead to a remedy: *King v Yurisch* (2007) ATPR 42-129. Under s82 loss or damage is recoverable, and if seeking this remedy, loss or damage would need to be proven. If seeking an injunction, loss or damage need not be established: *World Series Cricket Pty Ltd v Parish* [1977] ATPR 40-040, 17,426.

<sup>228</sup> *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45.

<sup>229</sup> It has been in the context of non-animal related litigation: see *Barry v Lake Jindabyne Research Centre Pty Ltd* (1985) 8 FCR 279; *Wingate Marketing Pty Limited v Levi Strauss & Co.*, [1994] ATPR 41-303.



may contain GM material. Is this misleading and deceptive, and critically, how is it possible to determine that the consumers' understanding of GM free included a belief that the feed used in the production process was GM free? The intuitive response of each person may well differ. However, in this highlighted scenario, the ACCC did intervene to have the packaging altered.<sup>230</sup> The view was that by labelling the chickens as 'not genetically modified', the impression conveyed to consumers might have been that feed provided to the chickens was also GM free.

Section 52 is complemented by s53 which targets specific instances of what may be considered unfair conduct. Section 53(a) has particular relevance, with its prohibition applying to the false representation of goods having a particular standard, quality, value, grade, model, or a representation that they have had a particular history or particular use. Within the *Trade Practices Act 1974*, there is also a criminal equivalent of this civil provision,<sup>231</sup> with the civil, (though not the criminal) provision replicated in the State and Territory based *Fair Trading* legislation.<sup>232</sup> Quality within the terms of s53 has been held to apply to the virtues, attributes, and properties of the thing.<sup>233</sup> Examples of a breach include where an item is misdescribed in a catalogue,<sup>234</sup> where used goods are described as top quality,<sup>235</sup> or where flavoured cordial is represented to contain fruit.<sup>236</sup>

Finally, s55 of the *Trade Practices Act 1974* (and its State and Territory based equivalents)<sup>237</sup> states:

“A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing

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<sup>230</sup> Example provided in ACCC, “Food and Beverage Industry – Food Descriptor Guidelines to the Trade Practices Act”, November 2006, 13 (no indication is given as to whether there were concerns under s52 or s53 or both.).

<sup>231</sup> Section 75AZC(1)(a) *Trade Practices Act 1974*.

<sup>232</sup> *Fair Trading Legislation* equivalents: (Qld), s40; (NSW), s44; (Vic), s12; (ACT), s14; (Tas), s16; (SA), s58; (WA), ss12-13; (NT), s44.

<sup>233</sup> Examples outside the animal-welfare context include: *Ducret v Chaudhary's Oriental Carpet Palace Pty Ltd* [1987] ATPR 40-804; *Ferro Corporation (Aust) Pty Ltd v International Pools (Aust) Pty Ltd* (1994) ATPR (Digest) 46-136.

<sup>234</sup> *Wise v Greenslade & CLM Holdings Pty Limited* [1977] ATPR 40-035.

<sup>235</sup> *MacFarlane v John Martin and Co* [1977] ATPR 40-034.

<sup>236</sup> *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* [2004] FCA 516; BC200402193.

<sup>237</sup> *Fair Trading Legislation* equivalents: (Qld), s44; (NSW), s49; (Vic), s12; (ACT), s19; (Tas), s20; (SA), s63; (WA), s17; (NT), s47.

process, the characteristics, the suitability for their purpose or the quantity of any goods.”

It has a slightly narrower range than s52, confined, as it is, to conduct **liable** to mislead, whereas s52 extends to conduct **likely** to mislead. By necessity therefore, any conduct that is ‘liable to mislead’ will also be ‘likely to mislead’.<sup>238</sup> An example of breach occurred where advertisements stated that facial tissues were made from cotton fibre, when this was not the case.<sup>239</sup>

These generic consumer protection provisions are complemented by State and Territory food legislation which provides for penalties for any person, who in the carrying on of a food business, engages in conduct that is misleading or deceptive, or likely to mislead or deceive in relation to the advertising, packaging and labelling of food.<sup>240</sup>

## Part II – The Evidentiary Difficulties

On its face, the law provides a coherent framework in which to deal with misleading claims about the life of animals and their processing prior to retail sale. What the legislation does hide, however, are the evidentiary difficulties in establishing that the conduct was misleading and deceptive, or contrary to the provisions in s53 and s55. It is submitted that in the current circumstance, evidence will sequentially develop from the following sources.

- i) the advertisement itself;
- ii) the background and intent behind the production of the advertisement;
- iii) evidence of the production process and the conditions of the animals;
- iv) consumer evidence;
- v) consumer surveys; and
- vi) industry perception.

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<sup>238</sup> *Westpac Banking Corporation v Northern Metals Pty Ltd* (1989) ATPR 40-953, 50,410.

<sup>239</sup> *Trade Practices Commission v Golden Australia Paper Manufacturers Pty Ltd* (1995) ATPR 41-370. The criminal equivalent to s55 is s75AZH of the *Trade Practices Act 1974*.

<sup>240</sup> See for example: *Food Act 2001*, (ACT) ss15, 18, 24; *Food Act 2004* (NT) ss14, 17, 21; *Food Act 2003* (NSW) ss15, 18, 21, 42; *Food Act 2006* (Qld) ss34, 37, 40; *Food Act 2001* (SA) ss15, 18, 22; *Food Act 2003* (Tas) ss15, 18, 22; *Food Act 1984* (Vic) ss10, 10A, 13, 17A, *Food Act 2008*, (WA) ss16, 19, 23.

