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The Australian Animal Protection Law Journal (AAPLJ) is meant for general information. Where possible, references are given so readers can access original sources or find more information. Information contained in the AAPLJ does not represent legal advice.

A Note From The Editor

New writing

The encouragement and mentoring of new writers on issues of animal protection law is one of the most important roles of the Australian Animal Protection Law Journal.

This issue of the AAPLJ is rich in "new writing". This is substantially due to the expert peer reviewers whose "feedback" of constructive criticism is always aimed at developing the art of writing in a rigorous, scholarly way, while ensuring ease of understanding.

- **Glenn Wright** considers how the status of animals might fare under the emerging legal theory of Earth Jurisprudence¹ (aka Wild Law), compares it with an Animal Law approach to law reform and discusses whether they can be reconciled.
- **Nicholas Findlater** analyses the relative "sophistication"² of "pet lemon laws"³ that specifically target the purchase of companion animals, and the Australian Consumer Law, as a means of regulating such purchases.
- **Melanie Cole** undertakes a comparative analysis, from a vegan or vegetarian standpoint, of the regulatory frameworks for food labelling in Australia, the United Kingdom and the European Union.
- **Emmanuel Giuffre**⁴ reflects on presentations by Swiss animal advocate Antoine Goetschel in the 2013 Voiceless lecture series.
- **Anita Killeen**⁵ reviews the New Zealand case, Auckland Society for the Prevention of Cruelty to Animals v Paulette Taki⁶.

1 "Earth Jurisprudence stresses human interconnectedness and dependence with the natural world. Recognition of human interconnectedness with nature is a prerequisite for ecological sustainability and should be recognised as the foundation of our legal system". <http://www.earthlaws.org.au/what-is-earth-jurisprudence/>

2. The 'sophistication' of the two legislative schemes is measured by reference to the criteria of causes of action, remedies, and policy justifications.

3 U.S. State-level enactments

4 Legal Counsel for Voiceless.

5 Former Chief Prosecutor, Serious Fraud Office in New Zealand (2003 – 2010).

6 District Court, Auckland CRI-2008-004-15941, 12 February 2010, Judge Wade.

Research

Reflecting the development of Animal Law as a field of research in Australia, the AAPLJ has compiled a reference list of recent and current research projects by postgraduate and undergraduate students in Australian universities. This is an evolving list. Suggested additions are welcome.

Letters to the Editor

Letters fulfil another important role of the AAPLJ - that of providing a forum for principled consideration and spirited discussion of the issues of law and fact affecting the lives of non-human animals.⁷

In this issue, **Caroline Hoetzer** writes that recent media reports of continuing greyhound deaths on and off the track have added weight to an urgent need to address the animal welfare issues raised by Alexandra McEwan and Krishna Skandakumar (“The welfare of greyhounds in Australian racing: Has the industry run its course?”).⁸ **Alexandra Whittaker**⁹ notes that animal law, despite its multi-disciplinary nature, appears to have received little attention as a discipline area for animal and veterinary scientists.

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⁷ “The greatest threat to animals is passivity and ongoing acceptance of the status quo; a status quo most easily maintained through silence,” as Peter Sankoff reminded readers in the inaugural issue of the AAPLJ, in 2008.

⁸ (2011) 6 AAPLJ 53.

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Animal Law and Earth Jurisprudence: A Comparative Analysis of the Status of Animals in two Emerging Discourses

*By Glenn Wright**

Animal Law and Earth Jurisprudence, two emerging legal discourses on animals and the environment, have proposed paradigm shifts in the way legal systems treat nonhuman animals. Animal Law critiques legal systems for failing to accord adequate consideration to animals' interests, while Earth Jurisprudence's core premise is that all natural entities, including animals and the environment, have the right to carry out their natural functions. Both approaches radically reframe the concept of rights.

In this paper, I first provide a brief outline of Animal Law and Earth Jurisprudence, including a history of each and an overview of their key concepts, proponents and texts. The discussion of Animal Law begins with a consideration of the classical approach to animals, the animal welfare paradigm, Singer's utilitarianism and Regan's 'subject-of-a-life' theory. More recent legal approaches to implementing these animal rights theories are then considered: Francione's abolitionism and Wise's campaign to incrementally extend rights to those of the nonhuman animals most closely related to humans, the great apes.

In contrast to Animal Rights and Animal Law, the core texts of Earth Jurisprudence have largely left the position of animals unconsidered. This paper explores how animals would be treated under an application of Earth Jurisprudence, in particular focusing on the nature of rights in Earth Jurisprudence and what the content of animals' rights is under this paradigm.

This paper compares the status of animals under the Animal Law and Earth Jurisprudence approaches, and discusses whether the two can be reconciled. Environmentalism and Animal Rights have historically been considered irreconcilable, but I will argue that they are mutually beneficial and complementary in many significant ways, and that the approaches to law

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reform espoused in Animal Law and Earth Jurisprudence can contribute to reconciliation.

Animal Law

The term 'Animal Law' can refer to a range of interrelated concepts concerning animals and the law. Firstly, Animal Law can simply refer to the study of laws relating to animals, interest in which as a discrete legal field has grown exponentially in recent years. A second conception of Animal Law is the advocacy for and implementation of laws that seek to promote animal welfare, within legal frameworks that have traditionally facilitated their exploitation. This is perhaps better termed 'animal welfare law' and describes the current state of law in most jurisdictions. Animals are treated as property and exploited, but the law seeks to define 'acceptable' limits to exploitation by prohibiting 'unnecessary pain and suffering'.¹⁰

Thirdly, Animal Law refers to a discourse that deconstructs the relationship between animals and the law and critiques the foundations of the current legal framework. Animal Law seeks to question the underlying justification of the legal treatment of animals, in particular the status of animals as property, and proposes legal reforms that move toward better recognition and protection of their rights. In the following section, this lineage will be briefly traced from animal welfare approaches, to the key contemporary proponents of animal rights, and to the recent calls for the recognition of animal rights through legal reform.

Philosophical Approaches to Animals

Animal Welfare

Humans' views of animals have advanced markedly since the days of 17th century philosopher René Descartes, who declared animals to be no more than mere biological machines.¹¹ This view was challenged by Jeremy Bentham, who cultivated a proactive anticruelty movement and helped shape legal reforms aimed at improving welfare. For this he has been called the "first patron saint of animal rights".¹² Bentham's famous footnote,

10 Voiceless, 'What is Animal Law', available at http://www.voiceless.org.au/Law/Misc/What_is_Animal_Law_.html.

11 See René Descartes, *Discourse on the Method* (1637), cited in Cottingham, J., 'Descartes, René' in Ted Honderich (ed) *The Oxford Companion to Philosophy* (Oxford University Press, Oxford 1995) 188-192.

12 Jonathan Bentham, 'Animal Liberation and Rights' (2007) 23(2) *Anthropology Today* 2.

written in 1823, stated that in assessing whether to give consideration to animals, “the question is not, Can they reason? nor, Can they talk? but, Can they suffer?”¹³

Bentham’s approach was utilitarian and reformist: he accepted the legitimacy of utilizing animals for human benefit, but argued that unnecessary suffering, should be eliminated. Bentham stated, “every act by which, without prospect of preponderant good, pain is knowingly and willingly produced *in any being whatsoever*, is an act of cruelty”.¹⁴

The modern animal welfare approach, Bentham’s legacy, is perhaps best summarized by the ‘Five Freedoms’, which aim, in line with Bentham’s approach, to eliminate unnecessary suffering. The Five Freedoms are the freedom from: hunger and thirst; discomfort; pain, injury or disease; fear and distress; and the freedom to express natural behaviours.¹⁵ The Five Freedoms have their genesis in the Brambell Report,¹⁶ itself commissioned by the British Government partly in response to Ruth Harrison’s 1964 book *Animal Machines*.¹⁷ The Five Freedoms are not intended to define minimum standards for animal welfare, but instead describe ‘ideal states’ which form a “logical and comprehensive framework for analysis of welfare”.¹⁸

The purpose in highlighting this limitation is to show that the animal welfare approach, in contrast to the rights-based approaches outlined below, does not offer animals concrete protection from suffering, but rather an aspirational goal to reduce their suffering as much as possible. This means that animal suffering is reduced insofar as it is economically and practically viable to do so, i.e. welfare is increased only if human interests are not significantly impacted.¹⁹

13 Jeremy Bentham, Introduction to the Principles of Morals and Legislation (2nd edn 1823) ch 17, fn 122, available at <http://www.econlib.org/library/Bentham/bnthPML18.html>.

14 Charles Atkinson, Jeremy Bentham: His Life and Work (Methuen, London 1905) 8, available at

<http://infomotions.com/etexts/archive/ia301112.us.archive.org/1/items/jeremybentham00atkiuoft/jeremybentham00atkiuoft.pdf>.

15 Farm Animal Welfare Council, ‘The Five Freedoms’, available at <http://www.fawc.org.uk/freedoms.htm>.

16 Roger Brambell, Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems (London, UK: HMSO, 1965).

17 Ruth Harrison, *Animal Machines: The New Factory Farming Industry* (V. Stuart, 1964). The book brought the conditions in factory farms to public attention for the first time.

18 Farm Animal Welfare Council, ‘The Five Freedoms’, available at <http://www.fawc.org.uk/freedoms.htm>.

19 While it is difficult to find a statement to this effect, it is clear that this is the tenure of an animal welfare approach. For example, Animal Welfare Approved, a US animal welfare certification provider, states that it “works diligently to maintain a farm’s ability to be economically viable” in improving welfare (Animal Welfare Approved, ‘Standards’, available at

Animal Rights

In contrast to the animal welfare approach, a more radical movement began in the late 1970s, starting with Peter Singer's seminal book *Animal Liberation*.²⁰ This movement, rather than seeking to improve the welfare of animals exploited for human purposes, seeks to put an end to this exploitation altogether.

