

# **AUSTRALIAN ANIMAL PROTECTION LAW JOURNAL**

ISSN 1835-7008

Australia's first Animal Law journal

**(2012) 7 AAPLJ**

**EDITOR**

**John Mancy**

**ASSISTANT EDITOR**

Jacque Mancy-Stuhl

Published by

John Mancy  
18 Wavell St., Carlingford,  
New South Wales 2118 Australia  
E-mail: [mancyj@gmail.com](mailto:mancyj@gmail.com)

(2012) 7 AAPLJ

# A Note From The Editor

## Animal Law: An emotional subject?

Law is not an autonomous system, and I know of no better way to make this point than to introduce an audience to the law affecting non-human animals - Animal Law - with its inseparable economic, political, scientific, historical, ethical, social and cultural components.

An unexpected benefit of introducing students to Animal Law, I have found, is that it keeps them wide awake, given the strong emotional content of so much of its subject matter.

By placing the law in the context of broader social, cultural and especially ethical considerations, an interdisciplinary approach to teaching Animal Law forcefully brings home the point that "much can be learned from other disciplines (e.g. animal welfare science, political science and ethics), especially in identifying the assumptions that underpin legislation, codes of practice and so on in this area"<sup>1</sup>.

But, does "emotion" really have any useful role to play in the consideration of law affecting animals? Philosophers Peter Singer and Tom Regan might disagree, but **Melissa S Biggs** writes in this issue "that reason is sterile without emotion: in ethics, reason and emotion work together. Attempts to expunge emotion (particularly as a misguided attempt to make animal ethics 'respectable') are self-defeating".<sup>2</sup> Melissa considers how a feminist ethic of care approach to animal ethics might interact with a broader ethic of care to communities, families and human individuals, in a context of law, animal welfare science and health issues involved in the consumption of cow's milk in Queensland.

**Alex Bruce** noted briefly in the final chapter of his book, *Animal Law*

---

<sup>1</sup> The words quoted are those of Griffith University lecturer Steven White in this issue, in a short article on the "future of animal law in the legal curriculum as we approach its 10th anniversary in Australia".

<sup>2</sup> The Editor encourages debate on this and any other views expressed, or subjects raised, in this Journal, through letters, responsive articles, notes or "opinion" pieces. The AAPLJ was founded "to serve as a scholarly forum for principled consideration and spirited discussion of the issues of law and fact affecting the lives of non-human animals". As I wrote in the first issue, in 2008 (using Peter Sankoff's words): "the greatest threat to animals is passivity and ongoing acceptance of the status quo; a status quo most easily maintained through silence." - Ed.

*in Australia - An Integrated Approach*,<sup>3</sup> permitting the market to drive animal law reform could be a stronger avenue to change than attempting to pit uncertain animal interests or rights against well-established human rights claims. And, "using possible breaches of the ACL to do this would shift the focus away from that emotive and apparently intractable debate to the issue of consumer welfare and consumer rights."

In this issue, Alex, in the first section of a two-part article, considers whether the federal government's intention, expressed in its *Labelling Logic Report*,<sup>4</sup> to use the Australian Consumer Law (ACL) to regulate consumer values issues associated with food animal welfare and religious slaughter of animals, is at least theoretically capable of being achieved. Translating economic and consumer theory into practice in the legal application of the ACL is, of course, a quite different matter.

The second part of Alex's article will be published in (2012) 8 AAPLJ. It explores whether and to what extent the case law permits an interpretation of the ACL to prohibit misleading or deceptive animal welfare claims, and whether failure to advise consumers that animals have been slaughtered according to religious practice could amount to misleading or deceptive conduct.

Ethical and legal issues arising from the use of animals in circuses are considered by **Eleanor Browne** in *Clowning Around: Why has the NSW Parliament failed to abolish exotic animal circuses?*

There are also the usual Book Reviews, a letter on animal rights and journalism, and (for the first time) a list of those acknowledged experts in various disciplines impinging upon Animal Law: the peer reviewers whose time and skills have been selflessly given to uphold the standard of articles in this journal. Without them, this journal could not have earned its inclusion in the Australian Research Council's ERA 2012 Journal List. Without them, there would be no Australian Animal Protection Law Journal.

---

<sup>3</sup> Reviewed in this issue, at p. < .

<sup>4</sup> Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27.1.11, Commonwealth of Australia.

<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/labelling-logic> (Accessed 26.6.12).

# CONTENTS

<b>A Note From The Editor</b>	2
<b>Labelling Illogic? Food Animal Welfare &amp; the Australian Consumer Law (Part 1)</b>	
Alex Bruce	5
<b>The Feminist Ethic of Care and the Question of Caring for Animals and Humans: Cow's Milk in Queensland</b>	
Melissa S. Biggs	48
<b>Animal Law in Australian Universities: Towards 2015</b>	
Steven White	70
<b>Clowning Around: Why has the NSW Parliament Failed to Abolish Exotic Animal Circuses?</b>	
Eleanor Browne ...	82
<b>Book Reviews</b>	107
<b>Letter to the Editor</b>	114
<b>Peer Reviewers</b>	116

# Labelling Illogic? Food Animal Welfare & the Australian Consumer Law [1]

*By Ven. Alex Bruce\**

## Introduction

This article is intended as the first of two exploring whether, and to what extent an existing regulatory regime in the form of the new *Australian Consumer Law* ('the ACL')<sup>5</sup> and the economic forces of informed consumer demand that it protects, can be employed to advance food animal welfare initiatives and to address practices associated with the religious slaughter of animals. By 'food animals' I mean the millions of chickens, cows and pigs processed and slaughtered in Australia each day for human consumption.

At first glance, the ACL appears to have little to do with animal welfare generally and food animal welfare specifically. Located within the *Competition and Consumer Act 2010* (Cth) ('the CCA'), the ACL is not intended to benefit animals, but to facilitate the larger objective of the CCA in enhancing the welfare of Australians through the promotion of competition, fair trading and consumer protection.<sup>6</sup>

Recently, however, the Commonwealth government concluded a comprehensive review into food product labelling in Australia. In January 2011, the gracelessly titled 'Legislative and Government Forum on Food Regulation (Convening as the Australia and New Zealand Food Regulation Ministerial Council)' released its *Labelling Logic Report* making certain recommendations about future regulatory initiatives concerning product labelling.<sup>7</sup>

---

\*Associate Professor, Buddhist Monk, ANU College of Law.

5 On 1 January 2011, the relatively fragmented landscape of consumer protection and product liability law in Australia fundamentally changed. The Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (ACL Act) completed a process of reform that had been gaining momentum since the early 2000s, which culminated in the creation of a single, nationwide consumer protection and product liability regime known as the ACL. The ACL replaced 17 generic consumer protection laws that existed across States and Territories with a single national consumer law. It is the largest reform of Australian consumer protection laws ever undertaken.

6 Competition and Consumer Act 2010 (Cth) s 2.

7 Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia.

Importantly, the *Labelling Logic Report* recommended what it called ‘consumer values issues’: consumer concerns associated with food animal welfare and religious practices associated with food animal products, to be regulated through the mechanisms in the CCA generally but particularly the new ACL.<sup>8</sup> In its December 2011 *Response*, the Commonwealth government agreed.<sup>9</sup>

So, instead of simply legislating to prohibit certain animal farming practices, or to regulate the religious slaughter of animals, the Commonwealth Government is intending market forces, in the form of consumer demand exerting up-stream market pressure on primary industry producers, to implement food animal welfare initiatives.

In an increasingly competitive market, it is anticipated that demand for ethically-produced food animal products will signal producers of consumers’ preferences for food animal welfare practices such as free-range farms.<sup>10</sup> In safeguarding this consumer demand, the Commonwealth government intends the ACL will be enforced to prevent misleading or deceptive animal welfare claims made by suppliers, underscoring the importance of accurately evaluating the potential for the ACL to fulfil these policy objectives and, in so doing, advance food animal welfare initiatives.<sup>11</sup>

But how realistic is this intention? This first article explores the *theoretical* economic and consumer protection policy foundations for using the ACL in this way. It does so in the following seven parts.

Part I explains why the imperative to regulate for food animal welfare and the religious slaughter of animals has recently become an important issue for Australian governments. Part II places that imperative in the context of the *Labelling Logic Report* as it explains why the ACL has now assumed an important role in the regulation of food animal welfare. Part III explains the regulatory inconsistencies and conflicts inherent in government attempts to facilitate profitable primary industries and freedom of religious practice on the one hand, while simultaneously

---

<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/labelling-logic> (Accessed 26 June 2012).

<sup>8</sup> *Ibid* 47, [3.20].

<sup>9</sup> *Response to the Recommendations of Labelling Logic: Review of Food Labelling Law and Policy* (2011), Commonwealth Government, December 2012, 40.

<sup>10</sup> *Above* n 3.

<sup>11</sup> *Above* n 3, 97, [6.3].

attempting to improve animal welfare on the other. Part IV shows how consumers are responding to this regulatory conflict in their purchasing patterns. Part V explains the economic assumptions that underpin the *Labelling Logic Report* and that empower consumers to show their sensitivity to food animal welfare issues. Those economic assumptions are intended to facilitate market conditions whereby the consumer is sovereign, a concept discussed in Part VI. But even if consumer sovereignty *theoretically* empowers consumers to indirectly benefit food animal welfare, does the evidence indicate they are *in fact* willing to pay a price-premium for welfare-friendly food animal products? Part VII analyses Australian and European literature which suggests that they are willing.

This article concludes that the Commonwealth government's intention, expressed in its *Labelling Logic Report*, to use the ACL to regulate consumer values issues associated with food animal welfare and religious slaughter of animals, is theoretically capable of being achieved. However, as this article also notes, translating economic and consumer theory into practice in the legal application of the ACL is a quite different matter.

The second article, to be published in (2012) 8 AAPLJ, will explore whether and, if so, to what extent the case law permits an interpretation of the ACL to prohibit misleading or deceptive animal welfare claims, and to consider whether failure to advise consumers that animals have been slaughtered according to religious practice can amount to misleading or deceptive conduct.

## **Part I: The Imperative for Australian Governments**

Adequately regulating food animal welfare practices and the religious ritual slaughter of animals has recently assumed a certain level of urgency in Australia. In May 2011, the Australian Broadcasting Company current affairs program 'Four Corners' revealed a pervasive culture of abusive and cruel handling practices associated with Australian beef cattle exports to Indonesian abattoirs.<sup>12</sup> There were images of cattle being abused while being slaughtered, supposedly according to Islamic religious ritual.

---

12 A Bloody Business, ABC Four Corners Program, 30 May 2011

<<http://www.abc.net.au/4corners/content/2011/s3228880.htm>> (Accessed 20.5.12).

The disturbing footage and the national condemnation it generated, convulsed the Commonwealth government into suspending the live export trade on 7 June 2011, while it developed and implemented an *Export Supply Chain Assurance System* intended to prevent future animal welfare abuses.<sup>13</sup>

Although live cattle exports were resumed, systematic breaches of the new scheme, by Australian export companies North Australian Cattle Company and International Livestock Export, were revealed by yet another review into the export industry, released in May 2012, by the Commonwealth Department of Agriculture, Forest and Fisheries ('DAFF').<sup>14</sup>

The heightened awareness of food animal welfare issues also resulted in evidence emerging in 2011 of gross animal welfare abuses at Australian abattoirs LE Giles in Victoria and in 2012, in the Hawkesbury Valley in New South Wales.<sup>15</sup>

These international and domestic animal welfare scandals have prompted fierce criticism from animal welfare groups such as Animals Australia and the Royal Society for the Prevention of Cruelty to Animals (RSPCA). However, arguments between animal welfare advocates and the food animal industry or religious representatives tend to degenerate into intractable conflicts between human rights claims versus uncertain animal rights or interest claims resulting in significant legal and regulatory confusion and inaction.<sup>16</sup>

The debate concerning animal 'rights' is all the more confusing because, despite growing awareness of the legal and ethical complexities associated with human exploitation of animals, most people in Western societies do not accept that animals possess rights that should be legally protected and enforced over and above human rights claims, interests, preferences or freedom of religious practice.<sup>17</sup>

---

13 <<http://www.daff.gov.au/animal-plant-health/welfare/export-trade/gov-response-to-cattle-mistreatment-in-indonesia>> (Accessed 20 May 2012).

14 <<http://www.daff.gov.au/aqis/export/live-animals/livestock/investigation-report/combined>> (Accessed 20 May 2012).

15 <<http://www.abc.net.au/am/content/2011/s3379638.htm>> (Accessed 20 May 2012).

16 Alex Bruce, 'Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of the Religious Slaughter of Animals' (2011) 34(1) University of New South Wales Law Journal 351.

17 Gary Steiner, *Anthropocentrism and its Discontents: The Moral Status of Animals in the History of Western Philosophy*, (The University of Pittsburgh Press, United States, 2005), 6-7.



In Australia, this view is reinforced by a legal system that characterises animals as property able to be exploited by their owners with few limitations.<sup>18</sup> The ways society exploits animals for entertainment, pleasure and consumption raise profound moral, ethical and legal issues. Accordingly, ‘ethical animal welfare, the protection of animals for their own sake as sentient beings with a capacity for suffering, is no doubt one of the basic values of modern Western states’.<sup>19</sup>

It is very difficult for Western states generally and Australian governments, in particular, to develop these values when those same states and governments pursue primary industry policies permitting the industrial exploitation of animals-as-property while simultaneously professing a commitment to improving the welfare of animals.<sup>20</sup> This is particularly so of the millions of animals processed and slaughtered daily to feed humans.<sup>21</sup>

This difficulty is an inevitable result of an apparent inherent regulatory conflict between the Commonwealth government facilitating primary industry exploitation of food animals as an economic resource and preserving religious slaughter practices on the one hand, while encouraging the protection of animal welfare on the other.<sup>22</sup>

Satisfactorily navigating these inconsistent regulatory objectives is fraught with difficulty because doing so calls into relief deep cultural norms, religious beliefs and vested economic interests.

The Australian government apparently does not intend to directly regulate for food animal welfare or mandate certain slaughter practices for the religious slaughter of animals. The lack of an express power in the *Constitution* means animal regulation is not principally the responsibility of the Commonwealth government.<sup>23</sup> Instead, regulatory responsibility for animals throughout Australia is shared across

---

18 Attorney General (SA) v Bray (1964) 111 CLR 402.

19 Bolliger, Gieri, Constitutional and Legislative Aspects of Animal Welfare in Europe, Conference, February 2007, 1.

20 Alex Bruce, Animals and Cruelty, Chapter 8 in *Animal Law in Australia: An Integrated Approach*, (LexisNexis Butterworths, Sydney, Australia, 2012) 197.

21 Alex Bruce, Animals as Food, Chapter 9 in *Animal Law in Australia: An Integrated Approach* (LexisNexis Butterworths, Sydney, Australia, 2012) 221.

22 Steven White, ‘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(3) *Federal Law Review* 347, 359.

23 Andrew Bartlett, Animal Welfare in a Commonwealth System: A Commonwealth Politician’s Approach, in *Animal Law in Australasia: A New Dialogue*, Peter Sankoff and Steven White (eds), (The Federation Press, Sydney 2009) 387.

Commonwealth, state, territory and local governments through a complex, often confusing, co-operative regime.<sup>24</sup>

However, the Commonwealth Government *indirectly* influences food animal regulation by assuming lead policy responsibility through the former *Primary Industries Ministerial Council* ('PIMC'), replaced in September 2011 by the *Standing Council on Primary Industries*. ('SCoPI').<sup>25</sup> Under the PIMC/SCoPI framework, the Commonwealth Government issued various *Model Codes of Practice* ('MCOPs') and *Australian Standards*, relating to the welfare of animals, that are implemented to varying degrees of effectiveness through state and territory legislation.

The Commonwealth Government develops these initiatives by conducting various Reviews into animal-related issues, creating Reports that make certain recommendations intended to be implemented through Policy Proposals. One such Report and Proposal frames the theoretical and legal analysis throughout these two articles.

## **Part II: Why the ACL Has Assumed a Greater Profile**

The Commonwealth Government is proposing to facilitate consumer preferences for welfare-friendly food animal products by prohibiting misleading or deceptive animal welfare representations made by suppliers of those products.

In its 2011 *Labelling Logic Report*, the Commonwealth has adopted a regulatory approach to food product labelling that involves an issues hierarchy. These hierarchical issues are intended to guide regulatory initiatives associated with product labelling. In descending order of importance, the Commonwealth intends focussing on: (i) food safety, (ii) preventative health, (iii) new technologies and (iv) consumer values issues.<sup>26</sup> Animal welfare claims made by suppliers of food animal products fall into the category of 'consumer values issues'.<sup>27</sup>

---

24 Steven White, '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(3) *Federal Law Rev.* 347.

25 < [http://www.mincos.gov.au/about\\_scpi](http://www.mincos.gov.au/about_scpi) > (Accessed 26 June 2012).

26 Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia, 40-41, [3.3].

27 *Ibid* 97, [6.1].

Consistent with this hierarchical regulatory approach, in addressing concerns associated with ‘consumer values issues’, the Commonwealth government view is that ‘food labelling for such generalised issues is best left to market responses’.<sup>28</sup> In its December 2011 *Response to the Labelling Logic Report*, the Commonwealth affirmed that consumer values issues (such as animal welfare and religious issues) associated with food animal products were best regulated through the mechanisms in the *Competition and Consumer Act 2010* (Cth).<sup>29</sup>

The decision to use the ACL in this way is consistent with earlier Commonwealth regulatory initiatives, such as the *Food Standards Australia New Zealand Act 1991* (Cth), intended to prevent misleading and deceptive conduct by ensuring that consumers have adequate information to make informed food choices.<sup>30</sup>

It is also consistent with State government initiatives such as the NSW *Food Amendment (Beef Labelling) Act 2009* and associated Regulations that prescribe the AUS-MEAT Domestic Retail Beef Register for the purposes of beef labelling requirements prohibiting misleading or deceptive statements made on meat product labels.

However, the unstated assumption behind this policy of preventing deception associated with food labels involves the effective operation of market forces of supply and demand. It assumes market dynamics will facilitate consumers’ desires for accurate information about welfare-friendly food animal products. In an increasingly competitive market for food products, it is anticipated that consumer demand for ethically produced animal products will signal producers to implement food animal welfare practices such as free-range farms.<sup>31</sup>

In attempting to satisfy this consumer demand, food animal products accentuating animal welfare will be subject to careful scrutiny under the misleading or deceptive conduct provisions of the ACL. Product

---

28 Ibid 97, [6.3].

29 Response to the Recommendations of Labelling Logic: Review of Food Labelling Law and Policy (2011), Commonwealth Government, December 2012, 40.

30 Food Standards Australia New Zealand Act 1991 (Cth), s 3(c).

31 Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia, paragraph 3.20 at p 47.

differentiation based on food animal welfare claims requires careful substantiation.<sup>32</sup>

It might have been thought prior to 2011 that the lack of a national consumer protection regime required separate jurisdiction-specific legislation preventing misleading or deceptive conduct. However, the coming into effect of the ACL on 1.1.11, as part of the *Competition and Consumer Act 2010* (Cth), changed the regulatory landscape.<sup>33</sup>

This is why the Commonwealth government's response to the *Labelling Logic Report* does not emphasise State legislation, such as the NSW *Food Amendment (Beef Labelling) Act 2009* or State or Territory *Fair Trading Acts*. Instead, the focus is on the ACL.<sup>34</sup>

Section 18 of the ACL, generally prohibiting misleading or deceptive conduct in trade or commerce applies to corporations as a law of the Commonwealth and equally to unincorporated entities through reciprocal State and Territory application legislation.<sup>35</sup>

## Two Important Threshold Questions

However the efficacy of the ACL in preventing misleading or deceptive conduct in relation to food animal product labelling and whether, in doing so, it will encourage suppliers to improve food animal welfare, rests upon satisfactory answers to two sets of important but related questions. Both sets of questions concern the ability of consumers to influence the animal welfare practices of suppliers of food animal products.

The first set of questions relate to the *theoretical* relationship between consumers and their role in the market, the role of consumer protection legislation such as the ACL and food animal welfare. Jeff Leslie and Cass Sunstein confidently suggest that 'many consumers would be

---

32 In its Food Labelling Guide, the ACCC warns that it has 'become increasingly concerned about representation on the labels, packaging and advertisements of food and beverage products.' ACCC Food Labelling Guide, 2009, Canberra, Australia, 3.

33 Alex Bruce, Australia's National Consumer Protection Regime, Chapter 1 in Consumer Protection Law in Australia, (LexisNexis Butterworths, Australia, 2011) 4.

34 Response to the Recommendations of Labelling Logic: Review of Food Labelling Law and Policy (2011), Commonwealth Government, December 2012, 13.

35 Alex Bruce, Application of the Competition and Consumer Act 2010, Chapter 2 in Consumer Protection Law in Australia, (LexisNexis Butterworths, Australia, 2011).

willing to pay something to reduce the suffering of animals used as food'.<sup>36</sup> Does the literature actually support this suggestion? What exactly is the relationship between consumer protection legislation such as the ACL, consumer buying power and food animal welfare?

And even if there is a relationship how do consumer spending patterns actually influence food animal welfare practices?

In answering these questions, this article explores two key aspects of consumer protection theory. First, it explores the way in which consumer protection law and policy is intended to benefit consumers by empowering them to make informed purchasing decisions. It therefore discusses the concept of 'consumer sovereignty'.

This discussion takes place in the context of the policy approach expressed by the Commonwealth government in its *Labelling Logic Report*<sup>37</sup> that assumes, at least in theory, that if consumers are provided with sufficient information about food animal products their spending patterns will signal suppliers about associated food animal welfare issues. These are the 'consumer values issues' referred to in the *Labelling Logic Report*.<sup>38</sup>

This article then explores whether consumers, once informed by suppliers about animal welfare issues associated with the food products they are buying, are *actually willing*, as Leslie and Sunstein suggest, to pay a price premium to reduce the suffering of animals used as food. If there is no evidence of this willingness, then even if the ACL is effectively enforced, its capacity to influence suppliers to introduce food animal welfare initiatives will likely be minimal.

However, if the theoretical relationship between consumers, consumer protection legislation and food animal welfare can be established, the second set of questions relate to the *legal* implementation of that relationship.

Given the significant consumer protection role expected of the ACL, it is necessary to address several practical legal questions. Does the case law permit an interpretation of ACL s18 in ways that would prevent

---

36 Jeff Leslie and Cass Sunstein, 'Animal Rights Without Controversy' (2007) 70 *Law and Contemporary Problems* 117.

37 Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia, 47, [3.20].

38 *Ibid* 41-42, [3.7].

producers making misleading statements about the conditions in which meat and egg products were produced? Does the case law permit an interpretation of ACL s18 in ways that would require meat produced through the religious slaughter of animals to be clearly identified so that consumers can choose whether to buy those products?

The answers to this second set of questions are explored in the subsequent article (to be published in (2012) 9 AAPLJ - **Ed.**) and involve an analysis of case law relating to two circumstances of alleged misleading or deceptive conduct: 'positive' conduct relating to actual statements made on existing food animal product labels and 'negative' conduct relating to the failure to provide specific information on food animal product labels.

### **Part III: Regulatory Inconsistency and Conflict**

Western societies largely accept that meat products form a natural part of human dietary requirements; 'children have traditionally been brought up to regard consuming the flesh of other animals for food as both normal and desirable'.<sup>39</sup> Indeed, sociologist Pierre Bourdieu asserts that meat-eating is part of Western society's 'habitus', an unquestioned principle of everyday life.<sup>40</sup>

Human preferences for meat products have grown dramatically since World War 2 and will continue to grow at a dramatic rate as the world's population soars. By 2050, the United Nations Population Division predicts the world's population will reach from eight to 11 billion.<sup>41</sup> Much of this population growth will occur in developing countries where a growing middle class, with more disposable income is expected to generate substantial demand for meat products as part of their diet.<sup>42</sup> This is particularly so in China and India where demand for meat products is growing rapidly.<sup>43</sup>

---

39 Nick Fiddes, *Meat: A Natural Symbol*, (Routledge Press, United States, 1991) 5.

40 Pierre Bourdieu, *Outline of a Theory of Practice*, (Cambridge University Press, United Kingdom, 1977).

41 United Nations Department of Economic and Social Affairs; *World Population Prospects - The 2010 Revision* <<http://www.un.org/popin/>> (accessed 29 March 2012).

42 Philip Thornton, 'Livestock Production: Recent Trends, Future Prospects' (2010) *Philosophical Transactions of the Royal Society* 2854 - 2855.

43 Jean-Francois Hocquette and Vincent Chatellier, 'Prospects for the European Beef Sector Over the Next 30 Years' (2011) *Animal Frontiers* 20.

In satisfying these growing preferences for meat products, animal farming enterprises have gone from small family-owned operations to large-scale concentrated animal farming operations ('CAFOs'). Large scale CAFOs, managed by vertically integrated corporations, aim to maximise the efficient production of animal products to satisfy domestic and foreign demand for food animal products.<sup>44</sup>

The step from characterising animals as property to the efficient *exploitation* of animals as property is effortlessly facilitated through contemporary market dynamics. The idea of evaluating the effectiveness of CAFOs through the lens of efficiency is very much a product of the neo-classical school of economic theory; the prevailing hermeneutical lens through which contemporary markets and the legal regulation of those markets are understood.<sup>45</sup>

Neo-classical economic principles define corporate success in terms of profit and return on investments where wealth is maximised through productive, allocative and technical efficiencies accomplished through techniques of mass-production of food animal products.<sup>46</sup>

Therefore, in the 21st century, successful CAFOs are those managed by corporations able to maximise their profits through the efficient management of feed/weight ratios. Success is measured in terms of profits per unit as corporations pursue efficiency as a means to wealth-maximisation, the key feature of neo-classical economics.<sup>47</sup>

The Australian legal and regulatory framework facilitates the efficient exploitation of animals in the chicken, pork and beef industries to satisfy human needs, wants and preferences for meat, echoing Wendy Adams's observation that 'human beings do not treat animals harshly because they are classified as property; animals are classified as property so that human beings can *legally* treat them harshly'.<sup>48</sup>

---

44 This is particularly so with the Australian chicken meat industry where two vertically integrated companies supply approximately 80% of the Australian market. Australian Chicken Meat Federation Inc, *The Australian Chicken Meat Industry: An Industry in Profile*, 2012 at 13. <<http://www.chicken.org.au/industryprofile/>>

45 Justice John Spigelman, 'Economic Rationalism and the Law' (2001) 24(1) *University of NSW Law Journal* 200.

46 Darian Ibrahim, 'A Return to Descartes: Property, Profit and the Corporate Ownership of Animals' (2007) 70 *Law and Contemporary Problems* 86.

47 Geoffrey Evans, 'To What Extent Does Wealth Maximisation Benefit Farmed Animals?' (2006) 13 *Animal Law* 167.

48 Wendy Adams, 'Human Subjects and Animal Objects: Animals as 'Other' in Law' (2009) 3 *Journal of Animal Law and Ethics* 29.

The reality is that most of the animals in Australia that are slaughtered for their meat or farmed for their eggs do not see the sun or feel the earth. They do not socialise with other animals. They are not able to express their natural instincts but are confined in mass-factories before being slaughtered or their eggs harvested.

This gulag-inspired process of factory farming is described as:

*a system of raising animals using intensive production line methods that maximise the amount of meat produced while minimising costs. Industrial animal agriculture is characterised by high stocking densities and/or close confinement, forced growth rates, high mechanisation and low labour requirements.*<sup>49</sup>

Producing animal meat or harvesting eggs using these intensive production line methods is perfectly legal in Australia. MCOPs relating to beef cattle, poultry and pigs permit the industrial processing of animals for human consumption. These MCOPs were issued by the PIMC/SCoPI, whose stated objective is ‘to develop and promote sustainable, innovative and profitable agriculture, fisheries/aquaculture and food and forestry industries’.<sup>50</sup>

Accordingly, MCOPs permit the use of profit and efficiency-enhancing animal husbandry practices that would otherwise be characterised as acts of cruelty under State and Territory *Animal Welfare Acts*. These same *Animal Welfare Acts* also exempt certain methods of slaughter of animals for religious purposes from established cruelty offences.<sup>51</sup>

While food animals generally experience conditions that cause suffering, the experience of animals that are slaughtered according to religious ritual is potentially even worse.

In Australia animals whose meat is intended for general consumption are required by Commonwealth *Codes* and *Standards* to be stunned before they are slaughtered.<sup>52</sup>

---

49 From Nest to Nugget: An Expose of Australia’s Chicken Factories, Voiceless, November 2008, 9.

50 [http://www.mincos.gov.au/about\\_pimc](http://www.mincos.gov.au/about_pimc).

51 For example, s 24(1)(b) of the Prevention of Cruelty to Animals Act 1979(NSW) creates a defence against allegations of cruelty in relation to animals slaughtered for food consumption.

52 CSIRO’s Australian Standard for the Hygienic Production & Transportation of Meat and Meat Products for Human Consumption (AS 4696:2007); National Animal Welfare Standards for Livestock Processing Establishments Preparing



Chicken, pigs and cattle are required to be unconscious or insensible when they are killed in order to minimise the suffering associated with the slaughter process.

