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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:

- **Elizabeth Ellis** finds serious flaws in the Australian regulation of animal welfare, both in the law and its administration, when measured against key attributes associated with good governance and the rule of law.
- **Angela Radich** considers whether *amicus curiae* applications could provide an attractive alternative for Australian animal protection advocates who lack standing and/or the resources to take on well-funded industry bodies and government entities.
- Are higher penalties the most effective way of ensuring improved welfare outcomes for animals, **Tracy-Lynne Geysen, Jenni Weick & Steven White** ask, in discussing recently increased penalties for animal cruelty offences in Queensland. The joint authors underline the need for further empirical legal, political and sociological research on the meaning of “community expectations” about sentencing outcomes.
- **Alexandra McEwen** describes American philosopher Martha Nussbaum's “capabilities approach” for non-human species, critically analysing Nussbaum's claim for justice for animals. McEwen presents a set of principles which might underpin an Australian law and policy dealing with animal protection and well-being.
- And, the first introductory textbook on Australasian Animal Law is reviewed.

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.

Concise letters in reply to any of the articles published are 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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Making Sausages & Law: The Failure of Animal Welfare Laws to Protect both Animals and Fundamental Tenets of Australia's Legal System

*By Elizabeth Ellis**

Laws are like sausages. It is better not to see them being made.

The above aphorism, attributed to Bismarck, was quoted by Philip Ruddock when addressing lawyers in 2007 on the subject of law reform.¹ Interestingly, Mr Ruddock also referred to the rule of law in the same speech.² Apparently the juxtaposition of the rule of law with a preference for secret law-making did not strike the (then) federal Attorney-General as odd.³ Perhaps this is unsurprising: the rule of law is commonly invoked for effect and may be used for a multitude of purposes. For this, and other reasons, the idea is open to challenge in terms of both its value and meaning.⁴ Arguably, however, the 'minimum content' of the rule of law can serve as a useful framework for reflecting on the exercise of public power, notwithstanding its contested nature.⁵ This minimum content is generally understood by

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¹ The Hon. Philip Ruddock, (Paper presented at 'Law and Government', 35th Australian Legal Convention, Sydney, 25 March 2007) [127].

² *Ibid* [8].

³ Mr Ruddock appears to cite Bismarck as a rhetorical device to emphasise the difficulty of law reform and the messiness of the process but the reference nevertheless sits uncomfortably with the notion of the rule of law.

⁴ For discussion and critique of the concept of the rule of law see, eg, Richard Bellamy (ed), *The Rule of Law and the Separation of Powers* (2005, Ashgate), Pietro Costa and Danilo Zolo (eds), *The Rule of Law: History, Theory and Criticism* (2007, Springer) and Cheryl Saunders and Katherine Le Roy (eds) *The Rule of Law* (2003, Federation Press).

⁵ Simon Evans, 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13 *Public Law Review* 94, 94-5.

reference to various accepted attributes,⁶ including generality, openness, certainty, impartiality, access to the courts and so on. These characteristics overlap with, and complement, those of transparency, accountability and public participation which are central to an effective system of responsible and representative government. In this context, the rule of law may be viewed as a means of eschewing arbitrary rule and constraining the exercise of executive power.⁷

The importance of law as a constraint on power has been highlighted by those at the highest level. In the 2000 Boyer Lectures, for example, Murray Gleeson referred to the words of Thomas More in Robert Bolt's play *A Man for All Seasons* to describe law as a 'windbreak' that 'restrains and civilises power'.⁸ In this general sense, the rule of law is a hallmark of civil society and an essential characteristic of good government. In other words, the legitimacy of law and government in the western legal tradition are inseparable from attributes associated with the rule of law and the idea of law as a restraint on power. The further one moves from these qualities with respect to a given object of legal regulation, the less confident one can be that the rule of law and associated democratic values are maintained. In the context of animal welfare, however, law's protection is at best ambivalent. Given the sentience of nonhuman animals and the apparent community interest in their welfare,⁹ it is perhaps surprising that the legal regulation of animals in Australia falls significantly short of key attributes associated with good governance and the rule of law.

The problematic aspects of the law can be found at every level of animal welfare regulation: in the contradictory structure and language of the legislation, in the complex regulatory framework that relies heavily

6 Ibid, 95-96.

7 Duncan Kerr and George Williams, 'Review of executive action and the rule of law under the Australian Constitution' (2003) 14 Public Law Review 219, 220.

8 Chief Justice Murray Gleeson, The Rule of Law (The Rule of Law Lecture Series), Lecture 1, 'A Country Planted Thick with Laws' (19 November 2000)

<<http://www.abc.net.au/rn/boyers/stories/s214400.htm>> at 12 October 2009.

9 Research for the federal Department of Agriculture, Fisheries and Forestry, as part of the Australian Animal Welfare Strategy, reveals a high level of interest in, and emotional engagement with, the topic of animal welfare, although this is coupled with superficial knowledge and the assumption that legislation protects animals from cruelty. See Angela Southwell, Amarylise Bessey and Barbara Barker, Attitudes to Animal Welfare, A Research Report (July 2006, TNS Social Research), 11-13.

on regulations and codes of practice, in the disproportionate influence in the making of these subordinate laws and guidelines by bodies whose interests are very different to those of animals, and in the enforcement of a penal statute by inadequately resourced charitable bodies. Using NSW as an example, this article seeks to examine each of these aspects of the legal regulation of animal welfare in Australia through the lens of attributes associated with good governance and the rule of law, in particular the idea that ‘law restrains and civilises power’. Although there are jurisdictional differences, the shortcomings identified in relation to NSW are broadly typical of the legal regulation of animal welfare in Australia.

Legislative structure and language

Each State and Territory has enacted legislation whose specific object is to prevent cruelty to animals and/or to promote their welfare. In NSW, the relevant statute is the *Prevention of Cruelty to Animals Act 1979*. Although by no means the only NSW legislation concerned with animals,¹⁰ the *Prevention of Cruelty to Animals Act* (‘the Act’) is the State’s principal animal welfare statute. Notably, the Act’s express objects, set out in s3, are couched exclusively in terms of the prevention of cruelty to animals and the promotion of their welfare by persons in charge. Part I of the Act contains two general cruelty offences,¹¹ as well as various specific offences against animals.¹² Further offences are created by regulation. In conjunction with the fairly wide definition of ‘animals’ in s4, the legislation appears to provide animals with considerable protection.

Consideration of the whole of the Act’s provisions, however, reveals two major shortcomings. First, the Act contains various exemptions and defences which, in effect, legalise considerable cruelty to animals in the context of certain uses. A prime example is the express exemption of ‘stock animals’ in s9 which deals with the confinement of animals. This exemption provides the framework in which millions of animals, such as pigs and chickens, are routinely tightly confined in a way that would otherwise constitute an offence under the Act. Another example is provided by s15, which creates an offence of administering poison

10 Other NSW legislation includes the Animals Research Act 1985, the Exhibited Animals Protection Act 1986 and the Companion Animals Act 1998.

11 Section 5 cruelty to animals and s6 aggravated cruelty to animals.

12 Sections 7-23.

but limits its application to domestic animals. The defences set out in s24 also play a key role. For example, s24(1)(a)(ii) effectively allows the castration without anaesthetic of pigs less than two months old or of sheep or cattle less than six months of age. Other defences included in s24 relate to hunting, using animals in research and the destruction of animals used for food. Further exemptions and defences are contained in the regulations. These exemptions and defences run counter to the express objects of the Act and, taken together, mean that the legislation lacks application to the vast majority of animals. In other words, what the Act does – allow institutionalised cruelty to millions of animals – and what it purports to do – protect animals’ welfare – are in direct conflict. This inconsistency creates uncertainty in the interpretation of the legislation and is counter to good public policy. It is also at odds with the principle of legality when this is expressed to mean ‘that Parliament must squarely confront what it is doing and accept the political cost’.¹³

The problems created by the discrepancy between the objects clause and other statutory provisions are exacerbated by a second major shortcoming in the Act: the uncertain language in which key provisions are couched. First and foremost, the reference to an act of cruelty in s4 imports the words ‘unreasonably, unnecessarily or unjustifiably’. The obvious ambiguity of this phrase is compounded by similar references in other provisions. For example, the defences in s24 are only available where the accused satisfies the court that the specified act has been committed ‘in a manner that inflicted no unnecessary pain upon the animal’. The qualified application of the Act - to cruelty which is unreasonable, unnecessary or unjustifiable – is typical of animal welfare legislation in Australia and comparable jurisdictions overseas. Framed in this way, the construction of key words, such as ‘unnecessary’, is clearly critical to the Act’s scope and operation, yet its lack of enforcement in commercial contexts means there is an absence of Australian authority with respect to this. The result is a kind of circularity. If provisions such as s9 and s24 are assumed to support an interpretation of ‘unreasonably, unnecessarily or unjustifiably’ congruent with routine husbandry practices, this interpretation will rarely be subjected to scrutiny by the courts; in turn, the lack of judicial consideration reinforces the idea that the Act lacks application to commercial contexts. As a result, routine agricultural practices come to

13 R v Secretary of State for the Home Department; Ex parte Simms [2000] 2 AC 115, 131 (Lord Hoffmann) cited in K-Generation Pty Limited v Liquor Licensing Court (2009) 237 CLR 501, 520 (French CJ).

determine the content and scope of the law, with very little opportunity for parliament's intention to be tested in the courts. While the approach of British courts suggests that any gains for animals are likely to be limited where commercial considerations intrude, judicial exegesis of the idea of 'unnecessary suffering' would at least have the merit of exposing the limited reach of animal welfare legislation.¹⁴ As it stands, the diminished role of the courts denies a key protection associated with the rule of law, while the problematic structure and language of the legislation make it uncertain whose interests are protected or what is required to ensure compliance with the legislation.

Regulatory framework

The problematic structure and language of the Act are compounded by two other factors that also raise issues associated with the rule of law. First, there is a heavy reliance on delegated legislation and other instruments of uncertain status. Secondly, these legislative instruments are developed within a complex federal/State regulatory framework dominated by government agencies and industry bodies whose primary concerns and interests lie outside the sphere of animal welfare. These overlapping factors are considered below.

Heavy reliance on legislative instruments

The Act's general regulation-making power is found in s35. Its detailed provisions include the power to exempt by regulation any person, or any specified class of persons, either absolutely or subject to conditions, from the operation of any provision of the Act.¹⁵ In addition, s34A(1) allows the regulations to prescribe guidelines, or adopt a code of practice as guidelines, relating to the welfare of farm or companion animals. These guidelines are then admissible in proceedings as

14 For an examination of relevant British case law, see Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (2001, OUP). In *Department of Local Government and Regional Development v Emanuel Exports Pty Ltd* (Unreported, Magistrates Court of Western Australia, 8 February 2008, [97]-[98]) the magistrate referred to this case law in determining the issue of unnecessary suffering in relation to the export from WA of a class of live sheep.

15 Section 35(2)(d).

evidence of compliance, or failure to comply, with the Act or regulations.¹⁶

In NSW, codes of practice are incorporated into the Act through different provisions in the Prevention of Cruelty to Animals (General) Regulation 2006 ('the Regulation'). These incorporating provisions have a different operative effect. First, cll18-19 prescribe certain animal trades and corresponding Codes of Practice, as set out in Schedule 2 of the Regulation. Examples of prescribed animal trades are pet shops and animal breeding establishments. Proprietors and managers of a prescribed animal trade must, inter alia, comply with the provisions of the relevant Code and take all reasonable steps to ensure compliance by their employees or workers.¹⁷ Failure to comply with this requirement is subject to a maximum penalty of 25 penalty units.¹⁸ Note, however, that the Prevention of Cruelty to Animals Amendment Act 2009 (NSW) inserted s35(3) into POCTAA to enable the regulations to create offences with substantially increased penalties for offences relating to animal trades and laying fowl.

The other provision relevant to codes is cl24 which adopts various Model Codes of Practice for the Welfare of Animals¹⁹ for the purposes of s34A(1) of the Act. Accordingly, failure to comply with one of these codes is not an offence but may be given in evidence in proceedings for an offence under the Act or the Regulation. The Codes adopted by cl24 deal with the commercial use of stock animals, are developed through a national process, and can be extremely detailed.²⁰ Although the national Model Codes only have legal effect if incorporated in State or Territory legislation they appear to have an informal status which influences the regulatory process.

16 Section 34A(3). While other Australian jurisdictions incorporate codes of practice, most provide that compliance with these codes is an absolute defence.

17 Clauses 20(1) and 20(3)(i).

18 Clause 20 (1). See also Cl 23, Sch 3 which prescribes this clause as a penalty notice offence with a maximum penalty of \$200.

19 These Model Codes are gradually being rewritten as national standards. See below p 9.

20 For example, the Model Code of Practice for the Welfare of Animals: Domestic Poultry (4th ed, 2002). These codes are published by the CSIRO and are available at

<<http://www.publish.csiro.au/nid/22/sid/11.htm>>. See also <http://www.daff.gov.au/animal-plant-health/welfare/model_code_of_practice_for_the_welfare_of_animals>.

The uncertainty of the status of these codes complicates the ambiguity of key provisions of the Act. For example, the Division of Primary Industries²¹ which administers the Act notes on its website that unincorporated codes are ‘still regarded as the minimum standard by which livestock should be kept.’²² The incorporation in NSW of the Domestic Poultry Code even though the Regulation deals in detail with laying fowl further increases the uncertainty.

While delegated legislation is an important and inevitable part of modern government, the dangers of extensive reliance on non-parliamentary lawmaking are well known. This has led to the development of various mechanisms to scrutinise subordinate laws and to keep delegated lawmakers in check. An important means of exercising parliamentary oversight is the requirement for publication/notification/tabling of delegated legislation and the opportunity for its disallowance by either house. In NSW, the relevant provisions are found in Part 6 of the Interpretation Act 1987. These require that statutory rules be published on the NSW legislation website and that notification of their making be tabled in parliament, with the rules subject to dis-allowance. In practice, however, the volume of delegated legislation detracts from the efficacy of this form of oversight; moreover, there is no requirement in NSW that an incorporated code be published with the statutory rule or otherwise drawn to the attention of parliament.²³ To some extent the limits of this form of parliamentary oversight are ameliorated by the work of committees charged with reviewing regulations. In NSW, this function is performed by the Legislation Review Committee, constituted by members drawn from both houses and from across the political spectrum. Although this Committee may draw parliament’s attention to regulations on any ground,²⁴ it is expressly constrained from engaging in consideration of Government policy, other than in specified circumstances.²⁵ Moreover, where specific grounds are included, they

21 Previously a Department in its own right, Primary Industries is now a Division of Industry & Investment NSW. See below p 8.

22 <<http://www.dpi.nsw.gov.au/agriculture/livestock/animal-welfare/general/guidelines/national>> at 27 October 2009.

23 There may be jurisdictional differences, eg, s 7 of the Prevention of Cruelty to Animals Act 1986 (Vic).

24 Legislation Review Act 1987 (NSW) s 9(1)(b).

25 Legislation Review Act 1987 (NSW) s 9(3).

are not particularly helpful to the interests of animals and, in some cases, may be antithetical to them.²⁶

Another measure to increase transparency and accountability is the requirement for a regulatory impact statement ('RIS') with respect to major delegated legislation. In NSW, an RIS is required in relation to a principal statutory rule, which is defined to exclude amendments,²⁷ even though an amending regulation may make substantial changes to a regulatory provision.²⁸ For example, the Prevention of Cruelty to Animals Regulation 1996 (NSW) and the Prevention of Cruelty (Animal Trades) Regulation 1996 (NSW) were repealed in 2006 in accordance with the sun-setting provisions of the Subordinate Legislation Act 1989 (NSW) and combined and remade as the current Regulation. Accordingly, the 2006 Regulation was subject to the requirement for an RIS. This was not the case, however, when the Regulation was amended in 2007 to insert more detailed provisions with respect to layer hens.²⁹ Although this amendment included a provision to give effect to the agreement by Australian ministers in 2001 for a small increase in cage size for some laying fowl, the lack of an RIS meant less opportunity for public debate in relation to the broader issue of battery hens.³⁰ There are other circumstances where an RIS is not required. For example, it is unnecessary to comply with the requirement for an RIS where, inter alia, the responsible Minister

26 For example, s 9(1)(b)(i) and (ii) of the Legislation Review Act 1987 (NSW) respectively authorise the Committee to have regard to any undue trespass on personal rights and liberties and any adverse impact on the business community.

27 Subordinate Legislation Act 1989 (NSW) ss3 and 5.

28 Indeed, various codes of practice were originally incorporated into POCTAA for the purposes of s34A by an amending regulation: the Prevention of Cruelty to Animals (General) Amendment Regulation 2000.

29 Prevention of Cruelty to Animals (General) Amendment (Laying Fowl) Regulation 2007 (NSW).

30 The history with respect to this increase is instructive. Following lack of agreement to a Tasmanian proposal in 1992 to ban cage production of eggs, the States and Territories agreed in 1995 to legislate to give effect to the minimum cage sizes set out in the 3rd edn of the Model Code – Domestic Poultry. The agreement in 2001 to increase the minimum cage size per fowl from 450 sqcm to 550 sqcm took six years to be legislated in NSW.

See <http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0007/287098/

Review-of-penalties-for-egg-producers-who-fail-to-comply-with-cage-standards.pdf> at 21 September 2009.

certifies that the proposed statutory rule comprises or relates to certain matters, including those involving the adoption of international or Australian standards or codes where a cost/benefit assessment has already been made.³¹ The national code development process in relation to stock animals requires an RIS in accordance with the Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies endorsed by the Council of Australian Governments.³² In relation to animal welfare, however, the national RIS process has been criticised.³³ Because heavy reliance on subordinate legislation derogates from the power of parliament it is essential that safeguards provide a meaningful check on delegated power, particularly where the impact of its exercise is potentially so adverse to the well-being and lives of millions of animals.

Development of codes of practice

As the above suggests, mechanisms for scrutinising delegated legislation may be particularly unhelpful where the enabling Act allows the incorporation of a further layer of regulation, such as codes of practice. In the case of animal welfare there is a particular concern: many of the relevant codes are developed with significant input from bodies whose interests are essentially antagonistic to those of animals, including industry organisations which are not accountable politically for the result. Issues associated with impartiality, transparency and accountability in this code-development process are especially acute because the regulatory subjects are sentient creatures without any direct legal claims or capacity to articulate their own suffering.

It is significant that the impetus for Australian model codes in the early 1980s was a response from industry to challenges to methods of livestock management and animal experimentation from those concerned about animal welfare.³⁴ Most current national codes have been developed through a federal/State regulatory process under the auspices of the Primary Industries Ministerial Council ('PIMC'). The

31 Subordinate Legislation Act 1989 (NSW) s 6(1)(a); Sch 3(5).

32 <http://www.pc.gov.au/_data/assets/pdf_file/0020/65720/coag.pdf> at 27 October 2009.

33 See, eg, Malcolm Caulfield, Handbook of Australian Animal Cruelty Law (2008, Animals Australia) 60 in relation to the revised pig code.

34 Geoff Neumann, Review of the Australian Model Codes of Practice for the Welfare of Animals, Final Report (9 February 2005, Geoff Neumann & Associates Pty Ltd) 3.

object of the PIMC is ‘to develop and promote sustainable, innovative, and profitable agriculture, fisheries/aquaculture, food and forestry industries’.³⁵ That this object runs counter to the interests of animals is illustrated by the failure of the PIMC in 2009 to oppose a practice of slaughtering some animals in Victorian abattoirs without pre-stunning, despite scientific evidence (if any were needed) of the risk to animal welfare.³⁶

Notwithstanding the conflict of interest, it is within this regulatory framework that national model codes for livestock animal welfare have been developed. The Animal Welfare Working Group (‘AWWG’) of the Primary Industries Standing Committee has specific responsibility for this task. The AWWG comprises representatives of State and Territory governments, the federal Department of Agriculture, Fisheries and Forestry (‘DAFF’), Animal Health Australia (‘AHA’), the CSIRO and the Vertebrate Pests Committee.³⁷ Several aspects of the membership of the AWWG are worthy of mention. First, the government representatives are largely drawn from agencies whose primary goals are industry-related. For example, the NSW representatives are from the Animal Welfare Branch of the Department of Primary Industries (‘DPI’) which acts ‘in partnership with industry and other public sector organizations to foster profitable and sustainable development of primary industries in New South Wales.’³⁸ The focus on industry concerns is highlighted by the incorporation of the DPI, in July 2009, into a new government authority, the Department of Industry and Investment, trading as Industry & Investment NSW. The function of this body is ‘to build diversified industries and create jobs as well as provide better services to the people of the state through more integrated services and less red tape.’³⁹ Secondly, AHA is a non-profit public company established by governments and major livestock industry bodies, including Australian Pork Ltd, the Cattle Council of Australia

35 Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals, Domestic Poultry*, 4th edn, 2002, vii.