### ***The advertisement***

The first point of evidence will be the advertisement. What is the initial impression given to the consumer and what impression would have been made on an ordinary and reasonable member of the class. In ascertaining this, consideration will need to be given to an ordinary and reasonable member of the class taking reasonable care of her or his own interests. It will ignore assumptions that are fanciful.<sup>241</sup>

### ***The background***

The background to the advertisement, how it came about, will be critical, potentially informing the supplier's intent behind that message. This evidence will be available through normal discovery,<sup>242</sup> as well as legislative provisions available to the regulator<sup>243</sup> and any other normal usage of procedural court rules.<sup>244</sup> The critical point about the background is that internal documents of the company may well highlight the industry attitude, or give weight to intent to mislead. While finding such intent is unnecessary to establish breach,<sup>245</sup> it obviously leads more readily to a finding of misleading conduct. In *Arnotts Ltd v Trade Practices Commission*<sup>246</sup> the well-known biscuit manufacturer sought to take over Nabisco – another biscuit manufacturer. In establishing a breach of s50 (of legislation prohibiting a merger that would result in a substantial lessening of competition in a market), the court relied heavily on Arnotts' internal documents. These indicated that Arnotts recognised a separate biscuit market, which was contrary to the submissions put by Counsel. This market was distinct from a market that also incorporated other non-biscuit products, such as chocolate confectionary and the potato chip market. Similar evidence of this nature may also be critical in animal welfare litigation. “[I]f the seller of ‘animal friendly’ glue traps has publicly acknowledged that the company intended to convince consumers that animals caught in the traps would happily await their release, those statement are relevant.

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<sup>241</sup> For an illustration of this, see *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45. It was not every use of the ‘Nike’ name that would be misleading. It was only those uses that could reasonably be related to the trademark held by the American sporting giant that would be misleading.

<sup>242</sup> For an illustration, see *TPC v CC (New South Wales) Pty Ltd (No. 4)* (1995) 58 FCR 426.

<sup>243</sup> Section 155 *Trade Practices Act* 1974.

<sup>244</sup> Such as subpoena – for example Order 27A, r 2(1) Federal Court Rules.

<sup>245</sup> *Natural Waters of Viti Ltd v Dayals (Fiji) Artesian Waters Ltd* (2007) 71 IPR 571; *Forwood Products Pty Ltd v Gibbert* (2002) ATPR 41-870.

<sup>246</sup> (1990) ATPR 41-061.

Even without direct evidence of a seller's intent, the background and history of an ad may establish a circumstantial case of seller intent.<sup>247</sup>

### ***Animal Conditions***

Obviously, it will be necessary to show the actual processing conditions to establish any breach of the legislation. Central to this will be people with first-hand knowledge of what occurs, or photographic or video evidence of the conditions of the animals. This evidence will not always be easily obtained, or necessarily admissible, but combined with the actual consumer perception of what the labelling and advertisements indicated it may well be the most coherent evidence of the dichotomy between reality and perception.

### ***Direct Consumer Evidence***

Consumer evidence can play a significant role in this type of litigation. It is unnecessary to show that a person has actually been misled, but direct evidence that it has occurred is clearly most persuasive.<sup>248</sup> Litigation is about the reality of a dispute between two parties, not some abstract hypothetical based on theoretical precepts. To be able to put a face to the litigation can only highlight the alleged misleading nature of what has occurred.

### ***Survey Evidence***

Evidence that a person was actually misled<sup>249</sup> may also be obtained through consumer affidavits, expert economic evidence, or survey evidence. In an animal welfare litigation context, survey evidence would seem to have a particular importance.<sup>250</sup> The Federal Court has accepted that a properly designed and conducted survey will be admissible.<sup>251</sup> The person carrying out the survey must be able to establish the following criteria:

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<sup>247</sup> C Dillard, "False Advertising, Animals and Ethical Consumption", (2004) 10 *Animal L.* 25, 53.

<sup>248</sup> *Central Equity Ltd v Central Corp Pty Ltd* (1995) ATPR 41-443, 40,998; *Global Sportsman Pty Ltd v Mirror Newspapers Pt Ltd* (1984) ATPR 40-463, 45,343.

<sup>249</sup> 'Likely to mislead' is sufficient to invoke s52 of the *Trade Practices Act 1974*.

<sup>250</sup> Dillard, above n 247, 54 rates survey evidence as critical. "Surveys of consumer perception, which involve the testing the 'message' consumers receive from a given ad, may be the most important evidence in any false advertising case."

<sup>251</sup> *Arnotts Ltd v Trade Practices Commission* (1990) ATPR 41-061.

- i) that a representative sample was obtained;
- ii) that the method of questioning was appropriate;
- iii) those interpreting the data were experts;
- iv) that the information gathered was accurately reported; and
- v) that the survey was conducted independently of the counsel and the interviewers had no knowledge of the litigation.<sup>252</sup>

To support this procedure, the Federal Court has issued Practice Note No. 11 to overcome some of the perceived problems with poorly drafted surveys and inaccurate methodology.<sup>253</sup> Paraphrased this provides:

1. notice should be given to the other side of the intent to conduct a survey;
2. this notice should outline:
  - a. the purpose of the survey;
  - b. the issue to be examined;
  - c. the form and methodology;
  - d. the questions that will be asked;
  - e. the instructions to the person conducting the survey; and
  - f. any other controls.
3. the parties should attempt to resolve any differences on the above; and
4. a directions hearing should be held with the court as soon as the previous steps have been undertaken.

The Court may be willing to undertake a supervisory role in respect of the questions to be asked, and the methodology.<sup>254</sup> There is clearly a role for surveys in animal welfare litigation. With an increasing community awareness of issues related to care and protection of animals, and a greater understanding brought about by animal advocacy groups of the appalling conditions to which many modern animals are subjected, consumer surveys offer a rich vein of compelling testimony as to what may be understood by a particular label or advertisement.