However, not all animals slaughtered for consumption in Australia are in fact stunned before being killed because of religious requirements relating to the preparation and consumption of certain animal-based food. In particular, the Jewish and Islamic religious traditions contain very specific requirements concerning the slaughter and consumption of animals. The production of kosher and halal meat according to Jewish and Islamic religious rituals, respectively, involves cutting an animal's throat while it is fully conscious and then permitting the animal to exsanguinate.

A regulatory conflict or inconsistency thus exists between the requirements for the slaughter of animals generally, mandated by Commonwealth *Codes* and *Standards*, and the specific requirements of the Jewish and Islamic religious traditions for their religious slaughter.<sup>53</sup>

And although governments in the European Union, the United Kingdom and New Zealand recognise the welfare difficulties associated with the religious slaughter of animals, legislative attempts to regulate these practices in favour of consumer choice have singularly failed. Legislative initiatives such as the *Food Labelling (Halal and Kosher Meat) Bill* (UK) introduced in May 2012 and *Amendment 205*, proposed in 2010 by the European Parliament, that would have achieved similar aims, have been defeated by well-co-ordinated campaigns criticising governments for contravening rights of freedom of religion and religious practice guaranteed by treaty or statute.<sup>54</sup>

At least these governments attempted *some* form of regulation to address the issue of suffering experienced by animals during religious slaughter. Although the Australian government is aware of these difficulties, and despite consumer demand expressed over five years to

---

Meat for Human Consumption 2009-2010 (2nd Ed); Standing Committee on Agriculture and Resource Management ('SCARM') 2002 Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments.

53 Alex Bruce, 'Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of the Religious Slaughter of Animals' (2011) 34(1) University of New South Wales Law Journal 351; Joel Silver, 'Understanding Freedom of Religion in a Religious Industry: Kosher Slaughter (Shechita) and Animal Welfare' (2011) 42 Victoria University of Wellington Law Review 671.

54 Alex Bruce, 'Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of the Religious Slaughter of Animals' (2011) 34(1) University of New South Wales Law Journal 351.

address them, at its October 2011 meeting, the final in its current incarnation before transitioning to the SCoPI, the PIMC eventually decided not to regulate the religious slaughter of animals.

In a masterful display of bureaucratic procrastination, the PIMC simply stated that officials have been asked to continue discussions with religious groups in order to settle an ‘applicable risk management framework’, whatever that might mean!<sup>55</sup>

#### **Part IV: Consumer Sensitivity**

Confined in concentrated animal feedlot operations, packed tightly into layer upon layer of cages to produce eggs and sometimes slaughtered without prior stunning, the welfare of chickens, cattle and pigs is subordinated to the economic profit of the few dominant corporations in Australia supplying food animal products to consumers.<sup>56</sup>

These corporations are assisted by the former Primary Industries Ministerial Council (‘PIMC’) now *Standing Council on Primary Industries*, whose stated goal is ‘to develop and promote sustainable, innovative and profitable industries in these commodities.’<sup>57</sup> Issued under the auspices of SCoPI/PIMC, MCOPs, Australian Welfare Standards and other Policies relating to chicken, cattle and pigs permit animal husbandry practices that are intended to facilitate the profitable production of food animal products.

While some of these animal husbandry practices are clearly cruel, they are largely beyond the reach of State and Territory *Animal Welfare Acts*. Exceptions have been created permitting practices that would otherwise fall within the definition of cruelty or aggravated cruelty, potentially exposing CAFO or battery hen farmers to criminal prosecution.<sup>58</sup>

Legislative attempts in the European Union, the United Kingdom and New Zealand to either displace or regulate the religious slaughter of animals have foundered against human rights claims of freedom of

---

<sup>55</sup> Primary Industries Ministerial Council, Communiqué, PIMC 21, 28 October 2011.

< [http://www.mincos.gov.au/\\_\\_data/assets/pdf\\_file/0017/2034431/pimc-21.pdf](http://www.mincos.gov.au/__data/assets/pdf_file/0017/2034431/pimc-21.pdf)> (Accessed 1 April 2012)

<sup>56</sup> Alex Bruce, *Animals as Food*, Chapter 9 in *Animal Law in Australia: An Integrated Approach*, (LexisNexis Butterworths, Australia, 2012) 221.

<sup>57</sup> *Animal Health Australia; Animal Health in Australia 2008*, (2009) Canberra, Australia, 6.

<sup>58</sup> Alex Bruce, *Animals and Cruelty*, Chapter 8 in *Animal Law in Australia: An Integrated Approach*, (LexisNexis Butterworths, Australia, 2012) 197.

religious practice recognised by domestic *Constitutions* or International Human Rights Instruments.<sup>59</sup>

However, despite this regulatory regime, there is also evidence that consumers are becoming increasingly sensitive to the ways in which food animals are treated. This sensitivity is expressed morally and practically. From a moral perspective, 'one emerges blinking from the shadows... to discover that there is a moral consensus in the Western world that animals should be treated better than they are'.<sup>60</sup> From a practical perspective, this sensitivity is reflected in a willingness by some consumers to pay a price-premium for food animal products from suppliers who have implemented welfare-friendly animal husbandry practices.<sup>61</sup>

In response to this consumer demand, suppliers of food animal products are seeking to differentiate their products on the basis of animal welfare-friendly practices. Product labels promoting 'free-range', 'free-to-roam', 'organic' or cruelty-free animal husbandry practices are used by suppliers to influence consumers who, for example, 'seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing'.<sup>62</sup>

It is in these circumstances that instead of directly legislating to prohibit certain animal husbandry practices and slaughter without prior stunning, Australian governments are intending to indirectly regulate food animal products through consumer legislation prohibiting misleading or deceptive conduct. The ACL has suddenly been invested with a significant responsibility. And at the centre of this regulatory agenda is the power exercised by the consumer in the market.

---

59 For a more detailed discussion of the International Law implications associated with the religious slaughter of animals, see Joel Silver, 'Understanding Freedom of Religion in a Religious Industry: Kosher Slaughter (Shechita) and Animal Welfare' (2011) 42 *Victoria University of Wellington Law Review* 671.

60 Ellen Goodman, Book Review, 'Animal Ethics and the Law: A Review of Animal Rights: Current Debates and New Directions' (2006) 79 *Temple Law Review* 1291.

61 Luiza Toma et al, 'Consumer and Animal Welfare: A Comparison between European Union Countries' (2012) 58 *Appetite* 597; Laura Andersen, 'Animal Welfare and Eggs - Cheap Talk or Money on the Counter?' (2011) 62(3) *Journal of Agricultural Economics* 565; Brian Naald and Trudy Cameron, 'Willingness to Pay for Other Species' Well-Being' (2011) 70 *Ecological Economics* 1325; Morven McEarchen and Monika Schroder, 'The Role of Livestock Production Ethics in Consumer Values Towards Meat' (2002) 15 *Journal of Agricultural and Environmental Ethics* 221.

62 *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* [2010] FCA 1511, [31].

## The Role of the Consumer

In 2006, then Commissioner John Martin of the Australian Competition and Consumer Commission ('ACCC') launched the first edition of the ACCC's *Food and Beverage Labelling Guidelines*.<sup>63</sup> The *Guidelines* are intended to assist food and beverage providers in understanding the implications of the law relating to misleading or deceptive conduct.

During his presentation, Commissioner Martin made two important points that are relevant to the discussion in Part 3 of this article. First, that 'consumers are becoming increasingly sophisticated and discerning. They are demanding products that offer health benefits, are fresher or are Australian produced'.<sup>64</sup>

Second, he noted that 'products that can highlight such benefits have a better chance of standing out from the pack and grabbing the attention of shoppers on crowded shelves. But this creates temptation for producers and their marketers to 'push the envelope' and in some cases break the law in an effort to gain an edge over the competition'.<sup>65</sup>

In the last five years, Australian consumers *have* become more discerning about the way in which food animals are treated. This concern is reflected in both informal and industry-sponsored consumer surveys,<sup>66</sup> as well as the purchasing decisions made by governments and private corporations supplying food animal products to consumers.

For example, in September 2008, the InterContinental Hotels Group, which owns the Crowne Plaza Canberra, the National Convention Centre and Parliament House Catering Services, announced it would alter its purchasing decisions to buy eggs pursuant to the *Choose Wisely Campaign*.<sup>67</sup>

The same month, the Australian Capital Territory Government announced that by May 2009, 'all ACT Government agencies including our hospitals, correctional facilities, CIT campuses and schools, will use

---

63 John Martin, *Misleading Claims and the Trade Practices Act*, Presentation to the 8th Annual Food Regulation and Labelling Standards Conference, 23 November 2006, Sydney, Australia.

64 *Ibid* 3.

65 *Ibid*.

66 These informal and industry-sponsored surveys are discussed below.

67 Government Welcomes Action Against Battery Eggs. <http://www.chiefminister.act.gov.au/media.php?v=7457>

barn laid or free-range eggs' pursuant to the RSPCA's *Choose Wisely* Campaign.<sup>68</sup>

And in its 2012–13 Budget, the Tasmanian Government introduced the *Intensive Animal Farming Development Program* under which \$2.5 million will be spent over two years in phasing out battery-hen farms and the use of sow stalls.<sup>69</sup> In introducing these food animal welfare initiatives, the Tasmanian Treasurer specifically noted that 'changes in market and consumer demand' motivated the Budget initiatives'.<sup>70</sup>

Producers and suppliers are also beginning to recognise consumers' concerns and are attempting to differentiate their food animal products on the basis of animal welfare.

Unfortunately, the decisions of the Federal Court in *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd*,<sup>71</sup> and *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)*<sup>72</sup> confirm Commissioner Martin's fears that in doing so, some producers will attempt to take advantage of these concerns by labelling food animal products in ways that deceive consumers about welfare issues.

However, even if food animal products are accurately labelled, what exactly is the relationship between consumer protection legislation such as the ACL, consumer buying power and food animal welfare? And if this relationship is established then how might consumer spending patterns actually influence food animal welfare?

These questions can be considered threshold levels of inquiry. If consumer protection laws such as the ACL do not empower consumers to make informed purchasing decisions then the demand created by consumers' buying power will not exert sufficient influence on the producers of food animal products to improve food animal welfare. And even if consumers' buying power does influence producers, if they are simply choosing not to buy products from suppliers cognisant of

---

68 Ibid.

69 Treasurer Lara Giddings MP, 2012 – 2013 Budget Speech 'Strong Decisions. Better Future', 17 May 2012, delivered on the Second Reading of the Consolidated Fund Appropriation Bill (No 1) 2012  
< <http://www.treasury.tas.gov.au/domino/df/df.nsf/v-budget-budget-papers/0>> (Accessed 21 May 2012).

70 Ibid 12.

71 *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511 (23 December 2010).

72 *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)* [1012] FCA 19 (2 December 2011).

animal welfare concerns, then legislation such as the ACL that prohibits misleading or deceptive conduct legislation will have little effect in advancing food animal welfare initiatives.

A negative response to either of these threshold questions significantly reduces the ability of the ACL to function in a way that influences food animal producers to improve animal welfare and compromises the Commonwealth government's belief, expressed in its *Labelling Logic Report*, that the ACL can effectively regulate consumer values issues associated with food animal products. After all, what is the incentive to do so if consumers either cannot or will not signal their demand for those improvements through their buying patterns?

## **Part V: Efficient Markets & Consumer Demand**

Accordingly, the effectiveness of this regulatory approach is contingent upon several unstated assumptions. One assumption is that demand for animal welfare friendly food products will signal consumer preferences for animal welfare practices to be adopted by producers supplying food products into the market. Another assumption is that in attempting to satisfy this consumer demand, producers will increasingly seek to differentiate their products on the basis of animal welfare features thereby generating more sales.

At least in theory, the more consumers demand welfare friendly products, the more producers will seek to implement animal welfare initiatives.<sup>73</sup> If the ACL is to be effective in addressing consumer values issues associated with food animal welfare issues and, in turn, stimulate supplier-initiated food animal welfare practices, these assumptions need to be tested.

The ACL is located within the *Competition and Consumer Act 2010* (Cth), but what is the relationship between the ACL, consumer protection and competition policy? Exactly *how* is it intended that consumer buying power will influence the animal husbandry practices of suppliers of food animal products? What is the relevance of this relationship to consumers' preferences for welfare friendly food animal products? How does a competitive market operate so that suppliers will be made aware of these preferences?

---

<sup>73</sup> Industry surveys support this market trend. For example, in its 2010 Annual Report the Australian Egg Corporation Ltd indicated that the market for free-range eggs increased from 5.5% in 2000 to around 26.6% in 2009, 3.

<[http://www.aecl.org/system/attachments/347/original/Annual\\_Report\\_2010.pdf?1289462015](http://www.aecl.org/system/attachments/347/original/Annual_Report_2010.pdf?1289462015)> (Accessed 7 May 2012)

The principal goal of Australian competition policy is not the protection of individual traders or individual consumers. The High Court in *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC* stressed that ‘the purpose of the Act is to promote competition, not to protect the private interests of particular persons or corporations’.<sup>74</sup>

I have written elsewhere about how the CCA is even less concerned with the welfare of animals generally or food animals particularly.<sup>75</sup> In protecting and facilitating economic efficiency, consumers are said to benefit from the efficient allocation of society’s resources.<sup>76</sup>

If competition policy and consumer protection policy do not work together to ensure that consumers’ preferences for animal welfare are communicated to suppliers or, even if those preferences are communicated, if consumers are simply not willing to pay for animal welfare, then the *Labelling Logic* proposals rest on flawed assumptions and the ACL may be a relatively ineffective regulatory tool.

### ***Labelling Logic & Market Driven Consumer Welfare***

Animal welfare issues featured prominently in public responses to the *Labelling Logic* review; ‘generalised consumer values issues such as human rights, animal welfare, environmental sustainability and country-of-origin labelling were raised in a large number of submissions’.<sup>77</sup>

The intended approach of the Commonwealth government to these consumer values issues is to leave market forces as the impetus for suppliers to address these values.<sup>78</sup> How is this to occur? It is anticipated that market forces will respond to increasing consumer interest in values issues such as animal welfare by encouraging suppliers to differentiate their products on the basis of those values issues; ‘if the label claim provides a supplier with a positive point of differentiation in the market, there is a strong incentive for the supplier

---

<sup>74</sup> *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC* (2003) ATPR 41-915, [87].

<sup>75</sup> Alex Bruce, ‘Animals and the Trade Practices Act 1974’ (Cth) (2009) 2 Australian Animal Protection Law Journal 49, 52.

<sup>76</sup> Stephen Corones, Competition Policy and Economic Theory, Chapter 1 in Competition Law in Australia, (5th ed), (Thompson Reuters, Australia, 2010) 43.

<sup>77</sup> Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia, 97, [6.3].

<sup>78</sup> *Ibid* 98, [6.5].

to adopt such a claim and for consumers to respond.<sup>79</sup> Perhaps it is hoped that Adam Smith's 'invisible hand' may gently push suppliers into creating food animal welfare initiatives?<sup>80</sup>

This regulatory approach will only work effectively if competitive and informed markets place the consumer at the centre of supply and demand forces. This is the intention of the *Competition and Consumer Act 2010* (Cth) where consumer protection law and theory sits alongside competition law and theory with both functioning to create fair, competitive and informed markets *for the benefit of* Australian consumers.<sup>81</sup>

How does this work? To begin with, it must be acknowledged that there is no overarching theory of consumer protection that explains these dynamics. In fact, one commentator lamented that:

*It is almost impossible to cover the ever-growing mound of literature on consumer protection problems in different countries. It is quite impossible to survey developments in legislation and case law, be it only for one country. Consumer protection aspects have now been introduced in so many areas of law that it is hard to find out where specific consumer concerns begin...*<sup>82</sup>

The fundamental difficulty involves conceptualising 'consumer protection' as a discrete discipline and not as simply a sub-set of competition policy or as a body of law derivative from commercial or mercantile law or a body of law that is simply interdisciplinary in nature. Lynden Griggs has therefore astutely observed that consumer protection 'is a subject looking for the privilege of independent existence, let alone responsibility'.<sup>83</sup>

Complicating the search for clarity in conceptualising consumer protection policy is the sometimes bewildering vocabulary and terminology employed by commentators in discussing consumer

---

79 Ibid.

80 Adam Smith noted that even though individual traders do not intend to promote the public interest, nevertheless the effect of traders' commercial activities seems to, in fact, promote the public interest. Smith called this tendency of the economy to guide self-interest into cultivating economic well-being the 'invisible hand'; Alex Bruce, Market Definition, Chapter 3 in *Restrictive Trade Practices Law*, (LexisNexis Butterworths, Sydney, Australia 2010) 19, 21.

81 *Competition and Consumer Act 2010* (Cth), s 2.

82 Norbert Reich, 'Diverse Approaches to Consumer Protection Philosophy' (1992) 14 *Journal of Consumer Policy* 257.

83 Lynden Griggs, 'Intervention or Empowerment – Choosing the Consumer Law Weapon!' (2007) 15 *Competition and Consumer Law Journal* 111.



protection theories. The literature imports terms from fields as diverse as law, sociology, economics and behavioural studies.

Concepts such as ‘soft regulation’, ‘bounded rationality’, ‘neoclassical attribution’, ‘information asymmetries’, ‘biased contracting’ and ‘shrouded attributes’ have been adapted from other disciplines and then applied to consumer protection issues in an attempt to explore these difficult policy issues.<sup>84</sup>

It is beyond the scope of this article to explain and then unify these different theories into a new normative consumer protection framework. Nor do I think it helpful to attempt the task. The availability of these different theories permits explorations of aspects of consumer behaviour that would not fit neatly into one or other theory. The sheer complexity and subtlety of consumer issues lamented above surely requires an interdisciplinary hermeneutic [method of interpretation - Ed.].

For present purposes, the starting point is to consider the relationship between competition policy and consumer protection theory, especially since the stated purpose of the CCA is to enhance the welfare of Australians though the promotion of *both* competition as well as the provision of consumer protection.<sup>85</sup> Understanding this relationship clarifies the process by which consumers’ preferences for welfare friendly food animal products are signalled to the suppliers.

## **Competition, Efficient Markets and Consumer Welfare**

Section 2 of the CCA provides:

*The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.*

Implicit in s2 is the belief that Australian consumers are in some way better off if markets are competitive; that is, if fair trading is encouraged and consumers are protected from misleading, deceptive and unconscionable conduct. The other side of this is the view that anti-competitive markets, or markets in which consumers are not protected

---

<sup>84</sup> Alex Bruce, *Australia's National Consumer Protection Regime*, Chapter 1 in *Consumer Protection Law in Australia*, (LexisNexis Butterworths, Australia, 2011) 1, 6.

<sup>85</sup> Louise Sylvan, 'Activating Competition: The Consumer - Competition Interface' (2004) 12 *Competition and Consumer Law Journal* 191, 192.

from misleading or deceptive practices, will result in diminishing consumer welfare.

Both the consumer protection and competition provisions of the CCA are intended to enhance the welfare of Australians. Speaking about s2 of the then *Trade Practices Act* (now CCA) then Justice French of the Federal Court (now Chief Justice of the High Court) explained:<sup>86</sup>

*If the whole Act is about consumer welfare in a general economic sense, not limited to specific transactions, then the competition provisions and the consumer protection provisions can stand together comfortably under one rubric. Although Part V operates directly to protect consumers against varieties of misleading or deceptive conduct and other unfair trade practices, it can also be seen as supporting the competitive process in a wider sense by ensuring that markets have access to accurate information. The benefits of competitive outcomes reflected in the delivery of better goods and services for lower prices may be defeated if their advantages are obscured by a fog of misinformation.*

This vital relationship between competition policy and consumer protection in delivering market-based benefits to consumers is increasingly being recognised at an institutional level.

For example, in 2007, Commissioner Kovacic of the United States Federal Trade Commission said that ‘consumer protection laws are important complements to competition policy.’<sup>87</sup> And in 2009, the United Kingdom Office of Fair Trading issued an entire policy outlining the importance of integrating both in facilitating markets delivering benefits to consumers.<sup>88</sup>

Why is this? A competitive market is considered to be an ‘efficient’ market in the sense that competition is the mechanism by which society’s resources are efficiently allocated. The then Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd* observed:

---

<sup>86</sup> Justice Robert French, *Competition Law – Covering a Multitude of Sins*, 2004 Paper delivered to the Competition Law Conference, 15 May 2004, Sydney, 6.

<sup>87</sup> William Kovacic, ‘Competition Policy, Consumer Protection and Economic Disadvantage’ (2007) 25 *Journal of Law & Policy* 101, 114.

<sup>88</sup> Office of Fair Trading, *Joining Up Competition and Consumer Policy – The OFT’s Approach to Building an Integrated Agency*, December 2009, United Kingdom.

*Competition may be valued for many reasons as serving economic, social and political goals. But in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society's resources.*<sup>89</sup>

When a market functions efficiently, consumers benefit from price competition amongst retailers of goods and services. This competitive benefit takes two broad forms; *inter brand* competition, and *intra-brand* competition. In an efficient market, a consumer who wants to buy free-range eggs, for example, can visit different retailers and compare prices across different brands of eggs (inter brand) and compare prices across a particular brand of eggs (intra-brand). All forms of anticompetitive and deceptive conduct have potentially positive and negative consequences for inter and intra-brand competition.

A market can really only properly function as a device for controlling the disposition of society's resources if it is working efficiently. Competitive markets display a number of characteristics that illustrate what is meant by the term 'efficiency'. But what is meant by this term and what is the relationship between efficiency and consumer welfare?

A consistent theme in the development of competition and consumer policy is the concern with efficiency. Competitive markets are efficient markets and efficient markets are said to enhance consumer welfare. In 1989, the Economic Planning Advisory Council explained:

*Competition policy is based on the view that, in general, competitive markets lead to more efficient allocation of resources than do markets in which either buyers or sellers have significant market power. Such markets also promote technical efficiency (the effectiveness with which resources within a firm are utilised) and dynamic efficiency (the speed at which firms respond to changing problems and opportunities) ... When firms are unable to increase their profits through exercising market power, their pursuit of profit is channelled into finding ways to increase their efficiency and into searching for better ways to serve their customers.*<sup>90</sup>

The idea of evaluating the effectiveness of markets through the lens of efficiency is very much a product of the neo-classical school of

---

<sup>89</sup> Re Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012.

<sup>90</sup> Economic Planning Advisory Council, Promoting Competition in Australia, Council Paper No38, Australian Government Publishing Service, Canberra, 1989.

economic theory; the prevailing hermeneutical lens through which competition policy generally, and the CCA specifically, is viewed.<sup>91</sup>

The neo-classical school of economics makes certain assumptions about the way markets should function in order to promote efficiency and thereby to enhance consumer welfare. This school ‘assumes that markets free of failures will deliver optimal outcomes for producers and consumers alike. Consumer demand is a major driving force in determining what is produced, the quantity, its price and quality.’<sup>92</sup> In constructing the framework of such a market, free of failures, economists generally commence with a number of assumptions.

Those assumptions are: first, that there are many buyers and sellers in the market, second, that sellers produce a homogeneous product, third, that buyers and sellers are equally informed about price, fourth, that there are no barriers to entry, meaning that firms can enter and exit the market, and finally, that market forces of supply and demand establish the price of the product - suppliers cannot affect the price of the product since no one firm produces more of the product than the others.<sup>93</sup>

Unni Kjaernes succinctly describes the role of the consumer in this mix: ‘as sovereign, rational choosers; consumers are driven by an individual utilitarian orientation and seek to maximise personal benefits at the lowest possible cost. Dissatisfied consumers will use their purchasing power and go elsewhere.’<sup>94</sup>

Of course, no real market is perfect and deviations from this optimal competitive model occur in the form of anti-competitive conduct, information asymmetries, such as misleading and deceptive conduct and simple consumer irrationality. How is the concept of a perfectly competitive market relevant to an effective consumer protection policy? The relevance is described in this way:

*We study the predicted outcomes of the perfectly competitive model not because those predictions conform exactly to the ‘real world’ of*

---

91 Hon Justice John Spigelman, ‘Economic Rationalism and the Law’ (2001) 24(1) University of New South Wales Law Journal 200.

92 Craig Johnston, ‘Consumer Welfare and Competition Policy’ (1996) 3 Competition and Consumer Law Journal 1, 3.

93 Michael Swann and William McEachern, *Microeconomics: A Contemporary Introduction*, 2nd ed, (Thomson/Nelson, Melbourne, 2003) 219–20.

94 Unni Kjaernes, ‘Ethics and Action: A Relational Perspective on Consumer Choice in the European Politics of Food’ (2011) *Journal of Agricultural Environmental Ethics* 1, 3.

*our everyday economic experience, but because they provide an independent measuring rod - a benchmark model of economic performance against which economists compare the actual outcomes of real-world market situations ... much of the work of the Australian Competition and Consumer Commission relies on the model of perfect competition as a benchmark against which to test potential or actual breaches of the Trade Practices Act.*<sup>95</sup>

By understanding how perfectly competitive markets function, it is possible to learn how certain forms of corporate behaviour cause 'market failure' leading to deviations from the perfect, optimally efficient model.

In such cases, the result is one of *imperfect competition* that results in a diminution of *efficiency* which, in turn, leads to consumer detriment; a diminution of consumer welfare compromising the stated object of the CCA. For example, in the context of food labelling, the *Labelling Logic* Report explicitly draws a connection between information failures and detriments to consumer health.<sup>96</sup>

But how do these assumptions actually work? To begin with, it is helpful to think of competition in a market as taking place in the context of a tension that exists between firms and consumers.

Firms want to make goods or services at as low a cost as possible to themselves, and to sell those goods or services to consumers for as high a price as they can. In this way, firms attempt to widen the margin between their costs of production and sale prices. The difference between the two represents the profit the firm derives from its goods or services.

On the other hand, consumers want to choose between a wide variety of goods and services and also to be able to buy those goods or services as cheaply as possible.

The indicator of this tension is price. Through their purchasing patterns, consumers 'signal' to firms the goods or services that are preferred and the price levels they are prepared to pay for them. In this way, consumers 'activate' competition.

---

<sup>95</sup> Above n 56, 219.

<sup>96</sup> Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia, 133, [8.11].

Firms respond to those signals through product innovation, improved service and better allocation of resources as they compete with each other for customers. This process is described by Phillip Williams:

*We may imagine that each participant in the economy has a pile of dollar notes. Each dollar note counts for one vote in determining how the resources of the economy ought to be allocated. If a person spends some votes purchasing brown leather sandals, that expenditure will encourage resources to flow into the production of brown leather sandals. By voting in the marketplace with dollar notes, the consumer has been able to influence the allocation of resources.<sup>97</sup>*

In this sense, consumers are said to activate competition. In its 1983 - 1984 *Annual Report*, the then Chair of the Trade Practices Commission noted:

*Consumers not only benefit from competition, they activate it, and one of the purposes of consumer protection law is to ensure they are in a position to do so. Thus I believe administration is better placed to serve the total interest of consumers if it also has responsibilities to encourage market forces and industry efficiency.<sup>98</sup>*

Consumers ‘activate’ competition because firms compete to produce the goods and services demanded by consumers. At least *in theory*, competitive markets benefit consumers by providing more choice; a more efficient allocation of resources and price competition.<sup>99</sup>

However, markets are not ends in themselves, but economic processes that facilitate the efficient production and delivery of resources in such a way that consumers benefit. Because competitive markets are considered to enhance consumer welfare and because consumers are said to ‘activate’ competition, the consumer is said to be ‘sovereign’.

Given the regulatory<sup>100</sup> and academic<sup>101</sup> validation of consumer sovereignty as an effective hermeneutic with which to understand the

---

97 Philip Williams, ‘Why Regulate for Competition?’ in M James (ed), *Regulating for Competition: Trade Practices Policy in a Changing Economy*, (Centre for Independent Studies, Sydney, 1989) 13.

98 Trade Practices Commission, *Annual Report 1983 - 1984*, AGPS, Canberra, 184.

99 Louise Sylvan, ‘Activating Competition: The Consumer - Competition Interface’ (2004) 12 *Competition and Consumer Law Journal* 191.

100 William Kovacic, ‘Competition Policy, Consumer Protection and Economic Disadvantage’ (2007) 25 *Journal of Law & Policy* 101, 114; Office of Fair Trading, *Joining Up Competition and Consumer Policy – The OFT’s Approach to Building an Integrated Agency*, December 2009, United Kingdom.

relationship between competition policy and consumer protection policy, it is important to explore its implications for food animal welfare and *Labelling Logic*'s assumptions.

## Part VI: The Consumer is Sovereign

It is not surprising that consumer protection theory is frequently said to involve the notion of 'consumer sovereignty'.<sup>102</sup> At least in theory, 'the notion of consumer sovereignty, which is the linchpin of neo-classical economics, guarantees an important role for the consumer in (the) market economy.'<sup>103</sup>

This Section explores the way in which consumer protection laws and policy are intended to benefit consumers by empowering them (thereby making them 'sovereign') to make informed purchasing decisions.