36 Lorna Edwards, ‘Ritual Slaughter Ruling Condemned’, *Farmonline*, 13 November 2009 <<http://fw.farmonline.com.au/news/nationalrural/livestock/news/ritual-slaughter-ruling-condemned/1676377.aspx>> at 15 November 2009; PIMC 16 Communique 6 November 2009 <http://www.mincos.gov.au/data/assets/pdf_file/0004/1365511/pimc-16.pdf> at 15 November 2009.

37 <www.daff.gov.au/animal-plant-health/animal/committees/ahc/awwg> at 12 October 2009.

38 NSW Department of Primary Industries, *Annual Report, 2007-08*, 5.

39 <<http://www.dpi.nsw.gov.au/aboutus>> at 21 September 2009.

and the Australian Egg Corporation.⁴⁰ According to its Members' Charter, AHA 'is a dynamic partnership of governments and livestock industries that strengthens Australia's animal health status and reinforces confidence in the safety and quality of our livestock products in domestic and overseas markets'.⁴¹ With respect to the other members of the AWWG, the CSIRO is a national statutory agency concerned with scientific and industrial research and the Vertebrate Pests Committee coordinates Australian policy and planning in relation to pest animal issues.⁴²

Unsurprisingly perhaps, the codes developed by the AWWG tend to reflect industry practices even though there is some consultation with animal welfare organisations.⁴³ Where the process results in improvements to animal welfare, concessions are generally heavily qualified. For example, a revised *Model Code of Practice for the Welfare of Animals – Pigs*, was published in 2008. Pig farming in Australia is a highly intensive industry.⁴⁴ A major animal welfare issue is the common intensive farming practice of housing sows in stalls for most of their 16 week gestation. This practice is being phased out in Europe, with all sow stalls to be prohibited after 2013 except for the first four weeks of pregnancy.⁴⁵ By contrast, under the 2008 Australian pig code, the maximum time in stalls has been reduced to six weeks and pig producers have until 2017 before this change is operational. In

40 The Australian Livestock Export Corporation is an Associate Member.

<<http://www.animalhealthaustralia.com.au/corporate/members.cfm>> at 12 October 2009.

41 <<http://www.animalhealthaustralia.com.au/corporate/members.cfm>> at 12 October 2009. Of the nine points listed under the heading Members' Charter, only point 6 makes specific reference to the interests of animals. Moreover, the wording of this point, that AHA is 'mindful of the inherent value of livestock as sentient animals in all considerations' is difficult to reconcile in any meaningful with its broader objectives.

<<http://www.animalhealthaustralia.com.au/aahc/index.cfm?1D261FC4-DDE0-0F8B-F4B6-C8CAD9EDF7D7>> at 12 October 2009.

42 <<http://www.daff.gov.au/natural-resources/invasive/vertebrates>> at 20 April 2010.

43 See, for example, Primary Industries Standing Committee, above n 35, v and Primary Industries Ministerial Council, *Model Code of Practice for the Welfare of Animals - Pigs* (3rd edn, 2008).

44 Australian Bureau of Statistics, *Year Book Australia Livestock* (2008) Cat No 1301.1.

45 Peter Stevenson, 'European and International Legislation: A Way Forward for the Protection of Farm Animals?' in Peter Sankoff and Steven White *Animal Law in Australasia: A New Dialogue* (2009, Federation Press) 307, 311, 314.

addition, exemptions apply.⁴⁶ Moreover, the modest increase in the size of sow stalls in the 2008 Code only applies to new installations, with existing stalls merely required to meet vague outcomes-based criteria.⁴⁷ Even these minimal improvements had no formal legal status in NSW until 2010 when the relevant provisions were legislated by regulation.⁴⁸

The code development process has now been brought under the umbrella of the Australian Animal Welfare Strategy ('AAWS') endorsed by the Australian government in 2005. A key aim of the AAWS is the development of nationally consistent animal welfare provisions to be adopted by each State and Territory government.⁴⁹ As with the development of previous model codes, this standards development process is dominated by government and livestock representatives whose primary interest is to support industry. The first set of standards to be developed as part of this process, the *Australian Standards and Guidelines for the Welfare of Animals: Land Transport of Livestock* ('LTL Standards'), illustrates the difficulty of addressing animal welfare concerns. The LTL Standards replace seven model codes, as well as provisions on livestock transport in another 13 documents.⁵⁰ Although the transport of animals is a notoriously problematic area in terms of animal welfare, the management of the standards development process was the responsibility of AHA. The first step in the process was the production of draft standards by a small writing group comprising representatives of government, industry and research bodies.⁵¹ No animal advocates or animal welfare

46 Primary Industries Ministerial Council, Model Code of Practice for the Welfare of Animals - Pigs (3rd ed, 2007) [4.1.5].

47 Ibid, Appendix III.

48 The Prevention of Cruelty to Animals (General) Amendment (Animal Trades) Regulation 2010 (NSW) prescribed a commercial pig establishment as an animal trade and the Animal Welfare Code of Practice – Commercial Pig Production (2009, Industry & Investment NSW) as the relevant code. Accordingly, a breach of the Code now constitutes an offence under the Regulation. Note, however, that the prescribed Code is inconsistent with POCTAA. While cl24 of the Code prohibits the surgical sterilisation of a male pig over the age of 21 days, unless performed by a vet and with anaesthetic, s24(1)(a)ii) of POCTAA provides a defence in relation to the same procedure where the pig is less than two months of age.

49 <<http://www.daff.gov.au/animal-plant-health/welfare/aaws/online/goals>> at 12 October 2009.

50 Primary Industries Ministerial Council, Australian Standards and Guidelines for the Welfare of Animals: Land Transport of Livestock, Public Consultation Draft, 29 February 2008, vii-viii.

51 Ibid, vii.

representatives were included in the writing group for the LTL Standards but only in the Standards Reference Group that had input into the process after the initial drafting was completed. These draft standards were then subjected to a public consultation process and further revision.

The LTL Standards are detailed and complex and it is not easy to establish those changes made as a result of consultation, either with the Standards Reference Group or the broader public. Although the initial standards were subject to some amendment, there have been claims that the changes do little to benefit animal welfare, particularly in relation to bobby calves.⁵² A by-product of the dairy industry which requires cows to be kept constantly pregnant, bobby calves are typically taken from their mothers in the first 24 hours and transported to slaughter when five days old. The practice of transporting bobby calves after five days was reflected in the public consultation draft LTL Standards B4 and supported by the dairy industry; by contrast, submissions from animal welfare and advocacy groups supported an older age threshold.⁵³ Following this public consultation process, no change to the age threshold was recommended.⁵⁴

With respect to time off feed for bobby calves, the dairy industry submitted that 24 hours is the appropriate interval, while animal welfare and advocacy groups supported a maximum time off feed of 12 hours.⁵⁵ In the public consultation draft LTL Standards, a liquid feed for bobby calves every 12 hours was recommended by GB4.9 but this guideline was subsequently deleted in accordance with a proposal of the dairy industry.⁵⁶ Also deleted was that part of GB4.3 which recommended that bobby calves not be transported for a time exceeding 10 hours or a distance exceeding 500 kilometres.⁵⁷ Instead, standard SB4.5(iv), as

52 See, eg, 'Proposed Animal Transport Standards Disappointing'

<<http://www.abc.net.au/news/stories/2009/03/18/2519543.htm?site=southwestwa>> at 12 October 2009.

53 Animal Health Australia (2008), Australian Animal Welfare Standards and Guidelines for the Land Transport of Livestock, Public Consultation Response Action Plan, 83-4.

54 Ibid, 84.

55 Ibid.

56 Ibid.

57 This proposed guideline was qualified where the calves are intended for slaughter and exceeding this time and distance is necessary to reach the nearest available, operating livestock-processing establishment.

included in the draft for endorsement published in December 2008, requires that bobby calves be prepared and transported to ensure delivery in less than 18 hours from last feed, with no more than 12 hours spent on transports. According to the Public Consultation Response Action Plan, this standard allows ‘the objective of reasonable calf welfare to be achieved *without major industry consequences*.’⁵⁸ In addition, guideline GB4.8 of the same version provides that bobby calves should be given a liquid feed as soon as possible after unloading, unless they are slaughtered within 18 hours of commencing transport. Apart from the recognised problems at abattoirs in relation to feeding calves,⁵⁹ this guideline in effect supports a maximum time off feed of 24 hours when read in conjunction with standards SB4.5(iii) and (iv).⁶⁰

The point made by the Public Consultation Response Action Plan, that ‘POCTA provisions will still apply to any unsatisfactory outcomes’,⁶¹ offers little reassurance given the major problems with animal welfare law enforcement discussed below. Moreover, further changes to the LTL Standards are pending. Although the PIMC endorsed the 2008 version in May 2009 it was noted that ‘further industry consultation will occur before the standards are given legislative effect.’⁶² As a result, some changes to the 2008 edition are anticipated. In relation to bobby calves, the time-off-feed standard has been provisionally rewritten to require that calves between 5 and 30 days old travelling without their mothers must be slaughtered or fed within 30 hours from last feed.⁶³ The amended LTL Standards will be presented to the PIMC in November 2010 and, if endorsed, implemented by the States and Territories in 2011.⁶⁴

With respect to the LTL Standards, AHA claims that the outcome followed ‘an extensive consultation process’, involved ‘careful consideration’ by the reference group of ‘the views and comments of all

58 Animal Health Australia, above n 53, 85 (emphasis added).

59 Ibid.

60 Standard SB4.5(iii) of the 2008 draft requires that bobby calves be fed milk or milk replacer on the farm within 6 hours of transport.

61 Animal Health Australia, above n 53, 85.

62 PIMC 15, Communique 21 May 2009, p 3.

http://www.animalwelfarestandards.net.au/aahc/australian-animal-welfare-standards-and-guidelines/land-transport/land-transport_home.cfm> at 6 April 2010.

63 Email from Amanda Paul to Elizabeth Ellis, 8 April 2010.

64 Email from Amanda Paul to Elizabeth Ellis, 8 April 2010.

stakeholders' and generally reflects 'a high level of agreement about the welfare aspects of land transport'.⁶⁵ In further justification, AHA states that the 'decision-making process is conducted at the Reference Group level and is based on logic, values all opinions and is not set up to "out vote" any stakeholder or group.'⁶⁶ Yet, as also noted by AHA, there was less than full agreement for the LTL Standards as endorsed, particularly in relation to bobby calves,⁶⁷ as well as criticism of the standards development process by the RSPCA.⁶⁸ Moreover, the detail of the standards and guidelines, as well as the lengthy process, make it difficult to assess the extent to which animal welfare interests were taken into account. In addition, the complexity of the standards and guidelines, as well as the focus on technical and economic analysis in the 263-page RIS, do not facilitate participation by ordinary members of the public. Commenting on the public response, one of AHA's managerial staff stated:

There were 45 organisational written submissions and 72 personal submissions. This moderate response is thought to indicate a low level of concern with the development process and the standards and guidelines. This was supported by a lack of focus on a specific issue – there was a wide range of issues mentioned. It is also believed that the complexity of the Land Transport Standards and Guidelines and the RIS may have deterred those not truly motivated to respond.⁶⁹

An alternative explanation is that individual members of the public who feel strongly about the issues nevertheless lacked the confidence to engage in the process in an informed way. Arguably of relevance here is a point that has been made in a different context - that 'an official discourse of inclusiveness and bureaucratic rationality' may 'shroud

65 Animal Health Australia (2008), *Australian Standards and Guidelines for the Welfare of Animals - Land Transport of Livestock*, Draft for Endorsement, vii.

66 Animal Health Australia, above n 53, 11.

67 Animal Health Australia, above n 65, vii.

68 Animal Health Australia, above n 53, 11.

69 Kevin de Witte, 'Development of the Australian animal welfare standards and guidelines for the land transport of livestock' (Paper presented at the AAWS International Animal Welfare Conference, Gold Coast, Queensland, 31 August – 3 September 2008) 11.

<http://www.daff.gov.au/__data/assets/pdf_file/0009/1046394/22-kevin-de-witte.pdf>.

substantial interest group influence from public scrutiny'.⁷⁰ As currently structured, the standards development process is vulnerable to the charge that it pays lip service not only to animal welfare but also to that degree of effective public engagement in subordinate lawmaking that the rule of law would seem to require.

Enforcement

While the envisaged adoption of updated national codes as legally enforceable standards may go some way to decreasing uncertainty in relation to livestock, it will not ameliorate the major failings of animal welfare law. First, the disproportionate influence of industry interests suggests that animal welfare will continue to be a marginal rather than central consideration in the law's content. Secondly, only the standards, not the guidelines will be mandatory. Thirdly, standards are only of value if they are enforced. While law enforcement in any field typically yields issues about resources and the exercise of discretions, particular problems arise with respect to the regulation of animal welfare. In part this is a function of the inability of animals to articulate their own experience in terms acceptable to humans and the fact that the law denies them any direct legal claim. Also significant, however, is that the bulk of the enforcement function is carried out by private charities, principally the Royal Society for the Prevention of Cruelty to Animals ('RSPCA').

In NSW, the Act invests three agencies with an enforcement function: the police, officers authorised by the Minister, or the Director General or a Deputy Director-General of the Department of Primary Industries, and approved charitable organizations.⁷¹ In practice, the police have a very limited role in relation to animal welfare, other than investigating the animal cruelty offences inserted into the *Crimes Act 1900* (NSW) in 2007.⁷² Similarly, primary industries officers are not directly involved in enforcement of the Act,⁷³ although the department is responsible for its administration. This leaves the bulk of enforcement to the two charitable organisations approved in accordance with s34B of the Act:

70 Mark Burton, 'Chaos, Rhetoric and the Legitimation of 'Democratic Government': A Critical Review of Australia's Tax Legislative Process' (2007) 29 Sydney Law Review 613, 613.

71 Section 4(1); s24D.

72 Sections 530, 531.

73 Section 8(4) requires the advice of the Department with respect to the prosecution of a person for failing to provide food, water or shelter to stock animals on certain land.

RSPCA NSW and the Animal Welfare League NSW ('AWL'). The AWL's role is relatively minor, leaving the RSPCA as the major law enforcement body in NSW.⁷⁴ Even in jurisdictions where the department administering the relevant legislation has a more active role, the RSPCA usually retains a significant enforcement function. In Queensland, for example, the Department of Primary Industries and Fisheries and the RSPCA share the enforcement function by mutual agreement, with the former largely responsible for stock animals and the latter primarily for companion animals.⁷⁵

Criminal law enforcement is the archetypal state function. The state traditionally prosecutes criminal offences because the interests of the whole community, not just individual victims, are considered to be at stake; by this process, the law recognises and reaffirms values and interests deemed worthy of protection. At the same time, the coercive power inherent in the criminal justice process demands safeguards for those affected by it. These are traditionally afforded not only by the requirements of transparency and accountability associated with our system of representative and responsible government but by comprehensive legal rules, embodying ideas of procedural fairness and restraint of power. As the High Court has noted,

'a criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have been developed for the conduct of criminal trials therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious.'⁷⁶

In the case of criminal proceedings for animal cruelty,⁷⁷ the con-

74 The Prevention of Cruelty to Animals Amendment (Prosecutions) Act 2007 (NSW) removed the right to bring a private prosecution under the Act.

75 Steven White, 'Regulating Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?' (2005) 35 *Federal Law Review* 347, 351.

76 *R v Carroll* (2002) 213 CLR 635, 643 (Gleeson CJ and Hayne J).

77 For a consideration of the appropriateness of various regulatory responses to animal cruelty/welfare see, eg, Geoff Bloom, 'Regulating animal welfare to promote and protect improved animal welfare outcomes under the Australian Animal Welfare Strategy', (paper presented at AAWS International Animal Welfare Conference, Gold Coast, Queensland, 31 August – 3

sequences of conviction may be serious⁷⁸ but it is by no means 'obvious' that the resources of the prosecutor are much greater than the accused. Not only may private charities lack procedural expertise in relation to criminal investigations,⁷⁹ but successive governments have failed to resource the relevant bodies in a manner commensurate with the magnitude and complexity of the enforcement task. In 2008-2009, for example, RSPCA NSW received \$424,000 from the government for its inspectorial function.⁸⁰ Although this sum may be augmented by donations from members of the public and the assistance of pro bono lawyers, the resources available for enforcement reflect the charitable basis of the enterprise.

It is unsurprising then that the RSPCA undertakes very limited routine investigative activity,⁸¹ where complaints are investigated, it is likely that prosecution is reserved for the most serious cases,⁸² although it is difficult to establish the scope and detail of the enforcement process. First, the annual reports of the ACOs are limited in the information they contain. Since 2005, for example, written notices and penalty notices have been part of the armoury of enforcement options contained in the Act⁸³ yet data about their use is not included in the RSPCA's Annual Reports. Secondly, where information about enforcement activities is readily accessible, it may appear to be inconsistent with other publicly available data. For example, according to RSPCA NSW, there were

September 2008). <http://www.daff.gov.au/__data/assets/pdf_file/0003/1041951/regulating-aw-geoff-bloom.pdf>.

78 For discussion and critique of sentencing issues with respect to animal cruelty see, eg, 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 and Keely Boom and Elizabeth Ellis, 'Enforcing Animal Welfare Law: the NSW Experience' (2009) 3 *Australian Animal Protection Law Journal* 6.

79 For example, the Animal Cruelty Taskforce found no guarantee that a guilty person's fingerprints would be taken or a notation made on their criminal record where the investigation was carried out without police involvement. See NSW, *Parliamentary Debates, Legislative Assembly*, 9 November 2005, 19387 (Sandra Nori).

80 NSW RSPCA Annual Report 2008-2009, 46-47.

81 For example, only 55 routine inspections were carried out in 2008-2009 in NSW: RSPCA Australia, *National Statistics, 2008-2009*, Table 5.

82 White, above n5, 354.

83 Sections 24N, 33E inserted by the *Prevention of Cruelty to Animals Amendment Act 2005* (NSW).

704 charges approved to commence in 2006-2007 but the NSW Bureau of Crime Statistics and Research figures show 468 finalised charges for the same period.⁸⁴ While the Act requires ACOs to account in greater depth with respect to their enforcement activities,⁸⁵ the recipient is the Minister for Primary Industries, whose incongruous administration of animal welfare has already been noted. Moreover, in jurisdictions where government agencies are involved in enforcing the law in relation to farmed animals, little information about their activities is made publicly available.⁸⁶ Delegation of a penal function to a charitable body sits uncomfortably with the rule of law but it is too glib to assume that government assumption of all responsibility in this field would automatically lead to greater transparency or, indeed, different enforcement practices.

Without access to comprehensive information about enforcement it is difficult to evaluate the efficacy of law's protective role in relation to animals. It is clear, however, that the capacity of law to act as a windbreak is severely curtailed if adequate resources are not available to enforce the existing regime. Moreover, it is arguable that concerns other than animal welfare have motivated some penal provisions. In 2009, for example, POCTAA was amended by the insertion of s35(3) to allow the creation by regulation of offences with substantially increased maximum penalties in relation to animal trades and layer hens.⁸⁷ Although ostensibly 'aimed at improving the welfare of caged layer hens',⁸⁸ this amendment has been criticised as being less concerned with animal welfare than with giving large egg producers an advantage over their smaller competitors.⁸⁹ As already discussed, any disjunction between the actual aims of legislation and its purported objects creates uncertainty in its interpretation and is at odds with the principle of legality.

84 See Boom and Ellis, above n 78.

85 Section 34B(3)-(4); reg 25.

86 White, above n75, 357.

87 Prevention of Cruelty to Animals Amendment Act 2009 (NSW).

88 New South Wales, Parliamentary Debates, Legislative Assembly, 25 September 2009, 18215 (David Harris).

89 New South Wales, Parliamentary Debates, Legislative Council, 10 November 2009, 19138 (Ian Cohen).

Conclusion

Although the problems identified in this article are typical of a range of regulatory endeavours, the shortcomings are particularly serious in the case of animal welfare because animals are sentient beings yet exploited for human ends. Moreover, this occurs within a legal paradigm that treats animals as private property and in which they are powerless to assert their own interests. In these circumstances, it might be expected that governments would be fastidious in ensuring law's protective role; in fact, nearly every facet of this function is diminished. First, despite government rhetoric, the law accords only limited concessions to animals within a regulatory framework in which private industry, in collaboration with the executive arm, wields significant influence.⁹⁰ Secondly, the extent to which animal welfare is taken seriously is unclear because much of the law's development occurs at a subordinate level that lacks the transparency and exposure of the parliamentary process. Thirdly, the unique reliance on inadequately resourced private bodies to enforce a penal statute puts at risk those interests which the law purports to protect, as well as subverts the traditional relationship between the state and its citizens in relation to the criminal justice process. As noted at the outset, the idea of the rule of law is vulnerable to challenge⁹¹ but greater attention to its minimum requirements, in conjunction with the overlapping democratic values of transparency, accountability and public participation, would have the merit of increasing public awareness of animal welfare and providing a more informed basis for debate.