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<sup>252</sup> *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 41-061, 51,386.

<sup>253</sup> *Centurion Roller Shutters Pty Ltd v Automatic Technology (Aust) Pty Ltd* (1999) ATPR 41-731.

<sup>254</sup> *Heidelberg Graphics Equipment Ltd v Andrew Knox & Associates Pty Ltd* (1994) ATPR 41-326.

### ***Industry Perception***

The industry view of what has been claimed is relevant. As the majority of consumer litigation is brought by rival competitors, false or misleading assertions about the animal-friendly nature of a product are likely to be closely scrutinised. Given the nebulous nature of many claims, the industry view will be relevant though not determinative.<sup>255</sup>

### **Part III – Context to Animal Welfare**

Producers may make many claims to suggest that goods are produced humanely, (as in kind or merciful),<sup>256</sup> common ones include, that:<sup>257</sup>

- i) eggs are free range;
- ii) chickens are free range;
- iii) eggs were barn laid;
- iv) produce is organic; and
- v) pigs are bred free range.

Also, certification schemes promoted by organisations<sup>258</sup> such as the RSCPA and Humane Choice suffer from lack of widespread understanding of the criteria used and their auditing processes vary in effectiveness.<sup>259</sup> More insidious practices are symbols or images used to present an image of humane production, which often belie a far darker secret. These range from showing animals in an open, sunny environment when the truth is very different to so-called ‘suicide foods’ where an advertising image of the animal is used to encourage consumption (eg a ‘human-like’ chicken encouraging diners to eat at a chicken restaurant). “Suicide food is vile because it adds cuteness to the common avoidance tactic of packaging dead animals in forms distant from their lived reality. We like animals better, can relate to them more easily, when they look and speak like cheerful cartoon versions of themselves.”<sup>260</sup>

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<sup>255</sup> See *Arnotts Ltd v Trade Practices Commission* (1990) ATPR 41-061 where the industry perception, in the context of a merger within the one industry was seen as particularly noteworthy.

<sup>256</sup> See above n207

<sup>257</sup> See *Voiceless*, above n205, 13-17 where many examples are outlined.

<sup>258</sup> For an overview see *Voiceless*, above n205, 19-23.

<sup>259</sup> *Voiceless*, above n205, 20.

<sup>260</sup> M Kingwell, “Charlie, the Tuna, and other ‘suicide food’ fallacies”, in ALRC, above n213, 14.

How should the law respond? How can s52, s53, and s55 be used to correct the present imbalance, or is a different response required?<sup>261</sup>

The following hypothetical illustrates the difficulties.

“Animal Friendly Ltd” meats begins marketing Australian Pork with an image of a happy, seemingly contented pig grazing in a large open area. The area is clean and shelter is provided. In fine small print it is stated that the supplier complies with the Pig Code.<sup>262</sup> What the picture does not show is that pregnant sows are kept in stalls for up to six weeks of pregnancy, that the Code also sanctions the use of tooth clipping, castration, and tail docking of piglets without anaesthetic<sup>263</sup> or that the United Kingdom, Switzerland, Sweden, and Finland have banned the use of sow stalls. Does this advertisement or label constitute misleading or deceptive conduct?

The answer as to whether this is misleading or deceptive is not entirely clear, and on its own, demonstrates a particular problem with the current legislation. While there is a corporation engaging in conduct in trade or commerce, would a reasonable member of the public have been misled by the advertisement into believing that the animal had been raised in an open free-range environment? Relevant to this consideration is the party to whom the message is directed. If it is the public at large, and particularly if it is a rural community, then a reasonable member of that public would appreciate the image and description is mere puffery.<sup>264</sup> It would be understood that the image would not represent the reality of life for that pig. By contrast, if there is wide publication of that image encompassing a section of the community that would not have any understanding or appreciation of what is occurring (such as children),

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<sup>261</sup> For example, in the Australian Capital Territory and Tasmania, the method of egg production must be clearly labelled on the carton. See (ACT) *Egg (Labelling and Sale) Act 2001*, s5; (Tas) *Egg Industry Act 2002*, ss8, 19.

<sup>262</sup> Full name is *Model Code of Practice for the Welfare of Animals – Pigs*. This is a code of practice endorsed by the Primary Industries Ministerial Committee. See M. Caulfield, “The Law and Pig Farming”, in Australian Law Reform Commission above n213, 22-24. The Pig Code has no legal effect except in South Australia.

<sup>263</sup> Caulfield, above n262, 24.

<sup>264</sup> Self-evident puffery is not misleading and deceptive: *Pappas v Soulac Pty Ltd* [1983] ATPR 40-411.

then the answer may well be different.<sup>265</sup> Second, the use of the name Animal Friendly may support an argument that the production processes are humane, or friendly to the welfare of the livestock, when this is not the case.<sup>266</sup> The corporation may also argue that it complies with the applicable voluntary industry Code (see s51AD of the *Trade Practices Act 1974*). The response to this is that while compliance with a Code may be significant in determining whether there has been unconscionable conduct (s51AC(3)(g) & (h) of the *Trade Practices Act 1974*), of itself this will not act as a defence to misleading and deceptive conduct.<sup>267</sup> Given the overall impression created by the advertisement, and specifically that it does mention that compliance is undertaken with the Pig Code, it may well have the effect of erasing any misleading conduct. Nevertheless, a contrary argument would be that the disclaimer is ineffective given the visual prominence of the picture, and that an ordinary consumer would not be expected to have an awareness

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<sup>265</sup> The courts have accepted that in considering the relevant group of persons, the consideration is given to that particular class: eg *Astrazeneca Pty Ltd v Glaxosmithkline Australia Pty Ltd* [2006] ATPR 42-016 (information directed to medical practitioners). However, it is still open, where a message is directed to a particular profession or section, that a person's knowledge of that industry may lead to a finding of misleading and deceptive conduct: *Hoover (Australia) Pty Limited v Email Limited* [1991] ATPR 41-149. It is recognised that children are more susceptible to misleading advertising: D. Crouch, "The Social Welfare of Advertising to Children", (2002) 9 *U. Chi. L. Sch. Roundtable*, 179, 182.