The primacy of the consumer can be traced to the classical economics of Adam Smith. Smith concluded that 'consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as may be necessary for promoting that of the consumer.'<sup>104</sup>

The implications of the primacy of the consumer and the use of the term 'consumer sovereignty' can probably be traced to the work of William Hutt in his 1936 text *Economics and the Public: A Study of Competition and Opinion*.<sup>105</sup> Hutt thought consumers should be aided by the modern state in the exercise of freedom to pursue their own ends, with producers being disciplined through the market to satisfy the wants of consumers.<sup>106</sup> Hutt's emphasis on the primacy of consumers' freedom

---

101 Mark Armstrong, 'Interactions Between Competition and Consumer Policy' (2008) 4(1) *Competition Policy International* 97; Max Huffman, 'Bridging the Divide? Theories for Integrating Competition Law and Consumer Protection' (2010) 6(1) *European Competition Journal* 7; Stefan Schwarzkopf, 'The Political Theology of Consumer Sovereignty: Towards an Ontology of Consumer Society' (2011) 28(3) *Theory, Culture & Society* 106.

102 A good historical exploration of the notion of consumer sovereignty with its implication of consumer as voter can be found in: Stefan Schwarzkopf, 'The Consumer as 'Voter', 'Judge' and 'Jury': Historical Origins and Political Consequences of a Marketing Myth' (2011) 31(1) *Journal of Macromarketing* 8.

103 Vijaya Nagarajan, 'Reconceiving Regulation: Finding a Place for the Consumer' (2007) 15 *Competition and Consumer Law Journal* 93.

104 Adam Smith, *The Wealth of Nations*, 1776, (New York Modern Library, 1937) 625.

105 William Hutt, *Economics and The Public: A Study of Competition and Opinion*, (Honathan Cape Publishers, United Kingdom, 1936).

106 Joseph Persky, 'Retrospectives: Consumer Sovereignty' (1993) 7(1) *Journal of Economic Perspectives* 183, 186.

to pursue their own happiness or ends is reflective of John Stuart Mill's notion of the relationship of the individual to the state.

Mills' views will become relevant a little later in this Chapter as a philosophical defence of the principle of consumer sovereignty.

Neil Averitt and Robert Lande are two of the main United States scholars responsible for establishing the theoretical relationship between consumer sovereignty and competition policy.<sup>107</sup> Averitt and Lande conclude that for consumer sovereignty to work effectively, competition policy must ensure that markets (a) present consumers with a range of options and (b) the ability to select freely amongst those options.<sup>108</sup>

Averitt and Lande explain the mechanics of consumer sovereignty in this way:

*Consumer sovereignty is the state of affairs that prevails or should prevail in a modern free-market economy. It is the set of societal arrangements that causes that economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual businesses. It is the state of affairs in which the consumers are truly 'sovereign', in the sense of having the power to define their own wants and the opportunity to satisfy those wants at prices not greatly in excess of the costs borne by the providers of the relevant goods or services.*<sup>109</sup>

There are several elements to this extract that explain the nature of consumer sovereignty and how competitive and efficient markets facilitate that sovereignty.

First, it is said that the economy acts 'primarily in response to the aggregate signals of consumer demand.'<sup>110</sup> This is a reference to the signalling process described above. Through their purchasing patterns,

---

107 Neil Averitt and Robert Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust Law Journal 713; Neil Averitt and Robert Lande, 'Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law' (1998) 10 Loyola Consumer Law Review 44, Robert Lande, 'Consumer Choice as the Ultimate Goal of Antitrust' (2000 – 2001) 62 University of Pittsburgh Law Review 503.

108 Neil Averitt and Robert Lande, 'Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law' (1998) 10 Loyola Consumer Law Review 44, 47.

109 Neil Averitt and Robert Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 (3) Antitrust Law Journal 713, 714.

110 Ibid.



consumers ‘signal’ to firms the goods or services that are preferred and the price levels they are prepared to pay for them.

Second, these consumer signals occur as part of a cause and effect process. If consumer purchasing patterns are the signals, then firms, suppliers and producers respond to those signals through product innovation, improved service and better allocation of resources as they compete with each other for customers. Consumers therefore ‘cause’ the economy to work in their favour by the pricing ‘signals’ they send to producers of goods or services. The effect is that producers deliver into the market the goods or services that those consumers demand. This is what is meant by the observation that consumers ‘activate competition’.

Third, the process is interdependent because the *quality* and *quantity* of the signals that consumers send, and the goods and services produced are dependent on each other. However, firms can artificially interfere with the price signalling by consumers and in doing so they can manipulate the market to the detriment of consumers.

*From the supply side*, firms can collude to fix prices or to prevent competitive behaviour. In this way, firms can acquire market power not through superior competitive behaviour or through increased competitive efficiency, but simply through eliminating competition. The effect of eliminating competition is to eliminate consumer choice. Less *inter brand* and *intra-brand* competition result in consumers paying higher prices for goods or services than would prevail in a competitive market.

*From the demand side*, effective consumer choice can be diminished or even eliminated through misleading, deceptive or false conduct. For example, in *Colgate Palmolive Pty Ltd v Rexona Pty Ltd* Colgate sought an interlocutory injunction restraining Rexona from continuing an advertising campaign for its brand of toothpaste.

In granting the injunction, the Court observed:

*There is evidence that Rexona’s advertising campaign may erode the market share enjoyed by the smaller manufacturers of toothpastes .... Rexona contended that these matters are irrelevant as the small manufacturers are neither parties to the proceedings nor consumers. In my opinion the possible detriment to the small manufacturers is a relevant consideration .... If a corporation is engaging in misleading or deceptive advertising which assists it in gaining a substantial share*

*of a market at the expense of small manufacturers, the interests of those manufacturers must be a relevant consideration.*<sup>111</sup>

Misleading or deceptive conduct can erode or even eliminate a competitor, thereby reducing the level of competition in the market by reducing consumer choice.

Fourth, consumer sovereignty is characterised by consumers ‘having the power to define their own wants and the opportunity to satisfy those wants’.<sup>112</sup> In satisfying their wants, neo-classical economics assumes that consumers are ‘rational profit-maximisers’. Consumers are said to be ‘profit-maximisers’ because they carefully evaluate the cost/benefit of a particular good or service in order to maximise the benefit to themselves.

Consumers are said to be ‘rational’ in that they possess all relevant information necessary to make a prudent and rational decision about whether to enter into the transaction in question.

The idea is characterised as follows: ‘A consumer fully armed with relevant information, who is articulate and rational, is a necessary assumption of the neo-classical model.’<sup>113</sup>

However, in order for consumers to achieve their own good, governments should ensure that markets provide sufficient information to consumers, enabling them to make reliable choices and to protect them from market manipulation and deceptive practices.

Because neither markets nor consumers are rational or optimal, it is unsurprising to find that contemporary governments have responded to imperfect markets characterised by information asymmetries and consumer ‘bounded rationality’ by legislating for their opposite or relying on existing consumer protection regimes such as the ACL.

---

111 *Colgate Palmolive Pty Ltd v Rexona Pty Ltd* (1981) ATPR 40-242 at 43,195 – 43,196.

112 William Kovacic, ‘Competition Policy, Consumer Protection and Economic Disadvantage’ (2007) 25 *Journal of Law & Policy* 101.

113 Vijaya Nagarajan, ‘Reconceiving Regulation: Finding a Place for the Consumer’ (2007) 15 *Competition and Consumer Law Journal* 93.

## Returning to *Labelling Logic*'s Original Assumptions

This explanation of the relationship between competition policy and consumer protection policy, with its emphasis on consumer sovereignty, provides answers to the questions posed at the start of this Section concerning the proposed effectiveness of the *Labelling Logic* approach.

Australian governments have decided to deploy the ACL and consumer protection strategies to prevent misleading or deceptive claims associated with food animal products.

Provisions in the ACL relating to information disclosure, prohibiting unconscionable conduct, misleading or deceptive conduct and product liability represent attempts to empower consumers to make informed choices about the food animal products they purchase.<sup>114</sup> Empowering consumers in this way is consistent with general market-based disclosure strategies.

These strategies serve a two-fold purpose; providing consumers with sufficient information consistent with their sovereign status in the market, and also of stimulating political discourse:

*First, they can improve markets by letting consumers know what they are purchasing (and) if consumers also have moral concerns that bear on the use of a product, the market-improving potential of disclosure continues to hold ... consumers care about whether their decisions are producing moral or immoral behaviour. Many consumers are willing to pay to produce less in the way of moral damage and more in the way of moral benefit. Second, disclosure requirements can serve democratic functions by enabling citizens to receive information that bears on democratic judgments. Information about animal suffering may have significant effects on the political domain.*<sup>115</sup>

Where consumer choices reflect preferences for food animal products from suppliers who take account of food animal welfare, this is the market expressing demand for increased food animal welfare initiatives.

---

114 Alex Bruce, Factual Categories of Misleading or Deceptive Conduct, Chapter 4 in Consumer Protection Law in Australia, (LexisNexis, Australia, 2011) 87.

115 Jeff Leslie and Cass Sunstein, 'Animal Rights Without Controversy' (2007) 70 Law & Contemporary Problems 117, 123-124.

It is in this sense that consumers' purchasing power, their market 'sovereignty', has the potential to influence food animal welfare. If they are to remain competitive, suppliers must seek to differentiate their food animal products on the basis of consumer demand for welfare friendly practices. In this way consumers signal a demand for welfare friendly food animal products.<sup>116</sup>

By relying on consumer-driven market forces to stimulate potential food animal welfare reform and thus satisfy consumer values demands, the Commonwealth, state and territory governments will, at least in theory, not have to directly intervene to legislate for food animal welfare reform. When this consumer demand is underwritten by the effective enforcement of the ACL, it is intended that consumers will have the information they need to make effective and informed choices about food animal products.

However, even if Australian consumers *do* have sufficient information at their disposal to make informed choices about food animal products, does the research suggest that consumers will *in fact* exercise their choices in ways that require producers to care about food animal welfare?<sup>117</sup> This is an important question because suppliers will only implement welfare friendly practices intended to reduce the suffering of food animals if consumers are willing to pay a premium for the eventual animal food products.<sup>118</sup>

## **Part VII: Consumers' Willingness to Pay**

In his discussion of consumer sovereignty, Michael Korthals notes:

*Consumers are not only becoming more concerning about the safety of products for humans, animals and the environment, but also attach moral significance to the way each product is being produced and the norms and values involved. And what is even more striking, they also*

---

116 This process was specifically averted to in Labelling Logic - Food Labelling Law and Policy Review Panel, Labelling Logic: Review of Food Labelling Law and Policy, 27 January 2011, Commonwealth of Australia, 98, [6.5].

117 Brian Naald and Trudy Cameron, 'Willingness to Pay for Other Species' Well-Being' (2011) 70 Ecological Economics 1325.

118 Ibid.

*think it important to express these 'ethical' and political preferences in the market itself and not solely on the political forum.*<sup>119</sup>

Australian consumers have expressed similar concerns in responding to the 2009 Commonwealth Government Review into food labelling laws. After the first round of consultations and after receiving more than 6,000 public submissions, the Review Panel issued its *Issues Consultation Paper* on 5.3.10 ('the *Consultation Paper*') and invited further submissions.<sup>120</sup>

Question 17 of the *Consultation Paper* asked whether 'there is a need to establish agreed definitions of terms such as 'natural', 'lite', 'organic', 'free range', 'virgin' (as regards olive oil), 'kosher' or 'halal'? If so, should these definitions be included or referenced in the Food Standards Code?'<sup>121</sup>

The *Labelling Logic Report* recommended that in relation to consumer values issues relating to specific food production methods, including religious slaughter methods, specific values-based definitions in the *Food Standards Code* should be adopted in order to achieve consistency of definitions.<sup>122</sup>

This recommendation was rejected by the Commonwealth government in its December 2011 Response. Instead, it stated that where regulation concerning labelling representations was needed, the mechanisms in the *Competition and Consumer Act 2010* (Cth) were more appropriate to the task.<sup>123</sup>

Accordingly, Australian governments are leaving evaluation of the kind of consumer values issues such as animal welfare, identified by Korthals, to individual consumers in making purchasing decisions. Where food products (including food animal products) are accompanied by labels that *do* make certain values claims, those claims must be

---

119 Michael Korthals, 'Taking Consumers Seriously: Two Concepts of Consumer Sovereignty' (2001) 14 *Journal of Agricultural and Environmental Ethics* 201, 203.

120 *Issues Consultation Paper: Food Labelling Law and Policy Review*, 5 March 2010, Food Labelling Law Secretariat, Canberra, Australia.

121 *Ibid* 6.

122 Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia, Recommendation 36, 12.

123 Response to the Recommendations of *Labelling Logic: Review of Food Labelling Law and Policy* (2011), Commonwealth Government, December 2011, 40.

justified. If not, the representations made by those labels to consumers may breach the ACL.

However, even if consumers do have sufficient labelling information to make informed value choices about the food animal products they purchase, does the evidence indicate that consumers will in fact make choices that favour food animal welfare? If there is simply no evidence that consumers are willing to pay for food animal products from suppliers who take account of animal welfare, then it is unlikely that the ACL can seriously advance food animal welfare initiatives. There would be no incentive for suppliers to spend the money to do so.

### **Australian Consumers' Cognitive Dissonance**

In Australia this issue has only just begun to be investigated. Informal and industry-initiated surveys suggest that consumers are in fact willing to pay a price premium for welfare friendly food animal products. In September 2008, Humane Society International published the results of a survey titled *'Method of Production' Labelling of Animal-Derived Food Products: A National Approach* ('the HSI Survey').

The HSI Survey indicated that consumer concern for food animal welfare was indicated by increased retail sales of welfare friendly food products in the form of:

*(t)he doubling of the free-range egg market in the last six years alone, with the result that it now comprises over 30% of the total retail egg market value, representing an increase of more than 200% since 2000. Similar growth has occurred in the free-range chicken market, with one of Australia's major chicken-producers, Inglewood Farms, reporting a tripling in sales over a 6-month period in 2005.*<sup>124</sup>

According to the HSI Survey, these sales trends are supported by surveys gauging consumer preferences for welfare friendly products:

*Recent surveys have revealed that 63% of participants would be more inclined to buy free-range pig products after becoming aware of factory farming conditions. In the ACT, a 2005 survey revealed that 84% of participants felt that keeping chickens in battery cages was cruel, and 73% supported a prohibition on these cages. Moreover, a*

---

124 Humane Society International, 'Method of Production' Labelling of Animal-Derived Food Products: A National Approach; August 2008 <[http://hsi.org.au/editor/assets/admin/Labelling\\_policy\\_Aug08.pdf](http://hsi.org.au/editor/assets/admin/Labelling_policy_Aug08.pdf)> (Accessed 6 May 2012)

*survey in Queensland in 2001 showed that many consumers rank the humane treatment of animals ahead of price.*<sup>125</sup>

These industry survey results are reflected in a 2007 survey into the pig and egg industries conducted by Professor Grahame Coleman of Monash University, finding that 60% of respondents agreed with the statement that ‘welfare of animals is a major concern, while 71% agreed that ‘farm animals is an important consideration’.<sup>126</sup>

A more formal academic study into Australian consumers' willingness to pay for welfare friendly animal products was conducted in 2010 by Iris Bergmann, Tania von der Heide and Cecily Maller. Their study found that participants expressed concern for the welfare of farm animals on the one hand, but also expressed a desire to continue eating meat from factory-farmed animals on the other.<sup>127</sup> Bergmann et al found that most of the study participants therefore experienced different levels of *cognitive dissonance* in attempting to reconcile these contradictory concerns.

Whether and to what extent the Bergmann et al participants experienced cognitive dissonance again underscores the importance of the role of the ACL in advancing food animal welfare reform which, in turn, is dependent on consumers' willingness to pay for that welfare reform in the form of higher priced food products. But this will not occur if consumers are undecided or internally conflicted about food animal welfare issues at the time of purchase.

It is beyond the scope of this article to explore in detail the role of cognitive dissonance theory generally or as it applies to consumer food choices specifically. I have written about cognitive dissonance theory in the context of legal regulation elsewhere.<sup>128</sup> However, there are at least three reasons why it is relevant to briefly address the implications of cognitive dissonance theory to the discussion in this article.

---

125 Ibid.

126 Professor Grahame Coleman, Public Perceptions of Animal Pain and Animal Welfare, May 2007, Monash University, Australia < [http://www.daff.gov.au/\\_\\_data/assets/pdf\\_file/0006/299103/grahame-coleman.pdf](http://www.daff.gov.au/__data/assets/pdf_file/0006/299103/grahame-coleman.pdf)> (Accessed 7 May 2012)

127 Iris Bergmann, Tania von der Heide and Cecily Maller, Cognitive Dissonance and Individual's Response Strategies as a Basis for Audience Segmentation to Reduce Factory Farmed Meat Consumption, in R Russell-Bennett and S Rundle-Thiele (eds), 2010 International Nonprofit and Social Marketing Conference, Brisbane, Australia.

128 Alex Bruce, 'Cognitive Dissonance in the Contribution of the Catholic Church to International Human Rights Law Discourse' (2009) 30(1) Adelaide Law Review 149.

First, there is an important body of literature that examines the relationship between cognitive dissonance theory and consumer choices to eat food animal products.<sup>129</sup> Second, in resolving the experience of cognitive dissonance, the literature emphasises the importance of sufficient and accurate product information available to consumers. And third, the extent to which the experience of cognitive dissonance influences consumers and their purchasing patterns will in turn affect the regulatory approach adopted by the Commonwealth government in its *Labelling Logic* Report.

There is simply no incentive for suppliers to satisfy consumer demand for animal welfare values if consumers are conflicted about those animal welfare values.

If, as the Bergmann et al study suggests, Australian consumers do experience cognitive dissonance in holding inconsistent desires for animal welfare initiatives on the one hand and for eating animal products on the other, then the ACL will play a crucial role in ensuring consumers have sufficient and accurate product information enabling them to resolve their dissonance.

What then is the relationship of the ACL to cognitive dissonance theory? There is a substantial quantity of academic literature devoted to cognitive dissonance theory and its implications for consumer choice.<sup>130</sup> It was initially developed in 1957 by Stanford University social psychologist Leon Festinger who described it as a distressing mental state experienced when people ‘find themselves doing things that don’t

---

129 Emma Lea and Anthony Worsley, 'The Cognitive Context of Beliefs about the Healthiness of Meat' (2002) 5(1) *Public Health Nutrition* 37; Boyka Bratanova, Steve Loughnan and Brock Bastian, 'The Effect of Categorisation as Food on the Perceived Moral Standing of Animals' (2011) 57 *Appetite* 193; Monika Schroder and Morven McEarchen, 'Consumer Value Conflicts Surrounding Ethical Food Purchase Decisions: A Focus on Animal Welfare' (2004) 28(2) *International Journal of Consumer Studies* 168; Monika Schroder and Morven McEarchen, 'The Role of Livestock Production Ethics in Consumer Values Towards Meat' (2002) 15 *Journal of Agricultural and Environmental Ethics* 221; Steve Loughnan, Nick Haslam and Brock Bastian, 'The Role of Meat Consumption in the Denial of Moral Status and Mind to Meat Animals' (2010) 55 *Appetite* 156.

130 Andrew Elliot and Patricia Devine: 'On the Motivational Nature of Cognitive Dissonance: Dissonance as Psychological Discomfort' (1991) 67(3) *Journal of Personality and Social Psychology* 382; Draycott & Dabbs: 'Cognitive Dissonance: An Overview of the Literature and its Integration into Theory and Practice in Clinical Psychology' (1998) 37 *British Journal of Clinical Psychology* 37; Harmon-Jones & Mills (eds): 'Cognitive Dissonance: Progress on a Pivotal Theory in Social Psychology' 1999, American Psychological Association, The Eurospan Group, United States; Shultz & Lepper: 'Cognitive Dissonance Reduction as Constraint Satisfaction' (1996) 103 *Psychological Review* 219; Aronson, E: 'The Return of the Repressed: Dissonance Theory Makes a Comeback' (1992) 3 *Psychological Inquiry* 303.



fit with what they know, or having opinions that do not fit with the other options they hold'.<sup>131</sup>

Cognitive dissonance theory therefore concerns relationships amongst cognitions and amongst cognitions and consumer behaviour. Most cognitions are described as either 'cognitively irrelevant' or 'cognitively consonant'. That is, where two cognitions are unrelated to each other or fit harmoniously with each other. An example of the former is: 'the sky is blue and I think tonight's dinner will be special.' An example of the latter might be: 'I like eating meat and I like chicken meat.'

In both cases, there is no dissonance between the cognitions that can serve as the cause of inner tension in the person holding them.

However, Festinger also identified many instances where people experience dissonance taking the form of inconsistent cognitions or inconsistent cognition and behaviour. Bergmann's 2010 Australian study is a classic example, where consumers expressed concern for the welfare of animals, while simultaneously expressing a desire to eat meat. Festinger's insight was that a person who entertains dissonant cognitions experiences a state of unpleasant psychological tension. In this situation, cognitive dissonance theory holds that the psychological tension possesses drive-like qualities similar to hunger and thirst.

That is, the experience of cognitive dissonance will drive a person to reduce the dissonance in the same way that a thirsty person will be driven to reduce their thirst. Festinger noted that healthy people experience a need to experience and maintain a psychological homeostasis in their daily lives.<sup>132</sup>

Of particular relevance for the use of the ACL in advancing food animal welfare initiatives is how, according to cognitive dissonance theory, consumers are driven to reduce the internal suffering associated with dissonant desires. Festinger identified three principal strategies by which people attempt to reduce the psychological tension they experience as a result of cognitive dissonance.

First, people may alter the importance of certain cognitions. The psychological tension is lessened by affirming the importance of one

---

131 Leon Festinger, 'A Theory of Cognitive Dissonance' (Stanford University Press, United States, 1957).

132 Andrew Elliot and Patricia Devine: 'On the Motivational Nature of Cognitive Dissonance: Dissonance as Psychological Discomfort' (1991) 67(3) *Journal of Personality and Social Psychology* 382.

cognition over the other. Second, people can change cognitions to make one of them consistent with the other, or even eliminate one of the competing cognitions altogether. And finally, people can change their behaviour to make it consistent with one of their cognitions.

All three of these strategies have been used by consumers in resolving the dissonance they experience in expressing concern for the welfare of food animals on the one hand, while simultaneously expressing a desire to continue eating meat from factory farmed animals.<sup>133</sup>

The 2010 Bergmann et al Australian study found that in resolving their cognitive dissonance participants employed strategies that were based on 'incomplete knowledge and misinformation, such as the lack of awareness of animal experience and the impact of factory farming.'<sup>134</sup>

Although their work is continuing, this initial formal study by Bergmann et al emphasises the importance of accurate and sufficient information to enable consumers to make informed decisions.

### **European Union Citizens' Willingness to Pay**

Research on the issue of consumers' willingness to pay for increases in food animal welfare is in its infancy in Australia, but it has been extensively studied in Europe for at least 10 years.

Numerous studies and surveys indicate that European consumers are concerned about the welfare of food animals, demand animal welfare-friendly products and are willing to pay a premium for them.<sup>135</sup>

---

133 Steve Loughnan, Nick Haslam and Brock Bastian, 'The Role of Meat Consumption in the Denial of Moral Status and Mind to Meat Animals' (2010) 55 *Appetite* 156, 158.

134 *Ibid* 3.

135 Harper and Henson, *Consumer Concerns About Animal Welfare and the Impact on Food Choice: Final Report 2001*, United Kingdom Department of Agriculture and Food Economics; Monika Schroder and Morven McEarchen, 'Consumer Value Conflicts Surrounding Ethical Food Purchase Decision: A Focus on Animal Welfare' (2004) 28 *International Journal of Consumer Studies* 168; Chilton, Burgess and Hutchinson, 'The Relative Value of Farm Animal Welfare' (2006) 59 *Ecological Economics* 353; Fredrik Carlsson and Peter Frykblom, 'Consumer Willingness to Pay for Farm Animal Welfare' (2007) 34(3) *European Review of Agricultural Economics* 321; Mayfield, Bennett, Tranter and Woolbridge, 'Consumption of Welfare-Friendly Food Products in Great Britain, Italy and Sweden and how it may be influenced by Consumer Attitudes to and Behaviour Towards Animal Welfare Attributes' (2007) 15(3) *International Journal of Sociology of Food and Agriculture* 59; Morgan and McVittie, 'Estimation of the Value the Public Places on Regulations to Improve Broiler Welfare' (2008) 17 *Animal Welfare* 43; Giuseppe Nocella, Lionel Hubbard and Riccardo Scarpa, 'Farm

For example, a 2005 study indicated 74% of European citizens believed they could exert a positive influence on farm animal welfare through purchases of animal-friendly products and more than 60% confirmed they were willing to pay a price premium to ensure farm animal welfare.<sup>136</sup>

These studies consistently indicate that both access to food animal welfare information and the perception of welfare labelling significantly influence decisions consumers make in purchasing food animal products.<sup>137</sup>

However, the studies also revealed several obstacles to consumers making choices about food animal products consistent with their expressed concern for farm animal welfare, and that generated the sort of cognitive dissonance detected by the 2010 Australian study.

The main reported obstacle involved the lack of information concerning welfare issues available to consumers at the time of purchase.<sup>138</sup> Without sufficient information concerning farm animal welfare, consumers were unwilling or unable to exercise purchasing decisions that reflected their animal welfare concerns.

A 2010 U.K. study by Jacqueline Tawse sought to investigate the apparent discontinuity between consumers' stated belief in the value of animal welfare and their actual purchasing patterns.<sup>139</sup> Tawse found it was the lack of information about farm animal welfare that contributed to this discontinuity, concluding 'the success of a farm animal welfare campaign, however, is contingent upon not only its ability to reach a

---

Animal Welfare, Consumer Willingness to Pay and Trust – Results of a Cross-National Survey' (2010) 32(2) Applied Economic Perspectives and Policy 275; Napolitano, Girolami and Braghieri, 'Consumer Liking and Willingness to Pay for High Welfare Animal-Based Products' (2010) 21 Trends in Food Science & Technology 537; Lagervist and Hess, 'A Meta-Analysis of Consumer Willingness to Pay for Farm Animal Welfare' (2011) 38(1) European Review of Agricultural Economics 55; Toma, Scott, Revoredo-Giha and Kupiec-Teahan, 'Consumers and Animal Welfare. A Comparison Between European Countries' (2012) 58 Appetite 597.

136 Laura Andersen, 'Animal Welfare and Eggs – Cheap Talk of Money on the Counter?' (2011) 62(3) Journal of Agricultural Economics 565.

137 Toma, Scott, Revoredo-Giha and Kupiec-Teahan, 'Consumers and Animal Welfare. A Comparison Between European Countries' (2012) 58 Appetite 597, 606.

138 Mayfield, Bennett, Tranter and Woolbridge, 'Consumption of Welfare-Friendly Food Products in Great Britain, Italy and Sweden and how it may be influenced by Consumer Attitudes to and Behaviour Towards Animal Welfare Attributes' (2007) 15(3) International Journal of Sociology of Food and Agriculture 59.

139 Jacqueline Tawse, 'Consumer Attitudes Towards Farm Animals and their Welfare: A Pig Production Case Study' (2010) 3(2) Bioscience Horizons 156, 157.

considerable proportion of consumers, but also to present information, which will affect those consumers powerfully enough to alter their buying habits.<sup>140</sup> These results are consistent with recent U.S. studies.<sup>141</sup>

The literature is therefore consistent in concluding that consumers are interested in food animal welfare and are willing to pay a price premium for welfare-friendly products.

The signal importance of accurate and sufficient animal welfare labelling information has also been recognised at the regulatory level. In 2009 the European Commission investigated the issue of farm animal welfare labelling information<sup>142</sup> resulting in its inclusion in the current *European Union Strategy for the Protection and Welfare of Animals 2012-2015*.<sup>143</sup> Like the Australian Government, the EU Strategy intends to regulate animal welfare labelling claims through consumer protection legislation. Paragraph 3.4 of the EU Strategy notes:

*Animal welfare is also a consumer concern. Animal products are widely used, in particular in the context of food production and consumers are concerned about the way animals have been treated. On the other hand, consumers in general are not empowered to respond to higher animal welfare standards. It is therefore relevant to inform EU consumers about the EU legislation applicable to food producing animals and to ensure that they are not deceived by misleading animal welfare claims.*<sup>144</sup>

The EU Strategy emphasises the importance of sufficient and accurate information concerning animal welfare claims available to consumers, and the role of effective regulation of misleading or deceptive conduct.

All this research underscores the important role intended for the ACL.

---

140 Ibid.

141 R. Pickett, F Norwood and J Lusk, 'Consumer Preferences for Farm Animal Welfare: Results from a Telephone Survey of US Households' (2010) 19 *Animal Welfare* 335.

142 European Commission, Feasibility Study on Animal Welfare Labelling and Establishing a Community Reference Centre for Animal Protection and Welfare (2009) EU Directorate General for Health and Consumer Protection.