According to a former Chief Justice, '[i]n a democracy, the rule of law is not achieved by raw power but by public acceptance of the law and by public confidence in the institutions which promulgate and

90 This influence is not confined to livestock. In relation to companion animals, for example, the relevant Codes of Practice are produced within the Division of Primary Industries, with industry routinely cited first among the stakeholders consulted in the process. See, eg, Animal Welfare Code of Practice – Animals in Pet Shops (2008) 2.

91 Apart from the more usual criticisms, substantive versions of the rule of law embodying political philosophies based on human rights are inherently problematic for nonhuman animals who are regarded as a species of property. For a critique of the property status of animals see, eg, Gary Francione, "Animals – Property or Persons?" in Cass R. Sunstein and Martha C. Nussbaum, *Animal Rights: Current Debates and New Directions* (2004, Oxford University Press) 108.

administer it.⁹² This article has sought to demonstrate serious flaws in the regulation of animal welfare, both in the law and its administration. The inconsistent and uncertain nature of the language and structure of animal welfare legislation, the partiality and lack of accountability in its development, and the restricted access to the courts to enforce its breach all militate against public confidence in the current regulatory regime. To the extent that existing animal welfare law does command public support, this is arguably more a function of ignorance than acceptance.⁹³

In the context of the current regime, it seems there is no escaping the irony of Murray Gleeson's idea of law as a windbreak or shelter. Just as animal 'shelters' routinely destroy thousands of unwanted animals,⁹⁴ much of the legal protection afforded to animals is illusory. In relation to animal welfare then, it would seem that Philip Ruddock has little to fear – in important ways both the making of the sausages and the making of the law about the making of the sausages are hidden from the public gaze.

92 Sir Gerard Brennan, 'The Third Branch and the Fourth Estate', Faculty of Law, University College, Dublin cited in President's Report, Extra Judicial Notes, (1997) 16 Australian Bar Review 2, 2.

93 See above n9.

94 The RSPCA, for example, euthanased 72,309 dogs, cats and other animals in 2008-09. RSPCA Australia, National Statistics, 2008-2009, Table 2.

Appearing Amicus Curiae in Proceedings Involving Animal Interests

CAN A FRIEND OF THE ANIMALS BE A ‘FRIEND OF THE COURT’?

*Angela Radich*¹

At present, the voices of those who wish to speak on behalf of animals are rarely heard in Australian courts. The rules in relation to standing, the risk of adverse costs orders and a general lack of resources, amongst other things, collude to keep animal protection advocates out of the court room. As a result, there has been very little judicial consideration of our current animal welfare laws. While such laws are widely accepted by animal protection advocates as being inadequate in terms of ensuring animal welfare, many aspects remain untested in the courts. There have certainly been very few court decisions that have meaningfully progressed animal welfare. Clearly much more needs to be done to advance the interests of animals in our legal system.

This paper explores the possibility of animal protection advocates appearing *amicus curiae* in proceedings involving animal interests, as an alternative to initiating their own proceedings. It commences with a description of the traditional role of an *amicus curiae* and the use of *amicus curiae* briefs by animal protection groups in the United States. It then turns to an examination of the principles governing the grant of leave to appear *amicus curiae* in Australia, and in particular the grant of leave in public interest cases. Finally this paper considers the opportunities *amicus curiae* applications may present to Australian animal protection advocates. It is suggested that appearing *amicus curiae* may be a valuable tool for those seeking to advocate for the protection of animal interests.

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What does it mean to appear as *amicus curiae*?

Amicus curiae is a latin phrase that, when translated literally, means “friend of the court”.² The *amicus curiae* is a construct of the common law based on the inherent jurisdiction of a court to request assistance with its deliberations from members of the legal profession.³ An *amicus curiae* traditionally had the role of drawing the court’s attention to relevant authorities, points of law or relevant facts that may not otherwise be put before the court.⁴

It should be noted at the outset that the role of an *amicus curiae* is limited and is distinct from the role of an intervener. An intervener becomes a party to the proceedings (although limited to a particular issue or issues⁵) whose role carries all the benefits and burdens of that status.⁶ For example, an intervener may, in an appropriate case, file pleadings, adduce evidence, call and cross-examine witnesses, pursue an appeal and have costs awarded for and against it.⁷ A person appearing *amicus curiae* does not become a party to the proceedings and is unable to participate to the same degree.

The level of participation by an *amicus curiae* in a particular case is a matter within the discretion of the court.⁸ In most cases, an *amicus* will make written (and sometimes also oral) submissions.⁹ An *amicus* may

2 George Williams, ‘The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis’ (2000) 28 FLR 365, 366.

3 Ibid 367.

4 Claire Harris, ‘The Role of Amicus as a Form of Public Leadership?’, Public Law Weekend, 1 November 2008, 2.

5 R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ellis (1954) 90 CLR 55, 69 (Kitto J).

6 See Corporate Affairs Commission v Bradley; Commonwealth (Intervener) [1974] 1 NSWLR 391, 396 (Hutley JA); United States Tobacco Company v Minister for Consumer Affairs (1988) 20 FCR 520, 534 to 534 (Davies, Wilcox and Gummow JJ).

7 Susan Kenny, ‘Interveners and Amicus Curiae in the High Court’ (1998) 20 Adel L Rev 159, 159.

8 Williams, above n 2, 377.

9 See Garcia v National Australia Bank Ltd (1998) 194 CLR 395; Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355; Breen v Williams (1994) 35 NSWLR 522, 533 (Kirby P); Commissioner of Taxation v Scully (2000) 201 CLR 148, [76] to [81] (Kirby J).

also tender non-controversial evidence with the consent of the parties.¹⁰ Persons appearing *amicus curiae* have not, in the past, been permitted to file pleadings, initiate an appeal, inspect documents discovered by the parties, participate in interrogatories or tender controversial or complex evidence that may impose additional costs on the parties.¹¹ Importantly, a costs order will not normally be made against an *amicus*.¹² Even if a costs order is made, it is usually limited to the additional costs of having the *amicus* appear and will generally not extend to the costs of the broader proceedings.¹³

Use of *amicus curiae* briefs in the United States

In the United States interest groups seek to influence policy in a wide array of venues, including the courts. For such groups the level of participation in the litigation process ranges from holding vigils outside courts while awaiting the outcome of cases touching on the group's interests to the initiation of test cases.¹⁴ However the most common method of participation in matters before the United States Supreme Court is the filing of *amicus curiae* briefs¹⁵ (i.e. written submissions).

10 Bropho v Tickner (1993) 40 FCR 165, 172 (Wilcox J); National Australia Bank Ltd v Hokit Pty Ltd (1996) 39 NSWLR 377, 382 (Mahoney P).

11 See Corporate Affairs Commission v Bradley; Commonwealth (Intervener) [1974] 1 NSWLR 391, 399 (Hutley JA); United States Tobacco Company v Minister for Consumer Affairs (1988) 20 FCR 520, 534 to 535 (Davies, Wilcox and Gummow JJ); Bropho v Tickner (1993) 40 FCR 165, [23] (Wilcox J); Kenny, above n 7, 160; Human Rights Law Resource Centre Ltd and Blake Dawson, Why are Non-Parties Non-Starters? A Call for Clearer Procedures and Guidelines for Amicus Curiae Applications in Victoria, Submission to the Victorian Law Reform Commission Civil Justice Review, November 2006, 6. In relation to reviewing documents discovered by the parties see the comments made by the Court in United States Tobacco Company v Minister for Consumer Affairs (1988) 20 FCR 520, 538 to 539 (Davies, Wilcox and Gummow JJ).

12 Williams, above n 2, 368. Note in Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355 the appellants sought a costs order against the 11 amici curiae, however the High Court declined to make such an order – see Kenny, above n 7, 167.

13 National Australia Bank Ltd v Hokit Pty Ltd (1996) 39 NSWLR 377, 382 (Mahoney P); Human Rights Law Resource Centre Ltd and Blake Dawson, above n 11, 6.

14 Paul M Collins Jr, 'Friends of the Court: Examining the Influence of Amicus Curiae in Participation in U.S. Supreme Court Litigation' (2004) 38 Law & Society Review 807, 807.

15 Wendy L Martinek, 'Amicus Curiae in the U.S. Courts of Appeal', paper presented at Annual Meeting of the Midwest Political Science Association, 7-10 April 2005, 2.

Amicus curiae briefs are a staple of interest group participation in the United States and are filed in almost every case the Supreme Court accepts for review.¹⁶ The ease with which *amicus curiae* briefs may be filed in the Supreme Court is to be noted. The starting point is United States Supreme Court Rule 37(1) which provides:

An *amicus curiae* brief that brings to the attention of the Court a relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

An *amicus curiae* brief may be filed with the consent of all parties or if the Supreme Court grants leave.¹⁷ Parties in matters raising issues of public importance usually provide their consent to the filing of *amicus curiae* briefs.¹⁸ If consent is refused, the party seeking to appear *amicus* must file a motion for leave to file an *amicus* brief indicating the party or parties that do not consent to the filing of the brief and the nature of the person's interest in the proceedings.¹⁹ Leave is almost always granted.²⁰ In contrast, the opportunity to make oral submissions is much more limited. If the parties do not consent, the Supreme Court will only grant leave "in the most extraordinary circumstances".²¹

A large number of *amicus curiae* briefs are filed in the United States Supreme Court each year. For example, *amicus curiae* briefs were filed in 92% of the cases decided by the Supreme Court in 1993, when some 550 *amicus curiae* briefs were filed in the 95 cases decided - about six per case.²² In *Webster v Reproductive Health Services*,²³ a case concerning the constitutionality of an attempt to restrict access to abortion services, 78 *amicus curiae* briefs were filed by 420 interested persons or organisations.²⁴ There is a tendency for persons appearing as *amicus curiae* to argue in support of one of the parties and for numerous

16 Collins, above n 14, 807.

17 Rule 37(3), United States Supreme Court Rules.

18 Williams, above n 2, 375.

19 Rule 37(2)(b), United States Supreme Court Rules.

20 See Williams, above n 2, 375.

21 Rule 28(7), United States Supreme Court Rules.

22 See Williams, above n 2, 375.

23 *Webster v Reproductive Health Services* 492 US 490 (1989).

24 See Williams, above n 2, 375.

amicus briefs to be filed, leading to a ‘piling’ of support for one party or another.

There is strong empirical evidence that *amicus curiae* briefs are influential in shaping the decisions reached by the United States Supreme Court.²⁵ Research also suggests it is the content of the *amicus* briefs that influences the court, rather than the mere presence of the briefs in support of one party or another.²⁶

Amicus curiae participation in the United States Courts of Appeals is subject to virtually identical requirements as the filing of *amicus curiae* briefs in the United States Supreme Court.²⁷ While *amicus* briefs are filed in smaller percentage of Court of Appeal cases, in terms of the raw number of briefs filed the majority of *amicus* participation occurs in these lower courts (being the final federal courts of appeal in most instances).²⁸ However, given its place in the judicial hierarchy and the nature of the cases it hears, the Supreme Court has been the focus of most discussion of *amicus curiae* participation in United States courts.

As with other interest groups, animal protection organisations operating in the United States have used *amicus curiae* briefs in an attempt to influence judicial decision-making. For example, the United States Supreme Court case *United States v Stevens*²⁹ attracted a number of *amicus curiae* briefs filed on behalf of animal protection organisations. That case concerned the constitutional validity of a federal statute that made it an offence to create, possess or sell videos of animal cruelty.³⁰ The proceedings were an appeal from a decision of the United States Court of Appeals for the Third Circuit which declared the statute to be an unconstitutional abridgment of the First Amendment. *Amicus curiae* briefs supporting the validity of the statute were filed by animal protection organisations, including the International Society for Animal Rights, the Humane Society of the United States, the Animal Legal Defense Fund and the American Society for the Prevention of Cruelty to

25 Ibid 376; Collins, above n 14, 808.

26 Collins, above n 14, 807.

27 Martinek, above n 15, 3.

28 Paul Collins Jr and Wendy Martinek, ‘Amicus Participation in the U.S. Courts of Appeals’, paper presented at Annual Meeting of the Southern Political Science Association, 6 January 2010.

29 559 U. S. ____ (2010).

30 International Society for Animal Rights, Animals in Court

<http://isaronline.blogspot.com/2009/07/animals-in-court_30.html> at 3 October 2009.

Animals (amongst other interested persons).³¹ *Amicus curiae* briefs in support of a finding of invalidity were filed by a large number of booksellers, entertainers, reporters, hunters and other free speech advocates. This led International Society for Animal Rights to comment that the filing of *amicus curiae* briefs in the *Stevens* case was a microcosm of what the animal protection movement is up against in the courts of the United States.³² Although the Supreme Court ultimately held the statute to be invalid, the proceedings “shined a spotlight on graphic videos depicting pit bull fights and other acts of animal cruelty”.³³

Animal protection advocates have also filed *amicus curiae* briefs in a range of other United States courts. For example:

- The Humane Society of the United States filed an *amicus* brief in the United States Court of Appeals for the Fifth Circuit, submitting that the Court ought to reverse a district court's ruling that the State of Texas does not have authority to enforce a law prohibiting the sale, possession, and transfer of horsemeat. The Court of Appeals upheld the Texas law.³⁴
- The Animal Legal Defense Fund filed an *amicus* brief in the California Court of Appeal in support of a West Hollywood ordinance prohibiting non-therapeutic declawing of domestic companion cats (a practice that is excruciatingly painful). The California Veterinary Medical Association (“CMVA”) had commenced proceedings against the city of West Hollywood arguing the ordinance was preempted by State law regarding the practice of veterinary medicine. The CVMA was successful at first instance but on appeal the trial court's order

31 Ibid.

32 Ibid. In that case the law was supported by the Obama administration and 26 States of the United States – see MSNBC, Justices Reject Ban on Animal Cruelty Videos (2010) <http://www.msnbc.msn.com/id/36664233/> at 4 May 2010.

33 Mark Sherman, Court Takes up Free-Speech Case of Pit Bull Videos (2009) <<http://www.guardian.co.uk/world/feedarticle/8741821>> at 8 October 2009 and see the media articles on the case listed in Hanseul Kang, United States v. Stevens (2010) <http://www.scotuswiki.com/index.php?title=United_States_v._Stevens#Amicus_Briefs> at 4 May 2010.

34 The Humane Society of the United States, Empacadora, et al v Curry <http://www.hsus.org/in_the_courts/legal_victories/tx_horseslaughter.html> at 8 October 2009.

was reversed by the California Court of Appeal, and thus the declawing ban was reinstated.³⁵

- The Humane Society of the United States filed an *amicus* brief in the New Mexico Court of Appeals in support of a New Mexico law banning cockfighting. The law had been challenged by cockfighting supporters on the basis that the 1848 Treaty of Guadalupe Hidalgo, which ended the Mexican-American War, conferred a right to engage in cockfighting. The Humane Society filed *amicus* briefs in support of the State of New Mexico in both the trial court and in the Court of Appeals. The anti-cockfighting law was upheld by both courts.³⁶

These are but a few examples of the numerous cases in which *amicus curiae* briefs have been filed by animal protection groups in the United States. While the length of this paper does not permit a detailed examination of the use of *amicus curiae* briefs by United States animal protection advocates, it is evident that *amicus* briefs are important tools used by such advocates to promote the protection of animal interests.

35 California Veterinary Medical Association v. City of West Hollywood, 152 Cal. App. 4th 536 (2007) as cited in Schiff Hardin LLP, Cats Keep their Claws in West Hollywood <http://www.schiffhardin.com/EXP-LIT-ALDF_West_Hollywood.htm> at 8 October 2009.

36 The Humane Society of the United States, New Mexico Court of Appeals Rejects Bid to Resume Cockfighting (2009) <http://www.hsus.org/press_and_publications/press_releases/nm_court_rejects_bid_to_resume_cockfighting_051109.html> at 15 November 2009.

Appearing *amicus curiae* in Australian courts

In *Bropho v Tickner* Wilcox J observed:³⁷

In Australia, as distinct from the position in the United States, the intervention of an *amicus curiae* is a relatively rare event; the *amicus*' role normally being confined to assisting the court in its task of resolving the issues tendered by the parties by drawing attention to some aspect of the case which might otherwise be overlooked.

Australian courts have an inherent jurisdiction to regulate their own proceedings, which includes the power to grant leave to an individual or organisation to appear *amicus curiae*.³⁸ This allows the court to ensure that it is properly informed of matters it ought to take into account in reaching its decision.³⁹ The grant of such leave is entirely within the court's discretion.⁴⁰ Significantly, an *amicus curiae* does not need to show any proprietary, material or financial interest in the proceeding.⁴¹ It is also notable that in Australia, unlike the position in the United States, in most cases only one *amicus curiae* appears.⁴²

Unfortunately, there is a lack of clear and consistent guidance as to the circumstances in which leave will be granted for an *amicus curiae* to appear.⁴³ This is partly due to the tendency of the courts not to provide reasons (or at least detailed reasons) why a particular application has been granted or refused. Further, when reasons are given they often reveal inconsistency in the application of the relevant principles.⁴⁴ In

37 *Bropho v Tickner* (1993) 40 FCR 165, 172.

38 *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520, 534 (Davies, Wilcox and Gummow JJ); Williams, above n2, 366.

39 *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520, 534 (Davies, Wilcox and Gummow JJ).

40 *Levy v Victoria* (1997) 189 CLR 579, 604 (Brennan CJ).

41 Kenny, above n7, 160.

42 Williams, above n2, 387. However it is notable that in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 the High Court granted 11 persons leave to appear as amici curiae and a collective amicus application was made (although not granted) in *Brandy Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

43 *Human Rights Law Resource Centre Ltd and Blake Dawson*, above n 11, 12 and 13.

44 See Williams, above n2, 376 to 377.

this regard, Kirby J has commented that the High Court's approach to *amicus curiae* applications "may seem to an outsider to be unpredictable and inconsistent".⁴⁵ It also appears that the various Australian courts take slightly different approaches to the grant of leave to appear *amicus curiae*.⁴⁶ This lack of clarity has given rise to a number of proposals for law reform in the area of *amicus* intervention.⁴⁷

Given the current state of the law, this paper will merely provide a snapshot of key principles various courts have applied when considering applications to appear *amicus curiae*. Before turning to those principles, it is useful to briefly consider the development of the current approach of Australian courts.

The courts initially took a very narrow view of the circumstances in which an *amicus curiae* may be granted leave to appear.⁴⁸ The early approach reflected a view that *amicus* participation was contrary to the adversarial system of litigation and the judicial process; the principal object of litigation being the resolution of a dispute between the parties on the basis of the evidence and arguments provided by the parties.⁴⁹

The classic statement of the narrow approach is set out in *Australian Railways Union v Victorian Railways Commissioners*, where Sir Owen Dixon said:⁵⁰

I think we should be careful to allow arguments only in support of some right, authority or other legal title set up by the party intervening. Normally parties, and parties alone, appear in litigation... The discretion to permit appearances by counsel is a very wide one; but I think we would be wise to exercise it by allowing only those to be heard who wish to maintain some particular right, power or immunity in which they are concerned, and not merely to intervene to contend for what they

45 Attorney General (Cth) v Breckler (1999) 197 CLR 83, [107] (Kirby J).

46 See, for example, Levy v Victoria (1997) 189 CLR 579, 651 (Kirby J).

47 See, e.g., Williams, above n2, 399; Kenny, above n7, 169; Owens, R. J., 'Interveners and Amicus Curiae: The Role of the Courts in a Modern Democracy' (1998) 20 Adel L Rev 193, 197.

48 See Corporate Affairs Commission v Bradley [1974] 1 NSWLR 391.

49 Kenny, above n 7, 167. See also Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330 at 357 (Griffith CJ); R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361, 374 (Kitto J).