<sup>266</sup> The use of a business name can constitute misleading and deceptive conduct: *Bradmill Industries Ltd v B&S Products Pty Ltd* (1980) 53 FLR 385; *Winning Appliances Pty Ltd v Dean Appliances Pty Ltd* (1995) 32 IPR 43; *Pinky's Pizza Ribs on the Run Pty Ltd v Pinky's Seymour Pizza and Pasta Pty Ltd* (1997) TPR 41-600. Whilst cases of this ilk generally focus on the one business alleging misleading conduct by the use of a similar name by another business, there would seem to be no barrier to an argument that the name itself was misleading and deceptive. The question would become whether the use of the name 'Animal Friendly' was a mere puff, something in the nature of a self-evident exaggeration: *Australian Competition and Consumer Commission v Kaye* [2004] FCA 1363; BC200407004.

<sup>267</sup> The author is unaware of any authority to support, or conversely that disagrees with this view. The submission is that compliance with the Code will operate as a defence to an allegation of animal cruelty under such legislation (Caulfield, above n262, 23), but that its effect outside of this will be limited. An organisation may well comply with the Code but still mislead the public by an advertisement which depicts something outside the purview of the Code. As noted, (Caulfield, above n262, 23), the Code has no legal effect in NSW, Tasmania, the Australian Capital Territory and the Northern Territory.



of what the Pig Code does or does not allow.<sup>268</sup> The answer as to whether this advertisement is misleading and deceptive is unclear. A similar analysis would apply in relation to s53(a). There is little authority on how s55 is to be interpreted, but given the overlap between s52, 53, and s55 the analysis would be similar.

The difficulty in determining whether there has been misleading and deceptive conduct in respect of this conduct highlights several issues.

Given the complexity, there seems little incentive for a supplier to be openly frank and honest as to how animals are treated in the production process. As noted, with a premium often imposed for goods produced humanely, there is an economic incentive for producers to mislead the public.<sup>269</sup> This argument is only strengthened when it is considered that regulatory enforcement is limited by resources and there may be little inducement for other competitors to take action. Given that humane production of food stocks is rare, and those that do supply goods humanely are small entities without the resources to tackle the agricultural monoliths that dominate much of the food chain, change without more direct intervention is unlikely.

The next section considers a progressive regulatory response designed to allow corporations to voluntarily comply with a greater level of disclosure, but should that not occur, to provide more significant sanctions. It uses well-known enforcement pyramids of consumer law<sup>270</sup> to encourage initial compliance with more punitive sanctions decreed further up the pyramid.

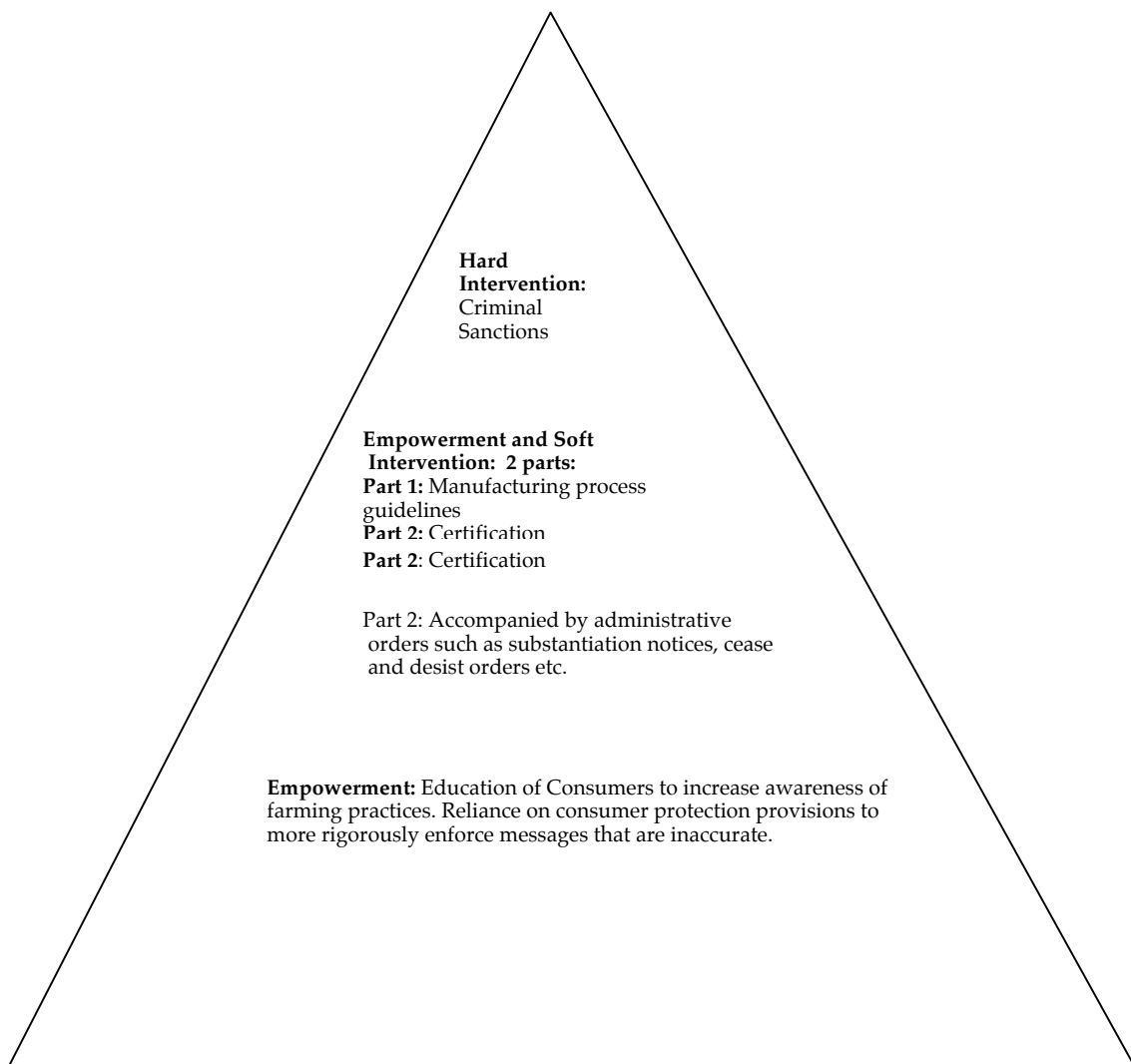
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<sup>268</sup> *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1989) ATPR (Digest) 46-048.