Peter Singer's Utilitarianism: A Step on the Road to Rights

Peter Singer was perhaps the first to move away from welfarism and propose an entirely new framework for considering the interests of animals. Singer's utilitarian theory builds on Bentham's welfarism,²¹ and takes a step forward, not only arguing that animals should not be treated cruelly, but that an animal's interest in not being treated cruelly, or, alternatively, its interest in enjoying happiness,²² must be considered equally with the interests of humans.²³ To assume that humans are worthy of greater consideration simply by virtue of their species is to ignore the fact that nonhuman animals' basic interests are the same as humans' basic interests.

Singer argues that, as both humans and nonhuman animals share a basic interest in pursuing happiness and avoiding cruel treatment, to disregard the interests of nonhuman animals is to discriminate on species membership alone. Without a rational basis, this denial of nonhuman animals' interests, which Singer terms 'speciesism', is analogous to denying rights based on sex or race:

racists violate the principle of equality by giving greater weight to the interests of their own race... sexists violate the principle of equality by favouring the interests of their own sex... speciesists allow the interests of their own species to

<http://www.animalwelfareapproved.org/standards/>, and the Animal Production Systems Group at the University of Wageningen in the Netherlands states that it focuses on "exploring trade-offs and synergies among environmental impact, animal welfare performance and economic viability of livestock systems" (Wageningen University, 'Animal Production Systems Group', available at <http://www.aps.wur.nl/UK/>).

20 Peter Singer, *Animal Liberation* (4th edn Harper Perennial, New York 2009).

21 *Ibid* 7.

22 *Ibid* 7.

23 *Ibid* 6.

*override the greater interests of members of other species... the pattern is the same in each case.*²⁴

It is pertinent to note that Singer's utilitarianism is not strictly a rights approach. Singer allows animals to be exploited, so long as the suffering caused is outweighed by the benefit gained. For example, regarding animal testing Singer states, "if an experiment on a small number of animals can cure a disease that affects tens of thousands, it could be justifiable".²⁵ Despite this, it is clear that the equal consideration Singer proposes would render much animal exploitation indefensible, and so Singer's utilitarianism goes much further than the animal welfare approach that currently dominates legal thinking.

Nonetheless, the possibility of animal exploitation which Singer's theory allows, contrasts with absolutist, or rights-based approaches. An absolutist approach would free all animals from all exploitation. Singer's theory does not offer absolute rights for animals, although he makes use of the language of rights as "convenient political shorthand".²⁶ That Singer's theory allows continued exploitation is significant because subsequent approaches, including that of Tom Regan, have rejected utilitarianism on this basis.

Tom Regan: Rights for All Subjects-of-a-Life

Tom Regan's approach to animals is now arguably the preeminent theory of animal rights, both in academic circles and the animal rights movement. In *The Case for Animal Rights*,²⁷ Regan develops an absolutist position on animal rights, breaking from utilitarianism and arguing that it allows the continuation of morally indefensible exploitation of animals.²⁸ This position is best summed up by Regan's phrase that animal rights advocates want empty cages, not bigger cages.

At the core of Regan's philosophy is the 'subject-of-a-life' principle that, because the subject-of-a-life cares about its life, its life has inherent value. This inherent value is equal among all beings, as one either is or is not a

²⁴ Ibid 9.

²⁵ Peter Singer, 'Setting Limits on Animal Testing' *The Sunday Times* (December 3, 2006) available at <http://www.utilitarian.net/singer/by/20061203.htm>.

²⁶ Singer, above n 20, 8.

²⁷ Tom Regan, *The Case for Animal Rights* (2nd edn University of California Press, Berkeley 2004).

²⁸ Indeed, Bentham himself said of cruelty to animals that "the more [it] is indulged in, the stronger it grows, and the more frequently productive of bad fruits" it becomes. Bentham, above n 13.

subject-of-a-life. Regan argues that a variety of criteria are to be considered in assessing whether a being is the subject-of-a-life, including, *inter alia*, its perception, desire, memory, and a sense of the future.²⁹ Regan explores this principle in great depth and finds that the preponderance of evidence leads to the conclusion that the majority of animals currently utilised by humans are subjects of a life, rather than biological entities without such subjective worlds.³⁰

Regan acknowledges the subject-of-a-life principle does not, of itself, enjoin us to treat subjects in any particular way. In order for justice to be done, Regan argues that the overarching principle is that, “We are to treat those individuals who have inherent value in ways that respect their inherent value”.³¹

From Animal Rights Philosophy to Animal Law: Approaches to Legal Reform

It is pertinent at this stage to discuss how legal theorists have proposed that the philosophical acknowledgement of animal rights be transposed into legal reform. For the purposes of the present paper, ‘Animal Law’ can be taken to mean these approaches to reform, in the same way that Earth Jurisprudence, discussed below, is an approach to legal reform in favour of the environment. The two most prominent such theories, which will be discussed here, are based on the animal rights approach, in that they call for absolute rights to be given to animals.

Gary Francione: Abolitionist Reforms

Gary Francione’s abolitionism argues for the complete abolition of animal exploitation. He argues that the legal fiction of the property status of animals is the primary mechanism by which humans exploit animals and therefore “abolition requires the recognition of one moral right: the right not to be treated as property or as things”.³² The aim of abolitionism therefore

29 Regan, above n 27, 243.

30 The subject of a life principle applies to sentient animals, i.e. all invertebrates. This therefore applies to the majority of animals exploited by humans.

31 Regan, above n 27, 248.

32 Virgine Bronzino, ‘Interview with Gary L. Francione regarding abolitionism as opposed to animal-welfare reforms’ (2005) available at <http://www.abolitionistapproach.com/media/pdf/veganimal-en-200906.pdf>.

is to secure a paradigm shift in moral and legal thinking, whereby animals are no longer regarded as things to be owned and used.

In *Rain Without Thunder*,³³ Francione envisages a practical legal approach to achieving abolition. He argues that animal rights advocates should propose and support legal reforms that seek prohibition of particular forms of animal exploitation. For example, Francione argues that a prohibition on using any nonhuman animals in a particular type of experiment is to be preferred to a more permissive regulation that requires animal use to be made more 'humane'.³⁴

Another example can be drawn from the regulation of battery-hen cages. A welfarist reform may be to increase the size of the cages, whereas an abolitionist reform would be to ban battery cages altogether. While it could be argued that these are simply degrees of the same action, there is a difference between increasing welfare within the confines of current methods of exploitation and removing a particular method altogether. Abolitionist reforms 'draw a line' under certain actions, outlaw them, and progress the legal system to genuinely humane methods, ultimately, to a rights-based treatment of animals in legal systems.

While Francione acknowledges that it is a shift in societal attitudes that ultimately drives legal change, he suggests we can incrementally work towards abolition through gradually increasing prohibitions on animal exploitation in legal regimes.

Steven Wise: Toward Legal Rights to Animals

Steven Wise builds on the general idea of incrementally increasing prohibitions of animal exploitation by arguing for the complete prohibition of exploitation of chimpanzees and bonobos as a first step in granting legal rights to animals. Wise argues that scientific evidence and the closeness of these animals to humans overwhelmingly supports the conclusion that they are subjects-of-a-life.

Wise also posits that nonhuman animals should no longer be considered property. In arguing for rights for chimpanzees and bonobos, Wise states "justice entitles [them] to legal personhood and to the fundamental legal

³³ Gary Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press, Philadelphia 1996).

³⁴ See Bronzino, above n 32.

rights of bodily integrity and bodily liberty”.³⁵ If Wise’s argument were to be accepted, this would entail recognition that chimpanzees and bonobos are not property and thereby prohibit all exploitation of these animals.

Wise’s book, *Rattling the Cage*, is of particular note for the development of Animal Law as a distinct movement as it offers a comprehensive legal analysis of the issues and specifically proposes that legal recognition of the rights of chimpanzees and bonobos will “arise from a great common law case”.³⁶ While Francione’s framework for either opposing or supporting legal reform based on whether it is abolitionist in nature provides a useful benchmark for potential reforms, Wise takes a step further and specifically proposes an abolitionist reform that is conceivable, but that would surely push the boundaries of the law.

The famous evolutionary biologist Richard Dawkins has alluded to Wise’s arguments, stating:

*Such is the breathtaking speciesism of our Christian-inspired attitudes, the abortion of a single human zygote can arouse more moral solicitude and righteous indignation than the vivisection of any number of intelligent adult chimpanzees! [...] The only reason we can be comfortable with such a double standard is that the intermediates between humans and chimps are all dead.*³⁷

Earth Jurisprudence

The emerging theory of Earth Jurisprudence suggests that the core failure of modern human governance systems is that they regulate human behaviour based on the fallacy that we are separate from nature and can operate outside the boundaries imposed by natural systems.³⁸ The Earth Jurisprudence approach is to set our laws within the context of fundamental principles of ecology and the limits imposed by nature.³⁹ Earth Jurisprudence acknowledges that human beings do not exist in a vacuum. Rather, we are part of the ‘Earth System’, which we rely on for our

35 Steven Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Publishing, New York 2000) 7.

36 *Ibid* 270.

37 Richard Dawkins, *The Blind Watchmaker* (W.W. Norton & Company, New York 1986).

38 Cormac Cullinan, ‘A History of Wild Law’, in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, Kent Town, South Australia 2011) 12, 13. The tenets of Earth Jurisprudence are set out in Cullinan’s earlier book *Wild Law: A Manifesto for Earth Justice* (Green Books, Totnes 2003).

39 *Ibid*.

existence, and we cannot continue to flourish unless this system is healthy.⁴⁰ Proponents of Earth Jurisprudence submit that this planet does not have capacity for infinite economic growth and continued environmental degradation.⁴¹

This ecocentric legal theory draws on theories of jurisprudence and governance, spirituality, politics, sociology and ancient wisdom.⁴² Earth Jurisprudence discerns the fundamental laws of nature (termed the ‘Great Jurisprudence’) and sets our laws within this context. Throughout history there have been philosophies based on some notion of a universal code or framework or power.⁴³ In a similar vein, the Great Jurisprudence ‘is what it is’; it is the nature of the world, the “fundamental laws and principles of the universe”.⁴⁴ Earth Jurisprudence holds that the Earth, a self-regulating system that has existed, developed and flourished for millennia, provides us with a universal framework in which to bound human laws.