143 European Union Strategy for the Protection and Welfare of Animals 2012-2015, 10 - 11, Part 3.4.

144 Ibid 11.

## **Conclusion: Theoretical Possibilities & Regulatory Realities**

Instead of directly legislating to prohibit certain animal husbandry practices and slaughter without prior stunning, the Commonwealth government is intending to indirectly regulate food animal products through consumer legislation prohibiting misleading or deceptive conduct. In its December 2011 Response to the *Labelling Logic Report*, the Commonwealth stated that consumer value issues (such as animal welfare and religious issues) associated with food animal products were best regulated through the mechanisms in the *Competition and Consumer Act 2010* (Cth).<sup>145</sup>

However, consideration of the question whether the use of the ACL in preventing misleading or deceptive conduct in relation to food animal product labelling will encourage suppliers to improve food animal welfare, initially rests upon exploring the *theoretical* basis of the regulatory strategy anticipated in the *Labelling Logic Report*, the relationship between consumers and their role in the market, the role of consumer protection legislation, such as the ACL, and food animal welfare.

Consumer demand is intended to signal suppliers about the products, services and attributes they desire. Informal, industry and early formal studies in Australia and studies in the European Union clearly indicate that consumers are demanding welfare friendly animal products. These studies indicate that consumers are willing to pay a premium for welfare friendly animal products provided they can be confident that welfare concerns have been heeded. Difficulties associated with consumers' cognitive dissonance or lack of willingness to pay have been attributed to the lack of information necessary for an accurate and informed purchasing decision.

Instead of simply legislating to prohibit certain animal farming practices, Australian governments are intending market forces in the form of consumer demand to exert backwards pressure on animal farmers to implement food animal welfare reforms. This pressure will be mediated through consumer demand.

---

<sup>145</sup> Response to the Recommendations of Labelling Logic: Review of Food Labelling Law and Policy (2011), Commonwealth Government, December 2012, 40.

As suppliers attempt to satisfy this consumer demand, they are increasingly differentiating their products on the basis of animal welfare claims, whether in advertising or on labels.<sup>146</sup>

Studies in the European Union suggest this consumer-oriented strategy will work, provided it is underpinned by an effective consumer protection regime. In order to avoid cognitive dissonance problems and misinformation, consumers must have sufficient information about the food animal products they are buying and that information must be accurate.

It therefore seems that, at least in theory, it may be possible to realise the Commonwealth Government's intention, expressed in its *Labelling Logic Report*, to use the ACL to regulate consumer values issues associated with food animal welfare and the religious slaughter of animals.

However, translating economic and consumer theory into practice in the legal application of the ACL is another matter altogether. Given that competition and consumer policy as well as consumer literature supports the role of the consumer as sovereign in generating food animal welfare, it remains to explore the *legal* implications of that relationship.

Does the law permit an interpretation of the ACL in ways that would prevent producers making misleading statements about the conditions in which meat and egg products were produced? Does the law permit an interpretation of the ACL in ways that would require meat produced through the religious slaughter of animals to be clearly identified so that consumers can choose whether to buy those products?

The answers to these questions will be explored in the second article.

---

146 Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia, 98, [6.5].



# **The Feminist Ethic of Care and the Question of Caring for Animals and Humans: Cow's Milk in Queensland**

*By Melissa S. Biggs\**

A number of theories of ethical philosophy attempt to explain or discover the nature of the ethical responsibilities of humans towards animals (or the rights or freedoms of animals).<sup>1</sup> The utilitarian philosopher Peter Singer and the rights based philosopher Tom Regan are the most prominent leaders of the 'rationalistic' philosophical schools, with an emphasis on the importance of consistency and fairness in ethical approaches, the justice approach. While these approaches have an intellectual appeal and have garnered significant academic and popular support they have also been subject to criticism, even from fellow supporters of animal liberation. In particular, writers within the feminist ethic of care tradition have pointed to the internal inconsistency of the rationalistic approach in denying the importance of emotional responses and have attempted to identify how the feminist ethic of care can provide an alternate and richer framework of ethical philosophy in responding to these sorts of questions. However, it appears that little academic thought has been given to the question of how an ethic of care approach to animal ethics interacts with a broader ethic of care – to communities, families and human individuals.

This paper examines, through the prism of a case study on the consumption of cow's milk in Queensland, the legal and philosophical framework that governs our current relationship with farm animals and how an ethic of care approach might shape ideal or correct laws and actions.

## **The Law and Philosophy in Queensland**

The case study at the end of this paper examines the dairy industry in Queensland and how personal knowledge as well as the law and regulatory environment affect the exercise of an ethic of care approach

---

\* Melissa S. Biggs is completing a Master of Laws at the University of NSW.

<sup>1</sup> Throughout this paper I will use the common terms 'human' and 'animal' rather than the more accurate but cumbersome terms 'human animal' and 'non-human animal'.



to animal ethics. For this reason it is useful to begin with a brief overview of law and regulatory environment as it relates to animal conditions in the dairy industry.

In Queensland, as in the rest of Australia, animals are considered by the law to be property.<sup>2</sup> There is no specific recognition in Queensland law of the ‘sentient’ nature of animals. The treatment of animals in Queensland is broadly governed by the *Animal Care and Protection Act 2002 (ACPA)* and the *Animal Care and Protection Regulation 2002 (the Regulations)*. Dairy cattle, our example creature, also find themselves within the scope of s468 of the *Criminal Code* which provides that “Any person who wilfully and unlawfully kills, maims, or wounds, any animal capable of being stolen is guilty of an indictable offence” (the penalty is higher in the case of stock than other animals) and the newly amended s242 which creates an indictable offence of serious animal cruelty. Under that section an act is not an offence if it is authorised, justified or excused by the *ACPA*.

The *ACPA* prohibits a breach of a duty of care to an animal (s17) as well as cruelty to an animal (s18) or the unreasonable abandonment or release of an animal (s19). Relevantly, there are also restrictions on the docking of the tail of cattle (s27). Crucially, s16 provides that a Code of Practice, as incorporated by the *Regulations*, is relevant in a proceeding for an offence against the Act. What this means, in practice, is that if it can be shown that an act complied with the relevant Code, the accused will not be found guilty. In relation to cattle the *Regulations* provide that the ‘Australian Model Code of Practice for the Welfare of Animals—Cattle’<sup>3</sup> (the Cattle Code) is a Code of Practice for the purposes of the *ACPA*.<sup>4</sup> The Cattle Code approves various husbandry practices that would otherwise be considered acts which kill, maim or wound or were otherwise cruel.

This legal framework is clearly based on a welfare approach: the law condones the exploitation of animals for human desires but attempts to protect the welfare of the animals so utilised. The philosophy behind this approach is grounded in the western Christian philosophical

---

2 See for example the definition of “property” and “stock” of the Criminal Code Act 1899 (Qld).

3 ‘Australian model code of practice for the welfare of animals—Cattle’ CSIRO (2004, 2nd ed) PISC Report No. 85.

4 Schedule 1.

tradition: animals fall within the dominion of man, to be used for his purposes.<sup>5</sup>

## **Rationalistic, Justice-based, Approaches in Ethical Philosophy**

There have of course been challenges to this philosophical (and political) orthodoxy. Perhaps most well known are the challenges posed by rationalistic, justice-based approaches.

Peter Singer's core philosophical argument concerning animal liberation turns on what he terms 'a clear understanding' of the nature of the principle of equal consideration of interests.<sup>6</sup> He argues that opposition to racism and sexism is based on the principle of equal consideration, according to which we must give equal consideration to the interests of all people, regardless of their race or sex. Following Bentham, he argues that the capacity for suffering is the vital characteristic that entitles a being to equal consideration. He then posits that animals can suffer (certainly at least all mammals can) and, on that basis, are entitled to equal consideration. He terms the devaluation of interests solely on the basis of species membership, speciesism.

Tom Regan investigates the basis of rights, arguing that formal justice (that is, equality of individuals) involves viewing certain individuals as having value in themselves: an inherent value. He turns to the basis for that value and suggests that those who are the subject-of-a-life have inherent value.<sup>7</sup> For Regan, subjects-of-a-life must have beliefs and desires, perception, memory and a sense of the future, an emotional life with feelings of pleasure or pain, preference and welfare interests, the ability to initiate action in pursuit of desires or goals, a psychological identity over time and an individual welfare.<sup>8</sup> He argues that because the subject-of-a-life condition is categorical and that the categorical status is shared by both moral agents (those with sophisticated abilities that allow them to choose to act morally) and moral patients (those who lack the prerequisites that would enable them to control their behavior in such a way as to be morally accountable) the criterion demonstrates a relevant similarity between moral agents and patients, thus requiring the attribution of equal inherent value to both.

---

<sup>5</sup> Genesis 1:28.

<sup>6</sup> Peter Singer 'Practical Ethics' in Susan Armstrong and Richard Botzler, *The Animal Ethics Reader* (Routledge, 2008) 36-46. See also Peter Singer, *Animal Liberation* (Pimlico, 1975).

<sup>7</sup> Tom Regan, *The Case for Animal Rights* (University of California Press, 1983).

<sup>8</sup> *Ibid* especially Chapters 1 and 2.

A traditional Kantian response to these two positions is to argue that while killing (for example) is a harm to both humans and animals, the wrongness of the harm arises only from its impingement upon a victim's rationality: that killing a rational human would require a special justification not needed for killing a non-rational animal, even though both are harmed by being killed. Hence, posits the Kantian, the key to inclusion in the moral community is rationality. Accepting this view would mean that Regan's move from 'death and pain are harms for humans and animals' to 'as they are of equal inherent value the same justification is required for killing or inflicting harm of either humans or animals' is rejected. Similarly, on a Kantian view, one could maintain that sexism and racism are objectionable because they fail to appreciate the rationality of those so oppressed. The same could not be said of speciesism. Thus, utilizing only rationality, it cannot be established that humans and animals are relevantly similar.<sup>9</sup>

Singer and Regan respond to the Kantian argument with the argument from marginal cases. If rationality is the necessary condition for moral consideration (as the Kantians would say) then it is morally permissible to harm animals (with the Kantian proviso that, although morally permissible, we disrespect our humanity when we act in inhumane ways towards those excluded from moral consideration) but it also means that, if the argument is to be taken to its logical conclusion, it is morally permissible to harm humans who lack the rationality required to enjoy moral consideration. These 'marginal humans' would include infants, the severely mentally deficient and those with brain damage or in comas.<sup>10</sup>

There are two rationalistic responses to this argument. The first is that we agree that, because they lack the necessary rationality, marginal humans do not in fact enjoy moral consideration and so can ethically be used in ways in which we currently use animals.<sup>11</sup> The second,

---

9 I have here largely followed the argument of Brian Luke 'Justice Caring and Animal Liberation' in Josephine Donovan and Carol J Adams (eds), *The Feminist Ethic of Care Tradition in Animal Ethics* (Columbia University Press, 2007) 125 - 152. A similar argument is suggested by Christine Korsgaard, *The Sources of Normativity* (Cambridge University Press, 1996) and Patrick Lee and Richard P George, *Body-Self Dualism in Contemporary Ethics and Politics* (Cambridge University Press, 2008).

10 See Peter Singer, *Animal Liberation* (Pimlico, 1975), Peter Singer 'The Significance of Animal Suffering' (1990) 13 *Behavioral and Brain Sciences* 9 and Tom Regan 'An examination and Defense of One Argument Concerning Animal Rights' (1979) 22 *Inquiry* 189. Please note that I use the term "marginal humans" as a convenient short hand as it is common in the literature. No disrespect or insult is intended.

11 R G Frey adopts this position with regard to vivisection; R G Frey 'Vivisection, Morals and Medicine' (1983) 9 *Journal of Medical Ethics* 94.

following from the first, is to agree that marginal humans (like animals) do not enjoy moral consideration but that we may choose not to exercise the ethical freedom to use marginal humans as we do animals. That is, for non-binding reasons we extend special care to the members of our own species.<sup>12</sup>

## **Feminist Ethic of Care Philosophical Approaches**

Feminist approaches to questions of animal liberation have ranged from an explicit rejection of the animal-ness of woman and the woman-ness of animals<sup>13</sup> to an identification of the shared experiences of animals and women. Carol Adams, for example, has identified the patriarchal roots of both vivisection and meat eating.<sup>14</sup>

The feminist ethic of care was first articulated in the 1960's and 1970's and developed as a normative ethical theory. It drew on the work of 18th century theorists such as Anthony Ashley-Cooper the 3rd Earl of Shaftesbury, Francis Hutcheson, David Hume and Adam Smith and the tradition of moral sense.

Largely due to the fact that it is contextual, 'care' and to whom it is owed is notoriously difficult to define. It has been variously described as an ethic defined in opposition to justice, a kind of 'labour', a particular relationship and/or a species of virtue ethics, with care as a central virtue.<sup>15</sup> Care theory is most simply articulated along three principles. First, we are dependant on others (and they on us) both individually and for the existence of civil life (and eco-feminists and those in the animal ethics tradition would argue – life more broadly). Secondly, some beings (or for the eco-feminists, ecologies) are particularly vulnerable to our choices and thus their outcomes deserve extra consideration (to be measured according to the level of their vulner-

---

12 Bonnie Steinbock 'Speciesism and the Idea of Equality' (1978) 53 *Philosophy* 256.

13 See for example Simone de Beauvoir, *The Second Sex* (first published 1949, Knopf, 2010 ed) and Mary Wollstonecraft, *The Vindication of the Rights of Woman* (first published 1792, Penguin Classics, 2004 ed)

14 See for example Coral Lansbury *The Old Brown Dog: Women, Workers, and Vivisection in Edwardian England* (University of Wisconsin Press, 1985), Carol Adams, *The Sexual Politics of Meat* (Continuum, 1990), Andree Collard, *Rape of the Wild* (Indiana University Press, 1988) and Suzanne Kappeler, *The Pornography of Representation* (University of Minnesota Press, 1986).

15 Sara Ruddick 'Care as Labor and Relationship' in Mark S Haflon and Joram C Haber (ed.s) *Norms and Values: Essays on the Work of Virginia Held* (Rowman and Littlefield, 1998) 3-26, James Rachels, *The Elements of Moral Philosophy* (McGraw Hill, 1999), Margaret McLaren 'Feminist Ethics: Care as a Virtue' Peggy DesAutels and Joanne Waugh (eds) *Feminists Doing Ethics* (Rowman and Littlefield, 2001) 101-118 and Virginia Held 'Feminist Moral Inquiry and the Feminist Future' in Virginia Held (ed.) *Justice and Care* (Westview Press, 2006) 153-176.

ability to one's choices and the level of their affectedness by one's choices and no-one else's). Thirdly, it is necessary to attend to the contextual details of the situation in order to safeguard and promote the actual specific interests of those involved.<sup>16</sup>

Carol Gilligan and other writers in this tradition argue that the importance of universal standards and their impartial application from a 'standpoint of detached fairness' advocated by liberal theories of justice (and consequentialist and deontological ethical philosophy) overlook the moral role of attachment to those close to us and that of the sympathetic imagination.<sup>17</sup> The masculine concern with rights, rules, and an abstract ideal of justice can result in philosophy being no more than a mathematical problem with humans. The feminine approach offers a more flexible, situational, and particularized ethic. Gilligan called the feminine conception "a morality of responsibility," as opposed to the masculine "morality of rights," which emphasizes "separation rather than connection".<sup>18</sup>

Josephine Donovan has explained the application of the ethic of care approach to animal ethics:

*"[It] thus rejects abstract rule-based approaches in favor of one that is more situational and focused on the context, allowing for a narrative understanding of the particulars of a situation or issue. As with feminism in general, care theory resists hierarchical dominative dualisms which establish the powerful (humans, males, whites) over the subordinate (animals, women, people of color). Instead, care theorists see all living creatures as having value and as embedded in an interdependent matrix."*<sup>19</sup>

Joan Tronto, focusing on interdependency and dependency (the first point of care ethics as outlined above) construes care as:

---

16 See generally Virginia Held, *The Ethics of Care: Personal, Political, and Global* (Oxford University Press, 2005), note that there are of course many variations on these basic principles, see for example Daniel Engster 'Rethinking Care Theory: The Practice of Caring and the Obligation to Care' (2005) 20 *Hypatia* 3, 50-74.

17 See for example Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (Oxford university Press, 2001, 5th ed)

18 Carol Gilligan, *In A Different Voice* (Harvard University Press, 1982), esp 26-28.

19 Josephine Donovan 'Caring for Animals: A Feminist Approach' (January 2009) *Tikkun*, available at [http://www.tikkun.org/article.php/jan09\\_donovan](http://www.tikkun.org/article.php/jan09_donovan)

*“a species of activity that includes everything we do to maintain, contain, and repair our ‘world’ so that we can live in it as well as possible. That world includes our bodies, ourselves, and our environment”.*<sup>20</sup>

This definition has been criticised as being too extensive – it encompasses almost every human activity. In response Daniel Engster has developed a ‘basic needs’ approach to care, defining care as a practice that includes:

*“...everything we do to help individuals to meet their vital biological needs, develop or maintain their basic capabilities, and avoid or alleviate unnecessary or unwanted pain and suffering, so that they can survive, develop, and function in society”.*

The feminist ethic of care tradition has provided a number of important critiques of the rights-based and utilitarian approaches to animal ethics and animal liberation.

First, it is clear that, when dealing with questions of animal ethics, rights and utilitarian ethical theory is highly de-contextualised. The aspirations are universalistic: once the ‘rule’ is discovered it should be universally applied if one wishes to act ethically. Many ethical situations (including those that involve animals) benefit from (or indeed require) a particularised and situational response. Utilitarian theory provides the most glaring examples of the failure of rationalistic ethics to engage with suffering: it merely (and impersonally) weighs units of pleasure and pain. Feminist ethic of care theory suggests that not only the suffering of the individual but the whole of the ‘relational web’ including context and history may be analysed and incorporated in reaching conclusions as to ‘right actions’: leading to a response that may not be universalisable or quantifiable.<sup>21</sup> Moreover, the feminist ethic of care sees animals (and people for that matter) as individuals with communicable feelings, from which arises a series of moral obligations.

This approach emphasizes the importance of empathy and or sympathy,<sup>22</sup> of attentive listening, and what Iris Murdoch termed

---

20 Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge, 1994) 126, see also 126-136.

21 Carol Gilligan, *In a Different Voice* (Harvard University Press, 1982) and Carol Gilligan, *Making Connections: The Relational Worlds of Adolescent Girls at Emma Willard School* (Harvard University Press, 1990).

22 Donovan, in particular emphasizes the role of sympathy theorists: Josephine Donovan ‘Attention to Suffering Sympathy as a Basis for Ethical Treatment of Animals’ in Josephine Donovan and Carol J Adams (eds) *The Feminist Ethic of Care Tradition in Animal Ethics* (Columbia University Press, 2007) 174-197. Ecofeminists tend to lean more

“attentive love”, which requires actually seeing another’s reality. Listening to what animals have to tell us is in many ways quite complicated: we do not share a language. However, analogy based on homology not only allows us to understand what (most mammals and birds, at least) have to say but is also, in reality, how we communicate with them everyday – companion, other domesticated and wild animals. For example, if my cat had a thistle stuck in his paw and was meowing and not walking on the paw, and trying to lick the thistle out, I would assume that the thistle hurt or discomforted him and he wanted it out of his paw. I assume this because if I had a thistle in my foot and I acted in that way (not walking on it, calling out and trying to get it out of my foot) it would be because it hurt or discomforted me and I wanted it out.<sup>23</sup> As with incommunicable humans (or even those from a linguistic or cultural background different to our own) miscommunications can occur. However the use of:

*“...improved practices of attentiveness...as a kind of discipline whose prerequisites include attitudes and aptitudes such as openness, receptivity, empathy, sensitivity and imagination...”<sup>24</sup>*

can limit those misunderstandings. Of course there is also a role for science, in attempting to quantify those experiences that many of us intuitively feel.<sup>25</sup> The feminist ethic of care in that way recognises that attention needs to be paid to individual particularities, it accepts the diversity of situations and individuals and thus provides contextualised responses in a way that neither rights nor utilitarian theory can.

Secondly, the rationalistic approaches fail on their own terms, clearly illustrating the problem of overly rationalistic thinking. Regan and others are arguing, in effect, that animals are entitled to be considered as persons because they are relevantly similar to humans and thus animals should enjoy the protection of rights. Singer’s argument also relies on the discovery of relevant similarities between humans and animals so as to bring their interests within a utilitarian calculation. The evident problem with this approach is that it is only with great difficulty that

---

towards emphasizing the role of empathy; for example Marti Kheel, *Nature Ethics: An Ecofeminist Perspective* (Rowman and Littlefield, 2008).

23 See further Kenneth Shapiro ‘Understanding Dogs through Kinesthetic Empathy, Social Construction and History’ in Clifton Flynn (ed) *Social Creatures: A Human and Animal Studies Reader* (Lantern Books, 2008) and *Mary Midgley, Animals And Why They Matter: A Journey Around the Species Barrier* (University of Georgia Press, 1983).

24 Alison Jaggar ‘Caring as a Feminist Practice of Moral Reason’ in Virginia Held (ed) *Justice and Care: Essential Readings in Feminist Ethics* (Westview Press, 1995) 179-202, 190.

25 Klaus Wilhelm ‘Do Animals Have Feelings?’ (February/March 2006) *Scientific American* 26-29.

relevant similarities can be discovered. The argument from marginal cases, used to respond to criticisms of the relevant criteria, is itself subject to a Kantian rejection, as explored above.

The feminist ethic of care response to the argument from marginal cases, in some respects, illustrates the core of the ethic of care response to rationalistic philosophy. To accept the rationalistic argument put forward by Singer and Regan one must first accept the emotive argument that it is inherently/morally wrong to kill and harm marginal humans. These rationalistic, justice-based arguments fail on their own terms: there is an unavoidable inconsistency that can only be resolved through the use of non-rationalistic reasoning.

Thirdly then the use of solely rationalistic thought is problematic. Singer and Regan both endorse an entirely rationalistic way of assessing animal ethics, expressing concern at

*“...the tired charges of being ‘irrational’, ‘sentimental’ or ‘emotional’...we can give lie to these accusations only by making a concerted effort not to indulge our emotions or parade our sentiments”.*<sup>26</sup>

Singer and Regan share a concern that association with sentiment and emotion would (or has) excluded the issues of animal ethics from serious moral or political discussion, hence their emphasis on reason.<sup>27</sup> Feminists have long pointed out the connection between the rise of the privileging of reason and women’s and nature’s oppression. Emotion is based in the body (Plato’s somatophobic ‘living tomb’)<sup>28</sup> and is base, animalistic, womanly, black, irrational, and erratic. Reason is the elevated soul, the clean clear approach of dignified (white) men.<sup>29</sup> As Brian Luke explains:

*“Their [Singer and Reagan’s] strategy is to gain respectability for animal liberation by using formalistic male theorising, thereby distancing the movement from female objects of contempt. By seeing emotional women as a public relations problem for animal liberation, this strategy tacitly accepts the patriarchal ideology behind the charges of ‘hysteria’ and ‘sentiment’, misrepresents animal liberation morality by erasing its emotional elements and disrespects the work of female animal liberationists*

---

26 Tom Regan, *The Case for Animal Rights* (University of California Press, 1983) preface, lii

27 Peter Singer, *Animal Liberation* (Pimlico, 1975) ix-x and Tom Regan, *The Case for Animal Rights* (University of California Press, 1983) lii.

28 Plato *Phaedrus* available at <http://classics.mit.edu/Plato/phaedrus.html>.

29 See Susan Griffin, *Woman and Nature: The Roaring Inside Her* (Harper and Row, 1978).



*(who are not only the majority of activists but compromise most of the movement's founders and leaders)."*<sup>30</sup>

Needless to say, animals have not fared well in the hierarchy of reason, consistently falling at the very bottom. On a traditional rights-based ethical approach (itself centred around the defining marker of 'rationality'), animals lacked ethical protection, except to the extent that behaving well to animals encouraged one to act well towards other men. Indeed, Cartesian objectivism provided the ethical foundations for extensive animal abuse. Contempt of 'feminine' knowledge and the elevation of rationalism mean that, in ethical philosophy, the playing field is unfairly tilted against those associated with that knowledge or understood by it – in this instance, animals. As Cathryn Bailey puts it:

*"If Reason sets the parameters of the discourse...only Reason can be heard. Only Reason will decide when something of relevance has been said, who has won or lost (and because it is Reason, there must, in some sense, be a winner and a loser)...animal 'silence' is an indication of their lack...(r)arely is it appreciated by philosophers that the assumption of this as a lack is already an assertion of superiority...the scenario is inherently exploitative."*<sup>31</sup>

Returning to the ethic of care's emphasis on empathy and sympathy, a rationalistic approach frames animal suffering (the pain on the utilitarian scales, the violation of rights in rights theory) as something "distant and debatable"<sup>32</sup>. Those theories fail to either engage with animal suffering conceptually or in individual circumstances. Again, Bailey illuminates the issue:

*"(rationalistic arguments) provide the illusion that we are honestly facing the thing when what we are too often doing is debating "piddling distinctions" on a quest for abstract moral principles. At the same time, animal discourse becomes a perfect opportunity for the affirmation of masculinity, for who but a real man can distance himself from the cries of furry animals..."*<sup>33</sup>

---

30 Brian Luke, *Brutal: Manhood and the Exploitation of Animals* (University of Illinois Press, 2007) 212.

31 Cathryn Bailey 'On the Backs of Animals The Valorization of Reason in Contemporary Animal Ethics' in Josephine Donovan and Carol J Adams (eds) *The Feminist Ethic of Care Tradition in Animal Ethics* (Columbia University Press, 2007) 344-359, 350.

32 *ibid* 351.

33 *Ibid* 351.

The point of these critiques of the use of reason is not to suggest that emotion is the only basis for exploring ethical considerations. The point is that reason is sterile without emotion: in ethics, reason and emotion work together. Attempts to expunge emotion (particularly as a misguided attempt to make animal ethics ‘respectable’) are self-defeating.

Finally, the feminist ethic of care emphasis on the political and structural context of animal ethics provides a contextualised response to ethical questions, the examination of those political issues itself contributing to the animal liberation project. Both Singer and Regan acknowledge the difficulties of the political project of animal liberation and emphasise the positive potential of political tools (such as changes in consumer habits). Importantly though, they both begin from the starting point that people do not care about animals. Regan sees it as a ‘plain fact (that) most people do not care very much about what happens to (animals)’ and Singer suggests that we have an evolutionary predisposal for kin, reciprocal and group altruism and that only reason can expand our consideration beyond those types of altruism and must therefore be reasoned into supporting this political project. This starting point obscures a strong possibility that the ethic of care embraces: that people *do* care about animals and their suffering but that indifference is socially manufactured and maintained by corporate, economic and legal structures.

Luke suggests that the strength and depth of the human-animal bond is demonstrated by numerous cultural phenomena.<sup>34</sup> He explores four examples: (1) the prevalence of animals as companions and the role of pets as family members who provide (and receive) companionship, love and affection; (2) the role of animals in human therapy; (3) deep and widespread public concern over particular animal rescue attempts; and (4) the almost universal presence (in cultures that hunt or slaughter animals) of mechanisms for mediating the guilt that such exploitation engenders. In light of the depth of the human-animal connection thus identified, Luke turns to the question of how it is that the various animal exploitation industries can continue to operate.

He suggests that divine permission and non-human inferiority are “the most generally applied techniques for forstalling sympathetic opposition to exploitation”.<sup>35</sup> The animal exploitation industries also engage in

---

34 Brian Luke ‘Justice, Caring and Animal Liberation’ in Josephine Donovan and Carol J Adams (eds) *The Feminist Ethic of Care Tradition in Animal Ethics* (Columbia University Press, 2007) 125-152.

35 *ibid* 137-8.

extensive and intensive efforts to prevent this reaction. Luke describes the promulgation of a ‘cover story’ (for example that the human consumption of flesh is a given and that ‘demand’ must be met – rather than acknowledging the active construction of markets); the denial of harm (for example in the extensive and self-conscious use of euphemisms such as the ‘dispatch’ of animal vivisection subjects and the denial of cruelty in patently cruel husbandry practices such as the stocking densities in factory farms); the denial of animal subjectivity (the promulgation of the idea that animals are “for” something, that they wish to be eaten or tested upon or hunted); and by the derogation of sympathy for animals (the belittlement [usually gendered] of sympathy if it does arise despite the other efforts to prevent that reaction).

The feminist ethic of care approach explores these political and structural challenges to animal liberation. The failure of rationalist ethical theory to engage with these concepts limits its political efficacy. As Luke puts it:

*“...rather than constructing justice-based arguments with a view towards charging animal exploiters with inconsistency, we might better resist those corporate and personal manipulations deployed to forestall the expression of our sympathies for animals in animal liberationist policies”.*<sup>36</sup>

This failure also means that utilitarians, when weighing pleasure and pain, may fail to recognise non-acknowledged priorities.

### **Applying the Ethic of Care – People and Animals Simultaneously**

Feminist ethic of care theory was developed in the context of discovering a normative morality that encompassed a greater range of ethical questions than that of animal ethics. There has been much discussion on the ‘correct’ or best application of care theory to particular situations. An animal ethics approach within the care tradition, as outlined above, obviously extends the responsibility of care to animals (often on a ‘sympathy’ basis) but in real life scenarios how does the ethic of care towards oneself, one’s family, one’s broader community and strangers sit with care responsibilities towards animals?