<sup>269</sup> See the comments by Dillard, above n 217, 60.

<sup>270</sup> As an example see Productivity Commission, *Review of Australia's Consumer Policy Framework*, Final Report, Canberra, 2008, 228.

Diagrammatically, the representation is as follows:



As can be seen, the model envisaged engages a three-step proposal with an increasing level of intensity and intervention at each stage. It seeks initially to empower the consumer and the industry to work together to voluntarily improve the lot of animal welfare by making consumers aware of the production process, with this curially enforced through the

current consumer protection measures. At the other end of the spectrum it imposes criminal sanctions for serious or repeated breaches of the law, and in the interim, uses two measures currently unavailable, or not widely available, in the law. The first is that of humane processing guidelines (similar to country of origin rules) operating as a defence to misleading and deceptive conduct. The second, the use of certification schemes,<sup>271</sup> to build upon the humane processing guidelines and providing a truly premium level of animal welfare developed in conjunction with animal advocacy groups.

## **Level 1:**

### **Empowerment through Disclosure**

#### **(Education + Civil penalties)**

As noted, current consumer protection measures are an imperfect solution. Their complexity, consumer misunderstanding as to what symbols and words mean, and dependence on regulatory enforcement all suggest that consumer education and disclosure, while important, cannot be the final solution. Empowerment rather than intervention in the consumer process is generally to be applauded and it is preferable that any more punitive interventionist steps should not be at cost of changing the long-term culture and understanding of the farm production process. It may be trite to say it, but education is arguably the most vital ingredient. Changing consumer sentiment and attitudes, perhaps more than any other measure, may force dramatic alterations to farming practices. If the case is that intensive farming practices are the only way to meet the current consumer demand for meat products, the result may simply be less animal products consumed. With consumers now relying on labelling for nutritional information (such as fat content), a similar process could be adopted for animal production processes. As noted by Voiceless,<sup>272</sup> the United Kingdom's food labelling approach has developed a traffic light system to inform consumers about animal welfare. Green would represent a high level of animal welfare, amber an average level and red a poor level of animal welfare in the production process. The effectiveness of this approach is dependant upon criteria that are explicit, understood and which truly represent best practice standards for animal welfare. This could be

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<sup>271</sup> These are available on a limited scale at the moment. See Voiceless, above n205, 19-23.

<sup>272</sup> Voiceless, above n205, 29.

linked by explicit consumer information at the point of sale (or probably more acceptable to industry, website information) as to, for example, the percentage of animals that die in transit to the processing plant, or the number that suffered injury during transport and prior to killing. Displaying information on the manner of death may also be considered (e.g. the animal was or was not anaesthetised prior to slaughter). The development of precisely what information should be publicised has the advantage of bringing animal welfare to the fore. In summary, the essence of this first step is disclosure, which as Leslie and Sustain<sup>273</sup> point out:

“[T]here are likely to be dynamic interactions between the market-perfecting and democracy-improving functions of disclosure. With respect to animal welfare, most people’s values are not firm and fixed. Their moral commitments and even their behaviour, are endogenous to what they know and to what learn from others. Many of those who think that they do not care about animal welfare might well change their minds and their behaviour if they are exposed to certain kinds of [animal] mistreatment.”

## **Level 2:**

### **Empowerment and Intervention**

#### **(Private Law Civil Penalties + Additional Administrative Remedies)**

Two steps are involved at this level. First, to introduce humane processing guidelines within a legislative framework. Second, certification schemes.

The first step in Level 2 would be to rely on legislation similar to the current country of origin guidelines. Adopting the language of s65AC of the *Trade Practices Act 1974*, the wording could be as follows:

“If:

- (a) a corporation makes a representation that goods are the product of (whether the representation uses the words ‘product of’, ‘produce of’, or any other grammatical variation

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<sup>273</sup> J. Leslie, CR Sustain, “Animal Rights without Controversy”, (2007) 70 WTR Law and Contemp. Probs. 117, 130.

of the word ‘produce’) a humane system of animal welfare;  
and  
(b) all, or virtually all, processes involved in the production  
or manufacture of the good were humane;

the corporation does not contravene...by reason only of making  
the representation.”<sup>274</sup>

The key is obviously what is not defined – what is meant by a ‘humane system of animal welfare’. The development of this could occur in two ways. First, a government could establish its criteria with this promulgated by regulation for each particular industry, thus enabling more easy amendment as animal welfare issues become better understood – though there is some evidence already as to what is required.