Berry and Swimme⁴⁵ propose that the three most basic elements of the Great Jurisprudence are differentiation (in that ‘nature abhors uniformity’),⁴⁶ autopoiesis (literally, ‘self-making’),⁴⁷ and communion (the interconnectedness of all aspects of the universe).⁴⁸ However, Cullinan notes that, as the Great Jurisprudence is derived by examining the universe, rather than being deduced from a theory, we can expect our understanding to deepen as our knowledge and understanding increases.⁴⁹

Earth Jurisprudence, being the theory that human laws should be bound by the laws of nature, recognises that: rights stem from the nature of the universe, from the nature of existence itself, rather than from human legal systems; all beings play a role in the Earth system; and human conduct must

40 Ibid.

41 There are a range of scientific papers which discuss our growing environmental problems. For an Earth Jurisprudence perspective on the science, see Stephen Harding, ‘Gaia and Earth Jurisprudence’, in *Exploring Wild Law*, above n 38.

42 For more detailed discussion of these aspects of Wild Law, one may refer to the recently published collection of essays *Exploring Wild Law*, above n 38.

43 Natural Law is perhaps the most well known in Western cultures.

44 Cullinan, above n 38.

45 Barry Swimme and Thomas Berry, *The Universe Story: From the Primordial Flaring Forth to the Ecozoic Era – A Celebration of the Unfolding of the Cosmos* (HarperCollins, San Francisco 1992) 73-75.

46 Richard Cooley, *Technology, Transgenics and a Practical Moral Code* (Springer, New York 2010) 16.

47 See Humberto Maturana and Francisco Varela, *Autopoiesis and Cognition: the Realization of the Living* (Reidel Publishing, Dordrecht, The Netherlands 1980) 78.

48 Cullinan, above n 38, 79.

49 Ibid.

be restrained to prevent impinging on the roles of other beings. Based on this recognition, it proposes that human governance arrangements be based on what is best for the whole Earth system.⁵⁰

Thus “binding prescriptions, articulated by human authorities, which are consistent with the [Great Jurisprudence] and enacted for the common good of the comprehensive Earth Community” are consistent with Earth Jurisprudence.⁵¹

Rights and Earth Jurisprudence

The central tenet of Earth Jurisprudence is that all components of a natural system have certain rights by virtue of their being part of that system. Thus, rights in Earth Jurisprudence have at their core a very different philosophical foundation to those contemplated by animal rights philosophers. Indeed, Earth Jurisprudence’s ‘rights’ may be more akin to the rights discussed by Singer, in that the rights of natural subjects in Earth Jurisprudence are more considerations to be weighed rather than absolute moral rights.

Thomas Berry states that rights mean: “the freedom of humans to fulfil their duties, responsibilities and essential nature and by analogy, the principle that other natural entities are entitled to fulfil their role within the Earth Community”.⁵² The core nature of rights in Earth Jurisprudence is the freedom of the rights holder to carry out its role in the Earth system.

At the Peoples’ Conference on Climate Change in Bolivia,⁵³ following the failed diplomatic climate change talks in Copenhagen,⁵⁴ attendees drafted a Declaration on the Rights of Mother Earth (the Declaration), echoing the tone and intention of Earth Jurisprudence.⁵⁵

Article 2.1 of the Declaration expands on this broad conception of rights and identifies the rights of nature as including, *inter alia*, the right to life and

50 Ibid, 117.

51 Peter Burdon, ‘The Great Jurisprudence’ in Exploring Wild Law, above n 38, 64.

52 Quoted in Cullinan, above n 38, 97.

53 See World People’s Conference on Climate Change and the Rights of Mother Earth (April 22nd, Cochabamba, Bolivia), Peoples Agreement, available at <http://pwccc.wordpress.com/support/>.

54 Joeri Rogelj et al, ‘Analysis of the Copenhagen Accord Pledges and its Global Climatic Impacts—a Snapshot of Dissonant Ambitions’ (2010) 5(3) Environment Research Letters, available at http://iopscience.iop.org/1748-9326/5/3/034013/pdf/1748-9326_5_3_034013.pdf.

55 See World People’s Conference on Climate Change, note 44 above.

to exist; the right to be respected; the right to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions; and the right to maintain its identity and integrity as a distinct, self-regulating and interrelated being. Likewise the Constitution of Ecuador sets out the rights of nature, which has “the right to exist, persist and maintain and regenerate its vital cycles”.⁵⁶

The Rights of Animals in Earth Jurisprudence

Animals are not accorded any rights in Earth Jurisprudence over and above those granted to all other components of the Earth system. All natural subjects hold the same basic ‘rights’.

In his book *Wild Law*, which outlines the legal approach of Earth Jurisprudence, Cormac Cullinan does not explore in any detail how the rights of animals would be balanced with those of humans. He simply notes that the starting point is the principle that each member of the Earth Community should be free to fulfil its natural role within the Earth Community. Indeed, the only passage of substance directly regarding animals is a discussion of the limitations to be placed on human rights, rather than a detailed look at the rights of animals per se.

Cullinan’s treatment of this issue leaves much to be discerned by future contributors to this emerging theory. Some commentators have started to address this issue. Most notably, Hamblin considers the Earth Jurisprudence approach to farming,⁵⁷ and White highlights some of the issues of reconciliation of animal and earth rights considered in more detail in this paper.⁵⁸ This section of the paper further elaborates on the place of animals in Earth Jurisprudence.

Cullinan poses the question, “does Earth jurisprudence entitle a human hunter to shoot a zebra?”⁵⁹ The answer, says Cullinan, depends on the circumstances, as different communities will have different versions of Earth Jurisprudence based on the ecological characteristics of the locality, their local customs, and their relationship with nature.

56 Constitution of Ecuador, Chapter 7.

57 Melissa Hamblin, ‘Wild Law and Domesticated Animals: A Wild Law Approach to the Regulation of Farming Industries in Australia’ (Wild Law Conference, Griffith University 16-18 September 2011).

58 Steven White, ‘Wild Law and Animal Law: Commonalities and Differences’ (Wild Law Conference, Griffith University 16-18 September 2011).

59 Cullinan, above n 38, 106.

Cullinan compares an indigenous hunter killing a zebra for food in accordance with traditional rituals and customs, with a reckless hunter aiming to sell the pelts. The hunter's actions are unacceptable, though Cullinan notes that there will be many difficult cases between these two extremes. It may be more accurate to say that the two extremes used in this example are guided not by the principles of Earth Jurisprudence as such, but instead on intuition: many people would agree that the bushman does no wrong, whereas an opportunistic and wasteful hunter commits an act that is against the moral sensibility of most people. As Judge Posner argues, "We realize that animals feel pain, and we think that to inflict pain without a reason is bad. Nothing of practical value is added by dressing up this intuition in the language of philosophy; much is lost when the intuition is made a stage in a logical argument".⁶⁰

The use of such examples demonstrates the difficulty of identifying the rights of non-human animals within Earth Jurisprudence and how human rights interact with these rights. Cullinan simply asserts that we need to develop more sophisticated mechanisms for making decisions within an Earth Jurisprudence framework.

A more philosophically problematic aspect of animals' rights in Earth Jurisprudence is the difficulty in determining what rights a particular animal has. An animal's role in the Earth system is the starting point for determining its rights, but simply identifying the role of an animal in the ecosystem does not in itself provide any detail on how human actions should be limited in relation to that animal. As Professor Lee notes, "zebrakind as a concept in isolation is not that helpful in determining the rights and wrongs of actions directed at zebras".⁶¹

Overall, whatever the rights ultimately held by an animal, the position of animals under Earth Jurisprudence generally involves a balancing or weighing of an animal's rights with the rights of other members of the Earth Community with which the animals interact, including humans. It is clear that this 'right to be' proposed by Earth Jurisprudence is not the same as the absolute right to life sought for animals by animal lawyers. Cullinan, for example, clearly envisages that animals can be exploited by humans so long

60 While Posner was referring to Singer's utilitarian approach and arguing that it fails because it is contrary to intuition, his argument seems much stronger here, where Cullinan's use of extremes does invite criticism that he is merely restating widespread intuition as principle. See Slate, 'Animal Rights Debate', available at

http://www.slate.com/articles/news_and_politics/dialogues/features/2001/animal_rights/_2.html.

61 Robert Lee, 'A Walk on the Wild Side: Wild Law in Practice' (2006) 18 *Environmental Law and Management* 6, 7.

as the exploitation is conducted as part of an ecologically sustainable relationship with the Earth's natural systems.

Wild animals and domesticated animals

It is clear from *Wild Law* that Earth Jurisprudence applies to wild animals: these animals should be allowed to carry out their natural functions. However, the situation is far less clear in relation to domesticated animals because it is difficult to determine the natural function of domesticated animals. On the one hand, their domesticated nature essentially means that it is now the function of these animals to provide the products that they have been bred for. Domesticated animals would not be in existence but for human use and would serve no function if transferred to their original habitats, in contrast to their non-domesticated ancestors. On the other hand, it seems fair to argue that the right of a subject to carry out its natural role in the Earth system should be discerned from the Great Jurisprudence, rather than from the roles that humans have imposed through modern agricultural systems. That is to say that although humans have changed the ability of domesticated animals in such a way as to prevent them from existing in the wild, the rights accorded to these animals should arguably be derived from their role pre-human intervention.

At a recent Wild Law conference, Melissa Hamblin elaborated on the way that Earth Jurisprudence could apply to animal farming industries and used the egg production industry as a case study.⁶² Her comments are particularly instructive given the relatively underdeveloped nature of Earth Jurisprudence vis-à-vis its application to agriculture.

Firstly, Hamblin notes that the regulation of animal industries is guided by human interests, with profitability enshrined as the core value.⁶³ Other goals, such as animal welfare and biodiversity, remain peripheral at best. Modern industrial agriculture, facilitated by these regulatory regimes, has led to a well-documented decrease in animal welfare and a high impact on the environment.⁶⁴

62 See Hamblin, above n 57.

63 The paper talks specifically about Australia, but her comments apply equally to other states that have moved to mostly large-scale industrialised agricultural systems.