50 Australian Railways Union v Victorian Railways Commissioners (1930) 4 CLR 319, 331.

consider to be a desirable state of the general law under the Constitution without regard to the diminution or enlargement of the powers which as States or as Commonwealth they may exercise.

In the absence of any formal rules governing *amicus* intervention, the statement made by Sir Owen Dixon in *Australian Railways* became the benchmark for many years.⁵¹ Sir Anthony Mason has commented that this narrow approach was virtually destructive of the role of *amicus* and was fashioned to meet the High Court's adjudicative function, rather than its law-making function.⁵² The courts have now moved away from such a narrow approach.

Core principles currently governing the grant of leave to appear *amicus curiae* were enunciated by Brennan CJ in *Levy v State of Victoria*:⁵³

The footing on which an *amicus curiae* is heard is that the person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted.

Brennan CJ went on to say:⁵⁴

It is not possible to identify in advance the situations in which the Court will be assisted by submissions that will not or may not be presented by one of the parties nor to identify the requisite capacities of an *amicus* who is willing to offer assistance. All that can be said is that an *amicus* will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the *amicus* is not disproportionate to the assistance that is expected.

51 Jason L Pierce 'The Road Less Travelled: Non-Party Intervention and the Public Litigation Model in the High Court' 28 *Alternative Law Journal* 69, 70.

52 Anthony Mason, 'International Amici Curiae in the High Court: A Comment' (1998) 20 *Adel L Rev* 173, 173.

53 *Levy v State of Victoria* (1997) 189 CLR 579, 604.

54 *Ibid.*

Therefore in exercising its discretion a court must usually first determine what material is likely to be put before it, and then what other material, if any, is likely to assist.⁵⁵ Leave to appear *amicus curiae* is often refused on the basis that the parties are able to adequately assist the court.⁵⁶

While the courts have recognised the valuable role an *amicus curiae* may play (particularly in matters before the High Court⁵⁷ and the final State courts of appeal⁵⁸), the cases also reflect a judicial concern to control the intervention of persons appearing *amicus curiae* to ensure proceedings between parties continue to be fairly and efficiently dealt with.⁵⁹ The courts are aware that involvement of an *amicus curiae* can expand inappropriately the range of issues in dispute, lengthen the hearing unduly and impose a greater costs burden on the parties.⁶⁰

To ensure the appropriate balance is struck, the courts have generally asked the following questions in deciding whether to grant an application for leave to appear *amicus curiae*:⁶¹

- Do public interest issues arise⁶² or do the proceedings affect the community generally.⁶³

55 Lindy Willmott, Ben White and Donna Cooper, 'Interveners or Interferers: Intervention in Decisions to Withhold and Withdraw Life-Sustaining Medical Treatment' (2005) 27 Sydney Law Review 597, 618.

56 See, for example, *Broken Hill Pty Co Ltd v National Companies and Securities Commission* (1986) 160 CLR 492, 503 (Mason J speaking for the Court) where the public interest was adequately served by the defendant; Transcript of Proceedings, *Brandy v Human Rights and Equal Opportunity Commission* (High Court of Australia, Mr J Basten QC, 4 October 1994) where the Public Interest Advocacy Centre conceded it was not there to fill a gap left by the other parties.

57 See *Breen v Williams* (1994) 35 NSWLR 522, 532 to 533 (Kirby P); *Levy v State of Victoria* (1997) 189 CLR 579, 650 to 652 (Kirby J); *Attorney General (Cth) v Breckler* (1999) 197 CLR 83, [104] to [106] (Kirby J); Transcript of Proceedings, *Wurridjal v Commonwealth* (High Court of Australia, Kirby J, 2 October 2008).

58 See *National Australia Bank v Hokit Pty Ltd* (1996) 39 NSWLR 377, 381 (Mahoney P).

59 See *Breen v Williams* (1994) 35 NSWLR 522, 533 (Kirby P); *National Australia Bank v Hokit Pty Ltd* (1996) 39 NSWLR 377, 382 (Mahoney P); *Levy v State of Victoria* (1997) 189 CLR 579, 651 (Kirby J).

60 *Bropho v Tickner* (1993) 40 FCR 165, 172 (Wilcox J); Kenny, above n 7, 167.

61 See *Human Rights Law Resource Centre Ltd and Blake Dawson*, above n 11, 11.

62 *National Australia Bank v Hokit Pty Ltd* (1996) 39 NSWLR 377, 381 (Mahoney P).

- Will the court be assisted in deciding the instant case and in formulating principles of law.⁶⁴
- Does the prospective *amicus curiae* have some expertise, knowledge, information or insight that the parties are unable to provide.⁶⁵
- Is it in the interests of justice for the *amicus curiae* to be permitted to appear.⁶⁶
- Is it in the parties' interest to allow intervention by the *amicus curiae*.⁶⁷
- Will the intervention occupy time unnecessarily and will any delay unnecessarily prejudice the parties.⁶⁸
- Will the intervention of the *amicus curiae* add inappropriately to the costs of the proceedings.⁶⁹

As noted earlier, factors such as these have not been applied by the courts in a consistent manner and in many cases reasons have not been given for granting or refusing leave to appear *amicus curiae*. So it is difficult to predict the outcome of an application in a particular case.⁷⁰

Similarly, research and debate on the influence persons appearing *amicus curiae* have on the cases in which they appear has not progressed far in Australia.⁷¹ However, it can be seen from the cases that submissions made by an *amicus curiae* have the potential to heavily influence the decision of the court. For example, in *Project Blue Sky v*

63 *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520, 534 (Davies, Wilcox and Gummow JJ).

64 *Breen v Williams* (1994) 35 NSWLR 522, 533 (Kirby P); *National Australia Bank v Hokit Pty Ltd* (1996) 39 NSWLR 377, 381 (Mahoney P); *Levy v State of Victoria* (1997) 189 CLR 579, 605 (Brennan CJ).

65 See *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520, 538 (Davies, Wilcox and Gummow JJ); *Levy v State of Victoria* (1997) 189 CLR 579, 604 (Brennan CJ).

66 *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520, 534 (Davies, Wilcox and Gummow JJ).

67 *National Australia Bank v Hokit Pty Ltd* (1996) 39 NSWLR 377, 381 (Mahoney P).

68 *Ibid*; *Levy v State of Victoria* (1997) 189 CLR 579, 605 (Brennan CJ).

69 *National Australia Bank v Hokit Pty Ltd* (1996) 39 NSWLR 377, 381 to 382 (Mahoney P).

70 *Williams*, above n 2, 398.

71 *Harris*, above n 4, 1.

*Australian Broadcasting Authority*⁷² the submissions made by the *amici curiae* were accepted by the High Court and were critical to the outcome of the case.⁷³ Equally, though, submissions made by an *amicus* may be entirely rejected by the court.

Given the complexity of judicial decision-making, it is difficult to predict the impact submissions made by an *amicus curiae* may have in a particular case. Nonetheless, it is suggested that prospects of any proposed submission being accepted by the court is a matter that ought to be carefully considered in deciding whether to make an application to appear *amicus curiae*.

Appearing *amicus curiae* in the public interest

Traditionally, persons appearing *amicus curiae* were disinterested bystanders seeking to assist the court by providing relevant information that had been overlooked or was otherwise unavailable.⁷⁴ More recently, public interest organisations have sought to appear *amicus curiae* to advance a particular policy position or a specific public good, such as the promotion of equality.⁷⁵ The public interest issues that have already attracted a grant of leave to appear *amicus* include the environment,⁷⁶ abortion,⁷⁷ access to fertility treatment,⁷⁸ euthanasia,⁷⁹

72 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.

73 Williams, above n2, 380. For other examples see *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301; *National Australia Bank v Hokit Pty Ltd* (1996) 39 NSWLR 377, 401-402 and 406 (Clarke JA).

74 See *Corporate Affairs Commission v Bradley; Commonwealth (Intervener)* [1974] 1 NSWLR 391, 398 to 399 (Hutley JA) as cited in *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520, 534 to 535 (Davies, Wilcox and Gummow JJ).

75 Williams, above n2, 368.

76 *Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1.

77 *Superclinics Australia Pty Ltd v CES* [1996] HCATrans 357.

78 *McBain v Victoria* [2000] 99 FCR 116.

79 *Re BMW; Ex parte Gardner* (2003) 7 VR 487.

human rights,⁸⁰ freedom of political expression⁸¹ and consumer protection.⁸²

In most cases before the courts the submissions of the parties are naturally constrained by the object of seeking to achieve victory in that case and by the facts of the particular matter.⁸³ Additionally, there may be no incentive for the parties to make submissions on issues necessary to formulate principles to be applied in like cases.⁸⁴ Therefore, where issues of wider significance arise, public interest organisations appearing *amicus curiae* may play a valuable role in bringing to the court's attention relevant matters beyond the litigation between the parties. Such matters may include principles of law, policy, facts and ethical questions.⁸⁵ It is through the participation of public interest groups that courts are most likely to gain a more complete understanding of the impact of their decisions on the wider community.

As the early approach of Australian courts reflected a view that *amicus* participation was contrary to the adversarial system of litigation and the judicial process, courts have not until recently favoured the participation of public interest groups as *amicus curiae*.⁸⁶ However the last 20 years have seen an increased willingness by the courts to allow applications made by public interest groups.⁸⁷ It is also now accepted that an *amicus curiae* may participate in partisan advocacy, although it is equally accepted that they may not take over the management of the case.⁸⁸

In recent times, public interest organisations have been granted leave to appear *amicus curiae* in some important cases. For example, in *Commonwealth v Tasmania (The Tasmanian Dam Case)*⁸⁹ counsel for the Tasmanian Wilderness Society was permitted to make oral

80 Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473; Kracke v Mental Health Review Board & Ors (General) [2009] VCAT 646.

81 Levy v State of Victoria (1997) 189 CLR 579.

82 Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 ALR 58.

83 Williams, above n 2, 366 and see, for example, Attorney General (Cth) v Breckler (1999) 197 CLR 83, [108] (Kirby J).

84 Williams, above n2, 366.

85 Human Rights Law Resource Centre Ltd and Blake Dawson, above n11, 8.

86 See Kenny, above n7, 160 to 161.

87 Ibid 161.

88 Ibid.

89 Commonwealth v Tasmania (The Tasmanian Dam Case) (1983) 158 CLR 1, [50].

submissions to the High Court as an *amicus curiae* in relation to how the destruction of a wilderness area in Tasmania affected Australia's international relations.

The *amicus* may even seek to raise issues that the parties do not wish to raise. For example, it has been said that the grant of leave to the Australian Catholic Health Care Association and the Australian Episcopal Conference of the Roman Catholic Church to appear *amicus curiae* in *Superclinics Australia Pty Ltd v CES*⁹⁰ “radically transformed the case from one of medical negligence to *the* test case on abortion”.⁹¹ However it has also been suggested that the result of the applications made in *Superclinics* would have been different had the principles in *Levy* been applied;⁹² in particular, the principles concerning the impact of the grant of leave on the efficient operation of the court and the potential delay to the parties.

There has also been an increasing rate of *amicus curiae* intervention in Australian courts in recognition of the fact that the litigation process can be an important means of achieving societal change.⁹³ It appears that this mechanism has been used to complement, or in some cases replace, strategies for achieving progress through the political process.⁹⁴ For example, proceedings have been commenced in the High Court to vindicate rights and interests that have not made headway in the political arena. It is apparent that those with little political power have viewed the High Court as more likely to advance their aims than parliament.⁹⁵ Similarly, as the legislature has failed to keep pace with public expectations regarding the treatment of animals, the courts may provide a real alternative for challenges to current practices.

Appearing *amicus curiae* in proceedings involving animal interests

The current Australian laws regulating our treatment of animals are unsatisfactory and require urgent reform. The extent of the reform required should not be underestimated. In this regard, Dr Melissa Perry QC has recently commented that “the nature of the deficiencies that

90 See *Superclinics Australia Pty Ltd v CES* [1996] HCATrans 357.

91 J Wainer, ‘Abortion before the High Court’ (1997) 8 Aus Feminist LJ 133, 137.

92 Willmott, White and Cooper, above n56, 603.

93 Williams, above n2, 387.

94 Ibid.

95 Ibid, 388.

exist, particularly in the regulation of intensive factory farming in this country, call for a 'root and branch' revision of the existing law".⁹⁶

Dr Perry QC has also said that "the manner in which animals are treated and, in particular, the prevention of cruel practices, are legitimate matters for public interest and concern".⁹⁷ While no instances of animal advocates appearing *amicus curiae* in Australian courts have been identified, it appears that matters concerning the protection of animals are matters of public concern and are ripe for *amicus* intervention.

For a number of reasons *amicus curiae* applications appear to be particularly relevant to proceedings involving animal interests. Firstly, animal law is a relatively new and unsettled area of law in terms of judicial decision-making. While most of the Acts, regulations and similar instruments concerning animal welfare are not new, there has been very little consideration of them by the Australian judiciary. Many issues posed by the use of animals are unknown to the wider community. And, as members of the judiciary are reliant on the parties to bring such matters to their attention, animal protection organisations appearing *amicus curiae* may assist the court by providing specialised knowledge or expertise.

Secondly, animal protection advocates appearing *amicus curiae* may provide the court with submissions and relevant material not presented by the parties due to their interest in the proceedings.⁹⁸ It is not hard to imagine circumstances where it is not in the interests of government or industry parties to make submissions on the aspects of a case concerning the humane treatment of animals. Animal protection advocates appearing *amicus curiae* may play a valuable role in such situations, assisting the court to understand the practical and moral consequences of its decisions.⁹⁹

Thirdly, judicial decisions in cases involving animals have the potential to affect the interests of those not a party to the proceedings, namely the

96 Dr Melissa Perry QC, Speech given at the launch of the Pro Bono Animal Law Service (PALS@PILCH), Sydney, 19 August 2009, 3.

97 Ibid.

98 Transcript of Proceedings, *Wurridjal v Commonwealth* (High Court of Australia, French CJ, 2 October 2008).

99 See Willmott, White and Cooper, above n 56, 612 in relation to the ethical and moral issues associated with end of life decisions.

animals concerned. It is arguable that these animals ought to have a representative in the court to make submissions in support of their interests, as those interests may not otherwise be protected (or even considered).¹⁰⁰

Fourthly, an *amicus curiae* may play a valuable role in cases where the parties agree or are neutral on a point of law and there is therefore no contradictor.¹⁰¹ Again, it is not difficult to imagine such a situation arising in proceedings to which a State government and a member of an animal industry are parties. In such circumstances the court may grant leave for an animal protection advocate to appear *amicus curiae* so that a question of law may be properly argued.

Finally, *amicus curiae* applications may be appropriate in cases where the parties do not have sufficient resources to fully present arguments to the court on the wider implications of a particular decision.¹⁰² For example, while the RSPCA is able to bring matters before the courts, it may be unable, due to lack of resources, to fully argue all aspects of the cases it initiates. In particularly significant cases another animal protection organisation may be able to assist the RSPCA by appearing *amicus* and making submissions on select issues.

There are advantages in appearing as an *amicus curiae* rather than as a party to the proceedings. Appearing *amicus* can be a relatively low risk and cost effective way of drawing to the court's attention the impact of a possible decision (as well as drawing public attention to a particular animal protection issue). This is because, as discussed above, it is unlikely that a costs order will be made against a person appearing *amicus curiae*. Also, it is likely that the person's own legal costs would be greatly reduced as there would be no costs associated with the filing of pleadings and the tender of complex evidence, and submissions would be made on more limited issues than all those thrown up by the dispute between the parties. Therefore, it is suggested that rather than initiating proceedings (which may be costly and risky) animal

100 See *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520, 535 and 539 (Davies, Wilcox and Gummow JJ).

101 Williams, above n 2, 367. See also *McBain v Victoria* [2000] 99 FCR 116; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, [68] (Hayne J) and [149] (Crennan and Keifel JJ).

102 See Transcript of Proceedings, *Wurridjal v Commonwealth* (High Court of Australia, French CJ, 2 October 2008).

protection advocates may be able to achieve similar goals by ‘piggy backing’ on existing proceedings as an *amicus curiae*.

However, it should be noted that there are also disadvantages associated with this approach, the main one being the need to wait for an appropriate case in which to intervene as an *amicus curiae*. Such an opportunity may never present itself. There are also practical difficulties facing potential *amicus curiae* which have not been covered in this paper but which should be considered in deciding whether to make such an application.¹⁰³ It may also be prudent to consult with the party, if any, to be supported by an *amicus* application (such as the RSPCA) to ensure the application will not be regarded as counterproductive or a disturbance to the proceedings.¹⁰⁴

What about when the shoe is on the other foot?

Animal protection advocates seeking to initiate litigation, including test case litigation, should be alert to the possibility that those who do not have the interests of animals at the forefront of their concerns (such as government entities and industry bodies) may also seek leave to appear as an *amicus curiae*. An example of a case in which an *amicus* intervention had a negative impact on proceedings commenced by an animal protection organisation is briefly considered below.

In late 2004, the Humane Society International Inc ("HSI") commenced proceedings in the Federal Court of Australia against Kyodo Senpaku Kaisha Ltd ("Kyodo"), the Japanese whaling company operating in the Australian Whale Sanctuary in Antarctica. HSI sought a declaration and an injunction under s475 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("EPBC Act") in relation to alleged contraventions of the EPBC Act by Kyodo as a result of its whaling activities. As Kyodo did not have a registered company office in Australia, HSI was required to make an application for leave to serve the originating process on Kyodo in Japan.

¹⁰³ Such as the lack of rules and procedures concerning the process for making *amicus* applications and the fact that the High Court does not determine applications for leave to appear *amicus* until the day of the hearing (in which case full written submissions must be prepared on the issues, as well as submissions on the grant of leave). See Williams, above n2, 389; Harris, above n4, 2 and 15.

¹⁰⁴ Harris, above n4, 8.

Allsop J was clearly concerned by the possible diplomatic implications of granting the leave sought by HSI and ordered it to serve copies of the originating process (and relevant affidavits and submissions) on the Commonwealth Attorney-General.¹⁰⁵ The Attorney-General subsequently filed submissions as an *amicus curiae*, submitting that the Court should not grant leave to serve the originating process as it "would be likely to give rise to an international disagreement with Japan" and that "similar disputes could also arise with other countries that do not accept Australia's claim to [the Australian Antarctic Territory]" which may "be contrary to Australia's long term national interests".¹⁰⁶

Allsop J accepted the Commonwealth Attorney-General's submissions on the diplomatic implications of service and, although HSI satisfied the leave requirements of the Federal Court Rules, leave was refused in the exercise of the Court's overriding discretion.¹⁰⁷

Allsop J's decision to refuse leave was overturned on appeal,¹⁰⁸ but the case shows that intervention of an *amicus curiae* may have an adverse affect on proceedings brought by animal protection organisations.

Conclusions

Amicus curiae briefs have become a useful means of advocating for the protection of animal interests in the United States, particularly in the U.S. Supreme Court. The approach to *amicus* applications in Australian courts, while lacking consistency and clarity, is becoming more welcoming of *amicus* intervention by public interest organisations. Given the significant hurdles facing animal protection advocates wishing to promote animal interests through the courts, appearing *amicus curiae* may provide an attractive alternative for those who lack standing and who do not have the resources to take on well-funded industry bodies and government entities.

105 Chris McGrath, 'Editorial Commentary - The Japanese Whaling Case' (2005) 22 EPLJ 250, 255.

106 Ibid.

107 Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2005] FCA 664, [27] and [33] to [34]; McGrath, above n106, 255.

108 See Humane Society International Inc v Kyodo Senpaku Kaisha Ltd (2000) 154 FCR 425.

Companion Animal Cruelty and Neglect in Queensland: Penalties, Sentencing and “Community Expectations”

By Tracy-Lynne Geysen, Jenni Weick & Steven White*

1. Introduction

A consistent feature of animal welfare law reform in Australian jurisdictions over the last decade has been increases in the maximum penalties for animal cruelty and duty of care offences. Queensland is no exception, with substantial increases introduced in 2001 through the passage of the *Animal Care and Protection Act 2001* (‘ACPA’). More recently, a change in the value of “penalty units” has significantly increased the maximum fine which may be imposed on offenders. This commitment to increased penalties raises a number of questions, including why this is occurring, what effect the increased penalties are having on sentencing outcomes, and whether increasing maximum penalties for cruelty and duty of care offences is the most effective way of addressing the protection of animals.