“[W]e know that stockpersons should not treat animals non-aversively, piglets should have toys, sheep should have moderate ventilation, cows should not be continuously bred, and dairy cows should not have their tails docked. As these studies show, it is possible to compare the animal welfare benefits of changing specific practices with the costs to producers of doing so, and research in this vein will be crucial in determining the feasibility of particular shifts in animal treatment that could arise through a disclosure regime.”<sup>275</sup>

The second method of exploring the meaning of a humane system of animal welfare could be, as was done with s52, to rely on judicial interpretation and through this, progressive evolution of this phrase. Government intervention may have the advantage of quicker implementation of what is meant by animal welfare, although political leadership on this issue has arguably favoured farming interests over animal advocacy groups.<sup>276</sup> Reliance on the judiciary leads to a longer lead-time in the understanding but has the advantage of greater flexibility and possibly a more balanced response to community and industry expectation. Realistically however, it is unlikely that a court would wish to involve itself with the establishment of new guidelines. Rather its actions are more likely to be the repeal of existing regulations

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<sup>274</sup> There would need to be a consequential amendment to s53 of the *Trade Practices Act 1974* to include reference to humane production guidelines.

<sup>275</sup> Leslie and Sustain, above n 273, 136 (footnotes omitted).

<sup>276</sup> See the criticism of the development of the Pig Code by Caulfield, above n 262.

that allow for the farming of animals in a particular way. For example this occurred in the Supreme Court of Israel's decision to annul regulations providing for the production of foie gras.<sup>277</sup>

The introduction of humane production guidelines has considerable advantages. First, as consumers become aware of the animal welfare issues, a marketing advantage will flow from a descriptor that the goods comply with a humane system of production (just as 'Produce of Australia' arguably does). The premium often attached to goods of this nature will draw producers to change their methods, and yet, as demand increases and a greater number of suppliers comply, the increase in consumer price is likely to be reduced. Second, the discussion between government, industry, and consumer groups as to whether the method be prescribed or left to judicial interpretation will work to bring animal welfare issues into the open and supplement the disclosure requirements at the lower level of the pyramid. Third, by drafting the legislation in this way, the representation that something is a product of the required system will operate as a defence to any alleged breach of the applicable consumer protection provisions. Producers would be able to avoid a likelihood of litigation by adopting the process accepted through the government prescripts. Importantly, there is nothing in the proposal that would compel a producer to change its method of production – any change would be consumer driven.

In addition, voluntary certification schemes could be introduced. Animal advocacy groups could work with industry to develop certifications that high quality animal welfare practices or norms have been adopted. This builds on what is currently occurring,<sup>278</sup> but would impose enforceable standards should a supplier make an assertion of certification when not appropriate. Certification schemes may have the advantage of being simply understood,<sup>279</sup> but may also disguise what is actually occurring. However, if the minimum is what the government has promulgated in the guidelines (or what the judiciary has developed), a certification scheme could build on this to provide a higher or supra-premium level of animal welfare for which some consumers may be willing to pay a higher price. Certification could also be used to raise revenue for the certifying association, with suppliers unwilling or

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<sup>277</sup> Noah – the Israeli Federation of Animal Protection Organisations v The Attorney-General (11/08/2003), HCJ, 9232/01.

<sup>278</sup> Human Society International ([www.hsi.org.au](http://www.hsi.org.au)) have endorsed the 'Humane Choice' label, which indicates that meats have been produced humanely.

<sup>279</sup> Many consumer goods such as cars and accommodation are routinely reviewed or certified.

unable to meet this cost suffering a competitive disadvantage if the premium market found a niche. The schemes would be enforceable under consumer protection legislation (as, for example, codes of conduct),<sup>280</sup> but like much of the consumer enforcement mechanisms rely on the financial capacity, ambition, and legal right to intervene. Additional remedies could also be provided at this level of the pyramid including the administrative remedies of substantiation notices (requiring a corporation or person to verify the claim) and cease and desist orders (an injunction to stop a person from carrying on an activity).<sup>281</sup> As they would operate at an administrative level, enforcement costs would be minimised.

### **Level 3:**

#### **Hard Intervention: Criminal Sanctions**

##### **(Greater involvement by the State)**

The final stage in the pyramid would be the imposition of criminal sanctions for repeated and serious breaches of consumer protection legislation or State-based food regulation legislation. At this level the impact and conduct has moved beyond the private law sphere with civil penalties and administrative sanctions for minor breaches to a concern expressed from the institutions of the State. However, it is important to note that criminal sanctions rarely have a significant impact as a consumer remedy. The higher burden of proof, the rules against self-incrimination and principles relating to the obtaining of evidence<sup>282</sup> all combine to make criminal prosecution a difficult and not quickly responsive mechanism. However, criminal law sanctions have a role to play at the apex of the pyramid.

The role of the criminal law could occur in two ways. First, it could build on current *Food Act* prescriptions,<sup>283</sup> which provide for terms of imprisonment for food falsely described. A common wording of the

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<sup>280</sup> Such as the Franchising Code of Conduct. Part IVB *Trade Practices Act 1974*.

<sup>281</sup> It should be noted that the Federal Government announced (February 17, 2009) that additional remedial powers would be given to the regulator and the courts. See [www.consumer.gov.au](http://www.consumer.gov.au) and link on latest news (accessed February 19, 2009).

<sup>282</sup> As noted by the Productivity Commission, above n270, 228-229.