In many situations there will be no conflict of responsibilities. One could easily meet co-existing care needs (for example, when I get up in the morning I will feed both my hungry baby and my hungry cat). On

---

<sup>36</sup> ibid 136.

the other extreme there are the ‘life-boat scenarios’ (there is only enough room on the lifeboat, should I throw off my baby or my cat?). These scenarios are, in terms of ethical debate, fairly unhelpful. The likelihood of ever actually being in a life-boat situation is extremely low and feeding both the cat and the baby in the morning is (generally speaking) undemanding enough that the mother in the developed world would not need to consider them as alternatives. Life-boat dilemmas also lack the specificity that provide useful texture and political background. Of more utility, in my view, is the examination of scenarios that the individual, as well as society and the law, face daily where there may indeed be a conflict of responsibilities. The example of the dairy industry in Queensland provides fertile ground for an examination of conflicting, or at least co-existing, responsibilities.

### **Dairy cattle in Queensland – Application of an Ethic of Care to both animals and people**

Jane Doe is a woman who lives in suburban Brisbane with her partner and two little girls. She is a thoughtful sort of person and has read the foregoing passages of this paper and is convinced that in order to live morally she should adopt an ethic of care approach, one which includes animals in the scope of care, to her ethical choices. She is at the supermarket in the dairy aisle and is trying to decide whether she should pick up some milk and cheese. She is aware that she should try to be empathetic and sympathetic and ‘listen’ to what the cow who produced the milk is ‘saying’ to her. Of course, there are no cows in the supermarket and so she uses a sympathetic imagination to try to work out whether the cow might have been upset in some way by the production of the milk. Jane reasons that although the cow might not particularly like being milked, it is for her own good (otherwise the cow’s udders would become engorged with milk). Moreover, it is common knowledge that milk products are high in calcium and other nutrients and are important for bone development, especially in girls who may otherwise suffer osteoporosis in later life. Of course, milk and cheese are also delicious and Jane’s partner and her girls will be extremely unimpressed if she comes home without them (particularly as she has bypassed the meat aisle this week). She also knows the dairy industry supports the employment of many rural families in Queensland, without which the welfare of families and communities would be diminished. Jane decides to pick up some milk and cheese and then continues with her shopping. Has she made a decision in line with her ethical principles?

This scenario highlights what I suggest is one of the key difficulties of the ethic of care approach to animal ethics: a lack of information (and a plethora of misinformation) about factors that intimately affect ethical decision-making. This difficulty is compounded when one attempts to synchronise one's caring for animals, one's family and one's community.

The lifecycle of the dairy cow and her young is provided for in the Cattle Code. At about two years of age the heifer will be made pregnant, usually by artificial insemination.<sup>37</sup> Heifers are restrained in devices referred to as 'rape racks' and the procedure involves inserting a human arm into the cow's rectum (approximately to elbow length, in order to position her uterus) and a metal spike (for delivering the semen) through the vaginal passage.<sup>38</sup> The Cattle Code requires the procedure to be conducted by 'trained artificial inseminators'.<sup>39</sup> The cow will (the farmer hopes) then become pregnant. In large herds it is sometimes the practice that 'late' cows will be injected with a corticosteroid hormone to induce the cow to give birth prematurely. The Cattle Code provides that this must be done under the advice and supervision of a veterinary surgeon.<sup>40</sup> The purpose of this is to align the timing of the birthing of all the cows, for convenience and also to achieve a few extra weeks worth of milk production at the beginning of the season. Induction increases calving problems because calves are in the wrong position and increases the number of cows with retained foetal membranes, as well as other clinical diseases. Calves will also be premature, with attendant health risks and far increased rate of death.<sup>41</sup> The newborn calves (called bobby calves) are separated from their mothers when they are 24-48 hours old.<sup>42</sup> The Cattle Code does

---

37 Dairy Australia: Australian Dairy Industry in Focus 2011, 12 available at <http://www.dairyaustralia.com.au/~media/Documents/Industry-overview/About-the-industry/The%20Australian%20Dairy%20Industry/Australian%20Dairy%20Industry%20In%20Focus%202011.ashx>.

38 Various youtube.com videos demonstrate the procedure.

39 5.9.4

40 5.10.5

41 Peter Mansell, A Cameron, D Taylor and J Malmo 'Induction of parturition in dairy cattle and its effects on health and subsequent lactation and reproductive performance' (2006) 84 Australian Veterinary Journal 312-316 and J Morton and K Butler 'The effects of induced parturition on the incidence of clinical disease and mortality in dairy cows from commercial herds in south-western Victoria' (1995a) 72 Australian Veterinary Journal 1-4.

42 M Edge, J Barnett, L Phillips P and Chamberlain 'Animal Welfare Reference Document for the Dairy Industry' (February 2006) *Animal Welfare Science Centre/Department of Primary Industries Victoria*, 57

not provide for this routine husbandry practice<sup>43</sup>. Cows will develop maternal bonds with their calves within five minutes of birth<sup>44</sup> and would usually feed their calf three or more times a day for several months (up to a year), so naturally this abrupt separation is a source of distress and compromised welfare.<sup>45</sup> Both cow and calf exhibit distress vocalisations and activity levels upon separation.<sup>46</sup> After the birth of the calf, the cow will be reimpregnated on her third or fourth next heat and milked for about ten months. She is rested for several weeks before her next calf and the cycle of pregnancies continues. This cycle of a double burden of pregnancy and lactation for seven months of the year, along with selective breeding and genetic manipulation for high milk yields, puts a significant metabolic strain on the cow. The udders are extremely heavy and this can cause painful stretching or tearing of ligaments and frequently causes painful foot problems, such as laminitis.<sup>47</sup> Many cows will suffer from mastitis (which is, as any woman who has suffered from it knows, an extremely painful condition). If the bacteria enter the bloodstream, the cow can die.<sup>48</sup> About 26% of cows in dairy herds are culled or die each year. Cows can naturally live for 25 years or longer, but most Australian dairy cows will not survive to five years. About half of these killings are for economic reasons such as reproductive failure or poor milk production. The main health reasons for killing are udder disorders, calving-associated disorders and lameness.<sup>49</sup>

Meanwhile, the outlook for the heifer's first calf is also grim, whether slaughtered or raised for meat production or dairy production. The

---

43 There is therefore a legal argument that, if it could be shown that the act was cruel, the act would amount to cruelty under the act. Note however that the Australian Standards and Guidelines for the Welfare of Animals—Land Transport of Livestock (AHA, Canberra 2008) do make provision for the transport of bobby calves.

44 Susan Hudson and M Mullord 'Investigations of maternal bonding in dairy cattle' (1977) 3 *Applied Animal Ethology*, 271-276.

45 Daniel M Weary, Jennifer Jasper, Mary J Hotzel 'Understanding Weaning Distress' (2008) 110 *Applied Animal Behaviour Science*, 24-41 and P Le Neindre 'Evaluating housing systems for veal calves' (1993) 71 *Journal of Animal Science*, 1345-1354

46 Ruth C Newberry, Janice C Swanson 'Implications of breaking mother-young social bonds' (2007) 110 *Applied Animal Behaviour Science* 3-23.

47 Laminitis is common and can also be caused by waiting on hard surfaces for milking. Jan K Shearer and S Van Amstel 'Lameness in Dairy Cattle' Proceedings of the 2000 Kentucky Dairy Conference. Available at <http://www.healthypooves.com/pdffiles/dr%20shearer.pdf>.

48 Pauline Brightling, Graeme A. Mein, Jakob Malmo and Diane P Ryan Countdown Downunder: Farm Guidelines for Mastitis Control (1998) available at <http://www.countdown.org.au/pdf/Guidelines.pdf>.

49 Mark Stevenson and I Lean 'Descriptive epidemiological study on culling and deaths in eight dairy herds' (1998) 76 *Australian Veterinary Journal* 482-488.

Cattle Code provides that the bobby calves may be transported for slaughter (they are considered ‘waste’ products) at five days of age and that it is permissible to withhold food for up to ten hours before slaughter.<sup>50</sup> These tiny calves are susceptible to injury during transport<sup>51</sup> and Australian researchers have concluded that:

*"Studies on bruising, weight loss, and mortality in transported calves indicate that the welfare of these animals may be seriously compromised"*<sup>52</sup>

Some calves are kept for ‘pink veal’. The Code permits individual calf pens that “*should* be constructed and located to allow each calf to see, hear and *preferably* touch other cattle” [my emphasis].<sup>53</sup> This is not a mandatory requirement. Isolated calves suffer stress, boredom, abnormal coping behaviours, food refusal and increased susceptibility to disease.<sup>54</sup> Some calves are kept to be reared as dairy cows, like their mothers. They undergo a ‘disbudding’ procedure to remove the ‘buds’ that would develop into horns. The various procedures to gouge or burn out the sensitive bud all cause the calf significant pain and distress.<sup>55</sup> The Code considers all cattle should be dehorned to ‘minimise pain and suffering’, which is at odds with the clear evidence that cattle can and have been competently managed with horns intact for centuries.<sup>56</sup> The Cattle Code does not mandate the use of analgesics during the procedure. In other parts of the country, the tails of the calves are docked, for greater convenience when milking. Section 27 of the *ACPA* prohibits this procedure in Queensland unless it is carried out by a veterinary surgeon who is satisfied that it is in the best interests of the animal. The calf so kept will grow into a heifer and the cycle continues.

Jane is shocked and saddened when she discovers these facts about the welfare of dairy cattle and calves. She is particularly touched by the

---

50 5.11. Note however that the Australian Standards and Guidelines for the Welfare of Animals—Land Transport of Livestock provides for 18 hours without liquid feed (B4 at page 59).

51 K Bremner, L Matthews, D Bears and A Painting ‘The Behaviour and Welfare of Calves during Unloading after Transportation’ (1992) 52 Proceedings of the New Zealand Society of Animal Production, 73-75 and I McCausland ‘Stifle bruising in bobby calves’ (1977) 25 New Zealand Veterinary Journal, 71-72.

52 P Hensworth, J Barnett, L Beveridge and L Matthews ‘The welfare of extensively managed dairy cattle: a review’ (1992) 42 Applied Animal Behaviour Science 161-182.

53 3.4

54 P Le Neindre ‘Evaluating housing systems for veal calves’ (1993) 71 Journal of Animal Science, 1345-1354.

55 KJ Stafford, DJ Mellor ‘Dehorning and disbudding distress and its alleviation in calves’ (2005) 196 Veterinary Journal 3, 337-349.

56 See for example *Ford v Wiley* (1889) 23 QBD 203. Discussion of handling methods for horned cattle is still important to today’s farmers: see <http://familycow.proboards.com/index.cgi?board=cow&action=print&thread=17555>.

plight of mothers calling out to their babies and the deaths of the tiny bobby calves. She is outraged that the law does so little to protect them, and is confused as to why she had never heard about these things before. She resolves to tell her friends about these facts so they will be better informed when making ethical decisions. She agitates for legal reform for the worst abuses. Jane is still unsure though whether she should stop buying dairy products. After all, it is an important component of a healthy diet. She doesn't want her own health to suffer and she is conscious of her care responsibilities towards her two young daughters.

Milk and other dairy products contain calcium. In the human body calcium is required for the functioning of muscles and nerves as well as clotting blood, regulating enzyme activity and intracellular signalling and hormonal secretion.<sup>57</sup> Less than 1% of total body calcium is needed to support these critical metabolic functions, the other 99% is stored in bones and teeth where it provides structure and strength.<sup>58</sup> It is common knowledge, therefore, that it is important to consume dairy products. Dairy Australia suggests at least three serves a day should be consumed. Dairy Australia also suggests dairy products are essential for the prevention of osteoporosis and for healthy teeth. It further suggests that dairy products are good for people who suffer from asthma and diabetes, as well as those trying to lose weight, that dairy products are good for your heart and that people with lactose intolerances can still enjoy dairy products.<sup>59</sup> However, what Dairy Australia and other self-interested sources of information do not make clear, is that dairy products are not necessarily the best and certainly not the only sources of calcium. The Harvard School of Public Health notes that green leafy vegetables and legumes can be alternate sources of calcium. Importantly, dairy products can cause extreme discomfort to those who suffer from lactose intolerance, are high in saturated fat (a strong risk factor for heart disease), may increase the risk of ovarian cancer and probably increase the risk of prostate cancer. It is concluded that although one glass of milk a day (in conjunction with an otherwise healthy diet) may decrease the risk of fractures, that amount of calcium can be derived from other sources (green leafy vegetables, legumes or

---

57 Jonathan Barratt, Kevin Harris and Peter Topham, *Oxford Desk Reference Nephrology* (Oxford University Press, 2009) 52.

58 'Committee to Review Dietary Reference Intakes for Vitamin D and Calcium, Food and Nutrition Board, Institute of Medicine. *Dietary Reference Intakes for Calcium and Vitamin D*' National Academy Press (2010).

59 'Dairy and Your Health' Dairy Australia available at <http://www.dairyaustralia.com.au/Health-and-nutrition/Dairy-and-Health.aspx>.



supplements) and overall “we cannot be confident that high milk or calcium intake is safe”.<sup>60</sup>

Jane is horrified upon discovering this information. She has been encouraging her children to consume at least three serves of dairy a day. She is angry that no one told her about these possible risks. She wants the government to create health policy that reflects these facts. On the other hand, the evidence is that a small amount of dairy is not dangerous and is possibly beneficial. Jane is also concerned about the effect on dairying communities if she (and everyone else) suddenly stopped buying dairy products completely.

Most dairy products produced in Queensland, as in other parts of the country, are purchased by large retailers like Coles or Woolworths or big companies like Pauls or Dairy Farmers. Last year, Queensland farmers, on average, were paid only 55.8c per litre for their milk.<sup>61</sup> The much stronger bargaining position of big corporate buyers is mainly responsible for this price. Consumers prefer the convenience of buying from large supermarket chains rather than patronising individual producers, leaving producers little choice but to sell through big chains. Jane is appalled. Farmers work hard and she wants to support fair incomes for them. In light of this further information, she reconsiders her ethical response to purchasing milk and other dairy products.

She decides her care responsibility towards dairy cows means she simply cannot purchase milk produced in the ‘normal’ manner. She finds dairy producers in her area who produce milk with methods she finds more acceptable. She uses the internet, makes some phone calls and finds that both Barambah Organics and Eden Hope Dairy have a polled herd, do not slaughter bobby calves, and allow their cows a two-year breeding cycle. While Jane feels these improvements do not truly meet her care requirements to the animals (the cows are still impregnated, the male calves will be slaughtered at a later age etc), she knows her family will be upset if she completely denies them dairy products, and she wants to support these improved practices. She decides she might cut dairy from her family’s diet in the future but, in the meantime, she will only buy from these producers. These products are more expensive than she is used to paying and Jane's family does

---

60 ‘Calcium and Milk: What’s Best for Your Bones and Health?’ Harvard School of Public Health at <http://www.hsph.harvard.edu/nutritionsource/what-should-you-eat/calcium-full-story/index.html#calcium-from-milk> (see article for all scientific references).

61 See <http://www.dairyaustralia.com.au/Statistics-and-markets/Prices/Farmgate-Prices.aspx>

not have a high disposable income. She decides to allocate the same amount of money that she used to spend on dairy to buying these new products, and considers the decreased quantity as a ‘health saving’ for her family.

## Conclusion

The application of the feminist ethic of care theory in this situation emphasises its contextuality and responsiveness to sympathy and emotion as well as the constraints of multiple layers of responsibility to various actors. If some of the factors were changed, for example if we examined George in Tasmania who has access to Elgaar Farm products,<sup>62</sup> or Liz in Doomagee who can only access UHT milk from ‘normal’ dairies, or Sam in Sydney who has no children to care for, or Penny in Perth who has a high disposable income and could support changed practices by donations, the relevant ethical conclusions might differ. Importantly, political considerations – the desire to change or end farming practices through consumer actions and legal change - are inherent in an ethic of care approach. Rationalist approaches lack these nuances, which is why the ethic of care approach is to be preferred, or at least considered, in making ethical judgments.

---

## Bibliography

*Animal Care and Protection Act 2002*

*Animal Care and Protection Regulation 2002*

*Criminal Code Act 1899* (Qld).

Adams, C *The Sexual Politics of Meat* (1990)

‘Australian model code of practice for the welfare of animals—Cattle’ CSIRO (2004, 2nd ed) PISC Report No. 85

Beauchamp, T and J Childress *Principles of Biomedical Ethics* (2001, 5<sup>th</sup> ed)

Bremner, K, L Matthews, D Bears and A Painting ‘The behaviour and welfare of calves during unloading after transportation’ (1992) *52 Proceedings of the New Zealand Society of Animal Production*, 73-75

Brightling, P, G A. Mein, J Malmo and D P Ryan Countdown Downunder: Farm Guidelines for Mastitis Control (1998) available at <http://www.countdown.org.au/pdf/Guidelines.pdf>

---

<sup>62</sup> Elgaar Farm utilises many positive welfare practices, such as retirement of milking cows to live out their natural lives on pasture after their ‘useful’ life as a milker (about ten years) is over. See <http://www.elgaarfarm.com.au/>

- ‘Calcium and Milk: What's Best for Your Bones and Health?’ Harvard School of Public Health at <http://www.hsph.harvard.edu/nutritionsource/what-should-you-eat/calcium-full-story/index.html#calcium-from-milk>
- Collard, A *Rape of the Wild* (1988)
- ‘Committee to Review Dietary Reference Intakes for Vitamin D and Calcium, Food and Nutrition Board, Institute of Medicine. Dietary Reference Intakes for Calcium and Vitamin D’ National Academy Press (2010).
- ‘Dairy and Your Health’ Dairy Australia available at <http://www.dairyaustralia.com.au/Health-and-nutrition/Dairy-and-Health.aspx>
- Dairy Australia: Australian Dairy Industry in Focus 2011, 12 available at <http://www.dairyaustralia.com.au/~media/Documents/Industry-overview/About-the-industry/The%20Australian%20Dairy%20Industry/Australian%20Dairy%20Industry%20In%20Focus%202011.ashx>
- de Beauvoir, S *The Second Sex* (first published 1949, 2010 ed)
- Donovan, J ‘Caring for Animals: A feminist Approach’ (January 2009) Tikkun, available at [http://www.tikkun.org/article.php/jan09\\_donovan](http://www.tikkun.org/article.php/jan09_donovan)
- Donovan, J & Adams, CJ (eds) *The Feminist Ethic of Care Tradition in Animal Ethics* (2007)
- Edge, M, J Barnett, L Phillips and Chamberlain ‘Animal Welfare Reference Document for the Dairy Industry’ (February 2006) *Animal Welfare Science Centre/Department of Primary Industries Victoria*, 57
- Engster, D ‘Rethinking Care Theory: The Practice of Caring and the Obligation to Care’ (2005) 20 *Hypatia* 3, 50-74
- Frey, RG ‘Vivisection, Morals and Medicine’ (1983) 9 *Journal of Medical Ethics* 94
- Gilligan, C *A Different Voice* (1982)
- Gilligan, C *Making Connections: The Relational Worlds of Adolescent Girls at Emma Willard School* (1990)
- Griffin, S *Woman and Nature: The Roaring Inside Her* (1978).
- Held, V ‘Feminist Moral Inquiry and the Feminist Future’ in V Held (ed.) *Justice and Care* (2006) 153-176
- Held, V *The Ethics of Care: Personal, Political, and Global* (2005)
- Hemsworth, P, J Barnett, L Beveridge and L Matthews ‘The welfare of extensively managed dairy cattle: a review’ (1992) 42 *Applied Animal Behaviour Science* 161-182
- Hudson, S and M Mullord ‘Investigations of maternal bonding in dairy cattle’ (1977) 3 *Applied Animal Ethology*, 271-276
- Jaggar, A ‘Caring as a Feminist Practice of Moral Reason’ in V Held (ed) *Justice and Care: Essential Readings in Feminist Ethics* (1995) 179-202
- Kappeler, S *The Pornography of Representation* (1986)
- Kheel, M *Nature Ethics: An Ecofeminist Perspective* (2008)
- Korsgaard, C *The Sources of Normativity* (1996)
- Landsbury, C *The Old Brown Dog* (1985)
- Lee, P and R P George *Body-Self Dualism in Contemporary Ethics and Politics* (2008)
- Le Neindre, P ‘Evaluating housing systems for veal calves’ (1993) 71 *Journal of Animal Science*, 1345-1354

- Luke, B *Brutal: Manhood and the Exploitation of Animals* (2007)
- Mansell, P, A Cameron, D Taylor and J Malmo 'Induction of parturition in dairy cattle and its effects on health and subsequent lactation and reproductive performance' (2006) 84 *Australian Veterinary Journal* 312-316
- McCausland, I 'Stifle bruising in bobby calves' (1977) 25 *New Zealand Veterinary Journal*, 71-72
- McLaren, M 'Feminist Ethics: Care as a Virtue' P DesAutels and J Waugh (eds) *Feminists Doing Ethics* (2001) 101-118
- Midgley, M *Animals And Why They Matter: A Journey Around the Species Barrier* (1983)
- Morton, J and K Butler 'The effects of induced parturition on the incidence of clinical disease and mortality in dairy cows from commercial herds in south-western Victoria' (1995a) 72 *Australian Veterinary Journal* 1-4
- Newberry, RC, JC Swanson 'Implications of breaking mother-young social bonds' (2007) 110 *Applied Animal Behaviour Science* 3-23
- Plato *Phaedrus* available at <http://classics.mit.edu/Plato/phaedrus.html>
- Rachels, J *The Elements of Moral Philosophy* (1999)
- Regan, T 'An examination and Defense of One Argument Concerning Animal Rights' (1979) 22 *Inquiry* 189
- Regan, T *The Case for Animal Rights* (1983)
- Ruddick, S 'Care as Labor and Relationship' in M S Haflon and J C Haber (ed.s) *Norms and Values: Essays on the Work of Virginia Held* (1998) 3-26
- Shapiro, K 'Understanding Dogs through Kinesthetic Empathy, Social Construction and History' in C Flynn (ed) *Social Creatures: a Human and Animal Studies Reader* (2008)
- Shearer, CK, and S Van Amstel 'Lameness in Dairy Cattle' *Proceedings of the 2000 Kentucky Dairy Conference*.  
<http://www.healthyhooves.com/pdffiles/dr%20shearer.pdf>.
- Singer, P *Animal Liberation* (1975)
- Singer, P 'Practical Ethics' in S Armstrong & R Botzler *The Animal Ethics Reader* (2008) 36-46
- Singer, P 'The Significance of Animal Suffering' (1990) 13 *Behavioral and Brain Sciences* 9
- Stafford, KJ, DJ Mellor 'Dehorning and disbudding distress and its alleviation in calves' (2005) 196 *Veterinary Journal* 3, 337-349
- Stevenson, M and I Lean 'Descriptive epidemiological study on culling and deaths in eight dairy herds' (1998) 76 *Australian Veterinary Journal* 482-488
- Steinbock, B 'Speciesism and the Idea of Equality' (1978) 53 *Philosophy* 256
- Tronto, J *Moral Boundaries: A Political Argument for an Ethic of Care* (1994)
- Weary, DM, J Jasper, MJ Hotzel 'Understanding Weaning Distress' (2008) 110 *Applied Animal Behaviour Science*, 24-41
- Wilhelm, K 'Do Animals Have Feelings?' (Feb./March 2006) *Scientific American* 26-29
- Wollstonecraft, M *The Vindication of the Rights of Woman* (first pub. 1792, 2004 ed)



# Animal Law in Australian Universities: Towards 2015

*By Steven White* \*

## **I Introduction**

In 2015 the Australian legal community will be able to celebrate the 10<sup>th</sup> anniversary of the first stand-alone animal law course offered through an Australian law school. This will be a significant milestone, especially since the number of institutions offering a similar course has grown significantly in a relatively short time.

The developments in Australia lag those in the United States, but are ahead of some other jurisdictions, including the UK, Canada and Europe.

While the recent development of animal law in Australian law schools has been remarkable, it is important not to take this growth for granted. There is a risk that some of the gains may be tenuous. There is a need to not only consolidate the progress made to date, but to think about how the discipline is to continue to develop, to become further entrenched in the legal academy.

This short article provides only an introductory consideration of these issues, and some tentative suggestions for next steps, as part of what it is hoped will be a full, wide-ranging debate about the future of animal law in the legal curriculum as we approach its 10<sup>th</sup> anniversary in Australia.

In Part II of this article I provide a brief outline of the current state of play in Australia for animal law. Although this has been increasingly well documented in recent times, it is important to establish the status quo position in order to assess the possible future paths for animal law in Australia.

---

\* Steven White lectures in animal law at Griffith Law School, Griffith University.

In Part III, I place the teaching of animal law in the broader context of legal teaching. The recent emergence of animal law, as well as of earlier but still comparatively new disciplines such as human rights law, indigenous law and environmental law, has been accompanied by a thorough critique of the traditional model of legal education.

A conception of animal law which places the ‘non-human animal’ at the centre of legal enquiry, rather than as an ‘add-on’ to established legal doctrine, exemplifies many of the best aspects of changes in the nature of legal education in Australia. It implies inter-disciplinarity, attention to theory, and a focus on ethics (broadly conceived), as well as development of generic legal skills.

If animal law is now established as a worthy ‘new’ legal discipline in Australia, in the final part of the article I briefly identify some of the challenges facing animal law, and some of the potential opportunities for its continued development.

## II State of Play

The development of animal law in Australia may be familiar to lawyers closely interested in the area, but it is worth setting out for others.<sup>1</sup>

Since 2005, animal law has evolved from having almost no presence in the legal curriculum to the point where by 2013 elective courses in animal law will have been offered in at least eleven Australian law schools.<sup>2</sup> This represents just under 30% of Australia’s law schools,<sup>3</sup> which is a significant and growing proportion. Animal law may also be part of a variety of other courses. For example, research project courses, where students are able to pursue topics of their choice, or legal

---

<sup>1</sup> Earlier accounts can be found in Jackson Walkden-Brown, ‘Animal Law – Clients with Four Legs, Fur and Feathers?’ (2011) 17 *The National Legal Eagle* 14; Peter Sankoff, ‘Animal Law: A Subject in Search of Scholarship’, ch 17 in Peter Sankoff & Steven White (eds), *Animal Law in Australasia: A New Dialogue* (2009); Peter Sankoff, ‘Growth of Animal Law in Education’ (2008) 4 *Journal of Animal Law* 105; and Steven White, ‘The Emergence of Animal Law in Australian Universities’ (2007/2008) 91 *Reform* 51.

<sup>2</sup> See Voiceless, *The Animal Law Toolkit* (December 2009)

<[http://www.voiceless.org.au/sites/default/files/VoicelessFinalToolkit\\_010210small\\_1.pdf](http://www.voiceless.org.au/sites/default/files/VoicelessFinalToolkit_010210small_1.pdf)>. The Toolkit lists ANU, Bond, Flinders, Griffith, SCU, Melbourne, NSW, Sydney and Wollongong as having offered a course. By the end of 2012, UTS will join them (<<http://www.handbook.uts.edu.au/subjects/details/76033.html>>).

In 2013, Macquarie plans its first animal law course - Ed..

<sup>3</sup> The Council of Australian Law Deans (CALD) states that Australia has 39 law schools: CALD, ‘Legal Education in Australia’ <<http://www.cald.asn.au/slia/Legal.htm>>.

courses where the use or treatment of animals may be addressed in the context of a broader consideration of the nature of rights, legal personhood or ethics.<sup>4</sup> On the other hand, very few courses have been offered on a rolling annual or even biennial basis,<sup>5</sup> and some courses (such as the University of Melbourne) have been offered as post-graduate courses. There is a small but growing community of PhD candidates focussing, at least to some extent, on animal law issues, although it is difficult to document numbers.

The growth of animal law courses has been accompanied by a range of other very important developments, including:

- an increasingly well-organised legal profession, with the establishment of specialist animal welfare panels and committees,<sup>6</sup> the opening of an Animal Welfare Community Centre<sup>7</sup> and the inclusion of animal law in pro bono public interest programs;<sup>8</sup>
- the publication of animal law books, at a rate of more than one per year since 2008;<sup>9</sup>
- the commencement of this journal in June 2008;

---

4 These are obviously distinct from animal law as a stand-alone course offering.

5 Sankoff points out that 'it is one thing to get a new subject on the law school curriculum, and something else altogether to make it a "successful" course. While it is hardly a definitive indicator, one measure of the success of a particular course is the frequency with which it is offered': Peter Sankoff, 'Growth of Animal Law in Education' (2008) 4 *Journal of Animal Law* 105 at 125.