Considerable empirical research will be required before questions about the role and effectiveness of animal welfare penalties and sentences can be answered with any confidence. Two recent excellent contributions to the *Australian Animal Protection Law Journal* have made a start on the empirical research necessary to address these issues. Taylor and Signal have reported on research into public opinion about the nature and appropriateness of the response of the criminal justice system to animal

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abuse.¹ Boom and Ellis have explored the enforcement of animal welfare law in NSW, including a consideration of penalty and sentencing issues.² As well, Markham has recently provided the first detailed Australasian account of sentencing issues in an animal welfare context.³

Focussing on the Queensland jurisdiction, this article seeks to briefly address the grounds relied upon by State Government in persuading Parliament to increase penalties for animal welfare offences, and whether this political commitment to reform is reflected in sentencing outcomes in Magistrates Courts. The key justification used by government for increased penalties is the need to give effect to “community expectations”. The meaning of the term “community expectations” is, however, inexact. What does it mean to give effect to community expectations, and to what extent do these expectations feed through into sentencing outcomes in Magistrates Courts?

The first part of this article provides a brief account of the key animal welfare offences in Queensland, including the reform in 2001.

The focus is on companion animals, for two reasons. First, the key cruelty and duty of care provisions in the ACPA apply directly to companion animals. The treatment of commercially farmed animals and other categories of animal may be exempt from the application of these offences where there is compliance with a relevant code of practice.⁴ Second, RSPCA Qld and the then Department of Primary Industries and Fisheries (DPI&F) entered into a memorandum of understanding (MOU) as to their respective enforcement responsibilities:

1 Nik Taylor and Tania Signal, ‘Lock ‘em up and Throw Away the Key? Community Opinions Regarding Current Animal Abuse Penalties’ (2009) 3 Australian Animal Protection Law Journal 33.

2 Keely Boom and Elizabeth Ellis, ‘Enforcing Animal Law: The NSW Experience’ (2009) 3 Australian Animal Protection Law Journal 6.

3 Annabel Markham, ‘Animal Cruelty Sentencing’, chapter 12 in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (The Federation Press, 2009).

4 For a detailed account of the operation of codes of practice see Arjna Dale, ‘Animal Welfare Codes and Regulations – The Devil in Disguise?’, chapter 8 in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (The Federation Press, 2009).

The MOU was jointly developed by the DPI&F and the RSPCA, with all clauses subject to mutual agreement. ... The question of who enforces the [Act] is influenced by location and expertise. ... Although not a mandated requirement under the MOU, it is mutually accepted [that] the DPI&F will generally have primary responsibility for dealing with livestock animal welfare issues. Conversely, the RSPCA largely has responsibility for companion animal issues. This division of responsibilities is not an issue of constraining operations of agencies, but rather one of logistics and operational practicality.⁵

While the RSPCA brings a small but significant number of prosecutions each year, and publicly reports on these, DEEDI (formerly DPI&F) brings very few prosecutions, and does not publicly report on these. Together, the application of statutory exemptions and the administrative arrangements/operational priorities of RSPCA Qld and DEEDI mean that Queensland Magistrates deal almost exclusively with animal welfare offences involving companion animals.

The second part of this paper addresses the notion of “community expectations” and the role they have played in the reform of animal welfare law in Queensland, at least as expressed by politicians in Parliament, through second reading speeches and supporting materials such as Explanatory Notes.

Part Three considers how community expectations can be identified, and the article concludes by suggesting the need for further extensive empirical research in this area.

2. Companion Animals and Animal Welfare Offences in Queensland

Until 2001 the key animal welfare statute in Queensland was the *Animals Protection Act 1925*. This statute followed the first animal welfare legislation passed by the Queensland Parliament, the *Animals Protection Act 1901*. Before that, animal cruelty was addressed by 1850 NSW legislation. The RSPCA played a central role in making the case for animal welfare reform in 1925:

⁵ Evidence to Senate Rural and Regional Affairs and Transport Committee, Parliament of Australia, Canberra, 15 February 2006, 4 (Jim Varghese, Director-General, Queensland Department of Primary Industries and Fisheries).

The RSPCA had strongly lobbied for the 1901 Act because the 1850 legislation did not afford animals the protection desired nor did it provide the RSPCA with sufficient authority to efficiently discharge their duties. However by 1925, the RSPCA had become aware of shortcomings in the 1901 legislation and the *Animals Protection Act 1925* was enacted *for the more effectual prevention of cruelty to animals*. This Act was modelled on English and Western Australian legislation of the time, and, significantly, provided officers of the RSPCA with powers to enter premises in order to assist animals and secure evidence of an offence. It provided for the protection of animals against cruelty and neglect. When the Bill was introduced to Parliament in 1925, debate focused on issues of importance of the day - the working and doping of horses and greyhounds; employees' and drivers' treatment of work animals; the use of horses for food on pig farms; and protecting homing pigeons described by the Home Secretary, Hon. J. Stopford, as a "national asset".⁶

Despite numerous amendments over the years, by 2001 the maximum penalty for cruelty under the *Animals Protection Act 1925* was a fine of \$1500 and/or imprisonment for six months. After a failed attempt to introduce a new Act in the early 1990s, the 2001 legislation was passed by the Queensland Parliament with support from all political parties, and widespread interest group support, including from RSPCA Qld.⁷ The Act was proclaimed in March 2002.

The two key animal welfare offences in Queensland are now set out in s17 and s18 of the ACPA. Section 17 is a duty of care provision, and provides:

17 Breach of duty of care prohibited

- (1) A person in charge of an animal owes a duty of care to it.
- (2) The person must not breach the duty of care.
- (3) For subsection (2), a person breaches the duty only if the person does not take reasonable steps to—

⁶ Glenda Emmerson, *Duty and the Beast: Animal Care and Protection Bill 2001*, Research Brief No 2001/23, Queensland Parliamentary Library, 2001 13 (emphasis in original, footnotes omitted).

⁷ *Ibid* 13-14, 35-36.

(a) provide the animal's needs for the following in a way that is appropriate—

(i) food and water;

(ii) accommodation or living conditions for the animal;

(iii) to display normal patterns of behaviour;

(iv) the treatment of disease or injury; or

(b) ensure any handling of the animal by the person, or caused by the person, is appropriate.

(4) In deciding what is appropriate, regard must be had to—

(a) the species, environment and circumstances of the animal; and

(b) the steps a reasonable person in the circumstances of the person would reasonably be expected to have taken.

The maximum penalty for conviction of an offence under s17 is one year's imprisonment and/or a fine of 300 penalty units. As from 1 January 2009, a fine of 300 penalty units equates to a dollar amount of \$30,000. Prior to this date the maximum fine was \$22,500.⁸

The Explanatory Notes to the Animal Care and Protection Bill 2001 explicitly state that s17, a provision in form which is unique to Queensland, is intended to give effect to the so-called "Five Freedoms":

This is the key proactive aspect of the Bill. Positively providing for the welfare needs of animals is at the opposite end of the welfare continuum to the mere absence of being cruel, the focus of the current Act [*Animals Protection Act 1925*]. The Bill makes it an offence for persons in charge of animals to fail to comply with

⁸ The value of a penalty unit was increased from \$75 to \$100 effective 1 January 2009: Penalties and Sentences and Other Acts Amendment Act 2008 (Qld) ss 2-3, amending Penalties and Sentences Act 1992 (Qld) s 5(1).

their duty of care. The duty of care requirements are based on internationally acknowledged “Five Freedoms” of animal welfare originating from an inquiry into animal welfare by the “Brambell Committee” in the United Kingdom in 1965 and subsequently modified in 1992 by the United Kingdom Farm Animal Welfare Council.⁹

Section 18 of the Act creates an offence against cruelty, and provides a non-inclusive list of what may amount to cruelty:

18 Animal cruelty prohibited

- (1) A person must not be cruel to an animal.
- (2) Without limiting subsection (1), a person is taken to be cruel to an animal if the person does any of the following to the animal—
 - (a) causes it pain that, in the circumstances, is unjustifiable, unnecessary or unreasonable;
 - (b) beats it so as to cause the animal pain;
 - (c) abuses, terrifies, torments or worries it;
 - (d) overdrives, overrides or overworks it;
 - (e) uses on the animal an electrical device prescribed under a regulation;
 - (f) confines or transports it—
 - (i) without appropriate preparation, including, for example, appropriate food, rest, shelter or water; or

⁹ Explanatory Notes, Animal Care and Protection Bill 2001 (Qld) 4. For a discussion of the “Five Freedoms” and their origins see Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001) 264-266. Tasmanian legislation also explicitly imposes a “duty of care” on a person who has the “care or charge of an animal” but, unlike Queensland, does not define the content of this duty or establish specific penalties for breach: see *Animal Welfare Act (Tas)* s6.

- (ii) when it is unfit for the confinement or transport; or
 - (iii) in a way that is inappropriate for the animal's welfare; or
 - (iv) in an unsuitable container or vehicle;
- (g) kills it in a way that—
- (i) is inhumane; or
 - (ii) causes it not to die quickly; or
 - (iii) causes it to die in unreasonable pain;
- (h) unjustifiably, unnecessarily or unreasonably—
- (i) injures or wounds it; or
 - (ii) overcrowds or overloads it.

The maximum penalty for conviction of an offence under s18 is two year's imprisonment and/or a fine of 1000 penalty units. As from 1 January 2009, a fine of 1000 penalty units equates to a dollar amount of \$100,000. Prior to this date the maximum fine was \$75,000.¹⁰ The current maximum fine reflects a more than 65-fold increase on that applicable under the pre-2001 legislation.¹¹

While the focus of this article is on s17 and s18 of the ACPA, it is important to note that a number of other provisions in the ACPA also

¹⁰ Above n8.

¹¹ By way of contrast, in NSW the maximum penalty for cruelty is \$5,500 and/or six months' imprisonment, and for aggravated cruelty is \$22,000 and/or imprisonment for two years: Prevention of Cruelty to Animals Act 1979 (NSW) s5 and s6 respectively; in South Australia, the maximum penalty for cruelty is \$20,000 and/or two years' imprisonment, and for aggravated cruelty is \$50,000 and/or imprisonment for four years: Animal Welfare Act (SA) s13; in Tasmania, the maximum penalty for cruelty is \$12,000 and/or one years' imprisonment, and for aggravated cruelty is \$24,000 and/or 18 months' imprisonment: Animal Welfare Act 1993 (Tas) s8 and s9 respectively; and in Western Australia, the maximum penalty for cruelty is \$50,000 and/or imprisonment for five years: Animal Welfare Act 2002 (WA) s19.

create cruelty-related offences in some circumstances.¹² As well, the *Criminal Code* (Qld) includes offences against animals.¹³ Significantly, the offence of injuring a companion animal brings with it a maximum penalty of up to three years' imprisonment (ie one year greater than that for cruelty under the ACPA) and/or a fine of \$50,000.¹⁴ However, by contrast with the strict liability cruelty offence in the ACPA, the offence of injuring an animal under s468 *Criminal Code* (Qld) applies to the wilful and unlawful killing, maiming or wounding of an animal.

3. Reform of the Law in Queensland and “Community Expectations”

As Part 2 shows, in Queensland since 2001 there have been substantial increases in the relevant maximum penalty for cruelty offences, and the introduction of a stand-alone offence of breach of duty of care, also with a comparatively high maximum penalty.

On what basis have such significant increases been justified? A close reading of the Explanatory Notes for the Animal Care and Protection Bill 2001, as well as the Minister's second reading speech emphasises the community expectation that such offences should be treated seriously.

The Explanatory Notes to the Animal Care and Protection Bill 2001 refer to community expectations about animal welfare and sentencing in a number of places:

The primary objective of the Bill is to repeal the current and antiquated animal cruelty legislation, the *Animals Protection Act 1925* . . . and to replace it with contemporary and proactive legislation that promotes the responsible care and use of animals and helps to protect animals from acts of cruelty . . . The current Act [*Animals Protection Act 1925*] . . . does not reflect current attitudes, community expectations or knowledge about animal welfare issues . . . The community generally expects governments to take a far more proactive approach to animal welfare issues rather than the passive

12 See, eg, ACPA s19 (abandonment), s23 (cropping dog's ear), s24 (docking dog's tail), s25 (debarking), s26 (removal of cat's claw).

13 See, eg, *Criminal Code* (Qld) s211 (bestiality), s468 (injuring an animal).

14 By contrast with the greater level of protection afforded to companion animals under the ACPA, the maximum penalty for injuring 'stock' animals under the *Criminal Code* is seven years' imprisonment, significantly greater than that for injuring companion animals.

approach reflected in the current Act . . . The Bill is necessary to meet community expectations and provide a modern legislative framework for dealing with animal welfare issues. Such legislation is one means of demonstrating to the community . . . that Queensland meets community . . . expectations in relation to animal welfare . . . The general community has an expectation that inappropriate practices relating to animals should be outlawed and penalties with a sufficient deterrent value provided.¹⁵

In his second reading speech on the Animal Care and Protection Bill 2001, the Hon. H Palaszczuk, Minister for Primary Industries and Rural Communities, repeats some of the material in the Explanatory Notes. In addition, he states:

The bill retains some important conventional wisdoms that the general community holds that deliberate cruelty to animals is abhorrent and unacceptable and expects that, in other than exceptional circumstances, the perpetrator must be punished severely, and severely enough to deter others.¹⁶

It is notable that with one exception, discussed below, no further detail is provided by the Minister or in the Explanatory Notes as to how these community expectations have been identified. Where do we find the “conventional wisdoms” referred to by the Minister?

4. Evidence of Community Expectations

(i) Political Process

A useful starting place for identifying the community expectations which underpin animal welfare reform in Queensland is the political process. For example, in his Second Reading Speech on the Animal Care and Protection Bill, the Minister said:

In the year 2000, I received over 7,000 items of correspondence from members of the community on animal welfare issues. The bill will help governments act wisely and in tune with the community on animal welfare issues in contentious areas. This will be through a

15 Explanatory Notes, Animal Care and Protection Bill 2001 (Qld) 1-2, 5-6.

16 Queensland, Parliamentary Debates, Legislative Assembly, 31 July 2001, 1988 (Henry Palaszczuk).

provision to establish an Animal Welfare Advisory Committee to advise me on animal welfare matters.¹⁷

Representations from the public may be important in gauging public attitudes in an ad hoc way, but it also has to be acknowledged that they are not systematic and may be distorted by a range of factors, including the self-selecting nature of those who make representations and narrow interest group campaigns. As well, '[t]he 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'.¹⁸

More broadly, the passage of the Bill attracted a large number of speakers during the second reading debate, and the Bill received the unanimous support of the Legislative Assembly. This parliamentary consensus may be construed as evidence of community expectations, although questions may be raised, again, about how systematically this consensus was achieved and how well-informed members of parliament are about animal welfare matters generally.¹⁹ In particular, as may occur in addressing crimes of violence against humans, parliamentary action on animal welfare penalties may reflect an unreflective desire to "get tough on crime". As Boom and Ellis suggest, 'harsher penalties are not necessarily the best way of dealing with animal cruelty', even if 'there is a legitimate debate to be had with respect to sentencing issues without recourse to an unthinking and punitive law and order response'.²⁰ Boom and Ellis argue that:

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 behaviours in the longer term, such as banning the sale of animals in pet shops.²¹

17 Queensland, Parliamentary Debates, Legislative Assembly, 31 July 2001, 1989 (Henry Palaszczuk).

18 Boom and Ellis, above n2, 31. Although considering the position in NSW, this observation applies at least as strongly in Queensland, where even less publicly available information is available on penalties and sentencing processes and outcomes.

19 For contributions to the debate see: Queensland, Parliamentary Debates, Legislative Assembly, 16 October 2001 2860-2866; 17 October 2001 2914-2956.

20 Boom and Ellis, above n2, 31.

21 Ibid.

Finally, it might be argued that community expectations are reflected back to government through the views of the various animal welfare groups/organisations, on the basis that they collectively reflect broader community attitudes to animal welfare matters. In his Second Reading Speech the Minister claimed that:

The policies in this bill have been developed over several years in consultation with animal welfare groups, livestock industries and other animal user groups. All of these have supported the policy principles enshrined in this bill and all support the need for modern legislation. Relevant stakeholder groups have scrutinised the bill and given it their thumbs up.²²

In terms of companion animals and sentencing for cruelty/breach of duty, the key organisation is RSPCA Qld and it strongly endorsed the passage of the Bill. Emmerson states:

RSPCA Qld's Chief Executive Officer Mark Townend said that with this Bill, the government is moving to protect animals with the strongest deterrents possible, making Queensland one of the most advanced animal welfare protection jurisdictions in the world.²³

A key issue here, though, is the extent to which all stakeholder groups are given opportunities to comment and the seriousness with which those comments are taken, especially where they suggest an approach not consistent with the government's preferred approach.

(ii) Research into Community Expectations

Until very recently, there has been little systematic research into the nature of community expectations in Australia about penalties and sentencing in an animal welfare context.

Legal research is thin on the ground. In 2002 it was suggested that:

[T]here is a further reason for taking a tougher and more creative approach to sentencing animal cruelty offenders. As the enactment of POCTAA [*Prevention of Cruelty to Animals Act 1979* (NSW)] has demonstrated, many Australians consider the treatment of animals

22 Queensland, Parliamentary Debates, Legislative Assembly, 31 July 2001, 1990 (Henry Palaszczuk).

23 Emmerson, above n6, 36, citing RSPCA Qld Media Release of 31 July 2001.

with minimum standards of decency to be a core value of a civilised society. Courts that show undue leniency to animal cruelty offenders disregard our community's core moral values. They also reinforce the notion that animals are property and not living, sentient beings . . . Whilst acknowledging that many violent offenders have themselves been victims of cycles of violence, Courts must exercise caution when sentencing offenders who have committed brutal and morally repugnant crimes. Just as some crimes against humans demand lengthy jail terms, certain crimes against animals demand serious treatment with respect to sentencing. Courts must send a strong message to the community that certain acts of animal cruelty will not be tolerated.²⁴

The assertions made here are very possibly correct, especially if one accepts that the political and parliamentary processes answer all questions about the legitimacy of a particular legal reform. However, no systematic empirical or other research is cited supporting the proposition that “undue leniency” is inconsistent with community expectations. Further, as discussed above, there is a risk that parliamentary fiat in this area reflects other agendas, such as a punitive “get tough on crime agenda”, as well as concerns about the well-being of animals.

Sociological and survey research is beginning to fill some of the gaps in determining “community expectations” about animal welfare penalties and sentencing. Taylor and Signal summarise international research on attitudes to serious animal abuse as demonstrating that ‘the public in general is supportive of increasing penalties for animal abuse’.²⁵ However, they acknowledge that ‘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’.²⁶ Analysing results based on a large, representative community sample (obtained through the Central Queensland Social Survey), Taylor and Signal conclude that ‘the general public are strongly in favour of the [Criminal Justice System] considering the abuse of cats and dogs as a

24 Katrina Sharman, ‘Sentencing Under Our Anti-Cruelty Statutes: Why Our Leniency Will Come Back to Bite Us’ (2002) 13 *Current Issues in Criminal Justice* 333, 334.

25 Taylor and Signal, above n1, 40.

26 *Ibid.*

serious crime which should attract serious penalties'. Importantly, though:

[h]ow extended punitive measures should play out is an open question. For example, whether the public 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.²⁷

This qualification is a particularly important one, given the argument above that the public may not be well-informed about existing animal welfare enforcement processes.

(iii) Magistrates, Sentencing and Community Expectations

Even if there remain some unanswered questions about the nature and foundation of “community expectations” about animal welfare penalties and sentencing, the evidence discussed above suggests a public preference for the imposition of more serious penalties. In Queensland, interest group organisations such as RSPCA Qld and BLEATS (Brisbane Lawyers Educating and Advocating for Tougher Sentences) have expressed the concern that the penalty reforms effected in 2001 have not been reflected to the extent they should in sentencing decisions of Magistrates. If true,²⁸ there are at least two reasons for why this might be occurring, one procedural and one substantive.

As to procedural concerns, BLEATS has:

pinpointed factors that were thought to be responsible for [the] anomaly [between sentences imposed and the maximum penalties available under ACPA]. The first of these was the standard of briefs prepared by the prosecuting authority, in this case the RSPCA, provided to either its inspectors or to solicitors instructed on its behalf in the course of prosecutions. The second was the inadequacy of submissions made to the Court in the course of prosecutions. There

²⁷ Ibid 50.