<sup>283</sup> See for example: *Food Act 2001*, (ACT) ss15, 18, 24; *Food Act 2004* (NT) ss14, 17, 21; *Food Act 2003* (NSW) ss15, 18, 21, 42; *Food Act 2006* (Qld) ss34, 37, 40; *Food Act 2001* (SA) ss15, 18, 22; *Food Act 2003* (Tas) ss15, 18, 22; *Food Act 1984* (Vic) ss10, 10A, 13, 17A, *Food Act 2008*, (WA) ss 16, 19, 23.

prohibition is as follows: “A person must not cause food intended for sale to be falsely described if the person knows that a consumer of the food who relies on the description will, or is likely to, suffer physical harm.”<sup>284</sup> There are two significant limitations with this wording. First, the *mens rea* of knowledge must be proven and there is a link to physical harm. Given the seriousness consequences at the apex of the pyramid, it is not suggested that there be a removal of the requirement of knowledge – this prerequisite nicely distinguishes itself from the non-intent based requirements of the consumer protection provisions. Nevertheless, the link to physical harm seems less justifiable. A person knowingly promoting food as animal-friendly has little justification on which to avoid prosecution. If the breach is serious and repeated, little is served by relying solely on provisions under the *Food Acts*, which only allow for a fine for misleading conduct.<sup>285</sup> Courts are able to determine whether a fine or a term of imprisonment is the appropriate penalty. However, with corporate entities the likely suppliers of much of the food, terms of imprisonment have little jurisprudential value without some extension to the corporate managers. Perhaps more realistic than amendments to make corporate officers personally liable under the *Food Acts*<sup>286</sup> would be an extension of the remedies under the *Trade Practices Act 1974* available for criminal breaches (such as s75AZC (false or misleading representations) and s75AZH (misleading conduct as to the manufacturing process)). The punitive sanctions for breaches of the *Trade Practices Act 1974*<sup>287</sup>, include fines,<sup>288</sup> injunctions,<sup>289</sup> punitive orders (such as an adverse publicity order),<sup>290</sup> and enforceable undertakings.<sup>291</sup> Additional remedies to better match community expectations of a higher standard of animal welfare include:

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<sup>284</sup> *Food Act 2001*, (ACT) s15; *Food Act 2004* (NT) s14; *Food Act 2003* (NSW) s15; *Food Act 2006* (Qld) s34; *Food Act 1984* (Vic) s10, *Food Act 2008*, (WA) s16. There is slightly altered wording in *Food Act 2003* (Tas), s15, *Food Act 2001* (SA), s15.

<sup>285</sup> *Food Act 2001*, (ACT) s18; *Food Act 2004* (NT) s17; *Food Act 2003* (NSW) s18; *Food Act 2006* (Qld) s37; *Food Act 2001* (SA) s18; *Food Act 2003* (Tas) s18; *Food Act 1984* (Vic) s13, *Food Act 2008*, (WA) s19.

<sup>286</sup> This is a matter of debate: see Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault* (September 2006), available at [www.camac.gov.au](http://www.camac.gov.au) (November 1, 2008).

<sup>287</sup> See Part VC of the *Trade Practices Act 1974*. This includes equivalent criminal offences for breaches of s53 (s75AZC), s55 (s75AZH). There is no criminal sanction for a breach of s52 and the country of origin provisions operate as a defence to a claim under s52, s53 and s75AZC.

<sup>288</sup> Section 79, *Trade Practices Act 1974*.

<sup>289</sup> Section 80, *Trade Practices Act 1974*.

<sup>290</sup> Section 86D, *Trade Practices Act 1974*.

<sup>291</sup> Section 87B, *Trade Practices Act 1974*.



- disqualification for corporate officers from acting as such;
- removal or suspension of licences, such as export licences;
- removal or suspension of licences to carry on the particular business;
- community service or probation orders, such as a contribution to an animal advocacy group;
- jail;<sup>292</sup> or
- some other order as the Court sees fit.

Courts may be seen as requiring a remedial smorgasbord to allow them to fashion the remedies to fit the crimes. In the area of animal welfare litigation, Courts need only the tools to allow them to function within recognised sentencing principles.<sup>293</sup>

### **Conclusion**

The moderate proposal suggested here may not please many animal protection law advocates, but it surely represents a practical and achievable reform capable of significantly improving the lot of intensively-farmed animals.

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<sup>292</sup> Jail is not an option for breaches of the consumer protection provisions, though there is a vigorous debate about the use and applicability of jail for cartel offences. See C. Beaton-Wells & B. Fisse, “Criminalising Serious Cartel Conduct: Issues and Policy”, (2008) 36(3) *ABLR* 166. Failure to pay a fine can result in a term of imprisonment of one day for each \$25 unpaid: Section 79(5) *Trade Practices Act 1974*.

<sup>293</sup> For example, s16A of the *Crimes Act 1914* (Cth) provide for a range of matters to be considering in ascertaining the appropriate fine. These include: the nature and circumstances of the offence, the personal circumstances of the victim; the loss or damage that resulted, whether this offence was part of a wider course of conduct, whether the offender pleaded guilty, the degree of cooperation with regulators, the principle of deterrence, the prospects of rehabilitation, the harm to the public, the size of the activities of the corporation and the response of the corporation to the offence.

# BOOK REVIEWS

## *Animal Law In Australasia - A new dialogue*

Edited by Peter Sankoff & Steven White

Publisher Federation Press

ISBN 9781862877191

As Animal Law continues to gain momentum as a recognised field of legal study in Australia and New Zealand, earlier this year practitioners, legal academics and students with an interest in the area welcomed the release of the first comprehensive scholarly book in Australia on the subject, *Animal Law in Australasia: A new dialogue*, co-edited by Peter Sankoff and Steven White.