64 See UN Food and Agriculture Organization, *Livestock's Long Shadow: Environmental Issues and Options* (UN Food and Agriculture Organization and Livestock, Environment and Development Initiative, Rome 2006), though note that this report has been criticised in a number of respects. For a very well-balanced treatment of environmental issues in livestock agriculture, see Simon Fairlie, *Meat: a Benign*

Secondly, Hamblin argues that an Earth Jurisprudence approach to animal industries would reframe regulation so that the core concern would be improving humans' relationships with other members of the Earth Community. In particular, an Earth Jurisprudence approach to animal agriculture would require smaller operations, improved welfare standards, a strong focus on whole of system environmental impacts and better consumer education.

Hamblin does not explicitly state why it is that the 'right to be' in Earth Jurisprudence does not require abolition of the killing of animals. As discussed above, implicit in Earth Jurisprudence is some notion that wild animals are 'fair game' so long as the taking is in line with the holism of Earth Jurisprudence, while the position in relation to domestic animals is less clear. Hamblin does not address whether an animal's role in the Earth System includes a role as a resource for humans.

Animals in Animal Law and Earth Jurisprudence: Comparative Analysis

COMMON THREADS

Critique of property

The critique of property as the vehicle for exploitation is common to Animal Law's abolitionism and Earth Jurisprudence. Both discourses hold a critique of private property as central to an understanding of how exploitation is made acceptable.

In *Wild Law*, Cullinan states that the treatment of land as property leads to exploitation as it is considered "a thing, an object that may be bought and sold, and by definition devoid of any personality or sacred qualities ... the current owner is given virtually absolute power over that land".⁶⁵ Similarly, Francione argues that the property status of animals is the major facilitator of continued animal exploitation.

Extravagance (Chelsea Green, Vermont 2011). See also Ramona Ilea, 'Intensive Livestock Farming: Global Trends, Increased Environmental Concerns, and Ethical Solutions' (2009) 22 *Journal of Agricultural and Environmental Ethics* 153.

65 Cullinan, above n 38, 139. Note however that the property status of land allows at least protection from others (e.g. pollution by neighbouring landowners).

Reframing rights

Both Animal Law and Earth Jurisprudence suggest that the main solution to the imbalances in the current law is to reframe our conception of rights. The basis for this reframing is, however, very different, and this is discussed in more detail below.

The reason for choosing the extension of legal rights as the driver of reform is that moral rights are easily expanded and integrated into our current legal systems. That is, moral rights, such as those argued for by Regan, can be recognised and protected in practice through legal rights. History has shown that this recognition of moral rights and extension of legal rights to match them can bring about significant change: the abolition of slavery, for example, was a legal as well as cultural process, much like the women's rights movement.⁶⁶

A Provincial Court in Ecuador recently granted an injunction against the Provincial Government that recognised the rights of the Vilcabama River to flow and not be polluted.⁶⁷ Similarly, a recent agreement between the Crown government of New Zealand and the Whanganui River iwi⁶⁸ recognizes the Whanganui River and its tributaries as a single natural entity, and makes it a legal entity with rights and interests, as well as the owner of its own river bed. Two guardians, one from the Crown and one from a Whanganui River iwi, will be given the role of protecting the river. They will serve as legal custodians in much the same way legal guardians represent children.⁶⁹

These examples represent the very early forays into the expansion of rights, showing that the language of rights and the law and its machinery can provide a platform for pressing these cases. However, it is also clear that widespread recognition of the rights of animals or natural entities will require a significant and gradual shift in our societal conscience.

The necessarily incremental nature of changing rights through the law is demonstrated by a case brought by People for the Ethical Treatment for

66 While it is true that these extensions have always related to the human species, this does not affect the capacity of rights as a concept to be a driver of change.

67 Rights of Nature, 'First Rights of Nature Case – Ecuador', available at <http://therightsofnature.org/first-ron-case-ecuador/>.

68 I.e. the Maori peoples inhabiting the area in question.

69 For a detailed discussion of the case, see Tim Vines, Alex Bruce and Thomas Faunce, 'Planetary Medicine and the Waitangi Tribunal Whanganui River Report: Global Health Law Embracing Ecosystems as Patients' (2003) 20 *Journal of Law and Medicine* 528-541.

Animals (PETA) in a US Federal Court. PETA argued that five wild-caught orcas performing at SeaWorld were being held as slaves in violation of the 13th Amendment to the US Constitution.⁷⁰ While generating significant publicity, the case was criticised by the Nonhuman Rights Project (NhRP) for being “premature and ill-conceived”,⁷¹ unrealistically ambitious, and actually setting back developing Animal Law jurisprudence by allowing a precedent to be set against finding non-human animals as persons.⁷² The NhRP says it has been planning to undertake legal action toward recognition of the rights of animals since 2007, carefully considering a range of approaches, jurisdictions and potential cases which would allow the law to be incrementally extended.⁷³

The Challenges for Recognition

The reframing or expansion of rights will face lengthy uphill battle. Just as Francione notes that social changes must come first and drive legal change, Cullinan notes that our societies and legal systems were traditionally framed to promote human interests only. He says efforts to have animal rights recognized in US courts have largely failed, not because “the American judiciary is particularly insensitive to animals [but because] recognizing that animals should be treated the same way as humans goes against the grain of the whole legal system”.⁷⁴ Wise agrees, focusing on incrementalism, and hoping for a “great common law judge” and a revolutionary decision in the courts to get the ball rolling.⁷⁵

Wise quotes Christopher Stone, author of *Should Trees Have Standing*, who wrote that proposals to extend rights were “bound to sound odd or frightening or laughable ... partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of ‘us’ – those

70 The 13th Amendment states that “[n]either slavery nor involuntary servitude... shall exist within the United States, or any place subject to their jurisdiction”. US Constitution, amendment XIII § 1.

71 Steven Wise, ‘As Judge Dismisses PETA’s Case against SeaWorld, NhRP Weighs the Damage’, (2012) available at <http://www.nonhumanrightsproject.org/2012/02/08/as-judge-dismisses-petas-case-against-seaworld-nhrp-weighs-the-damage/>.

72 See Michael Mountain, ‘PETA v. Seaworld – The Aftermath’ (2012) Zoe, available at <http://www.zoenature.org/2012/02/peta-v-seaworld-the-aftermath/>.

73 See Nonhuman Rights Project, ‘Exploring the Legal Case’, available at <http://www.nonhumanrightsproject.org/exploring-the-legal-case/>.

74 Cullinan, n 3844 above, 58.

75 Wise, n 35 above, 270.

who are holding rights at the time”.⁷⁶ The common ground here is illustrated by the fact that Wise, an Animal Law scholar, is citing Stone, an early advocate of rights for natural entities, in order to highlight the difficulties in having extensions to rights recognized.

DIFFERENCES

Basis upon which rights are reframed

Earth Jurisprudence requires a massive shift in the way we view rights. Under an Earth Jurisprudence approach, rather than increasing the rights of animals to meet those of humans, or including animals in our sphere of moral consideration, the rights of humans and animals are drastically reframed.

The rights of both are ‘equalised’ – humans’ rights would be far more constrained than at present, while animals and other components of the ecological system would have more rights. Whereas the animal rights approaches discussed above assert that there are objective moral rights that are owed to all living creatures, Earth Jurisprudence asserts that all components of the Earth system, in contributing to the health of the whole, are deserving of the right to perform their natural functions. Essentially, both approaches recognize the inherent value of animals, but do so on different bases.

Scope of protection for animals

It will be clear at this point that Earth Jurisprudence and Animal Law, based on a philosophy of animal rights, offer different levels of protection for animals. Firstly, Animal Law would protect all animals, domestic or wild, whereas Earth Jurisprudence, as described above, makes some distinction between these two categories. Secondly, the absolutist nature of the rights accorded to animals in the abolitionist approach means that protection is complete and impassable, whereas an Earth Jurisprudence approach to rights offers far more protection than the present welfare paradigm, but does not guarantee the life and liberty of animals.

⁷⁶ Christopher Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (3rd edn Oxford University Press, Oxford 2010) 8.

Domestic and Wild Animals

A final important difference between Earth Jurisprudence and Animal Law, as suggested above, is their differing treatments of wild and domesticated animals. While the former suggests that some utilization of domestic animals is acceptable, Francione states, “if we took animals seriously in a moral sense, we would stop bringing domesticated animals into existence for our purposes, and not formalize that exploitation by seeking to regulate it further within the legal system” and that “if we stopped bringing domesticated animals into existence, the only conflicts that would remain would involve humans and animals living in the wild”.⁷⁷ This difference is significant because it is a barrier to reconciling the two theories, as is discussed below.

Animal Law and Earth Jurisprudence: may the twain meet?

Environmentalists and theories of environmentalism have not generally embraced the individualistic and absolute nature of Animal Rights. The two movements have often been at odds. The emerging legal theories of Animal Law and Earth Jurisprudence, following these philosophical lineages, appear at first glance to continue this division and to be irreconcilable. This section of the paper will very briefly outline this conflict and suggest that a high level of reconciliation is practical and desirable. I will draw on the practical legal nature of Animal Law and Earth Jurisprudence, as well as the similarities and differences identified above, to argue for a pragmatic holism that acknowledges both the greater moral worth of animals and the intrinsic value, or ‘rights’ of nature. While conflicts are still likely to remain, it is argued that this goes some way to reconciling these two emerging discourses.

Animal Rights and Environmentalism: A rocky relationship

The difficult relationship between Animal Rights and environmentalism was notoriously described by Callicott in 1980. In a paper ‘Animal Liberation: A Triangular Affair’,⁷⁸ Callicott “appeared to delight in driving a very deep wedge between environmentalism and animal rights”,⁷⁹ a wedge

⁷⁷ Bronzino, note 32 above.

⁷⁸ J. Baird Callicott, ‘Animal Liberation: A Triangular Affair’ 2 *Environmental Ethics* (1980) 311.