²⁸ After reviewing Australasian legislation and cases, Markham concludes that ‘it would be wrong to dismiss legitimate criticisms of sentencing outcomes as the reactions of a punitive and ill-informed interest group . . . at a basic level the issue is one of giving effect to legislative intent. In general, this intent has not been realised to date’: above n3, 303. For a conclusion to similar effect in a NSW context see Boom and Ellis, above n2, 31.

appeared in these to be little assistance to the Court as to the relevance of the factors necessary for the Court to take up under the *Penalties and Sentences Act* 1992 (Qld) and how these factors might properly be applied to a prosecution under this act as against an act dealing with offences against humans. Submissions that had been made appeared to contain no discussion of the form of the provisions of sections 17 and 18 of the Act. There was little direction given as to the necessity to consider the deterrent aspect of the sentence given that there existed little by way of rehabilitation and counselling available particularly relating to conduct towards animals.²⁹

As to substantive matters, BLEATS argues that:

sentences appeared to reflect little acceptance of the nature of the changes that were made in 2001, particularly as to the maximum penalties included in sections 17 and 18 of the *Animal Care and Protection Act*.³⁰

In other words, Magistrates had failed to understand the significance of the changes in penalties introduced by ACPA. Again, even although this may well be true, the matter may be more complex than this.

First, the use of the past tense is significant. Just prior to the passage of ACPA, Emmerson summarised outcomes for RSPCA Qld under the *Animals Protection Act 1925* as follows:

In 1999-2000, the RSPCA Queensland Inspectorate responded to 9,411 complaints of alleged cruelty, an increase of 506 cases from the previous year. In addition, they placed a record number of 70 prosecutions before the Queensland courts. Courts imposed fines of almost \$33,000, and awarded costs of more than \$40,000 against defendants . . . The difficulty the RSPCA has in bringing prosecutions is demonstrated by the prosecution list for February to May 2001, which shows that the largest fine imposed was \$1,000, with the average being \$600. In most cases, costs awarded were less than \$500; however two prosecutions involved the awarding of costs of around \$10,000.³¹

29 Graeme Page SC, 'Changing Attitudes and Expectations of the Community and the Relevance of those Changes to Sentencing in Prosecutions commenced under the Animal Care and Protection Act 2001', address to the Queensland Magistrates Conference, 25-28 May 2008, 1-2.

30 Ibid 2.

31 Emmerson, above n6, 12.

By contrast:

During the period 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 [was concentrated between fines of \$1,000 and fines of \$2,999].³²

This shows that Magistrates may be starting to pay greater cognisance to penalties reform. More recent sentencing outcomes in which BLEATS has coordinated legal services for RSPCA Qld prosecutions further bears this out:³³

Sept 2009	Man mutilated 7 month old fox terrier 'Peanut' with a pair of secateurs before decapitating him.	Maximum penalty of 3 years imprisonment (prosecuted under <i>Criminal Code</i>)
Sept 2009	Man loaded 120 cattle onto a truck to be transported 1600km. Before the truck was loaded the man was advised of the cattle's appalling condition but the man insisted that they be transported. Unfortunately all of the cattle died on the way.	\$120,000.

³² Taylor and Signal, above n 1, 35-36.

³³ BLEATS, 'Cases' <<http://www.bleats.com.au/cases>> at 21 June 2010.

Dec 2009	A man brutally killed 2 kittens by drowning them and a 3rd kitten survived but had suffered a week of abuse - where the man hit, kicked and threw the kitten against walls.	\$5000 and 2 years probation, \$2499.31 in costs to the RSPCA and undertake 150 hours of community service (and attend other psychological treatment directed by probation officer).
Dec 2009	Woman kept female dog and 8 puppies in squalid living conditions and failed to provide treatment for the dog resulting in the dog's emaciation.	\$3,000 fine and ordered to pay \$4,426.99 to the RSPCA for their costs.
Dec 2009	Man failed to treat a dog with a severe injury, the dog suffered immensely.	\$1200 fine and \$681.00 to the RSPCA for their costs.
Feb 2010	Woman failed to treat an advanced skin cancer on a cat, the cat suffered tremendously.	\$3000 fine and \$73.80 court costs.
March 2010	Woman dumped 8 newborn puppies in a plastic bag into a bin. The puppies were found by a passerby, alive, but had they not been found would have suffered a slow and agonising death.	\$2,500 plus 5 year probation ordered. Abandonment matters usually \$500-\$1,000, but because of the severity of this case the fine was increased.

March 2010	Man left a dog and 10 puppies in faeces laden, putrid backyard and did not feed them or treat them at all. Pups underweight and flea laden.	\$3,000 and 5 year probation plus costs to the RSPCA.
March 2010	Woman was living out of her car with 12 Persian cats and 11 Pomeranian dogs. The 12 cats were in cages, with no access to food, water or litter trays. The cats were soaked in their own excrement, had matted hair, ringworm, and extensive skin sores.	\$4,000 fine and RSPCA costs of \$5,000.
March 2010	Woman surrendered her dog which had suffered severe neglect - flea burdened, mangy coat, had gone blind due to 100s maggots in his eyes, and suffered dental disease.	\$5,000 fine and \$547.58 costs to the RSPCA.

Secondly, a NSW Magistrate has spoken publicly about sentencing in animal cruelty cases. She urged caution in relation to criticism of sentencing matters generally, and criticised sensationalist media reporting for misinforming the public about the reasons for sentencing in particular cases. When specifically addressing sentencing in animal cruelty cases, she questioned the existence of a coherent set of community expectations:

[T]here is no unanimous agreement about what society allows as acceptable cruelty – there is a growing segment of the population which is not comfortable with the fact that cruelty in some circumstances is permitted as long as it causes no “unnecessary” pain on the animal. This is an area of growing concern and matters relating to animal rights, animal welfare and animal law are being increasingly addressed all over the world. In many situations our view of cruelty is biased and subjective. In more than 25 years sitting as a Magistrate in

both city and country areas, I can count on the fingers of one hand the numbers of prosecutions brought for cruelty to animals used in agriculture. I would be surprised if this reflected the extent of animal cruelty in that area of agriculture. Apart perhaps from cases of sadism (cruelty for its own sake) I suggest there would be no general agreement in the community as to an appropriate penalty in any particular case. This comment might apply to many other types of offences, but particularly so in animal cruelty cases. These matters raise high emotion in everyone involved.³⁴

This comment powerfully underscores the need for further extensive empirical research into community expectations about penalties and sentencing in animal welfare matters, across all categories of animals, and not just those animals – ie companion animals - where the imposition of harsher penalties is most readily agreed upon by the public. It also highlights the need to address a significant research gap, placing sentencing in animal welfare offence cases in the broader context of sentencing for crimes of violence against humans.

5. Conclusion

The notion of “community expectations” has provided the foundation for reform of animal welfare offence penalties in Queensland, effected most notably through the passage of ACPA. However, the content and application of “community expectations” is not straightforward. Further empirical legal, political and sociological research is required to ensure that we better understand the meaning of “community expectations” and the extent to which they are, and should be, reflected in the regulation of penalties in animal welfare offence cases. If it is found that recent reforms to maximum penalties for cruelty are not being reflected in sentencing outcomes, are still higher statutory penalties required? Are higher penalties the most effective way of ensuring improved welfare outcomes for animals? How can we ensure the community is better informed about animal welfare, including penalties and sentencing in cruelty cases, and what effect will improved understanding have on community expectations about sentencing outcomes?

34 Sue Schreiner, ‘Sentencing Animal Cruelty’ in *Cruelty to Animals: A Human Problem*, Proceedings of the 2005 RSPCA Australia Scientific Seminar, Canberra, 22 February 2005, 43

Martha Nussbaum's Capabilities Approach for Non-Human Species:

A PRELIMINARY CRITIQUE

By Alexandra McEwan*

Martha Nussbaum's capabilities approach for non-human species has been cited as a promising alternative approach to law and public policy dealing with animals. The capabilities approach is a set of political principles, expressed as ten core entitlements. Although initially developed to allow the voices of women to be heard in the global development agenda, more recently, Nussbaum has adapted the capabilities approach as a framework for human obligations towards other species. To this end, the capabilities approach for non-human species seeks to encompass non-human species as primary subjects of justice. In Nussbaum's approach, the notion of justice for non-human species is based on dignity and Aristotelian notions of flourishing and 'the good life'.

This paper critically analyses Nussbaum's claim for justice for animals. As background, relevant aspects of utilitarian and social contract theory are discussed. The capabilities approach for non-human species is described and examined against Nussbaum's claim of justice for animals. The question whether the capabilities approach goes beyond animal rights or utilitarian approaches to the well-being of animals is considered. Two of the ten capabilities approach entitlements, 'life' and 'bodily health', provide a starting point for discussion. The paper concludes by presenting a set of principles, drawn from Nussbaum's and other work, which might underpin an Australian law and policy dealing with animal protection and well-being.

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I Introduction

American philosopher Martha Nussbaum has gained international recognition for her work in virtue ethics, a school of thought recently cited as a possible antidote to the West's current moral crisis: climate change anxiety, rampant consumption and the unethical behaviour of financial institutions.¹ One of Nussbaum's important contributions to contemporary philosophy has been her adaptation of the capabilities approach.² Her approach has its foundations in Aristotelian ethics³ but was inspired by the work of 1998 Nobel Laureate for Economics, Amartya Sen. Sen formulated the capabilities approach in the early 1980s as a framework for the comparative assessment of quality of life, based on personal capacity.⁴ His approach assumed that living constitutes a combination of various doings and being, with capability conceived of as a person's ability to do valuable acts or reach valuable states of being.

Sen and Nussbaum have developed the capabilities approach in different, though mutually influential, ways.⁵ In the 1990s Nussbaum adapted the capabilities approach to address gender inequality for women within the global development agenda.⁶ More recently she expanded her challenge to the *status quo* by tailoring the capabilities approach to frame law and policy for people with disabilities, across nations, and in human relationships with other species.⁷ In the

1 Luke Slattery, 'Virtue Ethics to the Rescue, Possibly' *The Australian* (Sydney) 5 November 2008, 1.

<<http://www.australian.news.com.au/story/,,42601995-25192,00.html>> at 7 November 2008.

2 Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (2006).

3 See generally, Amartya Sen, 'Capability and Well-Being' in Amartya Sen and Martha Nussbaum (eds) *The Quality of Life* (1993) 30.

4 Amartya Sen, *Commodities and Capabilities* (1985); Sen, above n 3, 30. The capabilities approach was Sen's way of moving beyond the pessimism which was endemic among welfare economists following Kenneth Arrow's 'impossibility theorem'. See Amartya Sen, 'The Possibility of Social Choice' (1998) Nobel Lecture December 8 1998 178, 181-182.

<http://nobelprize.org/nobel_prizes/economics/laureates/1998/sen-lecture.pdf> at 7 September 2008.

5 Sen above, n3, 41.

6 Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (2000).

7 Nussbaum has published several versions of the capabilities approach for non-human species: Martha Nussbaum, 'Animal Rights: The Need for a Theoretical Basis' [Review of Rattling the

capabilities approach for non-human species Nussbaum establishes a political conception in which, she claims, non-human species are deemed primary subjects of justice. In developing this model, Nussbaum engages with rights and utilitarian theory and undertakes a critical examination of John Rawls' version of the social contract. Her concept of justice for non-human species draws upon the Aristotelian notions of dignity, and the individual 'good'.⁸

The capabilities approach for non-human species has been cited as a promising alternative approach to law and policy dealing with animal protection.⁹ Nussbaum argues that the capabilities approach is superior to the social contract because it establishes direct obligations of justice, in the form of entitlements, to non-human species.¹⁰ She also considers her approach as superior to utilitarianism, due to its ability to respect individual creatures and its refusal to aggregate the good.¹¹

Nussbaum's claims suggest that the capabilities approach moves beyond the animal rights and animal welfare divide, their theoretical shortcomings, and what they are able to achieve politically. The capabilities approach is a complex model with manifold links to rights, utilitarian, and social contract theories. It is cognisant of this complexity that this paper approaches the examination of Nussbaum's claim of justice for animals.¹² Part II sets the scene by setting out

Cage: Towards Legal Rights for Animals], (2001) 114 Harvard Law Review 1506; Martha Nussbaum 'Beyond 'Compassion and Humanity': Justice for Non-Human Animals' in Martha Nussbaum and Cass Sunstein (eds), *Animal Rights: Current Debates and New Directions* (2004) 299; Nussbaum above, n2. This discussion focuses on the most recent and extended version, published in 2006.

8 See Aristotle, 'The Nicomachean Ethics: Book I' in Betty Radice (ed) Aristotle: *The Nichomachean Ethics*, Translated by A K Thomson (revised edition, 2004).

9 Steven White; 'Animals and the Law: a new Legal Frontier? [Review Essay]' (2005) 29 Melbourne University Law Review 298.; Gail Tulloch, 'From Sentience to Capabilities and Affective Education ' (Paper presented at the Humane Education: A Compassionate Ethic for Animals Griffith University, Nathan, Queensland 5-6 October 2007).

10 Nussbaum, above n2, 351.

11 Ibid.

12 Humans are animals and the semantic division between 'human' and 'animal' is artificial. In the context of animal rights discourse, some authors may use the term 'non-human animals'. In this paper, I use the terms 'non-human species' and 'animals'. Non-species is used where

aspects of utilitarian theory and John Rawls' theory of justice and version of the social contract¹³ that are of specific relevance to the capabilities approach for non-humans species. In Part III the capabilities approach for non-human species is described and examined against Nussbaum's claim of justice for animals. In doing so, the question of whether the capabilities approach goes beyond the animal rights or utilitarian approaches to the wellbeing of animals is considered.

II Theoretical foundations of the capabilities approach for non-human species

A. Utilitarianism, Animal Rights and the Animal Welfare Agenda

1. Utilitarianism

(a) Classical Utilitarianism

As a modern jurisprudential principle, utilitarianism has as its premise Jeremy Bentham's (1748 – 1832), belief that 'nature has placed mankind under the governance of two sovereign masters, pain and pleasure'.¹⁴ Bentham was of the opinion that these fundamental dimensions of human experience could be effectively controlled and directed by the skillful legislator.¹⁵ Importantly, by focusing on sensation (pleasure and pain) rather than characteristics commonly thought of as uniquely human, such as rationality, Bentham's foundational principle applied to humans and other sentient beings.

In general, classical utilitarianism consists of three elements: consequentialism, sum ranking and a substantive view of the good.¹⁶

Nussbaum's capabilities approach is being referred to in a technical sense. At other times, for simplicity's sake, I use the term 'animals'.

13 John Rawls, *A Theory of Justice* (revised ed, 1999).

14 Jeremy Bentham, 'From an Introduction to the Principles of Morals and Legislation' in Alan Ryan (ed) *Utilitarianism and Other Essays* (1987) 65.

15 Morrison explains that 'Bentham united psychology, ethics and jurisprudence upon the classical lines the French philosopher Helvetius had suggested, that of governance of the human being by the dictates of pleasure and pain'. Wayne Morrison, *Jurisprudence: From the Greeks to Post-Modernism* (2005) 187.

16 Nussbaum, above n 2, 339; Amartya Sen, *Development as Freedom* (1999) 59.

Consequentialism refers to looking to the outcomes of actions in order to assess them.¹⁷ For Bentham, any decision as to the appropriate course of action was made on the basis of a calculation of its utility. Utility refers to the principle by which an action is assessed according to its tendency to augment or diminish the happiness of those affected by it.¹⁸ As part of this, the capacity for suffering gives each *being* the right to equal consideration, expressed in the formula ‘each to count for one and none for more than one’.¹⁹ Sum-ranking is the process by which the utilities of individuals are summed together to obtain their aggregative merit.²⁰ It is important to note that sum-ranking entails the possibility that happiness will be distributed unequally and has been criticized for not paying attention to the distribution of this total merit to individuals.²¹ Lastly, utilitarianism assumes that ‘the good’ has uniform application across society. It does not concern itself with the way in which different sectors of society might define the good. Nussbaum rejects consequentialism on the basis that a uniform good is contrary to democratic pluralism.²²

(b) Utilitarianism and the Animal Welfare Movement

The organized animal welfare movement emerged in the early 18th century. It was heavily influenced by the Benthamite principle that sentience, rather than species membership, was the true basis for moral status.²³ As a social movement ‘animal welfare’ accepts human use of

17 Simon Blackburn, *Being Good: A Short Introduction to Ethics* (2002) 86; Sen, above n3, 59; Nussbaum, above n2, 338.

18 Bentham, above n 14, 65. Rosemary Hunter, Richard Ingleby and Richard Johnstone, *Thinking About Law: Perspectives on the History, Philosophy, and Sociology of Law* (1995) 43.

19 Peter Singer, *Animal Liberation* (2nd edition, 1995), 5; Jeremy Bentham, ‘An Introduction to the Principles of Morals and Legislation’ in JH Burns and HLA Hart (eds), *An Introduction to the Principles of Morals and Legislation* (first published 1789, 1996 edition).

20 Sen, above n16, 59.

21 *Ibid*; Hunter et al, above n18, 43.

22 Samuel Freeman, ‘Frontiers of Justice: The Capabilities Approach vs. Contractarianism Reviewing Frontiers of Justice: Disabilities, Nationality, Species Membership’ (2006) 85 *Texas Law Review* 385, 389; Nussbaum above n2, 344.

23 Susan Armstrong and Richard Botzler, ‘General Introduction - Animal Ethics: A Sketch of How it Developed and Where it is Now’ in Susan Armstrong and Richard Botzler (eds), *The Animal Ethics Reader* (2003) 4, 5.

animals, including killing for food and the use of animals in research,²⁴ though advocates for the animals involved to be treated humanely. This is the dominant paradigm in Australia and other western nations and is adopted by organizations such as the Royal Society for the Prevention of Cruelty to Animals (RSPCA). In contemporary discourse ‘animal welfare’ can be defined in various ways, depending on whether it is being used for scientific, legal or other purposes.²⁵

Although founded on Benthamite utilitarianism,²⁶ the development of anti-cruelty legislation in Australia has been constrained by ‘questions of humanist utilitarian necessity’ in determining what animal suffering was a matter of moral concern.²⁷ As Jamieson notes, the differential protection of animals according merely to perceived public benefit and economic viability has obfuscated animal welfare law’s original philosophical basis.²⁸

Preference utilitarianism, developed by Peter Singer, is different from the ‘mainstream’ or ‘humanist’ animal welfare approach described above. In applying the tenets of utilitarian theory to the question of what humans owe to animals, Singer concluded that as animals have the capacity to suffer, their interests should have equal consideration to those of humans in any utilitarian calculation of the good.²⁹ This means that in any balancing act in which animal and human interests are given equal weight, the interests of animals may prevail. Preference utilitarianism judges actions not by their tendency to maximise pleasure and pain, but by the extent to which they accord with the preference of

24 Anders Schinkel, 'Martha Nussbaum on Animal Rights' (2008) 13 *Ethics and the Environment* 41, 44 - 5.

25 Geoff Bloom, 'Regulating Animal Welfare to Promote and Protect Improved Animal Welfare Outcomes Under the Australian Animal Welfare Strategy' (Paper presented at AAWS International Animal Welfare Conference, Gold Coast, 1 September 2008) 18-19.; White, Steven, 'Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?' (2007) 35 *Federal Law Review* 347, 372.

26 Philip Jamieson, 'Duty and the Beast: The Movement in Reform of Animal Welfare Law' (1991) 16 *University of Queensland Law Journal* 238, 239. Jeremy Bentham recognized sentience rather than species membership as the proper measure of utility, Singer, above n19, 7.

27 Jamieson, above n 26, 239.

28 *Ibid.*

29 Singer, above, n19, 8, 237.

the beings affected by the action or its consequences.³⁰ What distinguishes preference utilitarianism from the classical (hedonist) approach is its method, which universalises interests by taking a being's interest to be what, on balance and after reflection on the facts, that being prefers.³¹

2. *Animal Rights*

On the face of it, animal rights proposes a more ambitious agenda than animal welfare in that its aim is to eliminate animals' legal status as property.³² This is founded on the idea that animals are beings with a moral and ethical status just like human beings and should not just have protection of the law, but also rights recognized within the legal system.³³ Animal rights advocates oppose all human use of animals³⁴ and extend the Kantian dictum that 'humans have a right never to be treated merely as a means, but always at the same time as an end' to animals.³⁵ The animal rights position was articulated in the early 1980s, by Tom Regan.³⁶ Regan argued that individual creatures who meet the subject-of-a-life criterion deserve legally enforceable rights.³⁷

30 Peter Singer, *Practical Ethics* (2nd ed, 1993) 94.

31 *Ibid.*

32 Cass Sunstein, 'Introduction: What are Animal Rights?' in Cass Sunstein and Martha Nussbaum (eds) *Animal Rights: Current Debates and New Directions* (2004) 3, 11.