6 Animal welfare panels include the Barristers Animal Welfare Panel (BAWP) and Brisbane Lawyers Educating and Advocating for Tougher Sentences (BLEATS). The BAWP, established in 2006, comprises 'well in excess of 100 barristers (including 25 silks) from all the State Bars of Australia', offering pro bono or reduced fee representation on matters related to animal welfare, as well as a range of other advocacy activities: BAWP, 'Who We Are' <<http://www.bawp.org.au/>>. BLEATS, established in 2007, consists of a panel of barristers, solicitors and community members undertaking pro bono prosecutions for RSPCA Qld: BLEATS, 'BLEATS Today' <<http://www.bawp.org.au/>>. Committees include the NSW Young Lawyers Animal Law Committee (<<http://www.lawsociety.com.au/about/YoungLawyers/Committees/AnimalLaw/index.htm>>) and the Law Society of South Australia's Animal Law Committee.

7 National Association of Community Legal Centres, 'Animal Welfare Community Legal Centre Inc' <[http://www.naclc.org.au/organisation\\_details.php?organisation\\_id=728](http://www.naclc.org.au/organisation_details.php?organisation_id=728)>.

8 See, eg, Northern Rivers Animal Law & Education Project <[http://www.nrclc.org.au/content\\_common/pg-animalaweducationproject.seo#Future/Current%20Projects/Events](http://www.nrclc.org.au/content_common/pg-animalaweducationproject.seo#Future/Current%20Projects/Events)>.

9 These include Malcolm Caulfield, *Handbook of Australian Animal Cruelty Law* (2008); Peter Sankoff & Steven White (eds), *Animal Law in Australasia: A New Dialogue* (2009); Deborah Cao, *Animal Law in Australia and New Zealand* (2010); Graeme McEwen, *Animal Law: Principles and Frontiers* (2011) (eBook available at <

<http://www.bawp.org.au/animal-law-e-book>>; Alex Bruce, *Animal Law in Australia: An Integrated Approach* (2012); and Mirko Bagaric & Keith Akers, *Humanising Animals: Civilising Humans* (2012).



- the rise of highly professional think tank organisations which include a focus on animal law, such as Voiceless<sup>10</sup> and THINKK;<sup>11</sup> and
- the emergence of law firms specialising in animal law.<sup>12</sup>

It's reasonable to argue, then, that there has been a striking growth in the teaching of animal law over a very short period of time in Australia, with a burgeoning growth in legal materials to support teaching and an increasingly active legal profession.

### **III Animal Law in the Legal Curriculum**

While there is a need to be realistic about what can be expected of the law and lawyers in effecting meaningful change for the treatment of animals,<sup>13</sup> the developments briefly summarised in Part II are hugely positive, since they are firmly grounded in an understanding that the interests of animals are not legally well-protected. By and large, they reflect an engagement by lawyers with issues that other disciplines and non-legal organisations have long been concerned about. And lawyers do have a contribution to make:

- in making clear the ways in which the interests of animals are marginalised through law;
- in assisting those who seek to apply or to challenge prevailing law;
- in striving to ensure that as far as possible decision-makers are held legally accountable for their decisions affecting animals; and
- in lobbying for legislative change to better protect the interests of animals.

The growth of animal law in universities is important since it might be expected to lead to a greater pool of lawyers, working in a variety of institutional settings, with an awareness of animal law issues and an informed understanding of their significance. It can help to develop a

---

10 Voiceless: The Animal Protection Institute <<http://www.voiceless.org.au/>>.

11 THINKK: The Think Tank for Kangaroos <<http://thinkkangaroos.uts.edu.au/>>.

12 See, eg, Couper Geysen - Family and Animal Law (<<http://www.coupergeysen.com.au/>>) and Lawyers for Companion Animals (<<http://lawyersforcompanionanimals.com.au/>>).

13 For a rumination on the limits of strategic litigation as a means of law reform see Matthew Liebman, 'Who the Judge Ate for Breakfast: On the Limits of Creativity in Animal Law and the Redeeming Power of Powerlessness' (2011) 18 Animal Law 133.

significant proportion of lawyers who have a sound understanding of the legal treatment of animals and who are able to critically reflect on the nature of the law as it affects animals.

Beyond this, though, given the value-laden nature of animals, ethics and the law, animal law can contribute to the broader educational goal of self-understanding on the part of students about their own ethical belief systems.<sup>14</sup>

The extent to which these outcomes will be achieved is highly dependent on the way in which teaching is conducted. The nature of legal teaching generally has been the subject of sustained critique and reshaping over the past two decades. In 1987 the landmark *Pearce Report*<sup>15</sup> identified a prevailing narrow focus in legal education; a preoccupation, across the curriculum, with teaching legal rules and principles, in order to churn out graduates primed to immediately engage in legal practice.<sup>16</sup> Keyes and Johnstone suggest that the so-called traditional model of legal education has five dominant characteristics:<sup>17</sup>

- a teacher-focussed approach, where the expert teacher transmits special knowledge to students conceived as empty vessels, and who are largely passive;
- a focus on transmission of content knowledge, especially legal rules drawn from cases (of particular relevance for animal lawyers is the suggestion that '[I]legal rules are taught in year or semester long subjects, based on nineteenth century categorisations of law and without any consideration of their theoretical, historical, political, or economic foundations'),<sup>18</sup>
- a conviction that law is an autonomous system, with little to learn from other disciplines (again, particularly relevant for animal lawyers is the conviction that 'lawyers have little, if

---

14 For an extended discussion of the significance of animal law in fostering personal reflection see Peter Sankoff, 'Animal Law: A Subject in Search of Scholarship', ch 17 in Peter Sankoff & Steven White, *Animal Law in Australasia: A New Dialogue* (2009) 398-399.

15 Denis Pearce, Enid Campbell & Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987).

16 Richard Johnstone, 'Whole-of-Curriculum Design in Law', ch 1 in Sally Kift et al (eds), *Excellence and Innovation in Legal Education* (2011) 1.

17 Mary Keyes & Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26 *Sydney Law Review* 537 at 539.

18 *Ibid* 540.

anything, to learn from other disciplines and interdisciplinary studies are regarded as having limited value, at best);<sup>19</sup>

- a close relationship between the legal profession and the academy, with the former driving the content of teaching in the latter; and
- an individualised, isolating approach for both teachers and students, reflected in, for example, a focus on individualised assessment.

Keyes and Johnstone are critical of all these characteristics as being inconsistent with broader education literature on good teaching practice. While not suggesting the traditional model is descriptive of present practice, they do suggest it is useful as a benchmark to assess changes in legal education over the past two decades. A clear-eyed understanding of this traditional model of legal education helps explain, at least in part, why it may have taken so long for animal law to enter the legal curriculum in Australia, especially in the form that animal law appears to be taught in Australia (a point considered further below).

Importantly, Keyes and Johnstone acknowledge that since the 1980s there have been changes in curriculum, teaching approaches and assessment strategies across the sector.<sup>20</sup> For example, many law schools now give greater attention to teaching generic and legal skills, theory and ethics. There is more emphasis on facilitating active student learning. There is a greater interest in legal education and research on the part of legal academics.

Despite this, change has been uneven, sometimes temporary, and law schools have struggled to completely overcome or transcend the traditional model of legal education. This is partly due to counter-veiling factors such as the vastly increased number of law schools and law students, a lack of funding for law schools despite the comparatively high fees imposed on law students, and the market pressures associated with the commodification of higher education. Together these factors have led to demands from students for greater flexibility in teaching arrangements, and increased workloads for teachers.<sup>21</sup> This has led to less time being available for reflecting on, and consciously improving, teaching practice.

---

<sup>19</sup> Ibid 541.

<sup>20</sup> Ibid 538.

<sup>21</sup> Ibid 548-549.

What should legal educators be striving to achieve in reshaping legal education? Some key facets include:

- less focus on preparing students for private practice, with its emphasis on acquisition of knowledge expertise in a range of narrow areas. This focus continues to be forced on law schools because of the content issues that must be addressed for graduates to meet the admission requirements of legal practitioner boards.
- greater attention on integrating theory, inter-disciplinarity, generic skills and ethics into the legal curriculum.
- an approach which shifts away from the transmission model, to one which is student-focused, helping students to construct their own knowledge through engagement with learning materials.<sup>22</sup>

The emergence of animal law in Australia is entirely consistent with the positive agenda for legal education articulated by Keyes and Johnstone. I have not been privy to the course outlines, teaching materials and approaches for each animal law course taught in Australia to date. However, through a combination of reviewing course descriptions, participation in workshop discussions, and informal communication with colleagues, it is possible to reasonably conclude that animal law teaching has clearly transcended the traditional model of legal education. As far as I can determine, the dominant approach to teaching animal law to date has been one that places the law in the context of broader social, cultural and especially ethical considerations, addressing issues of theory and adopting an interdisciplinary approach. Such an approach is predicated on an understanding that law is not an autonomous system, and that much can be learned from other disciplines (e.g. animal welfare science, political science and ethics), especially in identifying the assumptions that underpin legislation, codes of practice and so on in this area. There is no sense that the content of animal law courses is being driven by the demands of the practising legal profession.<sup>23</sup>

---

<sup>22</sup> Ibid 557-564.

<sup>23</sup> In his more systematic study of animal law courses offered around the world, Sankoff, above n 5 at 137, wrote that '[t]he most difficult aspect of the survey lay in my attempt to discover what the teaching of animal law actually encompasses'. Despite this, Sankoff draws a rough distinction between two categories of animal law courses - those which 'attempt to provide students with a survey of the major laws affecting animals' and those which 'focus less on specific laws and the way they deal with animals, and more on the theoretical dimensions of the law related to animals':

If this is an accurate picture of animal law teaching in Australia, why is it that it consistently transcends traditional models of legal education? A number of factors suggest themselves. First, as a new area of the curriculum, animal law course proposals may be subject to greater scrutiny, by heads of school, deans and curriculum approval committees. As suggested above, the shifting nature of Australian legal education and the erosion of the traditional legal model, may have helped create the right conditions for the inclusion of animal law in the curriculum.

Second, animal law is an elective course not bound by the requirements of legal practitioner boards that have long constrained compulsory courses in the legal curriculum. Teaching animal law is not primarily about preparing students for private practice, although it may be highly relevant for the fortunate few who are able to practise in the area.

Third, for various reasons, there is relatively little case law, especially higher court decisions, in the area of animal law. This means it would be difficult to build a survey course based on legal rules gleaned from court decisions.

Finally, animal law courses in Australia have been initiated by law teachers who may be loosely described as animal advocates. Such teachers are likely to bring a genuine enthusiasm to their teaching of the area, and a very high level of commitment. Animal law is not being offered just to fill a perceived hole in the curriculum, as can be the case with some commercially-oriented electives.

#### **IV Challenges for the Future**

What I've sought to suggest so far is that animal law has grown remarkably quickly over the past eight years, and that courses in the area have been committed to best-practice teaching principles. There has been a flourishing of animal law scholarship. These are very important factors in establishing the legitimacy of animal law in the eyes of senior law school staff, setting up the right conditions for continued adoption.

---

ibid. So long as the qualification 'theoretical' is broadly construed, my hypothesis would be that most Australian animal law courses fall into the latter category.

However, animal law is not yet entrenched as a standard, essential course in the suite of electives offered by most Australian law schools. In those law schools in which it has been offered, its continued presence is currently dependent on a relatively small number of committed academics. Already there has been some fluctuation in the availability of courses offered at different institutions, with few courses consistently offered on an annual basis. Perhaps, some willing academics have yet to convince their law schools that a course should be offered?

While there is reason to be optimistic that a combination of committed teachers, high student demand and increasing awareness by law schools and the legal profession of the significance of animal welfare is likely to see the continued presence of animal law courses in the legal curriculum, this should not be taken for granted.

A number of measures could be taken to ensure animal law continues to make an increasingly important contribution to the legal curriculum.

One important measure is to continue building a strong research culture in the area. This is occurring through the emergence of specialist animal law journals and books, and publication of animal law-related articles in generalist journals. However, on all the evidence, the number of masters and PhD students researching animal law questions remains very small, and there needs to be an increase. Building a research base in the discipline will contribute to the next generation of animal law teachers. In order to achieve the goals of a stronger research culture, one avenue might be for researchers and their law schools to collaborate, creating a cross-institutional centre for animal law. Such a centre could provide an attractive option for higher research degree students, as well as providing the concentration of expertise necessary for grant applications to sustain ongoing research.

Another positive development would be to broaden the scope of courses offered. So far, animal law courses in Australian law schools have essentially been of an introductory nature. It is, of course, possible to envisage a wider variety of courses being offered. These might include clinical/student placement courses, specialist courses (eg addressing wild animals and the law) and courses that address a range of related issues, including animal law (eg a course examining the law of nature conservation, climate change and endangered animals).

Inspiration for the possibilities here is provided by the Center for Animal Law Studies (CALs), at Lewis & Clark Law School in Portland, Oregon.<sup>24</sup> For some years it has offered a wide range of animal law courses, including an introductory course, a specific advocacy course which explores legislation, lobbying and litigation, an advanced animal law seminar, an international wildlife course, a course focussed on theory, specialist courses on particular types of animal (e.g. farm or companion) and an animal law clinic. In 2012, it will be commencing an LLM in Animal Law.<sup>25</sup> As well, the Autonomous University of Barcelona,<sup>26</sup> a well-respected research university, has recently established a Master in Animal Law and Policy.<sup>27</sup>

The difficult question, of course, is how to offer a wider range of courses given the teaching and time constraints faced by academics, and the smaller student population base of Australia. One route would be to draft in adjunct course teachers, including from the profession. This occurs to some extent already, consistent with the approach in other legal disciplines, and could be much further developed in animal law. The major constraint may be the still limited pool of potential teachers, although this pool should grow as more students graduate from animal law courses and enter the profession.

Another possibility would be to take advantage of online teaching and other blended learning strategies to open up access to animal law-related courses across a number of institutions. If sufficient demand could be demonstrated, this type of approach could even provide the basis for a Masters' degree offering in animal law, with students undertaking a combination of home institution and third-party institution courses in order to complete the qualification. This would allow for a sharing of resources (in particular the intellectual resource of teaching), while broadening the range of courses potentially available to students.

A final issue to raise here is the effect on students of completing a course in animal law. Many teachers of animal law can attest to the strong response of some students to the issues raised by animal law, both in terms of engagement in learning during the course and in course

---

24 Center for Animal Law Studies <[http://law.lclark.edu/centers/animal\\_law\\_studies/](http://law.lclark.edu/centers/animal_law_studies/)>.

25 CALs, 'Animal Law LLM' <[http://law.lclark.edu/centers/animal\\_law\\_studies/curriculum/LLM/](http://law.lclark.edu/centers/animal_law_studies/curriculum/LLM/)>.

26 Universitat Autònoma de Barcelona.

27 UAB Graduate School, 'Master in Animal Law and Society' <[http://www.uab.es/servlet/Satellite/postgraduate/master-in-animal-law-and-society/basic-details-1217916968009.html?param1-2826\\_en/param2-2012/](http://www.uab.es/servlet/Satellite/postgraduate/master-in-animal-law-and-society/basic-details-1217916968009.html?param1-2826_en/param2-2012/)>.

evaluations. However, to date, as far I'm aware, there has been no systematic research into the effect of animal law education on attitudes to animals.<sup>28</sup> A longitudinal study to measure attitudes on the part of law students (pre- and post-course) would be valuable in this regard, especially if more than one institution was to take part, both to increase the student sample size and to allow for comparisons between courses taught in different ways.

## V Conclusion

Reflecting on a global survey of animal law courses, Peter Sankoff wrote in 2008:

*Hopefully, five to ten years from now, neither full-time nor adjunct members of academic staff will face impediments in getting a course up and running in their own institution. Although there is still a long way to go in terms of using the law to attain a better world for the animals that live in it, the continued development of the subject in law schools is doing an excellent job of putting in place a framework that will give future lawyers the tools to take up this vital challenge.*<sup>29</sup>

I share this generally optimistic assessment of the future of animal law, and especially of the role it has to play in improving the lives of animals. However, as we approach the 10<sup>th</sup> anniversary of animal law in Australia, the time is right to be thinking about the future direction of the discipline and of the ways in which it might be further developed.

---

<sup>28</sup> There has been some research on student attitudes in response to veterinary and animal science courses: see, eg, Susan J Hazel, Tania D Signal & Nicola Taylor, 'Can Teaching Veterinary and Animal Science Students about Animal Welfare Affect Their Attitude towards Animals and Human-Related Empathy?' (2011) 38 *Journal of Veterinary Medical Education* 74.

<sup>29</sup> Sankoff, above n5, 142.





# Clowning Around: Why Has The NSW Parliament Failed to Abolish Exotic Animal Circuses?

By Eleanor Browne \*

A significant number of people in New South Wales (NSW) support legal prohibition of exotic animal circuses.<sup>1</sup> About 15 local councils have banned such circuses from performing in their shire.<sup>2</sup> Despite this popular movement, the NSW Parliament recently refused to take decisive action.<sup>3</sup>

On 14.9.11, Ms Clover Moore, the Independent member for Sydney, presented a petition with 10,000 signatures calling for an end to exotic animals in circuses. In doing so, she said:

*[N]o matter how well a circus is managed, even if all legal requirements are surpassed, circus life always will be cruel to exotic animals because it is absolutely incompatible with their physiological, social and behavioural needs. This level of cruelty has no place in modern entertainment.*

The Liberal and Labor State parties refused to support the introduction of a bill providing for the abolition of exotic animal circuses. Although circus animals represent a minute percentage of Australian animals (about 135 animals are being used in animal circuses, including six lions, about 10 monkeys, and a number of camels, llamas, horses,

---

\* This article is a much expanded version of the winning entry in the 2011 Animal Law Essay competition hosted by the NSW Young Lawyer's Animal Law Committee. Eleanor Browne BA (Hons) LLB (Hons) graduated from the University of Sydney in 2009. She has worked as a solicitor in the corporate and community legal sectors and is passionate about a range of social justice issues, including Animal Law.

1 A 10,000 signature petition sponsored by the RSPCA, Animals Australia and Animals Asia, calling for a ban on exotic animal circuses was presented to the NSW Parliament on 14 September 2011.

2 Many councils have banned circuses that use wild animals on their land, including Parramatta, Lismore, Wingecarribee, Newcastle, Blue Mountains, Warringah, Woollahra, Hornsby, Pittwater, Manly, Randwick, Ku-ring-gai, Lake Macquarie, Liverpool and Camden: NSW, Parliamentary Debates, Legislative Assembly, 14.9.11, 5702 (Clover Moore).

3 NSW, Parliamentary Debates, Legislative Assembly, 14 September 2011, 5702 (Clover Moore).

ponies, dogs, geese, pigs and cows),<sup>4</sup> the continued use of animals in circuses often arouses public sentiment.

Whilst the emerging field of Animal Law has fostered discussion of many animal welfare and rights issues, relatively little attention is usually given to the ethical and legal issues arising from the use of animals in circuses. A recent NSW parliamentary debate shows there is no consensus, or even majority acceptance, of the proposition that animal circuses are blatantly at odds with animal welfare or societal expectations.

This paper uses the recent NSW parliamentary debate as a springboard to contend that both exotic and domestic animal circuses should be abolished as a step towards recognising the inherent worth of non-human animals. This argument is inspired by the work of Gary Francione, who advocates abolition, rather than regulation, of the human use of animals, and a paradigm shift in moral and legal thinking. The paper argues that abolishing the use of animals in circuses would be an appropriate and achievable step towards the implementation of Francione's ideal.

The various definitions and uses of the terms exotic, wild and domestic are first examined. The paper then outlines the regulation of circus animals in NSW, other Australian jurisdictions, and internationally, where advocacy against animal circuses is gaining ground. Thirdly, it uses a recent NSW parliamentary debate to outline and analyse arguments made for and against a ban on exotic animal circuses. Fourthly, the paper develops a rights-based approach to advocate abolition of exotic and domestic animals in circuses. Finally, it considers the future of the debate and suggests continued local council advocacy, combined with eventual legislative reform, could broaden recognition and protection of animals, in the big top and beyond.

## **I DEFINITIONS**

The terms 'exotic', 'wild' and 'domestic' are often used in discussing the subject of animals in circuses, and in other contexts. The terms are rarely defined and often applied imprecisely and inconsistently. This

---

<sup>4</sup> These figures are estimated on the basis of telephone calls made by the author on 25 March 2012 and website surveys of the following circuses: Stardust Circus; Lennon Bros Circus; Circus Royale; Eronis Circus; Circus Olympia; Circus Ringbarkus; Webers Circus; Perry Bros Circus; Burtons Circus; and Joseph Ashton Circus. While there are currently no elephants, bears, leopards or tigers in Australian circuses, these animals could be legally kept in all jurisdictions except the ACT as discussed in Section II below.

section will consider common uses of these terms and outline the terminology adopted by this paper.

The term 'exotic' is not defined in any state or territory standards for the regulation of circuses, nor in their national counterpart, the Recommended National Circus Standards (National Standards), developed by the National Consultative Committee on Animal Welfare (NCCAW) (which has been superseded by the Australian Animal Welfare Strategy (AAWS)). The RSPCA uses the term 'exotic' interchangeably with 'non-domesticated', citing elephants, big cats, and non-human primates as exotic.<sup>5</sup> Using these terms interchangeably lacks clarity and precision, as a species may be both exotic and domesticated, for example an Asian elephant.

A definition of exotic animals used by the Commonwealth Department of Sustainability, Environment, Water, Populations and Communities, in the context of importation and trade of animals in Australia, is 'animals that do not occur naturally in the wild in Australia'.<sup>6</sup> This definition resembles that of the Oxford English Dictionary, which defines 'exotic' as 'originating in or characteristic of a distant foreign country'.<sup>7</sup> These definitions of 'exotic' are technically more accurate, and suggest that all animals of foreign provenance are exotic animals. However, this definition may not be neatly applied to a discussion of animals in circuses, as it is unlikely to accord with commonly-accepted usage. For example, llamas, camels, ponies and even dogs do not occur naturally in the wild in Australia and may therefore meet this definition of exotic. It is unlikely that those who specifically oppose exotic animal circuses intend to oppose the use of ponies, dogs and llamas as well.

The expression 'wild animals' is also frequently referred to in discussions regarding animals in circuses, often in the absence of explicit definition. In a recent NSW parliamentary debate the terms 'wild' and 'exotic' were used interchangeably, although neither term was defined. For example, in introducing the petition calling for a ban on exotic animals in circuses, Clover Moore MP said: "Circuses deny exotic animals the opportunity to maintain instinctive social bonds,

---

5 RSPCA Australia Knowledgebase <[http://kb.rspca.org.au/What-is-the-RSPCAs-view-on-the-use-of-animals-in-circuses\\_146.html](http://kb.rspca.org.au/What-is-the-RSPCAs-view-on-the-use-of-animals-in-circuses_146.html)> at 23 February 2012.

6 Department of Sustainability, Environment, Water, Population and Communities Biodiversity – Wildlife Trade – Exotic (non-native) Animals <<http://www.environment.gov.au/biodiversity/wildlife-trade/exotic-animals/index.html>> at 23 February 2012.

7 Oxford Dictionaries <<http://oxforddictionaries.com/definition/exotic>> at 23 February 2012.

making life sad and painful. Wild animals need a high level of stimulation...".<sup>8</sup>

In similar debates in the House of Commons in 2011, British MPs preferred to use the term 'wild' rather than 'exotic'.<sup>9</sup> During the UK debate, 'wild' was defined as 'a species that does not originate in the British Isles'.<sup>10</sup> This definition differs from the Oxford English Dictionary which says 'wild' can be used to describe animals or plants where they are living or growing in the natural environment; not domesticated or cultivated.<sup>11</sup> Again, the term 'wild' appears to be used inconsistently and imprecisely. Although circus animals such as lions and elephants may be wild in the sense they do not originate in Britain or Australia, these animals do not live or grow in a natural environment and cannot be said to be wild in the Oxford Dictionary sense. Indeed, most circus animals are bred in captivity and have never been wild in the true sense. Further, the terms 'wild' and 'exotic' should not be used interchangeably: a kangaroo may be wild, but is not exotic.

The term 'domestic' is used more consistently and is defined in the National Standards as 'any of the various animals which have been domesticated by man, so as to live and breed in a tame condition'.<sup>12</sup> However, this definition is vague and unhelpful in determining whether particular species are to be regarded as 'domestic'. For example, a camel may be domesticated, wild, exotic, or feral, and the National Standards provide no assistance in determining which of these categories a circus camel should fit within. The recent NSW parliamentary debate made no reference to camels, so it seems unlikely that camels were intended to come within the proposed ban on exotic animal circuses. However, the UK debates specifically referred to camels as wild animals that should come within a ban.<sup>13</sup>

The above analysis suggests inconsistencies between the various uses and definitions of the terms exotic, wild and domestic are pervasive. Definitions are not just semantic. Determining the uses of and boundaries between terms is essential to determining the scope of the debate. Such definitions will determine which animals, if any, are suitable for life in the circus. Determining which animals fit within

---

8 NSW, Parliamentary Debates, Legislative Assembly, 14 September 2011, 5702 (Clover Moore) (emphasis added).

9 UK, Parliamentary Debates, House of Commons, 23 June 2011, 548.

10 Ibid. at 550.

11 Oxford Dictionaries <<http://oxforddictionaries.com/definition/wild>> at 26 February 2012.

12 Recommended National Circus Standards, Definitions.

13 UK Parliamentary Debates, House of Commons, 23 June 2011, 548.

which categories is inherently value-laden because it determines the breadth and significance of a potential ban.

Accordingly, the remainder of this paper will prefer the use of 'exotic' to the term 'wild', to refer to animals that are of foreign provenance. Lions, tigers, leopards, elephants, monkeys and bears are all referred to as 'exotic'. For exotic animals that have since been domesticated and are common on Australian farms and in Australian families, the term 'domestic' will be preferred. For example, dogs, ponies, pigeons, cows and llamas will all be referred to as 'domestic'. Given that the NSW parliamentary debate and the petition calling for a ban on exotic animal circuses do not mention camels, this paper proceeds on the assumption that camels are categorised as 'domestic' animals. This is not an endorsement of this view nor a suggestion that camels should be excluded from a ban on exotic animals in circuses.

## **II LEGAL FRAMEWORK**

### **A. Australian perspectives**

The use of circus animals in Australia is regulated through state and territory laws. Although this paper focuses on the law in NSW, the law in each Australian jurisdiction will be outlined in brief for completeness and comparison.

#### **1 National Approach**

In 2005, the National Consultative Committee on Animal Welfare (NCCAW), a non-statutory body established in 1989, published its Recommended National Circus Standards (National Standards). Following a review in February 2008, the National Standards were retained without amendment. A 2006 review of the NCCAW recommended that it be phased out and superseded by the Australian Animal Welfare Standards (AAWS) Advisory Committee.

In 2009 the AAWS Advisory Committee issued the Australian Animal Welfare Standards and Guidelines: Exhibited Animals (Draft June 2009) (AAWS Draft Guidelines). The AAWS Draft Guidelines are not concerned with circus animals, and are not useful for a discussion on circus animal regulation. As such, the National Standards, although not legally enforceable unless codified by or incorporated into state and territory legislation, remain the authoritative national position. It is therefore essential to consider the ways in which the National Standards have been endorsed and adopted by the various states and territories.

## 2 States and Territories

The National Standards have been adopted, with some minor variations, by NSW, Queensland, Western Australia, and South Australia. The discussion of the National Standards, considered in detail in relation to NSW, is therefore applicable to each of these jurisdictions.