⁷⁹ Gary Varner, ‘Can Animal Rights Activists be Environmentalists?’ in Andrew Light (ed) *Environmental ethics: an Anthology* (Wiley & Sons 2003) 95.

that has remained.⁸⁰ Extending Callicott's metaphor, Sagoff bluntly states: "Environmentalists cannot be animal liberationists. Animal liberationists cannot be environmentalists"⁸¹.

The reason for this dichotomy, it is said, is that animal rights are:

*moral notions that grow out of respect for the individual. They build protective fences around the individual. They establish areas where the individual is entitled to be protected against the state and the majority even where a price is paid by the general welfare.*⁸²

This conception of rights means that Animal Law does not cover all the natural subjects that Earth Jurisprudence proponents believe are worthy of moral consideration. While Animal Law may advocate the protection of ecosystems as necessary to protect individual animals at times, no robust protection is offered to the environment. In addition, Animal Law would assign no more value to the individual members of a highly endangered species than to those of a common or domesticated species, and would give the same absolute rights to invasive species which may be an ecological burden. Due to this focus on the individual, Animal Rights theory offers no realistic plan for managing the environment, and could potentially hinder efforts to improve environmental protection.

Likewise, Regan criticizes the environmental holism on which Earth Jurisprudence is based for its protection of ecosystems at the expense of individual animals. As in Singer's utilitarianism, the rights of animals are not absolute in Earth Jurisprudence: animals can be deprived of their most basic right, the right to life, if doing so would contribute to the overall Earth system. An animal has no absolute right, except rights that are attributed according to the animal's function in the Earth system. Reagan states that theories of environmental holism and animal rights are "like oil and water: they don't mix"⁸³.

80 For completeness, it is worth noting that Callicott later regretted this aspect of the paper and the notoriety it subsequently received. He states: "My biggest regret is that I achieved exactly what I set out to achieve... to drive a wedge between animal ethics and environmental ethics." See J Baird Callicott, 'Introductory Palinode', available at <http://jbcalicott.weebly.com/introductory-palinode.html>.

81 Mark Sagoff, 'Animal Liberation and Environmental Ethics: Bad Marriage, Quick Divorce' (1984) 22 Osgoode Hall Law Journal 297.

82 Bernard Rollin, 'The Legal and Moral Bases of Animal Rights' in Harlan Miller and William Williams (eds) *Ethics and Animals* (Humana Press 1983) 106.

83 Regan, above n 27, 362.

Reconciling Animal Rights and Environmentalism

This raises the question: is reconciliation of these two discourses desirable and possible? Of particular interest for this essay is whether the reconciliation of Animal Law and Earth Jurisprudence can be used to close the gap between environmentalism and animal rights. It is submitted that reconciliation is desirable. Firstly, there are considerable similarities between the two theories; seeing them as completely exclusive is unwarranted and unnecessarily divisive. Secondly, reconciliation of Animal law and Earth Jurisprudence can complement each other and offer mutual benefits.

Animal Law and Earth Jurisprudence: toward reconciliation

Since Callicott's divisive article, significant attempts to bridge the divide have been made, including by Callicott himself.⁸⁴ The focus of this section will be on reconciliation through Animal Law and Earth Jurisprudence, though I will allude to the philosophical efforts where pertinent.

Animal Law and Earth Jurisprudence are appropriate vehicles by which to reconcile Animal Rights and Environmentalism. Animal Law and Earth Jurisprudence are well suited to this for a number of reasons. First, they are both legal approaches focused on practical action. Secondly, they already have a specific and well-defined 'common enemy' in Western conceptions of property. Thirdly, an advancement of either theory in a court or legislature will also be an advancement of the other. Fourthly, novel mechanisms have been proposed that are consistent, at least to some extent, with both approaches. Finally, a certain level of pragmatism in the application of the approaches can go a long way toward reconciliation.

Practical Action

Animal Law and Earth Jurisprudence are approaches to legal reform that are focused on practical action. Given this focus, attention should be paid to their practical aspects, rather than 'squabbling amongst themselves' as to the precise nature of their philosophical underpinnings and their compatibility. As approaches to legal reform, both acknowledge the

84 See J Baird Callicott, 'Animal Liberation and Environmental Ethics: Back Together Again' (undated) Between the Species 163, available at <http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1703&context=bts&sei-redir=1>.

significant barriers they face and the incremental nature of change.⁸⁵ In this context, it is far more rational to focus on the practicalities of advancement, rather than on the minutiae of their philosophical differences. This is particularly true in light of the fact that the similarities between the approaches means that their advancement will often offer mutual assistance.

In suggesting that Animal Law and Earth Jurisprudence can be reconciled because they are legal approaches rather than philosophical theories, I do not suggest that differences should not be identified and discussed, but that these may become more relevant as either approach moves toward achievement of its goals. Once the differences between the approaches are borne out in practice, it would be apt to conduct a detailed assessment of the relationship between Animal Law and Earth Jurisprudence, but until such time, much more could be gained in taking a reconciliatory approach.

Common cause against a common enemy

The second point made above is that Animal Law and Earth Jurisprudence can “make common cause against a common enemy - the destructive forces at work ravaging the nonhuman world” rather than perpetuating the divisive schism that views the two approaches as irreconcilable. As discussed above, a critique of property is central to both Animal Law and Earth Jurisprudence. Given that the core tenet of each approach is the same, it is clear that even the theoretical differences are less pronounced than they may initially appear. While ultimately the driving rationale for reframing the concept of property is different, proponents of both approaches are aiming for a similar practical goal.

Mutual advancement

Given that both approaches aim for a similar legal reform, and that both face the same challenges in achieving this reform, it is fair to say that an advancement of either Animal Law or Earth Jurisprudence is an advancement of the other. Incremental recognitions of Animal Rights and Earth Jurisprudence allow the legal machinery to see the subject of rights in a different way and provide an additional platform from which both theories can develop.

⁸⁵ This sentiment is conveyed by Jonathon R Lovvorn, 'Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform' (2006) 12 Animal Law 133.

For example, if Wise's campaign succeeds in achieving rights for certain great apes,⁸⁶ this opens up the possibility that rights can be incrementally extended and changed to protect the environment. Likewise, in *Sierra Club v Morton*,⁸⁷ one great common law judge dissented and decided that a tree should be granted standing:⁸⁸ had this been the majority view, it would have been a logical extension of the case to request standing for an animals, a request that Wise himself has made and was not granted.

There is another sense in which the two approaches may be mutually beneficial. Regan suggests that rights for animals could actually be beneficial for the Earth community as a whole, thus offering the prospect that Animal Law and Earth Jurisprudence are reconcilable:

*[Animal Rights] ought not be dismissed out of hand by environmentalists as being in principle antagonistic to the goals for which they work. It isn't. Were we to show proper respect for the rights of the individuals who make up the biotic community, would not the community be preserved?*⁸⁹

However, there are some problems with this argument. For example, rights for animals would prevent the removal of invasive species which threaten an ecosystem. Also, the protection of rights may advance environmentalism in relation to wild animals, but the position is less simple in relation to domestic animals, as Earth Jurisprudence makes a distinction between the two.

Novel mechanisms

Another option for reconciliation is to identify new legal structures that can bring together the two approaches. Both theories offer a critique of property law, but have, as yet, offered little in the way of proposals for practical reform of property law. For example, Francione simply says that abolition

86 Some progress has already been made in Europe. Though falling short of a complete ban, an EU Directive allows for the use of great apes in experiments in very limited circumstances (Directive 2010/63/EU). New Zealand has already gone one step further and banned experimentation on great apes entirely. See Rowan Taylor, 'A Step at a Time: New Zealand's Progress Toward Hominid Rights' (2001) 7(35) *Animal Law* 35-43.

87 *Sierra Club v. Morton*, 405 U.S. 727 (1972), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=405&invol=727>.

88 See Justice Douglas' dissenting opinion, *ibid* 741.

89 Tom Regan, 'Rights and Environmental Ethics: An Aside', available at <http://animalliberationfront.com/Philosophy/Morality/Rights%20and%20Environmental%20Ethics%20An%20Aside.htm>.

of the property status of animals is key, while Cullinan states that, having identified that property law is at fault, the “challenge that now faces us is how to begin the process of undoing the property systems that impede a proper relationship with the land, and to build a workable alternative in its place”.⁹⁰

An innovative property law reform that may benefit both theories is the proposal that animals should be afforded property rights.⁹¹ Essentially this proposal would involve extending property rights to animals, with human guardians defending these rights in court. Hadley argues that this could satisfy the core moral demands of both Animal Law and Earth Jurisprudence. While such ideas are nascent and cannot be explored in detail here, they certainly present novel methods of both reforming the law and of reconciling Earth Jurisprudence and Animal Law.

Pragmatic Holism

Mary Warren was the first academic to propose a reconciliatory response to Callicott’s assertion that Animal Rights and Environmentalism are mutually exclusive. Warren took a positive step toward reconciliation, insisting that ecocentric and animal rights approaches are in fact complementary.⁹² Warren's approach is a decidedly pluralistic one, agreeing that animals and plants have rights, but arguing that they do not have the same rights as humans. For Warren, animal rights and human rights are grounded in the differing psychological capacities of humans and animals, while environmental ‘rights’ are based on the value of nature, both as a resource and intrinsically:

*Human beings have strong rights because we are autonomous; animals have weaker rights because they are sentient; the environment should be used with respect - even though it may not have rights - because it is a whole and unified thing which we value in a variety of ways.*⁹³

While Warren’s argument is appealing for its simplicity, its pragmatism seems unlikely to convince proponents of Animal Law because it explicitly relegates the rights of animals to beneath those of humans. In addition,

⁹⁰ Cullinan, above n 38, 145.

⁹¹ John Hadley, ‘Nonhuman Animal Property: Reconciling Environmentalism and Animal Rights’ 36(3) *Journal of Social Philosophy* 305.