33 David Favre, *The Gathering Momentum* (2005) 1 *The Journal of Animal Law* 1, 2; Steven Wise, *Animal Rights, One Step at a Time* in Cass Sunstein and Martha Nussbaum (ed) *Animal Rights: Current Debates and New Directions* (2004) 19, 25. In *Balakrishnan v Union of India* Kerala High Court, no 155/1999, June 2000, the court recognized animal rights. This Kerala High Court decision was not disturbed on appeal in the Supreme Court of India, *Nair and Ors v Union of India* (2001) Supreme Court of India Civil Appeal no. 3609-3620.

34 Sunstein above n 32, 5.

35 Sunstein, above n32, 5; Fredrick Copleston explains that the words 'at the same time', and 'merely' are of importance. He gives the example of going to the hairdresser. The hairdresser is used as a means to an end other than him or herself, though must never be used as a mere means to one's subjective ends'. *History of Philosophy Volume. 6: Modern Philosophy, Part II: Kant* (1960) 120.

36 Tom Regan, *The Case for Animal Rights* (1983).

37 Tom Regan defines subjects-of-a-life as animals who have beliefs and desires; perception, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference and welfare interests; the ability to initiate action in

3. *John Stuart Mill, Aristotle and the Good*

The ethical theories of John Stuart Mill (1806-73) and Aristotle are both important to an understanding of the foundations of Nussbaum's capabilities approach and her attempt to develop an individual notion of 'the good' for non-human species. Although a member of the utilitarian school, Mill developed the theory in a way different to Bentham. Bentham was interested chiefly in the quantitative rather than qualitative aspects of pleasure.³⁸ Although he defended the principle of utility, Mill took a qualitative approach to pleasure or happiness. As a result, pleasures had to be graded for their quality and a one-dimensional calculation was no longer appropriate.³⁹ Mill's qualitative conception of pleasure resonates with Aristotle's attempts to identify and describe the circumstances in which human capabilities manifest and flourish.⁴⁰

Aristotle's ethics and utilitarianism share some ground.⁴¹ Like utilitarianism, Aristotelian ethics are teleological: they look at goals and the ends of conduct in terms of goodness.⁴² However, Aristotle's interest was in what good conduct did for the individual in question, rather than society at large, and how virtues such as courage and generosity contributed to 'the good life' as distinct from 'goodness' as living for others or self sacrifice.⁴³ For Aristotle, goodness was a matter of functioning properly in the way nature intended. Mill, in contrast, rejected the idea that Nature planned anything for humans.⁴⁴ It is the Aristotelian approach to the good life as it pertains to the

pursuit of their desires and goals; a psycho-physical identity over time; an individual sense of their own welfare independent of their utility to others. Ibid 243.

38 Morrison, above n15, 192.

39 Ibid 200.

40 Ibid 201; David Lindsay, 'An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law' (2005) 29 Melbourne University Law Review 131, 154.; Nussbaum, n2, 346.

41 Alan Ryan, 'Introduction' in Alan Ryan (ed) *Utilitarianism and Other Essays* (1987) 7, 20-1.

42 Ibid 20; Aristotle, above, n 8.

43 Ryan, above n41, 20.

44 Ibid 21.

individual that underpins the capabilities approach for non-human species.⁴⁵

John Stuart Mill believed the essence of justice lay in individual rights⁴⁶ but maintained that justice was grounded on utility (i.e. the balancing of interests).⁴⁷ Mill's conclusions regarding the relationship between justice, individual rights, and utility, point to the overlap between some forms of utilitarianism and rights theory. Although recognising John Stuart Mill's utilitarianism as a 'close ally' of the capabilities approach for non-human species, it is to John Rawls and the social contract method that Nussbaum turns as the starting point for the capabilities approach.⁴⁸

B. Martha Nussbaum and the Social Contract Tradition: Non-Human Species as Primary Subjects of Justice

1. The Social Contract Tradition and John Rawls' Theory of Justice

To put the capabilities approach into its broadest social context, it is a framework intended to express an 'overlapping consensus' regarding humanity's moral obligations towards non-human species and how these values would be reflected within a legal system.⁴⁹ In *Political Liberalism*,⁵⁰ John Rawls defined the overlapping consensus as the shared political values that stabilize and sustain a constitutional regime of justice within the pluralism of reasonable religious, philosophical and moral doctrines characterizing contemporary liberal democracies.⁵¹ According to Rawls, within human society, these core values are tolerance, reasonableness and a sense of fairness.⁵²

45 Nussbaum, above n2, 349, 353.

46 Ibid 333.

47 John Stuart Mill 'Utilitarianism' in Alan Ryan (ed), *Utilitarianism and Other Essays* (1987) 272, 332.

48 Nussbaum, above n2, 330 - 7.

49 Nussbaum, above n2, 391-92.

50 John Rawls, *Political Liberalism* (1993).

51 Ibid, 15.

52 Ibid 11-14.

In Rawls' view, justice involved basic entitlements and fairness⁵³ and in a *Theory of Justice*, Rawls aimed to establish the concept of "justice as fairness".⁵⁴ This required a revision of the classical social contract formulation. Rawls replaced 'the state of nature'⁵⁵ with the 'original position', a hypothetical state in which parties decide upon principles for a just society.⁵⁶ He imbued the parties with certain characteristics. They were free and equal moral persons, making the contract behind a veil of ignorance as to their future status in the society being established.⁵⁷ The veil of ignorance acted as a device to ensure the emergent principles were based on fairness.

Nussbaum agrees with Rawls on the nature of justice, though disagrees with his ideas about whether it is possible to deal with the question of what humans owed to animals within the conception of 'justice as fairness'.⁵⁸ Although Rawls acknowledged that what humans owe to animals might involve justice, he believed that 'justice as fairness' was not the appropriate formulation. Rawls saw the duties that humans owe to animals as based in compassion and humanity. Nussbaum rejects Rawls' conclusions regarding animals. In developing the capabilities approach for non-human species, she was faced with the challenge of reformulating Rawls' version of the social contract so that it encompasses non-human species as primary subjects of justice. Her first task was to identify why non-species have been excluded. On this point, Nussbaum identified two major main inadequacies in Rawls' version of the social contract:

1. its assumption of mutual advantage and the freedom, equality, and independence of persons entering the social contract.⁵⁹
2. It conflates two questions in its formulation.

Nussbaum interprets Rawls' use of the term 'equality' to mean equivalence in mental and physical powers and argues that this is an

53 Nussbaum, above n2, 337.

54 Rawls (1999), above n13; Nussbaum, above n 2, 340.

55 The concept of the state of nature generally assumed natural rights. However, in the state of nature individual rights were insecure, so the social contract was necessary in order to secure those rights. Ibid 51.

56 Rawls, above n13, 11.

57 Ibid; Noel Preston, *Understanding Ethics* (2007), 44 – 45.

58 Rawls, above n50, 21.

59 Freeman, above n22, 399.

important reason why non-human species have not been included as parties to the social contract.⁶⁰ Her interpretation of Rawls' concept of equality has been disputed.⁶¹ So too has her view of the role of mutual advantage in Rawls' theory. Freeman, for example, argues that the fundamental idea behind Rawls social contract doctrine is not mutual advantage but a *well-ordered society*:

an ideal of free and equal persons motivated by their moral sense of justice and their rational good, cooperating on terms of reciprocity and mutual respect that all reasonably accept and agree upon, and these terms are justified to them for reasons they also accept as reasonable and rational persons.⁶²

Nussbaum revises what she sees as Rawls' assumption regarding 'equality' in order to eradicate any moral or other asymmetries between humans and non-human species. She is well within her rights as a philosopher to do so. Equality is a moral idea, not an assertion to fact,⁶³ so there is no reason why Nussbaum cannot renegotiate the boundaries.

The second major problem Nussbaum identifies relates to Rawls' method, that it conflates two questions in its formulation: 'who are the framers?' and 'for whom is the contract framed?'. This results in the situation in which the framers (that is free, rational and independent human beings) are the only parties to whom the contract applies.⁶⁴ Those who do not have the requisite capacity, such as children, the disabled, and non-human species are, therefore, excluded as primary subjects of justice.⁶⁵

The next step is to separate out the 'who are the framers' and 'for whom is the contract framed' question. However, with regard to the 'who are the framers?' question, it is clear that the framers and arbiters of justice as fairness will always be humans and so will any representatives of animal interests. Because animals cannot be framers of the contract

60 Nussbaum, above n2, 29.

61 Kimberly Smith, 'Animals and the Social Contract: A Reply to Nussbaum' (2008) 30 Environmental Ethics 195.

62 Freeman, above n22, 400.

63 Singer, n19, 31

64 Nussbaum, above n2, 330.

65 Ibid, 33.

they cannot be primary subjects of justice. Unable to overcome this barrier, Nussbaum returns to what she considers the ultimate question: Why is the mistreatment of animals not “just morally wrong, but morally wrong in a special way, raising questions of justice”.⁶⁶ She reasons that the mistreatment of animals is unjust because, not only is it wrong of humans to mistreat animals; animals also “have a right, a moral entitlement, not to be treated in that way. It is *unfair* to them”.⁶⁷

5. Nussbaum: *Having Rawls’ Cake and Eating it Too?*

Having exhausted the possibilities available within contractarianism, Nussbaum turns to utilitarianism to consider whether it offers a mechanism by which animals can become primary subjects of justice. She notes that outcome-orientated views are able to consider, “in a primary and non-derivative way, the interests of the powerless”. This is because they do not conflate ‘who are the framers?’ and ‘for whom is the contract framed?’ questions. They can “imagine human beings framing principles of justice directly for a much wider group of beings”.⁶⁸

Nussbaum refers approvingly to utilitarianism’s outcomes orientation.⁶⁹ In fact, she views the capabilities approach as a form of what Rawls refers to as *imperfect* procedural justice, because it looks to the outcomes and then seeks to establish the procedures that will achieve that outcome as nearly as possible.⁷⁰ The desired outcome for non-human species is that their dignity is respected and that they are given the opportunity to flourish within the limitations of their innate capabilities.

It is in this focus on outcomes that the capabilities approach links to utilitarian theory. Yet, Nussbaum claims her approach is superior to utilitarianism, because it is able to focus on outcomes without aggregating the good across different lives and different

66 Ibid, 338 -9.

67 Ibid, 336 -7.

68 Ibid, 338-9

69 Ibid 338 – 339.

70 Rawls, above, n13, 74. Nussbaum, above n2, 82.

types of life.⁷¹ Theoretically, this means that the risks associated with aggregation, that it allows happiness to be distributed unequally and does not pay attention to the distribution of this total merit to individuals, can be avoided.⁷² Nussbaum wishes to approach outcomes and entitlements from the perspective of individual flourishing.⁷³

Nussbaum claims the capabilities approach is superior to contractarianism because it establishes direct obligations of justice, in the form of entitlements, to non-human species.⁷⁴ It does not make these derivative to duties between humans. This statement suggests that Nussbaum's is advocating for rights or entitlements. It would be reasonable to expect that those to which direct obligations of justice are owed will enjoy individual rights. However, it is pivotal to later arguments presented in this paper to note that Nussbaum achieves these direct obligations by reference to utilitarianism and in this context refers to 'interests of the powerless' rather than 'entitlements' or 'rights'.

Nussbaum's engagement with Rawls' theory of justice and utilitarianism raises the question: can Nussbaum have her cake and eat it too? Can she develop a model which maintains a commitment to rights or entitlements and simultaneously guarantees the desired outcomes? I now turn to examine the capabilities approach for non-human species in more detail, to assess Nussbaum's claim of justice for animals.

71 Nussbaum, n 2, 351.

72 Ibid; Hunter et al, above n 18, 43.

73 Ibid.

74 Nussbaum, above n 2, 351.

III MARTHA NUSSBAUM'S CAPABILITIES APPROACH FOR NON-HUMAN SPECIES

A. Frontiers of Justice

3. The Capabilities List for Non-Human Species

The capabilities list sets out, in 'a highly tentative and general way' ten political principles which together constitute the capabilities approach.⁷⁵

1. Life
2. Bodily Health
3. Bodily Integrity
4. Senses, Imagination, and Thought
5. Emotions
6. Practical Reason
7. Affiliation
8. Other Species
9. Play
10. Control over one's Environment

Each principle secures an entitlement and Nussbaum outlines some of the implications of each for law and policy. An examination of each capability is beyond the scope of this work and the reader is referred to Appendix A for a summary of the ten capabilities, principles and implications identified by Nussbaum. This paper takes the 'life' and 'bodily health' capabilities as starting points for an exploration of Nussbaum's claims. The life entitlement is important as it is generally accepted as the most fundamental human right,⁷⁶ with all others depending on the pre-existence of life for their operation.⁷⁷ The same is true for animals.⁷⁸ As millions of animals are killed every year in Australia for food, research, and sport, the entitlement to life is of

75 Ibid 392.

76 International Covenant on Civil and Political Rights, opened for signature 16 December 1966 999 U.N.T.S. 171 (entered into force 23 March 1976) Article 6 - 1. 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.

77 Rhona Smith, *Textbook on International Human Rights* (2005) 205.

78 George Seymour, 'Animals and the Law: Towards a Guardianship Model' (2004) 29 *Alternative Law Journal* 183, 187.

immediate relevance. Bodily health is pertinent to the conditions in which animals live.

(a) Life

Nussbaum's 'life capability' provides that all animals are entitled to continue their lives, whether or not they have such a conscious interest unless, or until, pain or decrepitude may make death no longer a harm.⁷⁹ Given the breadth of this principle, it is surprising that the entitlement to life is secure only for sentient animals and only against gratuitous killing for sport or luxury items. According to Nussbaum, under this entitlement, animals can be raised and killed for food, with the qualification that all cruel practices and painful killing in the process are banned. Nussbaum recommends that in order to raise consumer awareness, meat should be labelled as to the conditions in which the animal was raised.⁸⁰

(b) Bodily Health

The bodily health principle provides for a healthy life.⁸¹ It reiterates the call for laws banning cruelty, neglect and confinement of animals under human control, including those in the meat and fur industries, working animals and those in zoos and aquaria. It mandates that animals living in these circumstances are provided with adequate nutrition and space. The bodily health principle also insists that the asymmetry in welfare standards between animals raised for food and companion animals be eliminated. Lastly, Nussbaum recommends that, as humans are guardians of the animals that live with them, laws applying to these relationships should be closely modelled on parental duties toward their children.

These principles will be critically examined after I have set out some important aspects of Nussbaum's concept of justice.

79 Nussbaum, above n 2, 393-394.

80 Ibid 393.

81 Ibid 394.

What does Justice for Non-Human Species mean?

Nussbaum argues that the point of justice is to secure a dignified life for many different kinds of beings.⁸² Justice for non-human species is having the opportunity to flourish within their given individual set of capabilities. Nussbaum contends that the capabilities approach is able to recognise different types of animal dignity, and of corresponding needs for flourishing.⁸³ Dignity forms the premise for moral claims and entitlements to justice and is extended to all forms of life that possess both abilities and needs.⁸⁴

The capabilities approach focuses on the individual creature rather than the group or species. Although Nussbaum does not specifically define 'flourishing', from her discussion of this concept, it appears to have three key features. It protects the freedoms required to realise physical, mental, social and emotional capabilities. It also involves being supported, to a threshold level, in expressing those capabilities.⁸⁵ Importantly, the capabilities approach recognises that for domesticated animals flourishing may involve some benevolent discipline, for example, training a dog.⁸⁶ Finally, animals are presumed to have agency, pursuing 'the good life' within the bounds of their capabilities.

2. Who is Entitled to Justice?

Nussbaum struggles to decide on the boundary of justice for non-human species. Initially, she suggests that the capabilities approach has a wider scope than the animal welfare perspective, stating that 'the capacity for pleasure and pain is not the only thing of intrinsic value and is not necessary for moral status'.⁸⁷ However, she concedes that 'sentience is central to movement, affiliation, and emotions' and finally concludes

82 Nussbaum, above n 2, 350

83 Ibid, 300.

84 Ibid, 346.

85 Ibid 381.

86 Ibid 377.

87 Ibid, 362; In Nussbaum's view it is not a morally significant harm to kill non-sentient creatures. For these animals, the capabilities approach allows killing for food or to control populations though does not approve of gratuitous killing at 386, 394.

that ‘it seems plausible’ to consider sentience as a threshold condition for entitlements based on justice.⁸⁸

Within the animal welfare perspective, sentience marks the boundary within which animals have, as a minimum, an ethical claim to protection from cruelty.⁸⁹ In Tom Regan’s conceptualization, legally enforceable rights are deserved by animals who meet the subject-of-a-life criterion. To meet this, individual animals must have a sense of their own welfare independent of their utility to others: this limits the scope of rights to complex sentient creatures.⁹⁰ Although Nussbaum is advocating for justice as something more than protection from cruelty, and possibly something more than rights, her field of concern does not extend beyond that of animal welfare or Tom’s Regan’s approach to animal rights.

B. The Capabilities Approach: Strengths and Limitations

1. Life and Dignity

Nussbaum positions the life entitlement as the first phase in a gradual move towards a consensus against killing at least some, more complexly sentient animals for food.⁹¹ Although this qualification may be pragmatic, Nussbaum does not provide an ethical justification for why killing for food is acceptable.⁹² Her position on killing animals for food and research also contradicts her earlier statement that the capabilities approach is superior to utilitarianism as ‘no creature is being used as a means to the ends of others, or of society as a whole’.⁹³ In essence,

88 Ibid 361.

89 The Australian Animal Welfare Strategy (AAWS) adopts sentience to define its scope of application. The AAWS defines sentience as the capacity to have feelings and to experience suffering and pleasure. Sentience implies a conscious awareness. Commonwealth Department of Agriculture, Fisheries and Forestry, *The Australian Animal Welfare Strategy* (revised ed, 2008), 7, 27 <http://www.daff.gov.au/__data/assets/pdf_file/0008/749204/aaws-strategy-jun08.pdf> at 18 November 2008.

90 Regan, above n 36, 243.

91 Nussbaum, above n 2, 394.

92 Schinkel, above n 24, 41, 45.

93 Ibid 52.

Nussbaum gives the life entitlement and then, for the most part, takes it away.⁹⁴

Like the mainstream animal welfare position, the capabilities approach accepts the use of animals in research. Nussbaum states “research that should be allowed to promote human health and safety will continue to inflict the risk of disease, pain and premature death on animals”. She qualifies this by arguing that “unnecessary research” be stopped and the threshold of what is necessary be raised by “choosing topics cautiously and seriously”. Given the powerful interest groups driving the use of animals in research, especially the pharmaceutical industry’s relationship with medicine,⁹⁵ this assertion seems naive.

Introducing these inconsistencies into the life capability undermines the model’s coherence, and Nussbaum’s claim that her approach goes beyond the rights versus utilitarian divide.⁹⁶ When it comes to killing for food Nussbaum takes a utilitarian approach. Schinkel suggests that the tension between killing for food and the other nine capabilities could only be resolved by pointing out that human and animal interests need to be weighed against each other.⁹⁷ Given that the entitlement to life underpins all others, resolving the matter in this way would render the capabilities approach a utilitarian model. This raises the possibility, as Singer suggests, that the capabilities approach is a derivative form of preference or hedonistic utilitarianism.⁹⁸ In order to avoid this charge, Singer argues that Nussbaum needs to show on what basis capabilities are evaluated as important and good. This evaluation, according to Singer, is the key ethical claim underlying the capabilities approach.⁹⁹

94 Ibid.

95 Jelinek G and Neate S, The influence of the pharmaceutical industry in medicine *Journal of Law and Medicine* (2009) 17:216 – 223.

96 Nussbaum, above n 2, 351.

97 Ibid 53.

98 Peter Singer, Reply to Martha Nussbaum, 'Justice for Non-Human Animals', *The Tanner Lectures on Human Values*, (2002) <<http://www.utilitarian.net/singer/by/20021113.htm>> at 8th September 2008.

99 Ibid.

Evaluating capabilities as important and good

The capabilities approach finds ethical significance in the flourishing of innate capabilities: those that are evaluated as good and central.¹⁰⁰

Nussbaum claims that capabilities are evaluated as important and good on the basis of dignity and ‘the good life’. The good life for animals refers to being able to express their innate capabilities. It follows that, as dignity provides the premise for moral claims and entitlements, each capability should be evaluated on the basis of whether it is essential to a life with dignity.¹⁰¹ Despite this, one finds little reference to dignity in Nussbaum’s rationale as to the scope of each capability.¹⁰² Nussbaum accepts killing for food, though does not provide an account of how dignity and killing intersect, except to say that killing should be painless.¹⁰³ Nussbaum asserts that animals have an entitlement to live with dignity, though remains silent on whether they are also entitled to die with dignity or to describe what that might look like.