### (a) NSW

In NSW the National Standards have been adopted, with some minor stylistic changes, by the *Standards for Exhibiting Circus Animals in NSW (NSW Standards)*.<sup>14</sup> These standards are overlaid by the *Prevention of Cruelty to Animals Act 1979 (NSW) (POCTAA)*, the backbone of animal welfare regulation in NSW, and the accompanying regulations.<sup>15</sup> Circus animals in NSW are specifically regulated under the *Exhibited Animals Protection Act 1986 (NSW Act)* and associated regulations (*NSW Regulations*).<sup>16</sup> The Standards are subsidiary to the Regulations in the legal hierarchy.<sup>17</sup> The NSW Act stipulates that in situations where both it and POCTAA are relevant, both Acts apply, but that no person is to be punished twice for the same offence.<sup>18</sup>

The NSW Act implements a licensing regime, whereby circus animals are required to be kept and exhibited in accordance with the NSW Standards.<sup>19</sup> The NSW Standards - almost identical to the National Standards - contain the substance of the protection and regulation of circus animals, exotic and domestic. The NSW Standards are discretionarily enforceable under the NSW Act, which provides that the Director General *may* suspend or cancel a licence, if the holder fails to

---

14 Exhibited Animals Protection Act 1986 (NSW), s14.

15 Prevention of Cruelty to Animals (General) Regulations 2006 (NSW).

16 Exhibited Animals Protection Regulation 2010 (NSW).

17 Exhibited Animals Protection Act 1986 (NSW), s14.

18 Ibid. sch 4(1).

19 Under s24 of the Act, a person shall not exhibit an animal from a prescribed species without a license. Sch2 provides an extensive list of prescribed species. Common circus animals listed include pigeons, camels, llamas, cattle, goats, alpacas, domestic dogs, donkeys, and horses. Lions and monkeys are not included in the list of prescribed species. In addition, under s22(2) of the Act a person shall not exhibit an animal, other than a prescribed species, for the purpose of a circus unless the person holds an approval authorising the exhibition of that species. The maximum penalty for contravention of this section is 20 penalty units or imprisonment for 6 months. Under s17 of the NSW Regulations, it is a condition of this approval that circus animals be kept and exhibited in accordance with the NSW Standards. Similarly, s17 of the Act states that a permit shall not be issued unless the Director General is satisfied that the animal will be exhibited in accordance with the NSW Standards.

ensure that the ‘licensed animal display establishment’ is conducted in accordance with various prescribed standards.<sup>20</sup>

Under the NSW Standards, monkeys, chimpanzees, elephants, leopards, lions, tigers and bears are all suitable for use in circuses,<sup>21</sup> although the NSW Standards provide guidance that lions are more suitable than other big cats:

*In the wild, lions are basically sedentary individuals. They only become active during hunting, feeding, fighting, territorial marking or mating... Lions form prides with a hierarchy. The trainer can exploit this, so that the animals look to them [sic] for guidance. Stimuli emanating from the trainer, via training to perform tricks, helps to cater for the natural behavioural tendencies of the lions.*<sup>22</sup>

In early 2012 a campaign by Animals Australia halted plans by Darling Downs Zoo to sell two lion cubs, Spike and Spot, into circus life.<sup>23</sup> The campaign utilised negative publicity, media pressure, an objection from the Zoo and Aquarium Association and thousands of emails from concerned members of the public to halt the sale of the cubs, in order to prevent them ‘spend[ing] the rest of their lives (potentially 20+ years) on the road in a small, barren enclosure with no opportunity to express their natural behaviour’.<sup>24</sup>

The NSW Standards stipulate that audiences must be encouraged to treat animals with respect,<sup>25</sup> and provide that ‘no costume shall be used

---

20 Exhibited Animals Protection Act 1986 (NSW), s 30(1)(c)(i) and (ii). Other standards and policies that apply to the exhibition of animals in NSW include: General Standards for Exhibiting Animals in NSW; Policy on Exhibiting Primates in NSW; Standards for Exhibiting Animals at Mobile Establishments in NSW; Standards for Exhibiting Animals During Temporary Removals in NSW; Standards for Exhibiting Australian Mammals in NSW; Standards for Exhibiting Bottle-nosed dolphins in NSW; Standards for Exhibiting Captive Raptors in NSW; Standards for Exhibiting Carnivores in NSW; and Standards for Exhibiting Seals in NSW, NSW Department of Primary Industries Agriculture – Livestock – Animal Welfare <<http://www.dpi.nsw.gov.au/agriculture/livestock/animal-welfare/exhibit>> at 9 October 2011.

21 Whilst only two circuses in NSW continue to employ lions, and none currently use leopards, tigers, bears or elephants, there is no legal or regulatory barrier to the use of such animals, see: Standards for Exhibiting Circus Animals in NSW, pt 2, cl 3, s 10. The last elephants to be used in a NSW circus were Arna and Gigi. Arna’s handler died from a broken back and crushed aorta after an incident at the circus in late 2007. Both animals were subsequently re-housed in the Taronga and Western Plains Zoos: News.com.au <<http://www.news.com.au/top-stories/circus-gives-up-killer-elephant-arna/story-e6frfkp9-111115274053>> at 9 October 2011.

22 Standards for Exhibiting Circus Animals in NSW pt 2, cl 3, ss 10(a)(i)-(ii).

23 Animals Australia Features <<http://www.animalsaustralia.org/features/lion-cubs-spared-from-circus-cruelty.php>> at 29 March 2012.

24 Ibid.

25 Standards for Exhibiting Circus Animals in NSW, pt 2, cl 4, s 2(a).



that belittles the animal'.<sup>26</sup> Were this provision not farcical enough, the preceding clause suggests that in some circumstances silly costumes may not impinge upon animals' dignity, as it provides that: 'for performance purposes, it is acceptable to ceremonially dress animals as traditionally practised (both historically and culturally)'.<sup>27</sup> In addition to these vague, bizarre and anthropocentric provisions, the NSW Standards also cover transportation,<sup>28</sup> minimum enclosure size,<sup>29</sup> behavioural training,<sup>30</sup> veterinary attention,<sup>31</sup> and drug administration.<sup>32</sup>

While the NSW Standards are detailed and extensive, upon closer examination it becomes apparent that they are designed with human interests and convenience in mind. For example, the amount of space deemed acceptable for a lion in a circus is only a fraction of the space deemed necessary for a lion kept in a zoo.<sup>33</sup> The NSW Standards appear to be designed not to ensure animal welfare, but to ensure the practicality of running a circus for human entertainment. On the other hand, in some situations, the NSW Standards provide more rigorous protection than that provided by comparable welfare codes. For example, a circus cow is entitled to a rest for 10 minutes every two hours when travelling, while a cow destined for slaughter is afforded no such protection.<sup>34</sup> Again it becomes apparent that it is human rather than animal interests that are served by circus animal regulation. As such, the NSW Standards should not be relied upon to identify the welfare needs of animals, nor should compliance with the standards be used to measure welfare outcomes.

---

26 Ibid. pt 4, cl 12, s 2.

27 Ibid. pt 4, cl 12, s 1.

28 Ibid. pt 3, cl 6.

29 Ibid. pt 3, cl 7.

30 Ibid. pt 4.

31 Ibid. pt 5, cl 14.

32 Ibid. pt 5, cl 15.

33 Under the Standards for the Exhibition of Carnivores in NSW, lions are entitled to 300m<sup>2</sup> for two lions, with an additional 20m<sup>2</sup> for each additional animal, appendix 2. Under the Standards for Exhibiting Circus Animals in NSW, lions are entitled to enclosures of 20m<sup>2</sup> for the first animal, with an additional 10m<sup>2</sup> for each additional animal, pt 3 cl 7(3)(a)(ii).

34 Compare for example, the Standards for Exhibiting Circus Animals in NSW, pt3, cl6(1) that provides that 'if the distance to be covered entails more than two hours travelling, vehicles must stop for at least 10 minutes every two hours in order to properly inspect the animals and their facilities, and to provide food and water as required', with the Model Code of Practice for the Welfare of Animals: Land Transportation of Cattle, Primary Industries Report Series 77, cl9.3.1, which provides that the maximum 'water deprivation time' for mature stock is 36 hours, or 48 hours in some circumstances.

Although, to the author's knowledge, no circus registered in NSW currently uses cows, one Victorian circus that tours nationally boasts four Friesian cattle as part of its entourage: Circus Royale <<http://www.circusroyale.com/>> at 9.10.11.

*(b) Queensland*

Queensland animal welfare regulation is similarly three-tiered, and is facilitated through the *Animal Care and Protection Act 2001* (Qld) (**Queensland Act**), *Animal Care and Protection Regulations 2002* (Qld) (**Queensland Regulations**) and the *Code of Practice for the Welfare of Animals in Circuses 2003* (Qld) (**Queensland Code**). The Queensland Act provides for regulations to be made regarding animals used in entertainment, which covers animals in circuses.<sup>35</sup> The Queensland Regulations enshrine the Queensland Code in law as a compulsory code.<sup>36</sup> Non-compliance with the Code is an offence.<sup>37</sup> The Queensland Code is identical to the National Standards.

*(c) Western Australia*

Western Australia follows a similar pattern, with the *Animal Welfare Act 2002* (WA) (**WA Act**), *Animal Welfare (General) Regulations 2003* (WA) (**WA Regulations**), and the *Code of Practice for the Conduct of Circuses in WA 2003* (**WA Code**). The WA Code is based on the NSW Standards. However, the WA Code is voluntary rather than being legally enforceable, and is ‘not intended to be used for either audit or compliance purposes’.<sup>38</sup> But, compliance with the code can be used as a defence against an offence under the WA Act.<sup>39</sup> Welfare regulation of circus animals in WA is tokenistic. It is not intended to be enforceable and cannot ensure that animal welfare is maintained or valued.

*(d) South Australia*

South Australia’s circus animal welfare mechanism is implemented through the *Animal Welfare Act 1985* (SA) (**SA Act**) (formerly the *Prevention of Cruelty to Animals Act 1985* (SA)), *Animal Welfare Regulations 2000* (SA) (**SA Regulations**) and the *South Australian Code of Practice for the Welfare of Animals in Circuses 1998* (SA) (**SA Code**). While the SA Code predates the National Standards, which in their current form were endorsed in 2005, it is based on a prior edition of the National Standards and its substance reflects the National Standards despite some structural and semantic differences. Therefore,

---

<sup>35</sup> Animal Care and Protection Act 2001 (Qld) s 217(2)(d)(iv).

<sup>36</sup> Animal Care and Protection Regulations 2002 (Qld) sch 1, pt 1(1).

<sup>37</sup> Animal Care and Protection Act 2001 (Qld) s 15(3).

<sup>38</sup> Code of Practice for the Conduct of Circuses in WA (2003), preface.

<sup>39</sup> Animal Welfare Act 2002 (WA) s 25.

although the SA Code appears to be different to the National Standards at first glance, upon closer inspection there are far more similarities than differences, and therefore the analysis of the National and NSW Standards above is applicable.

(e) *Victoria*

Victorian animal welfare regulation is based upon the *Prevention of Cruelty to Animals Act 1986* (Vic) (**Victorian Act**), and the *Prevention of Cruelty to Animals Regulations 2008* (Vic) (**Victorian Regulations**). Neither the Victorian Act nor the Victorian Regulations specifically regulate animal circuses, and unlike in NSW, no licensing system is established. The Victorian Act establishes the pre-eminence of Codes of Practice, by stating that it does not apply to the management or maintenance of any animal (except farm animals which are covered by separate provisions) carried out in accordance with its related Code of Practice.<sup>40</sup> In the case of circus animals, the relevant Code of Practice is the *Code of Practice for the Public Display of Exhibition of Animals 2001* (Vic) (**Victorian Code**).

The Victorian Code applies to ‘wildlife and exotic animals held in confinement in zoos, wildlife parks, circuses and travelling exhibitions’.<sup>41</sup> It therefore differs from the National Standards, as it is not specifically designed for circus animals and is broader in scope. It provides far less detail than the National Standards and does not prohibit the use of any species in circuses. Only two provisions in the Victorian Code apply specifically to circuses. The first of these is for ‘long-term modal displays’,<sup>42</sup> which describes the type of enclosures suitable for circus animals. This provision provides no robust obligations, instead preferring to use modal language such as ‘may’ and ‘should’ to describe prescribed actions. Definitive language, such as ‘must’ and ‘must not’ is used infrequently, and where used is coupled with equivocations such as ‘avoid’ or ‘minimise’, which again weakens the strength of the provisions.<sup>43</sup> This makes the provisions more of a

---

40 Prevention of Cruelty to Animals Act 1986 (Vic) s 6(1)(b).

41 Victorian Department of Primary Industries Animal Welfare Legislation – Victorian Codes of Practice  
<<http://www.dpi.vic.gov.au/agriculture/about-agriculture/legislation-regulation/animal-welfare-legislation/codes-of-practice-animal-welfare/public-display-exhibition-animals>> at 17 March 2012.

42 Code of Practice for the Public Display of Exhibition of Animals 2001 (Vic) s 3.9.2(b).

43 For example, ‘the animals or cage foliage can be mist-sprayed daily but care must be taken to avoid excessive humidity’ at s 3.2, and ‘Enclosures must be constructed and designed to minimise the risk of animal escape’ at s 3.4. The use of modal language in animal welfare regulation is not unusual but is particularly noticeable in the Victorian Code.

guide than a set of legally enforceable regulations. Because the Victorian Code only impinges upon animal handlers' behaviour in rare situations of egregious welfare abuse, the lack of documented infringements of the Victorian Code does not demonstrate that animal welfare in circuses is high.

The second provision which applies exclusively to circus animals is 'display cages for long-term modal displays',<sup>44</sup> which lists the minimum space requirements for enclosures for circus animals. This provision defines minimum space requirements that pale into insignificance when compared to the parallel provisions for zoo animals, which are also outlined in the Victorian Code.<sup>45</sup> This discrepancy is more obvious than in NSW, where zoo animals are regulated through a separate standard. For example, under the Victorian Code lions and tigers in zoos are required to have a minimum enclosure size of 200m<sup>2</sup>, whilst the same guidelines provide only 20m<sup>2</sup> for their circus counterparts.<sup>46</sup> Similarly, small monkeys in circuses and zoos are entitled to 5m<sup>2</sup> and 60m<sup>2</sup> respectively,<sup>47</sup> and elephants in circuses are similarly disenfranchised, with only 400m<sup>2</sup> in comparison to the 900m<sup>2</sup> regarded as the minimum acceptable size for elephants in zoos.<sup>48</sup>

These figures again suggest that welfare protection for circus animals is not designed according to the needs of animals, but according to the exigencies of circus life, which necessitate small enclosures, frequent transportation and limited stimulation.

*(f) Tasmania*

Tasmania differs from other Australian jurisdictions in that it does not have a code dedicated to the welfare of animals in circuses. This may be because there are no Tasmania-based animal circuses, although circuses from the mainland can tour and perform in Tasmania. Nevertheless, the Tasmanian Department of Primary Industries, Parks, Water and the Environment has expressed support for nationally consistent animal

---

44 Code of Practice for the Public Display of Exhibition of Animals 2001 (Vic) appendix 2.

45 Ibid. appendix 1.

46 Code of Practice for the Public Display of Exhibition of Animals 2001 (Vic), appendix 1(3) and appendix 2.

47 Ibid. appendix 1(2) and appendix 2.

48 Ibid. appendix 1(5) and appendix 2.

welfare standards,<sup>49</sup> and should the AAWS revise the National Standards it is likely that these will form part of Tasmanian law through the *Animal Welfare Act 1993* (TAS) and the accompanying *Animal Welfare Regulations 2008* (TAS).

*(g) Northern Territory*

The *Animal Welfare Act 2000* (NT) and the *Animal Welfare Regulations 2004* (NT) do not have any provisions that specifically apply to animal circuses, and the Northern Territory (NT), like Tasmania, does not have a code dedicated to the welfare of animals in circuses. However, the NT Department of Housing, Local Government and Regional Services is supportive of the development and implementation of nationally consistent standards and guidelines for animal welfare, and provides a link to the National Standards on its website.<sup>50</sup>

*(h) Australian Capital Territory*

The Australian Capital Territory (*ACT*) has a different regime from other jurisdictions, having banned the use of a number of species of circus animals through the *Animal Welfare Act 1992* (*ACT*) (*ACT Act*). The *ACT Act* provides that a person who brings bears, giraffes, elephants, cats (other than domestic cats) or non-human primates into the *ACT* commits an offence.<sup>51</sup> The *Animal Welfare Regulations 2001* (*ACT*) provide that a circus permit will not be granted if a prohibited animal is included in the circus troop.<sup>52</sup> The *ACT* is therefore the first Australian jurisdiction to implement a ban on exotic animals in circuses, and became a world leader in this area by taking such a decisive step two decades ago.

## **Local Government bans**

A number of NSW councils have banned circuses that use exotic animals from performing in their local government area.<sup>53</sup> However,

---

49 Department of Primary Industries, Parks, Water and Environment Biosecurity – Animal Welfare – Tasmania’s Animal Welfare Standards and Guidelines <<http://www.dpiw.tas.gov.au/inter.nsf/WebPages/LBUN-7VR442?open>> at 17 March 2012.

50 Department of Housing, Local Government and Regional Services Animal Welfare – National Standards and Guidelines <[http://www.animalwelfare.nt.gov.au/national\\_standards\\_and\\_guidelines](http://www.animalwelfare.nt.gov.au/national_standards_and_guidelines)> at 18 March 2012.

51 *Animal Welfare Act 1992* (*ACT*), pt V.

52 *Animal Welfare Regulations 2001* (*ACT*) pt 4, s 7A.

53 NSW, Parliamentary Debates, Legislative Assembly, 14 September 2011, 5702 (Clover Moore), above n 2.

the effectiveness of these bans is compromised by the small size of local government areas, and the fact that circuses can often perform in neighbouring shires without obstruction. The existence of local council bans does not preclude the need for legislative measures, but indicates a level of support for the banning of exotic animal circuses.

## **B International Jurisdictions**

The reluctance of the NSW Parliament to ban exotic animal circuses is contrary to a global trend towards either total bans on all animals or partial bans on exotic animals in circuses.

In July 2009, Bolivia became the first nation to ban the use of all animals in circuses through the enactment of Law 4040.<sup>54</sup> The legislature was influenced by a campaign co-ordinated by Animal Defence International (ADI), which ran an extensive undercover investigation of circuses in Bolivia, Peru, Ecuador and Colombia.<sup>55</sup> As a result of this campaign, nationwide bans on all animals in travelling circuses are currently under consideration in Brazil, Colombia and Peru, where legislation is expected in the near future.<sup>56</sup> The state of Rio de Janeiro in Brazil and the cities of Buenos Aires (Argentina) and Porto Alegre (Brazil) have also implemented full bans on both exotic and domesticated species in circuses.<sup>57</sup> In early 2012, Greece became the second European nation, behind Bosnia and Herzegovina, to ban the use of all animals in circuses.<sup>58</sup>

Partial bans, that is bans on exotic animals only, are more common, and are in effect in Austria, Costa Rica, Hungary, Finland, India, Israel and Singapore.<sup>59</sup> The UK recently voted to ban the use of wild animals in circuses. A majority of the House of Commons voted to direct the Government to use its powers under s12 of the *Animal Welfare Act 2006* (UK) to introduce a regulation banning the use of all wild animals in circuses to take effect by 1 July 2012.<sup>60</sup> This vote followed a public

---

54 The Guardian World News – Animals <<http://www.guardian.co.uk/world/2009/jul/31/bolivia-bans-circus-animals>> at 18 March 2012.

55 Animal Defenders International Publications <<http://www.ad-international.org/publications/go.php?id=1684&ssi=98>> at 18 March 2012.

56 Animal Defenders International Publications <<http://www.ad-international.org/publications/go.php?id=2547>> at 18 March.

57 The Solution for a Better World <<http://thesolution.org.nz/2011/02/09/circus-animal-bans/>> at 20 September 2011.

58 Animal Defenders International Animals in Entertainment <[http://www.ad-international.org/animals\\_in\\_entertainment/go.php?id=2528&ssi=10](http://www.ad-international.org/animals_in_entertainment/go.php?id=2528&ssi=10)> at 18 March 2012.

59 The Solution for a Better World <<http://thesolution.org.nz/2011/02/09/circus-animal-bans/>> at 20 September 2011.

60 UK, Parliamentary Debates, House of Commons, 23 June 2011, 585.

petition signed by 26,000 people and introduced into the UK Parliament.<sup>61</sup> As the UK has more than eight times the population of NSW, the NSW petition, signed by over 10,000 people, represents far more opposition per capita than its UK equivalent. Despite this, in contrast to the lack of political will experienced in NSW, the UK petition was welcomed with bipartisan support. The UK Parliament reasoned that the notable public support for a ban, the welfare implications of keeping wild animals in circuses and the fact that maintaining wild animals in circuses was not necessary in modern entertainment<sup>62</sup> were reasons to ban the use of wild animals in circuses.

In a written parliamentary statement on 1.3.12, the Minister of State, Department for Environment, Food and Rural Affairs, Mr James Paice, confirmed the UK Government's intention to pursue a ban on the use of wild animals in circuses on ethical grounds.<sup>63</sup> Prior to implementing this partial ban, the UK Government established a consultation process and, as an interim measure, was proposing to establish a licensing scheme to protect the welfare of wild animals in circuses.<sup>64</sup>

The issues facing exotic circus animals in the UK and Australia are very similar, except that animals in Australian circuses travel far greater distances in hotter temperatures. It is therefore apt to consider the reasons why the NSW Parliament has eschewed the opportunity to reform circus animal regulation in line with the emerging global trend.

### **III ARGUMENTS FOR AND AGAINST A BAN**

This section teases out the arguments made for and against a ban. The arguments for a ban predominantly involve welfare considerations and generally do not invoke the language of rights. Arguments made against a ban are wide-ranging and include animal welfare considerations as well as economic, social and legal considerations.

---

61 UK, Parliamentary Debates, House of Commons, 8 June 2011, 69 WH.

62 Ibid.

63 UK, Parliamentary Debates, House of Commons, Written Ministerial Statements, 1 March 2012, 41 WS.

64 Department for Environment Food and Rural Affairs Consultations – Welfare of Wild Animals in Travelling Circuses <<http://www.defra.gov.uk/consult/2012/03/01/circus-animals-1203/>> at 19 June 2012.

## A. Arguments for a ban

The RSPCA presents the core arguments against using exotic animals in Australian circuses in its online policy.<sup>65</sup> The RSPCA's policy was the basis of the recent petition to the NSW Parliament and will be used to explore the strengths and weaknesses of arguments for a ban on exotic animal circuses. The RSPCA's position is based mainly on welfare considerations, although there is some suggestion of a deeper philosophical explanation for the proposition that exotic animals, and perhaps all animals, should not be used in circuses. < DTH >

The RSPCA notes that compliance with the National Standards is good, and does not seek to highlight the actions of individual handlers or circuses. Rather, the RSPCA's position is that compliance with relevant standards does not ensure animal welfare because exotic animal welfare is jeopardised by the very nature of circuses, rather than the standards of care or levels of compliance within animal circuses:

*The RSPCA's policy is based on the fact that no circus, no matter how well managed, can provide an appropriate environment for wild animals. Performing circus animals are kept for prolonged periods in close confinement, in artificial social groups and are continually being transported between circus venues for the duration of their performing lives.*<sup>66</sup>

This position identifies welfare concerns including stress, boredom, and abnormal behaviours or stereotypes, such as repetitive pacing or swaying, as indicators that exotic animal welfare cannot be ensured in a circus environment. The RSPCA's statement implies that no standard, however good, would be able to address its welfare concerns. In highlighting these concerns, the RSPCA draws heavily on the work of Iossa, Soulsbury and Harris (*Iossa et al. Article*), the primary piece of academic literature regarding exotic animals' welfare in circuses.<sup>67</sup>

Iossa et al. examine the behaviour, health, living and travelling conditions of non-domesticated circus animals and compare these with their counterparts in zoos. The authors conclude that the species of non-

---

65 RSPCA NSW Campaigns – Animals in Circuses <[http://www.rspcansw.org.au/campaigns/animals\\_in\\_circuses](http://www.rspcansw.org.au/campaigns/animals_in_circuses)> at 24 March 2012.

66 Ibid.

67 Iossa G, Soulsbury CD and Harris S, 'Are Wild Animals Suited to a Travelling Circus Life?' (2009) 18 Animal Welfare 129.



domesticated animals most commonly kept in circuses are the least suited to circus life. They refer widely to scientific literature on animal behaviour, but readily acknowledge that in many instances information is unavailable or lacking.<sup>68</sup> They assume that domestic animals and wild animals have different welfare needs, and they do not consider whether the welfare needs of domestic animals can be met by circuses.

While the Iossa et al. article is a much-needed addition to a limited academic landscape, it alone is unlikely to be sufficient to convince NSW lawmakers of the need for reform. It also highlights several fundamental problems with arguments made exclusively from a welfare perspective.

The first of these problems was highlighted in the recent UK parliamentary debates, which affirmed the lack of definitive scientific evidence regarding animal welfare in circuses by referring to the Report of the Circus Working Group, *Wild Animals in Travelling Circuses*, (**Radford Report**).<sup>69</sup> Although the Radford Report predates the Iossa et al. article, the latter is unlikely to alter the outcome or significance of the Radford Report, which found that:

*[O]ur present state of knowledge about the welfare of non-domesticated animals used in circuses is such that we cannot look to scientific evidence for a steer in the development of policy; it is, ultimately, an entirely political decision.*<sup>70</sup>

This demonstrates the danger for arguments based solely on welfare grounds, which, in the absence of comprehensive scientific analysis, may be discounted, criticised or avoided. However, acknowledging that welfare arguments were inconclusive was not fatal to the UK movement to ban exotic animal circuses. Rather, despite the Radford Report's finding that science was not instructive in this matter, the UK Parliament has since vigorously debated and overwhelmingly supported a ban on exotic animal circuses, with one MP asking:

*Do we really need a report to tell us right from wrong? Does a report that says there is insufficient evidence override our moral sense of what is or is not acceptable... [how can] keeping wild animals in*

---

68 Ibid. at 130.

69 Radford M, *Wild Animals in Travelling Circuses – the Report of the Circus Working Group*, U.K., October 2007.

70 Ibid. p 8.

*mobile cages as they travel around the country... [be] for the best welfare of the animals concerned?*<sup>71</sup>

While scientific research and writing on animal welfare in circuses are unable to conclusively assist, further attention could be paid to philosophical and jurisprudential arguments to provide a principled argument for banning exotic and domestic animals in circuses.

The second problem with relying on welfare arguments is that they tend to be limited to exotic animals without a justification as to why this should be the case. The welfare of domestic animals in circuses has not been considered widely, if at all. Iossa et al. do suggest that transportation and associated stresses are likely to be less detrimental for domesticated animals on the basis that domestic animals accustomed to handling are generally less stressed by being restrained and transported.<sup>72</sup> However, it is arguable that many of the considerations that support arguments for a ban on exotic animal circuses also apply to domestic animals. In particular, domestic animals may suffer from stress, insufficient cage size, insufficient exercise, unnatural and constrained social interactions, and boredom.

It is more difficult to establish that domestic animals are unable to manifest natural behaviours because domestic animals have been bred over time to display behaviours deemed desirable to humans, often including docility, obedience and loyalty. However, this argument does not show that domesticated animals can be satisfied by a circus life. It suggests only that further investigation is required.

The fundamental problem with a welfare approach is that it does not question the foundational assumption that human use of animals in circuses is acceptable, as long as welfare is ensured. Perhaps this contention is hinted at by the RSPCA in its suggestion that there are more 'fundamental problems' with keeping wild animals in circuses, and that ideally neither exotic nor domestic animals would be used:

*The RSPCA would prefer that all animals (including domestic animals) not be used in circuses to further ensure that they aren't portrayed in ways that may objectify them or subject them to indignity or ridicule.*

---

<sup>71</sup> UK, Parliamentary Debates, House of Commons, 8 June 2011, 71 WH (Robert Flello).

<sup>72</sup> Iossa G, Soulsbury CD and Harris S, above n 67 at 133.

These comments suggest the need for a philosophically robust argument against the use of both exotic and domestic animals in circuses, and I attempt to develop such a case in Section IV below.

## **B. Arguments against a ban**

In the recent NSW parliamentary debate, MPs justified the continued use of animals in circuses on a number of bases, few of which related to welfare. Some argued that animal welfare in circuses is already high,<sup>73</sup> that compliance with the NSW Standards is excellent,<sup>74</sup> and that the NSW Standards 'are some of the toughest in the world'.<sup>75</sup> The exposition in Section II above has demonstrated that compliance with the NSW Standards does not necessarily correlate with high levels of animal welfare. This is because the NSW Standards, and the National Standards they emulate, are designed to facilitate regular and repeated transportation and condone small enclosures, frequent performances, and unnatural social interactions - all apparently unavoidable in circus animal life. The unsubstantiated claim that NSW has some of the toughest standards in the world seems dubious in light of this article's previous outline of developments in overseas jurisdictions.

Anthropocentric arguments were also made in response to the proposal for a ban, including that circuses have existed for centuries and are a highly popular form of family entertainment;<sup>76</sup> that some circuses may not survive without animals;<sup>77</sup> and that circus owners have invested substantial resources in their animals and employ many people who love the lifestyle.<sup>78</sup> Such arguments cannot demonstrate that a ban on exotic animals in circuses is unwarranted, as they erroneously suggest that just because an action is culturally or historically ingrained, it is necessarily defensible. An analogous argument might be that slave owning is right because it has been practiced for centuries, is popular and is economically beneficial. Such arguments are poorly adapted to demonstrating that a ban on exotic animal circuses is unwarranted.

---

73 NSW, Parliamentary Debates, Legislative Assembly, 14 September 2011, 5703 (Katrina Hodgkinson).

74 Ibid.

75 Ibid.

76 Ibid.

77 Ibid.

78 NSW Parliamentary Debates, Legislative Assembly, 14 September 2011, 5704 (Richard Amery).

Further arguments against a ban suggested that there was insufficient evidence for a change in the law<sup>79</sup> and that whether a ban should include all animals had not been canvassed.<sup>80</sup> These are valid observations, but invalid arguments against the introduction of a ban. They do not show that maintenance of the status quo is the proper option. Another related argument is that changes to the law regarding exotic animal circuses should be made on a national basis.<sup>81</sup> This argument attempts to divest NSW of its jurisdiction to manage the welfare of animals within its territory while ignoring the fact that the ACT has already outlawed exotic animal circuses.

At best, these arguments may suggest the need for further consideration of the welfare, social, economic and legal implications of a ban on animal circuses. They do not demonstrate that a ban is unwarranted. Analysis of the arguments made against a ban on the use of exotic animal circuses shows that such arguments have much less to do with animals' interests than with humans'.