The book is a collection of chapters contributed by animal law scholars from Australia and New Zealand. Each chapter seeks to provide a detailed description of the current law in Australia and New Zealand, with respect to the nominated topics, and then moves on to provide a critical analysis of the issues at stake. The particular emphasis of the book is to highlight the ways in which the various regulatory regimes in place fail to effectively protect or promote animal welfare.

*Animal Law in Australasia* is a highly informative and well researched text on the current Australian and New Zealand law regulating the interactions between humans and animals. It is an ideal reference as it provides extensive footnotes, a case table, a legislation table and a detailed index. It would be of general interest to anyone interested in the field of animal law and animal protection law more specifically and also would provide a detailed introduction to someone new to the field.

The coverage of this first edition is extensive and the authors do an excellent job of examining a broad range of legal issues in relation to animals. As a teaching resource, *Animal Law in Australasia* is ideal for use as the prescribed text for an undergraduate law unit in Animal Law with supplementation through links to primary resources such as relevant cases and legislation. *Animal Law in Australasia* would be an important addition to any legal library.

- **Celeste M Black**, Senior Lecturer, Faculty of Law, University of Sydney

***Animals and Us - Teaching Positive Values***<sup>294</sup>

Edited by Faye Leister

Published by Faye Leister

ISBN 9780646513744

Written specifically for teachers of children in the 7-12 age group, this self-published book<sup>295</sup> will be a welcome aid to education on animal sentience, companion animals, factory farming and cruelty towards animals generally contains 64 enticing “activity pages” (see page opposite) about the welfare, protection and rights of animals.

An associated website <http://www.animalsandus.com.au/index.html> aims “to encourage and support teachers and child care workers to:

- become more informed about the plight of non-human animals;
- include Humane Education in their classroom or educational setting
- share information with other educators”.

The website has freely downloadable sample activity pages that non-commercial users are encouraged to use in the classroom, animal club or home.

**- JM**

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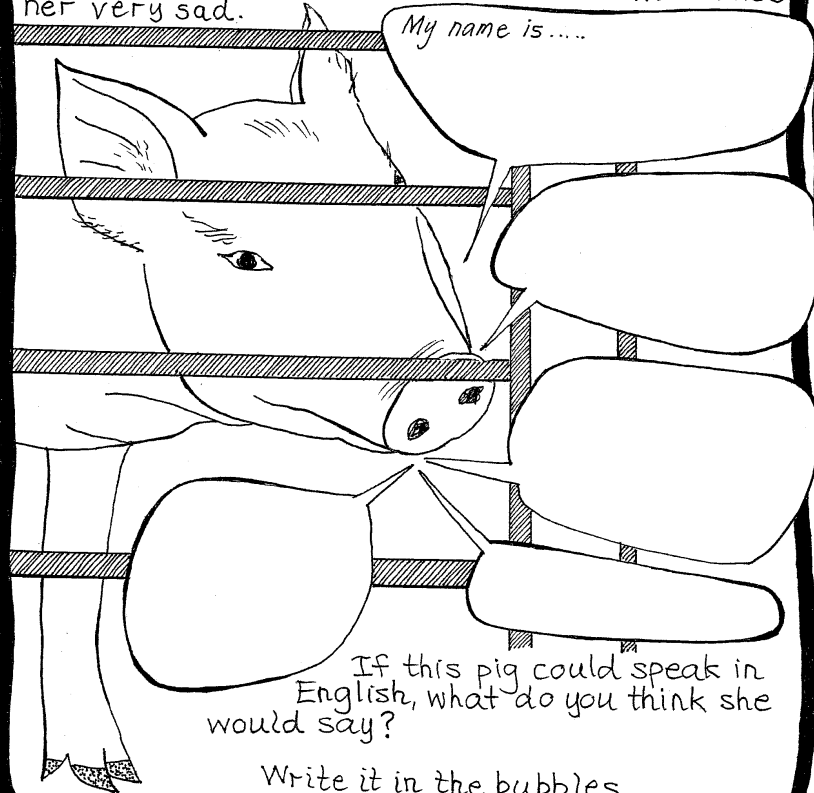
<sup>294</sup> available through <http://www.animalsandus.com.au/index.html>, Dominic (Educational Supplies) and educational bookshops.

<sup>295</sup> Faye Leister is a qualified Primary Teacher and has written and illustrated five educational activity books for children ages 6-12. She is also a visual artist, professional dancer and dance teacher.

# Where PIGS Live

In Australia, over 90% of pigs live inside factory farms. This means that they never feel the sun on their skin or feel the breeze, they never see the sky or get to walk on the ground.

For long periods of time they have to live in sow stalls with metal bars. They can barely move. When their babies are born the mother pig is put in an even smaller space. After just a few weeks her babies are taken from her. This makes her very sad.



## Guidelines for Contributors

All contributions (apart from brief case notes, letters and book reviews) are subject to peer review. Reviewers are not made aware of the contributing authors' identities and the reviewers remain anonymous to all but the Editor.

Articles must be original and should be accurate as to matters of fact and law. They may be generally informative or they may take a critical or analytical perspective. The best guide to the style is to closely read articles as published in the AAPLJ. Of course, contributors should write in plain English.

There is no recommended length of articles, but if they exceed about 6,000 words referees may consider whether the article is worthy of publication regardless of the length, or whether it could be shortened. Case notes, if they are simply reportage, should be concisely stated. Articles/briefs which take a critical or analytical perspective on interesting cases are particularly welcome.

The AAPLJ style generally follows The Australian Guide to Legal Citation (see <http://mulr.law.unimelb.edu.au/aglc.asp>).

All material submitted should be marked "Attn: AAPLJ Editor" and may be emailed to [mancyj@gmail.com](mailto:mancyj@gmail.com), preferably in MS Word or Rich Text Format (RFT).

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