While Nussbaum refers to difficult cases, she does not, for example, enter into a systematic analysis regarding the potential contexts in which killing for food might be acceptable. For example, it may be acceptable to kill and eat an animal when one has no other alternative, or where humans hunt in ways that do not completely disempower the animal through the use of technologies such as guns, outboard motors on boats and the like. Ultimately, what is good and important is an empirical issue that draws its character from the details of context.

(a) Values, Context and the Moral Claims of Non-Human Species

Anderson’s discussion of animal rights and the value of non-human life highlights how some of the complex dilemmas, what Nussbaum calls ‘difficult cases’ such as painless killing and the use of animals for food,¹⁰⁴ might be advanced by a detailed account as to the plurality of values associated with animals and the contextual justification for moral

100 Nussbaum, above n2, 347.

101 Ibid 346-7.

102 Schinkel, above n24, 62. See Sara Ortiz, ‘Beyond Welfare: Animal Integrity, Animal Dignity and Genetic Engineering’ (2004) 9 *Ethics and the Environment* 94, for a discussion of animal dignity and bodily integrity in the context of genetic engineering.

103 Nussbaum, above n2, 403.

104 Nussbaum, above n2, 394.

claims concerning them.¹⁰⁵ Anderson identifies species membership as an appropriate basis for understanding different types of animal dignity.¹⁰⁶

In Anderson's view, dignity and rights do not flow directly from capabilities. They are mediated by, and make sense within, the social contexts in which relationships between humans and animals take place. Anderson asserts that "an evaluative claim is valid when it is apt or rational for us to respond in a prescribed or normative way".¹⁰⁷ Following this, Anderson considers how various political and philosophical positions regarding what humans owe to animals reflect foundational human values. In animal rights discourse, respect towards other animals is the fundamental value supporting moral considerability for animals. This respect arises from human recognition of an individual animal's potential for reciprocal cooperative relations with humans. Nussbaum also highlights the role of reciprocity and cooperation in human-animal relationships. From the animal welfare perspective, moral claims are grounded on sentience and compassion for suffering. When it comes to human society's appreciation of Nature and recognition of the interconnectedness of ecosystems, Anderson identifies rational or normative responses as including wonder, awe and admiration for individual animals. By contrast, the moral claim of animals labelled as 'vermin' is diminished due to the opposition between their and human interests and their incapacity for reciprocal

105 Elizabeth Anderson, 'Animal Rights and the Values of Non-Human Life' in Martha Nussbaum and Cass Sunstein (eds) *Animal Rights: Current Debates and New Directions* (2004) 277, 290.

106 Ibid, 282.

107 Ibid 291.

cohabitation in the domestic sphere.¹⁰⁸ Nonetheless, where these animals are sentient they retain a moral claim to be treated humanely.¹⁰⁹

The values arising in the various social contexts to which Anderson refers should be interpreted as descriptive rather than determinative. For example, the implication of Anderson's discussion is not that respect should be limited to companion animals. Rather, the apposite question is how values such as respect, compassion, admiration, awe and wonder can be translated across situations to achieve a minimum standard of justice, that is, opportunities for flourishing. For example, thousands of greyhounds are euthanased every year when they 'retire' from Australia's racing industry, reportedly at around five years of age.¹¹⁰ Questions arising for legislators, policy makers and the public include whether this practice expresses respect, compassion and admiration and how well it respects the animal's dignity based on what is known about the innate capabilities that dogs possess. For example, on the basis of the argument Anderson puts forward, racing greyhounds cooperate with their humans owners. They deserve respect and should enjoy individual rights, including the right to live a life that aligns with their natural life trajectory.

Lastly, the fact that Anderson uses species membership as a way of exploring the values humans rely on in their relationships with animals in different settings does not have to be seen as antagonistic to utility-arianism's rejection of speciesism. If speciesism is defined as 'a prejudice or attitude of bias in favour of the interests of members of

108 Ibid 289; Management programs aimed at controlling populations of animals whose interests are at odds with those of humans generally refer to these animals as 'pest', 'feral', 'vermin', 'noxious' and/or 'invasive' animals. Thiriet argues that the use of these terms is a key problem for improving humane control because of their ability to conjure negative images in the public's mind. Dominique Thiriet, 'In the Spotlight - The Welfare of Wild Introduced Animals in Australia (2007) 24 Environment & Planning Law Journal 417, 419. See also, Savage, Rowan, 'Vermin to be Cleared off the Face of the Earth': Perpetrator Representations of Genocide Victims as Animals' in Colin Martin Tatz, Sandra Tatz and Peter Arnold (eds), *Genocide perspectives III: Essays on the Holocaust and other Genocides* (2006) 17.

109 Nussbaum, above n2, 387.

110 Cox, Nicole, 'Old Greyhounds Used as Guinea Pigs', *The West Australian* (Perth) 12 August 2006.

< <http://www.thewest.com.au/default.aspx?MenuID=77&ContentID=2945>> at 15th September 2008.

one's own species and against those of members of other species',¹¹¹ Anderson's analysis contributes to the broader animal protection agenda by identifying points of human prejudice against the moral claims of other animals. In doing so it provides a foundation for strategies aimed at pricking the conscience of human beings.¹¹²

2. The Capabilities Approach and Justice

A central question of this paper is whether the capabilities approach achieves justice. Nussbaum views the sphere of justice as one of basic entitlements and fairness.¹¹³ The capabilities approach can therefore be assessed on the basis of whether it confers non-human species with rights and a fair share of social goods. The conferral of basic entitlements and the distribution of social goods to non-human species needs to take account of species specific capabilities. As Nussbaum comments, 'nothing is blighted when a rabbit is deprived of the right to vote'.¹¹⁴

In this regard Nussbaum sets a high minimum standard of entitlements though does not attempt to deal with distributive justice.¹¹⁵ This notwithstanding that by accepting animal use in research and killing for food the core entitlements are infringed to satisfy human demand. Nussbaum does not explain this in terms of a distribution of social goods other than to indicate that human interests prevail. The capabilities approach therefore does not provide a principle by which any emergent inequalities in the enjoyment of social goods between humans and non-human species, and possibly within non-human species, could be redistributed to achieve fairness.¹¹⁶

What is clear within the capabilities approach is that cruelty infringes basic entitlements. Justice requires that cruelty in all its forms be deemed unlawful. As Nussbaum observes, in many cases, laws with this purpose exist though they are not well enforced.¹¹⁷ As part of

111 Singer, above n 19 , 6.

112 Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, 287 (Kirby J).

113 Nussbaum, above n2, 337.

114 Ibid 361; See also Seymour, above n78 , 185.

115 Ibid 75, 381. See also Freeman above, n22, 388.

116 Nussbaum, above n2, 381. Singer, above n98.

117 Nussbaum, above n2, 394.

banning cruelty, measures such as the repeal of statutory exemptions would provide an important step toward fairness as this would reflect a more balanced distribution of basic social goods (such as freedom of bodily movement) between human and non-human animals.

(a) *Is Justice Good Enough?*

The proposition that justice alone is the appropriate virtue by which to mediate human relationships with other species becomes a little shaky when one reflects on the similarities between children and animals. When Nussbaum recommends a guardianship model based on that of parent and child for human relationships with domestic animals,¹¹⁸ she is recognizing these sets of relationships as analogous.¹¹⁹ Children and animals share similar vulnerabilities in their relationships with adult humans. Following this, a useful question to test whether justice is enough to provide animals with the opportunity to flourish is whether justice is adequate in the case of children. It is clear that rights and fairness do not fully capture humanity's duties towards children. It seems necessary to provide something more. To flourish, children need nurturing and special consideration. Special consideration is certainly appropriate for endangered species and those in areas of diminishing habitat. Nurturing is essential for animals under human control.

As noted, Rawls acknowledged the possibility that what humans owe to animals may be a matter of justice, though 'justice as fairness' was not the appropriate formulation.¹²⁰ It is possible that justice for animals requires entitlements and fairness, but with explicit reference to compassion as an additional element. Although Nussbaum recognises an overlap between compassion and a sense of justice,¹²¹ she does not integrate compassion into her arguments in support of each capability. Unlike Rawls, Nussbaum believes compassion does not provide an adequate ethical basis for human duties toward other species. She defines compassion as involving the thought that another creature is suffering significantly, and is not (or not mostly) to blame for that

118 See Capability Two: Bodily Health and Capability Ten: Control over One's Environment in Appendix A of this paper.

119 Nussbaum, above n2, 400, 397; David Favre, 'A New Property Status for Animals: Equitable Self-Ownership' in Cass Sunstein and Martha Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 234, 242.

120 Rawls (1999), above n13, 21.

121 Nussbaum, above n2, 337.

suffering. In her view, the problem with compassion is that it omits the essential element of blame.¹²² Moreover, Nussbaum is concerned that even if compassion incorporated an acknowledgement of wrongfulness and a duty to refrain from harmful acts, it may not adequately support the stance that mistreatment is not just morally wrong, but morally wrong so that it raises issues of justice.¹²³ Midgely observes that by studying justice in the way Rawls does, that is, without a background discussion of its 'neighbours', justice is bound to expand in a way that obscures the claims of other virtues.¹²⁴ It is possible that Nussbaum has also fallen prey to this tendency. Nussbaum's approach to compassion in the capabilities approach for non-human species does not resonate clearly with her arguments in *Upheavals of Thought*,¹²⁵ in which she writes extensively on the role of compassion in public life. In this work, Nussbaum argues that in order to recognise the importance of compassion as a response to human suffering it must be embedded into certain basic goods, such as constitutional guarantees.¹²⁶ In the capabilities approach Nussbaum advocates for constitutional principles to include animals as subjects of political justice. However, she does not explicitly refer to her arguments in *Upheavals of Thought*.¹²⁷

Vanden Eynde approaches Nussbaum's ideas about compassion from a Buddhist perspective and sees the role of compassion in the capabilities approach as 'fleshing out' each capability, and as a concept with which to engage in cross-cultural dialogue.¹²⁸ Vanden Eynde suggests three principles, based in Buddhist thought, to construct a universal ethical framework. These principles recognize, firstly, the interdependency of all forms of life and the reciprocal obligations which arise from this, secondly, the need for universal compassion for sentient beings and thirdly, that all living creatures possess inalienable dignity.¹²⁹

The values and relationships expressed by these principles accord closely with those identified by Anderson, and with the role of dignity

122 Ibid 336.

123 Ibid 336 – 338.

124 Mary Midgely, *Animals and Why They Matter* (1983) 51.

125 Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (2001).

126 Ibid 415 – 416.

127 Nussbaum, above n 2, 400 – 401.

128 Maria Vanden Eynde, 'Reflection on Martha Nussbaum's Work on Compassion from a Buddhist Perspective' (2004) 11 *The Journal of Buddhist Ethics* 46.

129 Ibid 46.

in Nussbaum's capabilities approach. It is, however, important to note that dignity is a contested and vague concept and current ethical debate indicates that it should be approached with caution.¹³⁰ If animal dignity was to inform Australia's animal welfare framework there is a great risk of it becoming 'feel-good' rhetoric. The preceding discussion goes some way to providing some anchorage. The concept of dignity as it might be understood in human relationships with animals is constituted by a number of values including respect, compassion, wonder, awe and admiration of an animal's natural abilities (including its capacity to harm), or beauty. The assessment of capabilities for the purpose of legislation and policy development is a multidimensional undertaking, which would need to draw on this concept of dignity, the interdependency between species and the mental, physical and emotional characteristics of a given species.

3. The Capabilities Approach and Utilitarianism

Overall, the capabilities approach provides valuable insights into understanding the requirement of justice for animals and how a satisfactory minimum threshold might be achieved. However, when it comes to killing for food and the use, sometimes lethal, of animals in research, the entitlement to life is not inviolable. In taking this stance, Nussbaum undermines all ten entitlements.¹³¹ This, together with Nussbaum's acceptance of sentience as marking the sphere of justice, means that the capabilities approach can be considered a form of animal welfarism.¹³² In light of the powerful economic and cultural forces which drive the continuation of large-scale killing of animals for food and in research, the adoption of a utilitarian solution to this issue could be justified on the basis of pragmatism. However, it is also clear that Nussbaum's approach is utilitarian at a theoretical level. Although Nussbaum invokes rights theory and uses the language of entitlement to achieve direct obligations of justice for animals, she ultimately turns to utilitarianism and, in this context, refers to "interests of the powerless" rather than "entitlements" or "rights".

To make this conclusion is not to diminish the strengths of the capabilities approach. While in classical rights theory a right will trump

130 Doris Schroeder, 'Dignity: Two Riddles and Four Concepts' (2008) 17 Cambridge Quarterly of Healthcare Ethics 230.

131 Schinkel, above n 24.

132 Ibid; Singer, above n 98.

an interest,¹³³ one cannot conclude that utilitarianism, which uses the concept of interests, will prove less effective in achieving substantive outcomes for animal well-being. Lyons, for example, has suggested that while Rawls' two principles of justice and utilitarianism are not equivalent, the two approaches may not be so different with regard to the real-world arrangements they justify.¹³⁴ Nonetheless, Singer's utilitarianism goes further than Nussbaum in that it maintains that the killing of animals for food is not supported by the principle of equal consideration. On this basis, Singer advocates for vegetarianism. Although adopting this position would be consistent with the logic of the capabilities approach for non-human species, Nussbaum refrains from taking this step.¹³⁵

Nussbaum talks about entitlements rather than rights. It is relevant to note that both John Stuart Mill and Peter Singer argue for absolute rights within the bounds of utilitarian theory. Mill, writing in the context of justice among humans, concludes that the claim for personal security assumes a character of absoluteness.¹³⁶ Singer argues for a right to life when he states that some primates should be entitled to the 'same full protection against being killed that we now extend to human beings'.¹³⁷ On the basis of the foregoing discussion, it appears that the capabilities approach would be best considered as a form of preference utilitarianism.¹³⁸ This is because, in effect, the ten capabilities articulate a set of preferences of beings affected by actions or their consequences. The actions or consequences in question are those of humans, including laws and policies, and the many ways that these restrict animal preferences. Reflecting preference utilitarianism methodology,¹³⁹ the capabilities approach expresses the view that on balance, and on

133 Geoffrey Bloom, 'Everyone is in Favour of Animal Welfare' (2007) (91) Reform 19, 20.

134 Norman Daniels, Introduction' in Norman Daniels (ed), Reading Rawls: Critical Studies on Rawls' A Theory of Justice (1975) xi, xxv; David Lyons, 'Nature and Soundness of the Contract and Coherence Arguments' in Daniels, above n166, 143.

135 Freeman, above n22.

136 Mill, above n47, 327

137 Singer states 'in the present state of knowledge there is a strong case against the slaughter of chimps, gorillas and orangutans. On the basis of what we know now, we should immediately extend to them the same full protection against being killed that we extend now to all human beings...a case can also be made perhaps even to the point of all mammals' (emphasis added). Practical Ethics (1993) 132.

138 Singer, above, n98.

139 Singer, above, n30.

consideration of the facts regarding the innate capabilities of many sentient animals, they have a preference for expressing these capabilities and living their life according to their natural life trajectory.

CONCLUSION

This paper examined Nussbaum's claim of justice for animals and assessed whether Nussbaum's approach goes beyond the current animal rights or utilitarian approaches.

Based on the preceding discussion it can be concluded that at both applied and theoretical levels, Nussbaum's capabilities approach for non-human species is a form of animal welfarism. This is because, in order to deem animals direct subjects of justice, Nussbaum rests her case on Utilitarianism's notion of interests. Nussbaum uses the language of rights and entitlements, though accepts large-scale killing of animal for food and research. This means that the entitlements she refers to, expressed as capabilities, are not secure.

The strength of the capabilities approach is that it allows a fuller appreciation of the capability differences between and within species and it establishes a relatively high minimum standard of animal welfare. In doing so, Nussbaum makes a significant step toward her goal of justice for non-human species. However, the capabilities approach for non-human species, while aiming to contribute to the social justice agenda, does not provide a complete account as it does not explicitly concern itself with how inequalities are to be redistributed above these entitlements.¹⁴⁰ Despite the theoretical problems it raises in accepting the qualification of killing for food and research, the capabilities approach provides a pragmatic advocacy tool for legislative reform and has a stronger possibility of gaining widespread public support.¹⁴¹ By exploring Nussbaum's and related work it was possible to identify a set of ethical principles which might underpin Australian law and policy dealing with animal protection and well-being:

1. All forms of life are interdependent and reciprocal obligations and duty of care towards non-human species arise from this;
2. All sentient beings are to be treated with compassion; and

140 Nussbaum, above n, 2.

141 Favre, above n119, 236.

3. All living creatures have dignity and deserve respect.¹⁴²

Growing public concern about our duties towards animal suggests that concepts such as inter-species inter-dependence and reciprocity, compassion, respect and dignity would more clearly reflect community expectations regarding Australia's obligations towards non-human species than the current "humanist" animal welfare approach. The principles articulated above provide a suitable ethical framework with which to improve the wellbeing of animals, through much needed legislative reform.

¹⁴² Vanden Eynde, above n128, 129.

BOOK REVIEW

Animal Law in Australia and New Zealand

Deborah Cao

With contributions by Katrina Sharman & Steven White

Lawbook Co 2010. Thompson Reuters

ISBN 978 0 455 22618 7

This introductory textbook fills an important gap for the teaching of Animal Law in Australia and New Zealand.

It begins with first principles and builds up a detailed picture of the development and current state of Australasian animal law. It then covers the main areas of animal welfare law, beginning with the overarching anti-cruelty legislation and moving on to specific contexts: farm animals, companion animals, wild animals and animals used in research.

The book is particularly good for students as it includes many details of the relevant legislation for each jurisdiction and analysis of case law. It is an excellent companion to *Animal Law in Australasia - A New Dialogue*, (edited by Peter Sankoff & Steven White) which provides a deeper analysis of the issues raised in Deborah Cao's book and extends to other areas of animal law.

Animal Law in Australia and New Zealand was officially launched at Sydney Law School by the Governor of NSW, Professor Marie Bashir AC CVO, as part of the first lecture of the 2010 Voiceless Animal Law Lecture Series.

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

Former High Court of Australia judge, Michael Kirby AC CMG, concludes a Foreword to Deborah Cao's *Animal Law in Australia and New Zealand* with an observation that “(w)hat, not so long ago, was regarded as an exotic topic of limited interest is now a fast-growing curriculum subject with a real legal dimension”.

“Why has this happened? Why has it happened now? In part,” Michael Kirby continues, “it is because writers like Peter Singer re-kindled the ideas of earlier thoughtful observers and planted them in the mind of contemporary Australasia. In part, this has happened because cruelty to animals happens in our midst and, as a community, we are responsible for it. In part, the ideas have found eloquent expositors, like the authors of this book and there is nothing so powerful in the world as an idea whose time has come.”

The book contains chapters¹ by Stephen White, lecturer at Queensland’s Griffith Law School and co-editor of *Animal Law in Australasia - A New Dialogue* and a chapter² by Katrina Sharman, corporate counsel for the Australian animal protection institute Voiceless.

There is a most useful, 21-page, bibliography.

Animal Law has never been just about law, or just about animals. As Cao writes in the Preface to her long overdue introductory textbook: “It is about people and the relationships between people and other living beings as fellow creatures of existence”.

Animal Law is also about science, in the ways that recent findings of similarities (genetic, behavioural and cognitive, cultural, social, even moral or ethical³) continue to blur the boundaries of distinction between humans and non-humans. And, as Cao notes, “(a)ssertions of differences in some of these areas between humans and animals, or the absence of behaviour or ability in animals have often been used as reasons to deny animals due consideration”.⁴

Animal Law is about ethics, too. “Plato once said, in dealing with adults and ethics, one cannot teach ethics, one can only remind, that is help, people realise the unnoticed implications of their own beliefs”.⁵

And, of course, it is about social justice.

1 Regulation of the Treatment of Companion Animals and Regulation of Wild Animal Welfare.

2 Regulation of the Treatment of Farm Animals.

3 pp27-28.

4 p24.

5 B.E. Rollin, *Animal Rights and Human Morality* (Prometheus Books, Amhurst, New York, 2006) p18.

Animal Law is especially appealing to legally creative minds, given the challenges posed by a statutory and regulatory thicket that obscures from effective public scrutiny that which reasonable minds might think people have a right to know: what is done daily to produce the food, clothing and entertainments they choose to consume?

- **John Mancy**, founding editor Australian Animal Protection Law Journal and guest lecturer Animal Law undergraduate course, University of New South Wales, January 2010.

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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>).

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