⁹² Mary Warren, ‘The Rights of the Nonhuman World’ in Robert Elliot and Arran Gare, *Environmental Philosophy: A Collection of Readings* (Pennsylvania State University Press, 1983) 109-131.

⁹³ See Callicott, above n 84.

Warren's pluralism will inevitably lead to conflict as "ethical eclecticism leads, it would seem inevitably, to moral incommensurability in hard cases".⁹⁴

Callicott proposes a different form of pragmatism, based on a more objective moral foundation. Callicott essentially makes the argument, reminiscent of those of Earth Jurisprudence, that humans have always 'used' animals, and it is merely our modern, industrialised relationships with animals that cause our revulsion at the breaching of Animal Rights. Callicott argues that we must return to a relationship with animals whereby we consider them a part of the 'inner circle' of our mixed communities, i.e. our community of humans and domestic animals. On the other hand he argues that wild animals should be free from interference.⁹⁵

Arguably, Warren's pragmatism requires "well-meaning people" to "muddle through the moral wilderness, balancing and compromising the competing interests and incommensurable values",⁹⁶ which will lead to conflict. On the other hand, Callicott's attempt to find an objective moral basis is well-intentioned, but again falls down because it suggests that human exploitation of animals is in some way completely 'natural', such that animals' rights can always be subsidiary to those of humans. Nonetheless, these pragmatic approaches appear to be the closest it is possible to come to in reconciling the two approaches.

Ultimately, Animal Law, by insisting upon absolute and individual rights, cannot be completely reconciled with the more flexible Earth Jurisprudence, although the pragmatic approaches suggested can go some way towards this. This moral pragmatism, coupled with the practical pragmatism outlined above, suggests that, while complete reconciliation may be impossible, Earth Jurisprudence and Animal Law can bring Animal Rights and Environmentalism much closer than was previously assumed possible.

Conclusion

Animal Law and Earth Jurisprudence are very much works in progress, yet they are rapidly developing, with interest quickly growing amongst academics, activists, and even lawmakers and the judiciary. This paper has explored the theories of Animal Law and Earth Jurisprudence by outlining

⁹⁴ Ibid 164.

⁹⁵ Ibid.

⁹⁶ Ibid.

their central tenets and asking where the similarities, differences and synergies lie between them.

It is clear that these emerging theories are not mutually exclusive, but that considerable difficulty lies in their reconciliation. As these approaches to law reform develop, there may be further discussion of the devil in the theoretical and philosophical detail, which is to be welcomed, but this should not detract from legal approaches that are mutually enhancing.

The Application of the Australian Consumer Law to the Purchase of Companion Animals: A Comparative Analysis

*By Nicholas Findlater**

The legislative framework governing the purchase of companion animals in Australia remains firmly rooted in the longstanding conception of animals as corporeal hereditaments, deprived of distinct legal personalities⁹⁷ and suitable for ownership by humans.⁹⁸ Despite recent revisions to consumer legislation in Australia, including the adoption of a uniform federal law (the *Australian Consumer Law*), legislators in this country have not introduced independent provisions specifically targeting the purchase of companion animals.⁹⁹

The Australian legislative position can be contrasted with that of the United States. Although the US also has a uniform federal law governing contracts and the sale of goods (the *Uniform Commercial Code*),¹⁰⁰ twenty US States have implemented supplementary legislation specifically targeting the

. LLB (V), University of Sydney. The author would like to thank Celeste Black, Senior Lecturer in Animal Law at the University of Sydney, for her helpful comments on an earlier version of this paper. Any errors remain the author's own.

97 Deborah Cao, *Animal Law in Australia and New Zealand* (Thomson Reuters Lawbook Company, 2010) 88 [3.220].

98 Alex Bruce, *Animal Law in Australia – An Integrated Approach* (LexisNexis Butterworths Australia, 2012) 76 [3.3].

99 This paper understands 'companion animals' to mean dogs and cats. This definition is common to both US and Australian States: see, eg, Arizona Revised Statutes, Title 44, Chapter 11, Article 17; California Health and Safety Code, Division 105, Part 6, Chapter 5; New York General Business Laws, Article 35-D; Companion Animals Act 1998 (NSW) s 5(1); Companion Animal Regulations 2008 (NSW). This paper also uses 'pet' and 'companion animals' interchangeably, although the term 'pet' can import a wider meaning.

100 Jason Parent, 'Every Dog Can Have Its Day: Extending Liability Beyond the Seller By Defining Pets as 'Products' Under Products Liability Theory' (2005-2006) 12 *Animal Law* 241, 245; Rebecca F Wisch, 'Sale of Companion Animals by Breeders and Retailers' (Animal Legal and Historical Center, Michigan State University, 2005) [I.I.A], accessed 28 March 2013 <<http://www.animallaw.info/articles/dduspetsales.htm>>.

purchase of companion animals.¹⁰¹ These State-level enactments are nicknamed the ‘pet lemon laws’.

Adopting a comparative perspective, this paper interrogates a simple hypothesis: are the targeted pet lemon laws of the US more sophisticated than the non-targeted *Australian Consumer Law* as a means of regulating the purchase of pets? The ‘sophistication’ of the two legislative schemes is measured by reference to three criteria: causes of action, remedies, and policy justifications.

Accordingly, this paper proceeds in three stages. Part One investigates the causes of action open to an unsatisfied pet purchaser under the *Australian Consumer Law* and the US pet lemon laws. Part Two investigates the available remedies, including the evidentiary burdens that must be established to invoke them. Part Three compares the policy considerations underpinning the two legislative schemes, including the extent to which each scheme advances the interests of the animals whose purchase it purports to govern. The Conclusion revisits the opening hypothesis, and offers some closing observations.

As a sidenote, this paper does not attempt to critique the property status of companion animals. It assumes that their property status will endure, at least in the short term. The debate about the

property status of animals is certainly a worthy one, but the narrow parameters of this paper mean that this debate is best left to other branches of current animal law scholarship.¹⁰²

PART I

101 Rebecca F Wisch, ‘Table of State Pet Purchaser Protection Laws’ (Animal Legal and Historical Center, Michigan State University, 2013), accessed 15 April 2013 <<http://animallaw.info/articles/ovuspetprotectionstatutes.htm>>; Bruce A Wagman, Sonia S Waisman and Pamela D Fraisch, *Animal Law: Cases and Materials* (Carolina Academic Press, 4th ed, 2010) 534.

102 See, eg, Gary Francione, ‘Animals – Property or Persons?’ in Cass Sunstein and Martha Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 116-120; see also Steven Wise, *Drawing the Line: Science and the Case for Animal Rights* (Perseus Books, 2002) 21, 27.

Causes of action

When a consumer purchases a companion animal which turns out to be 'defective', what causes of actions might be available? How is a 'defect' defined? And did the consumer have any obligations during the purchasing transaction? Some key differences between the Australian and US legislative schemes are located along these fault lines.

The Australian Consumer Law

The *Australian Consumer Law* comprises Schedule 2 of the *Competition and Consumer Act 2010* (Cth). It replaces the *Trade Practices Act 1974* (Cth),¹⁰³ and also applies in New South Wales under the *Fair Trading Act 1987* (NSW).¹⁰⁴ Under *Australian Consumer Law* s 2(1) the definition of 'goods' extends to 'animals, including fish'.

The *Australian Consumer Law* protects consumers against misleading and deceptive conduct,¹⁰⁵ unconscionable conduct,¹⁰⁶ and unfair contract terms.¹⁰⁷ However, these three causes of action place a high evidentiary burden on the plaintiff.¹⁰⁸ For this reason, some Australian State Governments instead direct unsatisfied pet purchasers towards the *Australian Consumer Law's* consumer guarantees.¹⁰⁹ These include a guarantee in s 54 of acceptable quality¹¹⁰ and a guarantee in s 55 of fitness

103 See generally Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010 (Cth) and Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth) sch 5, item 2. See also Stephen Corones, *The Australian Consumer Law* (Thomson Reuters Lawbook Company, 2nd ed, 2011) 5-6 [1.15].

104 Fair Trading Act 1987 (NSW) s 28, pursuant to Competition and Consumer Act 2010 (Cth) s 140B.

105 See Australian Consumer Law Part 2-1.

106 See Australian Consumer Law Part 2-2.

107 See Australian Consumer Law Part 2-3.

108 See, eg, Australian Consumer Law ss 22(1), 22(2) and 24(1). See also Corones, above n 7, 195-197 [5.85], 233 [6.85].

109 See, eg, Western Australian Government, Departments of Commerce (Consumer Protection Division) and Local Government, *A Consumer's Guide to Buying a Pet* (11.4.11), accessed 14 .11.13, [3] <<http://www.commerce.wa.gov.au/ConsumerProtection/PDF/Publications/>>.

110 Australian Consumer Law s 54.

for purpose.¹¹¹ Significantly for pet purchasers, neither guarantee can be excluded by the terms of a contract.¹¹²

The s 54 guarantee is that goods supplied in 'trade or commerce'¹¹³ are of acceptable quality.¹¹⁴ The test of acceptable quality is objective, and asks whether a reasonable consumer knowing of any defects at the time of supply would regard them as acceptable.¹¹⁵

Suppliers avoid liability under s 54 if they draw the purchaser's attention to the defect prior to purchase;¹¹⁶ if the consumer is responsible for the defect through abnormal use;¹¹⁷ or if the consumer, prior to purchase, makes an examination of the goods that ought reasonably to have revealed that the goods were not of acceptable quality.¹¹⁸ In an animal context, for example, imagine that a cat for sale suffers from feline conjunctivitis. If the consumer, on examining the cat prior to purchase, saw symptoms including cloudy pupils and watery eyes, then the supplier might escape s 54 liability by arguing that the consumer's inspection ought reasonably to have revealed an underlying ailment.