#### **IV TOWARDS A PRINCIPLED APPROACH**

The above section has outlined some of the limitations of a purely welfare-based argument against the use of animals in circuses and the need to develop a more principled approach. Before attempting to develop such an approach, it is important to look more broadly at two features of the animal welfare paradigm that apply not only to circus animals, but to all animals subject to human use in Australia.

Animal welfare regulation in Australia is based on the concept of animals as property and the idea of necessary suffering. The legal status currently afforded to circus animals is firmly rooted in their historical and contemporary value as personal property.<sup>82</sup> This means that animals deserve protection because they are valuable assets, and to harm these assets would be to harm the proprietary interests of their owners. The economic value of circus animals and the financial interests of their owners underlie anthropocentric justifications of exotic animal circuses. In particular, arguments that circuses may not survive

---

79 NSW, Parliamentary Debates, Legislative Assembly, 14 September 2011, 5704 (Katrina Hodgkinson).

80 Ibid.

81 NSW Parliamentary Debates, Legislative Assembly, 14 September 2011, 5704 - 5705 (Richard Amery).

82 P Sankoff, 'The Welfare Paradigm: Making the World a Better Place for Animals?', in P Sankoff and S White (eds), *Animal Law in Australasia* (Federation Press, 1st ed, 2009) pp 7, 10-11.

without animals,<sup>83</sup> and that circus owners have invested substantial resources in their animals,<sup>84</sup> show that circus animals are seen as property to serve the interests of their owners and to provide financial reward.

Another key tenet of the existing animal welfare paradigm is that animals should not be subject to gratuitous cruelty or neglect, because they are sentient and experience pain.<sup>85</sup> However, under our current animal protection regime some degree of suffering is assumed and accepted, and cruelty or suffering is only objectionable if it is unnecessary or gratuitous. It is legal to inflict suffering, so long as this is necessary and proportionate to the proposed end. In the case of circuses, because small cages, frequent travel and unnatural social interactions are unavoidable features of circus animal life, these are each justified by and built into animal welfare protections for circus animals, and are not unlawful, although similar conditions in zoos are.

These assumptions, forming the basis of the animal welfare paradigm in Australia, are challenged by animal rights theorists who have developed alternative ways of conceiving and protecting animals' interests. Although animal rights advocates have said little about the use of animals in circuses, theories of academics such as Peter Singer, Tom Regan and Gary Francione can be adapted to develop an argument against the use of both exotic and domestic animals in circuses. Such an argument is essential to strengthen and inform public debate and guide the future of law reform on the use of animals in circuses.

## **A *Utilitarianism***

According to Peter Singer, animals and humans are entitled to equal moral consideration.<sup>86</sup> This principle provides a rational basis for balancing competing interests and is intended to be species blind. From this basis, Singer develops his utilitarian approach to animal protection, so that in a situation of competing preferences the path that minimises overall suffering should be chosen.<sup>87</sup> While a utilitarian approach to

---

83 NSW, Parliamentary Debates, Legislative Assembly, 14 September 2011, 5703 (Katrina Hodgkinson).

84 NSW, Parliamentary Debates, Legislative Assembly, 14 September 2011, 5704 (Richard Amery).

85 S White, 'Exploring Different Philosophical Approaches to Animal Protection in Law', in P Sankoff and S White (eds), above note 82, pp 79, 85.

86 P Singer, *Practical Ethics* (Cambridge University Press, 2nd ed, 1993) 48.

87 *Ibid.* pp 58-60.

animal welfare is complex and has attracted criticism,<sup>88</sup> it may also be instructive in considering the ways in which we conceptualise and value animals in society, including in circuses.

Applying a utilitarian approach to circus animals requires a balancing of interests. Singer acknowledges that balancing human and animal interests is not easy, and that precision will often be impossible. However, he writes that:

*Even if we were to prevent the infliction of suffering on animals only when it is quite certain that the interests of humans will not be affected to anything like the extent that animals are affected, we would be forced to make radical changes in our treatment of animals that would involve our diet, the farming methods we use, experimental procedures in many fields of science, our approach to wildlife and to hunting, trapping and the wearing of furs, and areas of entertainment like circuses, rodeos and zoos.<sup>89</sup>*

This statement presupposes that the outcome of a balancing exercise in relation to circuses, described by Singer as ‘tormenting animals to make them learn tricks’,<sup>90</sup> comes down in favour of animal interests and necessitates the banning of animal circuses.

It is helpful to deconstruct this conclusion by identifying the competing interests at stake in relation to circuses. On the one hand, circus animals experience confinement, unnatural social interactions, frequent transportation, stress and boredom, and engage in abnormal behaviours as a result.<sup>91</sup> On the other hand, some humans may have an interest in continued entertainment, employment and financial security that flow from the use of animals in circuses. How should these interests be balanced, and is Singer’s conclusion correct?

It is tempting to argue here that balancing animal life and liberty against temporary human pleasure and convenience demonstrates that circuses should be abandoned and that the continued use of all animals in circuses is unjustified. However, although intuitively appealing, such an approach is flawed in that it is impossible to objectively determine

---

88 See, e.g.: T Regan, *The Case for Animal Rights* (University of California Press, 1st ed, 1983) pp 220-1; MC Nussbaum, ‘Beyond Compassion and Humanity’, in Sunstein and Nussbaum (eds) *Animal Rights: Current Trends and New Directions* (Oxford University Press, 1st ed, 2004) 303; R Garner, *Animal Ethics* (Polity Press, 1st ed, 2005) Ch 7.

89 P Singer, *Animal Liberation* (Harper Perennial, 2nd ed, 2009) 17.

90 *Ibid.* p 22.

91 RSPCA NSW Campaigns <[http://www.rspcansw.org.au/campaigns/animals\\_in\\_circuses](http://www.rspcansw.org.au/campaigns/animals_in_circuses)> at 22 Oct. 2011.

the values to be ascribed to competing preferences.<sup>92</sup> For example, if I happen to think that animal circuses are frivolous, cruel or unnecessary, I am likely to trivialise the competing human interests and find that animals' interests predicate the abolition of animal use in circuses. If, on the other hand, I value economic stability, the pleasure that may be experienced by large numbers of people and the impact on livelihoods and employment, I may think that the continued use of small numbers of animals in regulated circuses is, on balance, justified.

This exercise demonstrates that the balancing process is vulnerable to anthropocentric manipulation. Therefore, if we are to find a robust philosophical position for an argument against animal circuses, we must look beyond utilitarianism.

## **B *Animal Rights***

An animal rights perspective is based on the premise that animals have inherent value and should not be treated as means-to-an-end.<sup>93</sup> On this basis, circus animals are entitled to the same considerations that apply to humans, including rights to life, liberty and fulfilment of one's capabilities. If we accept and apply an animal rights approach to circuses, the logical conclusion is that no animals should be kept in circuses, as maintaining animals in circuses is contrary to the principle that animals are ends in themselves.

An animal rights approach, such as that espoused by Tom Regan or Gary Francione, requires the abolition of human use of animals, rather than seeking improvements to animal welfare, which arguably 'make animal exploitation more efficient'.<sup>94</sup> While Regan does not explicitly discuss animals in circuses, Francione briefly notes that:

*There are thousands of zoos, circuses, carnivals, racetracks, dolphin exhibits, and rodeos in the United States... Animals used in entertainment are often forced to endure lifelong incarceration and*

---

92 This example is analogous to Singer's argument that an animal's preference for life should outweigh a human's 'trivial' preference for meat eating, see P Singer, above n 86, p62. For a criticism of Singer's argument see T Regan, above n 88, pp 220-221. Regan's criticism applies equally in the example provided, and demonstrates that it is impossible to weight up animals and human interests in order to determine the balance of utility.

93 See, for example, T Regan, above note 88 pp 96-101.

94 G Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (Columbia University Press, 1st ed, 2008) p 21.

*confinement, poor living conditions, extreme physical danger and hardship, and brutal treatment.*<sup>95</sup>

Animal rights theorists disagree with the fundamental premise of the animal welfare position, that it is acceptable to use animals as long as we treat them in a humane manner.<sup>96</sup> Rather, the animal rights position is that the fundamental problem is not *how* we use animals but *that* we use animals for human purposes at all.<sup>97</sup>

Francione has developed this concept of animal rights in a legal context in *Rain Without Thunder*<sup>98</sup> and *Animals, Property and the Law*,<sup>99</sup> where he argues that animals have the right not to be treated as property, and that animal rights advocates should propose and support legal reforms that seek prohibition, as opposed to regulation, of animal exploitation. For example, Francione would prefer the prohibition of animal experimentation to the increased regulation of animal experiments, and similarly, the prohibition of battery cages rather than an increase in their minimum legal size.<sup>100</sup> Rather than regulating animal use, abolitionist reforms would outlaw animal exploitation with a view to recognising and enshrining animal rights in the legal system.

Applying an animal rights approach to circus animals eliminates unjustified distinctions between exotic and domestic animals, misplaced attention on compliance with animal welfare codes, and the underlying assumptions that animals are merely property to be treated as means to human ends. However, there have been objections to Francione's thesis that removing the classification of animals as property will pave the way for the legal personhood of animals.<sup>101</sup> It is beyond the scope of this article to explore all these objections, so it will consider instead three objections likely to arise specifically in response to the proposed abolition of animals in circuses.

---

95 Ibid. p 27.

96 Ibid. p 9.

97 Ibid. pp 9-10.

98 Francione G, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press, 1st ed, 1996).

99 Francione G, *Animals, Property, and the Law: Ethics and Action* (Temple University Press, 2nd ed, 2007).

100 Bronzino V, 'Interview with Gary L. Francione regarding abolitionism as opposed to animal-welfare reforms' (2005) Veg Animal Info <<http://www.abolitionistapproach.com/media/pdf/veganimal-en-200906.pdf>> at 29 March 2012.

101 See, for a summary, S White, 'Exploring Different Philosophical Approaches to Animal Protection in Law', in Sankoff P and White S (eds), above note 82, pp 79, 99-102.



One likely objection is that some circus animals, such as dogs that have been rescued from euthanasia, or cows that may otherwise be used for food production, could have better existences in circuses than they would otherwise. Would a ban on all animal circuses throw these creatures from the frying pan into the fire? In practice, this objection could be met through regulations requiring that animals be retired and no further animals be purchased. Following their retirement, animals would be entitled to appropriate levels of care and maintenance in the spirit of the reform.

A related objection is that if animal circuses alone were abolished, it would create inconsistencies. For example, it would be illegal to use a dog in a circus, but legal to do so in a scientific laboratory. This objection rightly notes that until there has been a complete reappraisal of the use of animals in society, some animals will continue to be exploited after the use of others has been prohibited. However, if this objection is to be used as a barrier to change, it is unlikely that the use of any animals will ever be prohibited, for if affecting change in one discrete area of law is difficult, affecting change across all animal industries in unison will likely be impossible.

Incongruence between the prohibition of animal circuses and the continued use of animals in other contexts might well increase discussion and awareness of the moral and legal duplicity of human-animal relationships. Banning the use of animals in circuses may lead to some hard cases in the short term, but in the long term it could lead to a greater understanding of the pervasiveness of animal exploitation and the need for a fundamental rethink of human-animal relationships.

A further likely objection is that animal rights and the concept of prohibition are far from being accepted in societal thinking about animals and our relationships with them. Thus, it may be argued that the proposed approach is purely fanciful. Adopting the principles of animal rights would ultimately necessitate a complete change in most aspects of our lives, including farming, medicine, entertainment and manufacturing. Although this is an accurate observation, the abolition of animals in circuses is an achievable first step towards recognition that animals are more than mere chattels, because of the small number of animals involved and the pre-existing support for a ban on exotic animal circuses. Legal prohibition of all animal circuses could be an effective educational tool towards community recognition of the inherent worth of animals beyond those in circuses.

An application of Francione's theory to circuses is proposed, calling for a ban on all animals in circuses without necessitating any immediate rejection of the property status of animals. This approach offers an opportunity to break down entrenched views about the value of animals and reconsider the role of animals in society more broadly. This, in turn, could pave the way for gradual expansion of the abolitionist movement. Francione's approach provides a helpful platform for reconsidering the use of animals in circuses and a philosophical basis for the widely held intuition that the use of animals in circuses is archaic, cruel and unjustifiable.

## **V WHERE TO FROM HERE?**

The above analysis suggests that circuses involving exotic and/or domestic animals should be abolished in Australia. Such a reform, on a practical level, would follow developments in Bolivia, Bosnia and Herzegovina and Greece where total bans on animal circuses have been enacted. On a philosophical level, such reform would be a step towards the gradual adoption of a rights-based approach to animal protection, which, in turn, would broaden public awareness, concern and compassion for non-human animals.

## **Conclusion**

The failure of NSW MPs to take action on exotic animal circuses may be seen as a reflection of the current animal welfare paradigm, in which animals are regarded as property and protected according to their required use.

Circus animals may not be the most mistreated animals in society, but analysis of laws enacted to protect them illuminates the inherent failings of an animal welfare scheme that allows the fox to determine the best interests of the chickens.

In pressing the case for legal prohibition of animals in circuses, animal advocates can build on the existing support for such a ban, as an important, achievable step towards increased community recognition of the inherent worth of all animals.

# BOOK REVIEWS

## *Animal Law in Australia: An Integrated Approach*

Alex Bruce

Lexis Nexis Butterworths Australia 2012

ISBN 978 04 09327267 (pbk); 9780409329513 (e-book)

This most recent textbook on Australian Animal Law comes almost two years after Deborah Cao's introductory text, *Animal Law in Australia and New Zealand*.

Alex Bruce, Associate Professor at the Australian National University College of Law and a former senior lawyer with the Australian Competition and Consumer Commission, has written previous texts on trade practices law and consumer protection law. The structure, style and "integrated approach" of this book reflects this experience.

Chapters start with objectives and end with enumerated summary points and further reading references. A 12-page Appendix provides a "road map" of the complex of commonwealth, state and territory regulatory regimes discussed in the chapters. All very user-friendly, for students, teachers and most practising lawyers whose experience in negotiating the regulatory thicket is likely to be slight, at best.

The opening chapter is, unsurprisingly, "Animal Law in History". What is different from most other legal textbooks is the original, lively personal writing style and concision of expression - e.g. "Characterising animals as mere chattels while simultaneously attaching emotional importance to them leads to a significant amount of legal and regulatory confusion". After noting "the wonder and importance that early humans placed on the place of animals in their lives", the footnote reference, "And not just early humans. Track two on rock group Steely Dan's 1976 album *The Royal Scam* is titled *The Caves of Altamira*." so delighted this reviewer that I cannot refrain from footnoting the chorus.<sup>1</sup>

---

<sup>1</sup> " Before the fall when they wrote it on the wall

When there wasn't even any Hollywood

Bruce's book covers several areas that its Cao counterpart either does not address or does so comparatively briefly - e.g. animals as entertainment, animals in international law, animals as assistants, and dangerous dog legislation. Bruce has the more up-to-date and comprehensive coverage of the Australian Animal Welfare Strategy (AAWS), and how it fits within the regulatory framework.

A minor quibble, the final chapter, entitled 'Future Directions', raises some important issues - for example, the potential of the commercial cultivation and use of stem cells to make xenotransplantation redundant, or to create artificial or in vitro meat - but ("frustratingly", in the view of a fellow lecturer I discussed this chapter with) fails to explore them in any depth. - John Mancy, barrister-at-law.

\*\*\*\*\*

***A Worldview of Animal Law***

Bruce A. Wagman - Matthew Liebman ...  
Carolina Academic Press, Durham, North Carolina  
ISBN 978-1-59460-462-1

***Globalisation and Animal Law***

Thomas G. Kelch  
Wolters Kluwer  
Law & Business  
ISBN 978-90-411-3338-0

When two books on the same general subject appear almost simultaneously, their publishers probably see them as rivals. No less so when both are authored by North American lawyers and have broadly similar contents. Neither claims to be a legal textbook, nor to be comprehensive of the field of International or Comparative Animal Law

Bruce Wagman and Matthew Liebman are practising animal lawyers; Wagman also an Adjunct Professor of Law. Thomas Kelch is a Professor of Law and an attorney "who has been teaching, writing and speaking on Animal Law issues for more than 15 years".

---

They heard the call  
And they wrote it on the wall  
For you and me we understood."

The Wagman/Liebman book seeks to provide "a genealogy of current thinking and to identify points of agreement and contention between nations and peoples".

*"This will allow those who are working to improve the status of animals to incorporate the broadest scope of considerations into their decision-making processes, with the hope that such contemplation will lead to a more nuanced and productive effort to protect animals around the world".<sup>2</sup>*

The goal of the Kelch book is to look at laws illustrative of the various approaches taken by different countries and the international community to regulate the use of animals.<sup>3</sup>

However, despite some similarity of purpose, there are quite stark differences in the writing styles and degrees of emotional detachment. This suggests the books might appeal to very different readerships.

Taking the issue of using animals for human entertainment as one basis of comparison. Their material content on the issue is quite similar - although Wagman & Liebman, surprisingly, include "Companion Animals" in it,<sup>4</sup> noting problems of companion animal over-population.

"Commercial uses of animals for food and entertainment" is the relevant chapter heading in Wagman & Liebman. Before turning to their discussion of elements of "The Law on Entertainment", they note:

*"Perhaps even more divided than the world's view of what animals should and can be eaten is the world's view on the use of animals in entertainment".*

And conclude:

*"As the disparate examples in this chapter demonstrate, which side wins out depends on too many factors to warrant any kind of absolutist statement about who will win the balancing act between animal interests and human interests. The sympathies of a particular judge, the balance of power within a legislative body, the size and influence of a protest movement, and the existence of social and*

---

<sup>2</sup> p.5.

<sup>3</sup> p.23.

<sup>4</sup> Having defined "entertainment" for the purposes of the text as "amusement or diversion provided especially by performers", p.100.

*cultural trends all influence whether or not commercial interests will prevail over the welfare interests of animals.*"<sup>5</sup>

Kelch's Animals in Entertainment chapter begins with the story of a SeaWorld Florida trainer killed in 2010 by a captive killer whale who had also drowned one of his trainers in a 1991 incident. Kelch writes (similarly to Wagner/Liebman) that the regulation of animals in entertainment provides a good illustration of the way that humans typically deal with the human/animal relationship in the law, before expressing a doleful view:

*"But, whenever there is any conceivable benefit to any significant human population, the interests of animals are not potent enough to carry the weight necessary to end what is demonstrable and often monumental animal suffering".*

In the concluding chapter, "Past, Present and Future", Kelch identifies forces he sees as shaping the regulation of the uses of animals in the global marketplace: concentrated and integrated control over the meat industry by government-subsidised "mega-agricultural corporations",<sup>6</sup> that industry's alleged control of the media with its concentrated ownership, and "the force of law" which "as well as the power of government to enforce it, also creates barriers to truth".

*"The end result of this is that the global economic cabal behind uses of animals in agriculture, experimentation and entertainment, due to their economic power, their control of the media and their protection under governmentally enforced property, trespassing, intellectual property and other laws, are extremely successful in hiding what they do from the public."*<sup>7</sup>

Kelch recounts his childhood memory of a boy riding a bicycle that had tied around its spokes "a nearly dead baby snake that was being pummeled [sic] by the spinning of the wheel on the front forks". The 9-year-old Thomas Kelch found the cyclist was performing this grisly act in front of an excited childish audience because the owner of the snake had told him to do so.

*"So in an event that appears to have nothing to do with the place of animals in a globalized economy, the story of a dead baby snake, we*

---

5 p.109

6 p.307.

7 p.310

*can see all the elements of our globalized economy relating to animals in microcosm; animals are property, are without legal rights, and can therefore be exploited by humans".*

Kelch's pessimistic penultimate paragraph asks:

*"Is it simply human nature to be violent and will human exploitation of animals always continue because of the essential nature of humans? Even if 'human nature' is not an impediment are the economic and other forces too overwhelming, like the force that the concept of property had on the boy with the bike?"*

Perhaps, I should note my unavoidably greater familiarity with the general approach and practical application of the Wagman/Liebman book, having used it as a teaching tool,<sup>8</sup> an appreciable time before acquiring its Kelch counterpart - **John Mancy**.

\*\*\*\*\*

### ***Animals, Equality and Democracy***

Siobhan O'Sullivan

The Palgrave Macmillan Animal Ethics Series

ISSN 9780230576865 (hbk); 9780230576872 (pbk)

Why do we suspend basic liberal democratic values when we create laws for animals? It is not economic imperatives alone that generate animal suffering, politics matter, as Siobhan O'Sullivan<sup>9</sup> demonstrates in this book born from practical<sup>10</sup> as well as academic experience.

A new approach to animal protection is offered, focussing on what O'Sullivan calls "the internal inconsistency" in the way the State treats animals in relation to other animals, rather than the problem of "external inconsistency" - the way animals are treated in relation to humans.

*"The internal inconsistency means that the life of nonhuman animals is like a lucky dip or lottery. For those born in the right setting with a*

---

<sup>8</sup> In developing and delivering a unit on a similar subject: 'International Approaches to Animal Law', at a University of New South Wales summer intensive on Animal Law in December, 2011.

<sup>9</sup> Research Fellow, School of Social and Political Sciences, University of Melbourne.

<sup>10</sup> Visiting normally out of bounds intensive agricultural operations in the company of animal protection activists, to see how animals live inside "factory farms", and as an Animal Research Review Panel member for three years.

*particular set of attributes life can be wonderful. But for animals in the wrong setting, even if they possess precisely the same attributes, life may be characterised by legally sanctioned misery, exploitation and abuse*".<sup>11</sup>

Laws affecting animals do not reflect liberal democratic values.

*"One of the primary ways in which liberal democratic principles are compromised in relation to animal regulation is via the construction of laws that are internally inconsistent. By that I mean they are biased, or negatively discriminatory, against certain types of animals in specific contexts."*

Animals are categorised for political purposes,<sup>12</sup> then "codified into modern protective statutes". And where legal protection is not applied equitably "it tends to be beneficial for an animal to have a comparatively high level of visibility".

As evidence that "visibility plays a significant role in informing which animals receive strong legal protection and which animals receive only scant legislative attention", animal protection instruments in NSW are scrutinised.<sup>13</sup> Fluctuations are tracked in welfare protection when the same species of animal is engaged in different roles. Helpful tables clearly relate the different "Use"(s) and respective "Minimum Legal Requirements" for hens, rabbits, horses and dogs.<sup>14</sup>

Internal inconsistency arguments, asking people to accept that one puppy is comparable to another puppy for the purpose of creating laws that affect the lives of puppies, are rated "an easier sell" than external inconsistency arguments, asking the broader community to accept a puppy and a human baby as comparable individuals for the purpose of ethical reasoning.<sup>15</sup> - **John Mancy**.

---

11 [@ p5]

12 The rabbit's "multifaceted social status" is a good example. "Legally speaking, a rabbit is not a rabbit." It is "a companion rabbit, a research rabbit, a meat rabbit or some other type of rabbit". [p.29]

13 "... as a jurisdiction with conventional animal welfare laws that reflect animal protection trends throughout the Western world". [p.7]

14 "Those animals were selected because they are common animals, so they do not constitute special cases". [p112]

15 [@ p.162]





# Letter to the Editor

## Animal Rights & Journalism, a Postgraduate Application

*Dr Janine Little, senior lecturer in journalism at Deakin University, Geelong, Victoria, writes<sup>1</sup>:*

In the course of developing, from my undergraduate Media Law and Ethics unit, a Master of Professional Communication unit with a special focus on animal rights,<sup>2</sup> the Four Corners investigation by Sarah Ferguson, ‘A Bloody Business’, came to inspire my approach to teaching the ethico-legal nexus in journalism (ABC TV1, 30.5.11).

The learning objectives and assessment design of the Masters unit are based on the study of journalism excellence and longer form journalism where aspects of research, use of sources, verification of facts, and, advocacy for significant causes are the considerations to be addressed in a 2,500 word essay. The essay leads to either a feature article on the topic or a comparison of two forms of literary journalism – basically journalism that uses literary techniques to report a story.

The fact that ‘A Bloody Business’ made the Federal Government act fast to shut down the live animal export trade from Australia to one of Indonesia’s 134 abattoirs was a milestone for animal welfare, even if not much of an extension of animal rights. Animals Australia’s Lyn White wore a hidden camera into abattoirs to document inhumane practices, replicating the activist’s relationship with the media (as in *ABC v Lenah Game Meats*<sup>3</sup>) at considerable personal risk<sup>4</sup>. As part of their assignment, journalism students are required to identify and analyse the way vision for the story is obtained and how it supports the factual research and interview material gathered by Sarah Ferguson and her ABC crew. In both undergraduate and graduate units, students have

---

1 In an edited letter -Ed.

2 Such a curriculum development happens over a few years, rather than months, and so my incorporation of animal rights journalism as a specialist study has only just begun in these terms.

3 2001 HCA 63 [http://www.austlii.edu.au/cgi-bin/LawCite?cit=\[2001\] HCA 63](http://www.austlii.edu.au/cgi-bin/LawCite?cit=[2001] HCA 63), in which the ABC argued that its part in a trespass and secret filming of brush-tailed possums at a Tasmanian farm was its ethical duty.

4 Kelly Burke, (2011, May 31) Shocking Slaughterhouse Abuse Sparks Investigation, Sydney Morning Herald [online] <http://www.smh.com.au/environment/animals/shocking-slaughterhouse-abuse-sparks-investigation-20110530-1fd06.htm>

Accessed July 26, 2012

to negotiate the ethical imperative of acting to protect the vulnerable while also minding the legal pitfalls of relying on the defence of public interest when other laws might clearly override it.

The impact of the Four Corners story on the public, and the Federal Government's approach to the live export trade, provided journalism students with a high profile example of a story's content and source material leading to changes in public opinion and policy (c.f. Live Animal Export Restriction and Prohibition Bill 2011 [No. 2])

Because it is difficult for students to gauge how much of these shifts were reflexive moments in the glare of the media spotlight, rather than sustained changes in attitudes and/or questioning of contradictory personal attitudes toward meat production (compared with, say, companion animals), the focus is on the research and production values evident in the actual story and the materials made public on the ABC website rather than on tracing the progress of the 2011 Bill. Students have to make their own journalistic appraisal of the research methods used and the story impact achieved. To do so, they compare and contrast two pieces of journalism on the same topic. So they would consider "A Bloody Business" but would need to read also the Quarterly Essay, *Us and Them*, by Anna Krien<sup>5</sup> and appraise the outcomes of the story in terms of the ethical obligations and values of journalism. Krien, for example, writes of the Four Corners program:

*The public response seemed a clear assertion that what had happened was wrong and intolerable. But the story of the live cattle trade is more complex than it seems. And so too is our nuanced and often contradictory relationship with animals. It seems most of us have a minor clause inside us on the treatment of animals – a "that's not allowed" but "that's okay." We have our limits and our permissions. But the categories are becoming more and more blurred. After all, how can we allow one act and not another? For example, the cattle slaughtered in Indonesia are, to all intents and purposes, objects. "Things" that suddenly became subjects in the glare of a video camera. And to what end? For killing standards to be raised to Western-approved levels so that cattle can safely become objects once more?*

Students critically analyse stories and assess the social impact of journalism on public affairs issues, so they can show how writers like

---

<sup>5</sup> Quarterly Essay 45, *Us and Them: On the Importance of Animals*, by Anna Krien ebook. [www.quarterlyessay.com](http://www.quarterlyessay.com)

Krien shine lights on the types of collective self-deception that do more harm than good.

With animal rights there might be still a way to go as far as disrupting the cognitive dissonance that organises much of the economic and cultural arguments around *not* acting to lead change in the way people think, i.e. animal as subject and not as “thing”. But journalists have shown in recent times that stories about animals may warrant space as hard news, rather than relegate them to the “nothing” stories so often told about so much. -- *Janine Little*<sup>6</sup>

---

## **AAPLJ Peer Reviewers 2010-2012**

The Editor acknowledges with great appreciation the unremunerated application of intellectual rigour, and time freely given, by peer reviewers of articles appearing in the Australian Animal Protection Law Journal in the 24 months since and including (2010) 4 AAPLJ.

<b>Black, Celeste</b>	Senior Lecturer, Faculty of Law, University of Sydney
<b>Bloom, Geoff</b>	Partner, HWL Ebsworth Lawyers
<b>Bruce, Ven. Alex;</b>	A/Professor, Buddhist monk, ANU College of Law
<b>Ellis, Elizabeth</b>	Honorary Senior Fellow, Faculty of Law, University of Wollongong.
<b>Griggs, Lynden</b>	Academic, University of Tasmania
<b>Seymour, Frankie</b>	Social and environmental scientist; animal rights activist and writer,
<b>Sharman, Katrina</b>	Non-executive director & former Corporate Counsel of Voiceless, the animal protection institute
<b>Thiriet, Dominique</b>	Lecturer, School of Law, James Cook University
<b>Ward, Tara</b>	Adjunct lecturer in Animal Law, UNSW
<b>White, Steven</b>	Lecturer; Griffith Law School, Griffith University

---

<sup>6</sup> a member of Animals Australia, Voiceless, and Lawyers for Animals (Vic).