The s 55 guarantee is reasonable fitness for any disclosed purpose, and for any purpose for which the supplier represents that the goods are reasonably fit.¹¹⁹ The disclosed purpose can be disclosed expressly or impliedly.¹²⁰ Nevertheless, s 55 requires more than 'imprecise generalisations' from the consumer,¹²¹ because the consumer must prove reasonable reliance on the

111 Australian Consumer Law s 55.

112 Australian Consumer Law s 64.

113 See Australian Consumer Law s 2.

114 Australian Consumer Law s 54(1).

115 Australian Consumer Law s 54(2).

116 Australian Consumer Law s 54(4).

117 Australian Consumer Law s 54(6).

118 Australian Consumer Law s 54(7).

119 Australian Consumer Law s 55(1).

120 Australian Consumer Law s 55(2).

121 *Carpet Call Pty Ltd v Chan* (1987) ASC 55-583 (Thomas J), cited in *Corones*, above n 7, 400 [9.180].

skill or judgment of the supplier.¹²² Ultimately, these are questions of fact: the purpose of a farmer who seeks a dog to put to work on his farm differs substantially from the purpose of an elderly person who seeks a placid household companion. In neither case can liability be imposed on the supplier under s 55 if the consumer did not rely, or relied unreasonably, on the supplier's skill or judgment.¹²³

Close scrutiny of the operation of s 54 and section 55 is warranted in three respects. First, as Corones points out, there is no *obligation* under s 54 to examine goods prior to purchase.¹²⁴ Therefore, an intending pet purchaser who does not bother to examine the animal (or an online purchaser who cannot examine the animal)¹²⁵ is actually in a better position than an intending purchaser who does.¹²⁶

Second is the issue of whether a purchaser who makes a s 54 examination before purchase, or who seeks to reasonably rely on the supplier's knowledge under s 55, actually knows what to look for and what to ask. Perhaps noting this inequality in bargaining power, the RSPCA and some State Governments have published educative tools for intending pet purchasers.¹²⁷

Third, pet sales take place in a context of 'yips and mews'.¹²⁸ The emotionality of handling young pets arguably deprives the consumer of some rationality during the purchasing transaction.¹²⁹

122 Australian Consumer Law s 55(3).

123 Australian Consumer Law s 55(3).

124 Corones, above n 7, 395 [9.145].

125 See Wisch, above n 4, [V].

126 Corones, above n 7, 395 [9.145].

127 RSPCA Australia, Choosing a Puppy, accessed 15 April 2013 <<http://www.rspca.org.au/how-you-can-help/campaigns/pedigree-dogs/choosing-a-puppy.html>>; RSPCA Australia, The Smart Puppy Buyer's Guide, accessed 15 April 2013, <http://www.rspca.org.au/assets/files/Campaigns/Smart_Puppy_Buyers_Guide.pdf>. See also Western Australian Government, above n 13.

128 Wisch, above n 4, [II.A].

129 See generally Corones, above n 7, 40 [2.20].

Together, these three issues indicate how the practical reality of pet sales may prevent the unsatisfied pet purchaser from establishing the constituent elements of the consumer guarantees. Consumers who lack knowledge, who are impulsive, or who make only general references to their expectations, are in potential legal quagmires. The *caveat emptor* adage retains its significance, despite the apparent comprehensiveness of the *Australian Consumer Law*.

The US pet lemon laws

Compared to what a plaintiff must establish under the *Australian Consumer Law*'s consumer guarantees, the general approach of the US pet lemon laws appears to be simpler. The pet lemon laws tend to define a companion animal as unfit if they display a congenital defect or a contagious or infectious disease, considered by a certified veterinarian to be a serious health concern.¹³⁰ Some States import further requirements: for example, that the defect was known to the breeder at the time of sale,¹³¹ or that the animal most likely contracted the disease before it was sold to the consumer.¹³²

Despite their apparent simplicity, or perhaps as a result of it, the US pet lemon laws seem to be narrower in scope than the *Australian Consumer Law*'s consumer guarantees. First, under the *Australian Consumer Law*, a defect or disease that impairs some uses of a companion animal (breeding from it, or showing it) but not others (keeping the animal purely for companionship) might still found a cause of action under the s 55 guarantee, provided the consumer meets the additional requirements of express or implied disclosure¹³³ and reasonable fitness for purpose.¹³⁴ In contrast, a strict reading of the pet lemon laws closes off a cause of action unless the defect or disease impairs *all* uses of the animal. Second, the *Australian Consumer Law* allows for 'acceptable quality' and 'fitness for purpose' to be defined in

130 Delaware ST TI 6 § 4001; California Health and Safety Code §122050; and Arkansas ST §4-97-105, cited in Wisch, above n 4, [III.D].

131 California Health and Safety Code §122050, cited in Wisch, above n 4, [III.D].

132 New Jersey ST 56:8-92-97, cited in Wisch, above n 4, [III.D].

133 Australian Consumer Law s 55(2).

134 Australian Consumer Law s 55(1).

product-specific ways.¹³⁵ Arguably, this might cover the behavioural defects of a companion animal. The US tends to restrict causes of action to physiological defects.¹³⁶

In sum, these observations challenge the hypothesis presented at the start of this paper. It is not the targeted US pet lemon laws but rather the non-targeted *Australian Consumer Law* that is more sophisticated in regulating the purchase of companion animals: the *Australian Consumer Law* allows unsatisfied purchasers to tap into broader causes of action and it evaluates defects with reference to how the purchaser would have used their animal.

PART II

Remedies

To focus solely on causes of action, however, might skew this paper's conclusions. A more exacting test of this paper's hypothesis ought also to consider the remedies available under each legislative scheme.

The Australian Consumer Law

Despite the breadth of the s 54 and s 55 guarantees, the Australian consumer still faces significant evidentiary burdens in obtaining redress. One such burden is the need to distinguish between major and minor failures of a good.

A failure is 'major' if the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure.¹³⁷ A failure is also 'major' if it cannot easily, and within a reasonable time, be fixed.¹³⁸ Only major failures entitle the consumer to choose the remedy: usually, this is to reject the goods within a 'reasonable'

135 Australian Consumer Law ss 54(2)(a), 54(3)(a), 54(3)(e) and 55(1).

136 Wagman, Waisman and Fraisch, above n 5, 587.

137 Australian Consumer Law s 260(a).

138 Australian Consumer Law ss 260(c) and 260(d).

time frame and obtain a refund.¹³⁹

If the failure of the good is not major, then it is ‘minor’; and the only remedies available are repair or replacement.¹⁴⁰ For minor defects, the choice of remedy is with the supplier. ‘Repair’ in the context of pet sales will include reasonable veterinary fees, although it is the supplier (not the purchaser) who selects the veterinarian. Examples of minor defects in companion animals might include irritations, mild cataracts or urinary tract infections.¹⁴¹

The optimum remedial outcome for the unsatisfied pet purchaser therefore requires him or her to prove, firstly, that the defect in question is major. Second, he/she must argue that physiological or behavioural defects take longer to manifest, such that what constitutes a ‘reasonable’ rejection period in the context of pet sales ought to be longer than what constitutes a ‘reasonable’ rejection period for most other consumer goods.

Despite these evidentiary burdens, the *Australian Consumer Law* retains one significant remedial advantage over the US pet lemon laws: the *Australian Consumer Law* will allow damages for reasonably foreseeable consequential loss.¹⁴² Corones suggests that such damages may even extend to distress and inconvenience, provided the requisite statutory elements are made out.¹⁴³ Either way, the availability of consequential damages appears apt to address the financial disadvantage which accrues to unsatisfied pet owners who elect to nurse a defective (but much loved) new pet back to health.

The US pet lemon laws

139 Stephen Corones and Philip H Clarke, *Australian Consumer Law* (Thomson Reuters Lawbook Company, 4th ed, 2011) 474 [13.70].

140 *Ibid.*

141 See Western Australian Government, above n 13, [6]; Victorian Government, Department of Primary Industries, Code of Practice for the Responsible Breeding of Animals with Heritable Defects That Cause Disease (27 September 2010), accessed 14 April 2013 <<http://www.dpi.vic.gov.au/pets/about-pets/legislation-and-regulation/breeding-of-animals-with-heritable-defects>>.

142 *Australian Consumer Law* s 259(4); see also Corones and Clarke, above n 43, 475 [13.70].

143 Corones, above n 7, 647 [15.95].

The US pet lemon laws do not distinguish between major and minor failures. Instead, they tend to offer unsatisfied pet purchasers three legal remedies: (1) the purchaser can return the pet and obtain a refund; or (2) return the pet and exchange them for another; or (3) keep the pet and recoup reasonable costs for their veterinary treatment.¹⁴⁴ That said, there are some interesting jurisdictional differences. In California, if an owner elects to keep a defective pet, the owner may seek reimbursement for reasonable veterinarian fees up to 150 per cent of the original purchase price of the animal.¹⁴⁵ Most other States cap reimbursement at 100 per cent.¹⁴⁶ In Arkansas, the consumer is not given the option to return the unfit pet,¹⁴⁷ an anomaly Wisch attributes to ‘the incongruity in returning an animal that ... is defective and cannot again be sold’.¹⁴⁸

Comparing remedies available under the pet lemon laws to remedies available under the *Australian Consumer Law*, neither approach clearly outshines the other.

The US pet lemon laws suffer for the time frames they impose: these are generally stricter than under the *Australian Consumer Law*, allowing a consumer only seven to 15 days to return a sick or diseased animal.¹⁴⁹ Such a time frame captures companion animals whose illnesses appear shortly after purchase, but may not capture cases of cancer,¹⁵⁰ Parvovirus¹⁵¹ or defects that manifest in adolescence, such as hip dysplasia¹⁵². Uniquely, Florida and Delaware permit return periods of up to one year and up to two years, respectively, where the defect is congenital.¹⁵³ The *Australian*

144 See, eg, Vermont ST T.20 § 4302; Arizona ST §44-1799.05; and New York GBS Article 35-D § 753, cited in Wisch, above n 4, [III.E]. See also Joy Kenyon Allen, ‘Lemon Law’ Protects Buyer From Perils of Puppy Love’, Orlando Sentinel (Florida) 6 June 2004.

145 California Health and Safety Code §122100, cited in Wisch, above n 4, [III.E].

146 See, eg, Vermont ST T.20 § 4302; Arizona ST §44-1799.05; and New York GBS Article 35-D § 753, cited in Wisch, above n 4, [III.E].

147 Arkansas ST §4-97-105, cited in Wisch, above n 4, [III.E].

148 Wisch, above n 4, [III.E].

149 Ibid, [III.C].

150 See, eg, *State v Lazarus*, 633 So 2d (Louisiana App 1st Cir 1993), cited in Parent, above n 4, 252, 269.

151 See, eg, *Roberts v Melendez*, 6 Misc 3d 1015, 2005 WL 192353 (NYC Civ Ct, 2005), cited in David S Favre, *Animal Law: Welfare, Interests, and Rights* (Aspen Publishers, 2008), 58-61.

152 See, eg, *Cahill v Blume*, 801 NYS 2d 776 (table), 2005 WL 1422133 (NYC Civ Ct, 2005), cited in Parent, above n 4, 272.

153 Joy Kenyon Allen, above n 48. See also Florida ST 828.29 and Delaware ST TI 6 § 4001-4009, cited in Wisch, above n 4, [III.C].

Consumer Law sidesteps this problem by requiring rejection within a ‘reasonable’ time frame, determined by reference to the type and likely use of the goods.¹⁵⁴

On the other hand, the *Australian Consumer Law* suffers for its gradation of minor and major failures. By permitting an exchange for ‘minor’ defects, the *Australian Consumer Law* insulates both pet owners and pet suppliers from the reality of pet ownership.¹⁵⁵ Many companion animals experience ‘minor’ health problems during their lives, for which their carer must accept financial responsibility. In contrast, the US remedies are available only for a ‘serious’ (read ‘major’) health concern.¹⁵⁶ In defence of the *Australian Consumer Law*, a desire to develop responsible ownership qualities in pet owners was unlikely to have motivated its drafters. Nevertheless, by the measure of remedies, the targeted US pet lemon laws are probably more sophisticated than the non-targeted *Australian Consumer Law*. This conclusion affirms the hypothesis presented at the start of this paper.

PART III

Policy justifications

The third measure of ‘sophistication’ identified at the outset of this paper is the policy that informs and underpins the legislation. What were the legislators’ motivations in Australia and the US in enacting these provisions, and to what extent were the legislators considering the interests of companion animals?

The policy justification of the *Australian Consumer Law* is fairly transparent: it seeks to enhance the welfare of Australians by promoting competition, fair

¹⁵⁴ Australian Consumer Law ss 262(a)-(b). See also Corones, above n 7, 641 [15.65].

¹⁵⁵ See Leslie-Anne Petrie, ‘Companion Animals: Valuation and Treatment in Human Society’ in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (Federation Press, 2009) 57, 59.

¹⁵⁶ See, eg, Delaware ST TI 6 § 4001; California Health and Safety Code §122050; and Arkansas ST §4-97-105, cited in Wisch, above n 4, [III.D].

trading and consumer protection.¹⁵⁷ The *Australian Consumer Law* definition of ‘goods’ extends to include animals and fish, only because the old *Trade Practices Act* definition did.¹⁵⁸ The *Trade Practices Act* was – and the *Australian Consumer Law* is – startlingly silent on its operation in relation to animals, and the case law in this field is scarce.¹⁵⁹ As a result, the *Australian Consumer Law* struggles to escape the criticism that its consideration of the interests of companion animals is, at best, slight.

The policy justifications of the targeted US pet lemon laws, on the other hand, purport to explicitly safeguard the interests of companion animals. Parent’s commentary provides an example. On Parent’s analysis, product liability law (of which pet lemon laws are an example) is preferable to general consumer protection law because it is more likely to encourage a pet seller to fully disclose the character of an animal, the propensities of its breed, and its medical history.¹⁶⁰ Parent concludes that product liability theory can, in this way, be of equal benefit to animals and owners alike.¹⁶¹

The essence of Parent’s argument seems to be that product liability theory will induce the pet-selling industry to self-regulate.¹⁶² While it is one thing to say that pet lemon laws can positively influence a seller’s levels of disclosure, surely it is quite another to conclude that pet lemon laws benefit animals and owners *equally*.¹⁶³ For the following reasons, the policy justifications underpinning the targeted pet lemon laws should be approached with some caution.

First, there is the convincing counter-argument that pet lemon laws simply entrench the view that a pet is a disposable commodity.¹⁶⁴ This criticism seems pertinent insofar as the pet lemon laws ignore the question of what

157 See Competition and Consumer Act 2010 (Cth), s 2.

158 Trade Practices Act 1974 s 4.

159 See, eg, *Bentley v Wright* [1997] 2 VR 175.

160 Parent, above n 4, 275.

161 *Ibid*, 243.

162 See generally Andy Ho, ‘Puppy Lemon Law’ Has Its Limits,’ *The Straits Times* (Singapore), 28 April 2011.

163 Parent, above n 4, 243 (emphasis added).

164 Ho, above n 66.

happens to a defective pet that is returned. With the purchaser absolved of responsibility for its ongoing maintenance, the defective pet is (depending on its defect) more likely to be euthanased than re-sold, since any attempt to re-sell the pet only exposes the seller to the risk of the animal being returned to him or her once again.¹⁶⁵ The ‘fungibility’¹⁶⁶ of defective companion animals within the pet lemon law framework therefore rests uneasily with the hypothesis that targeted legislation specifically regulating the purchase of pets is more sophisticated than non-targeted, general consumer protection law.

Second, the pet lemon laws do not cope well with fragmented supply chains. Certainly the pet lemon laws capture intermediary suppliers, such as pet shops and online dealers. But primary suppliers, such as commercial-scale breeders or puppy mills, may be beyond the reach of the legislation, at least in the absence of a direct transaction between consumer and breeder.¹⁶⁷ (The same criticism can be made of the *Australian Consumer Law*). To justify pet lemon laws as directed towards improving the welfare standards and breeding practices of unscrupulous commercial-scale breeders is to risk overstating the laws’ scope.¹⁶⁸ For this reason, there appears to be merit in Griggs’ observation that consumer protection law (be it targeted or non-targeted) is an ‘imperfect’ method to improve animal welfare, at least where it is unaccompanied by consumer education and a change in consumer sentiment regarding the status of animals.¹⁶⁹ Western legal systems burdened by the ‘paradigm’¹⁷⁰ of pets as property may yet hope for a ‘silver

165 Cf Arkansas ST §4-97-105, cited in Wisch, above n 4, [III.E].

166 Petric, above n 59, 57, 59.

167 Wisch, above n 4, [III].

168 Adam J Fumarola, ‘With Best Friends Like Us, Who Needs Enemies? The Phenomenon of the Puppy Mill and the Failure of Legal Regimes to Manage It and the Positive Prospects of Animal Rights’ (1999) 6 Buffalo Environmental Law Journal 253, 282, cited in Wisch, above n 4, [VI]. See also PetRescue Australia, Australian Puppy Mills, accessed 15 April 2013 <<http://www.wheredopuppiescomefrom.com.au/australian-puppy-mills/>>.

169 Lynden Griggs, ‘A Consumer Based Regulatory Pyramid to Improve Animal Welfare’ (2009) 3 Australian Animal Protection Law Journal 73, 89; see also Wagman, Waisman and Fraisch, above n 5, 534.

170 Gary Francione, *Animals, Property and the Law* (Temple University Press, 2005) 24, cited in Petric, above n 59, 58-59. See also Bruce, above n 2, 76 [3.4].

bullet'.¹⁷¹ The lesson here is that the targeted US pet lemon laws appear to be no more sophisticated in promoting the interests of animals than the non-targeted Australian approach of general consumer protection.

CONCLUSION

This paper hypothesised that the targeted US pet lemon laws are more sophisticated than the non-targeted *Australian Consumer Law* as a means of regulating pet purchases. This initial hypothesis now seems too categorical. The non-targeted *Australian Consumer Law*, rather than the targeted pet lemon laws, appears to confer the more sophisticated causes of action when a companion animal reveals a defect. However, the pet lemon laws still provide the more sophisticated remedies. Policy-wise, neither the *Australian Consumer Law* nor the pet lemon laws appears to significantly advance the interests of companion animals, despite the latter's explicit claim to do so.

Jurisdictional differences among the pet lemon laws have complicated this comparison, which is why this paper sought to pull out the common features of the pet lemon laws and distinguish those US States with anomalous provisions. Likewise, the relative youth of the *Australian Consumer Law* may explain the lack of case law interpreting its provisions; perhaps the future will spawn more cases involving the operation of the new consumer guarantees with respect to companion animals.

The importance of looking to the future should not be underestimated. A sense of comfort with the status quo classification of companion animals as property permeates the Australian and US legislative approaches to pet purchases.¹⁷² This reality suggests that perhaps the potential for change lies not outside the system, but within it.¹⁷³ If companion animals are to

171 Jonathan R Lovvorn, 'Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform' (2005-2006) 12 *Animal Law* 133, 147.

172 Bruce, above n 2, 77 [3.4].

173 Lovvorn, above n 75, 147; see also Wagman, Waisman and Fraisch, above n 5, 51.

continue to exist as ‘property’ for the foreseeable future, the immediate goal ought not to be to dismantle this classification, but rather to make considerations about the welfare of companion animals less ‘invisible’¹⁷⁴ within it. Such a goal may not be radical.¹⁷⁵ But it is somewhere to start.

174 See generally Siobhan O’Sullivan, ‘Australasian Animal Protection Laws and the Challenge of Equal Consideration’ in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (Federation Press, 2009) 108, 116, 118.

175 Cao, above n 1, 82-83 [3.190].

Is It Really Vegan or Vegetarian? A Comparative Analysis of the Regulatory Frameworks for Food Labelling in Australia, the U.K. and the European Union

*By Melanie Cole**

Consumer demand for animal products is at an all time high.¹⁷⁶ This increased demand has led to the development of an intensive farming practice known as factory farming,¹⁷⁷ where nonhuman animals are treated more like machines,¹⁷⁸ than sentient, living beings. Although every State and Territory has enacted laws designed to protect animals, these statutes offer very limited protection to farm animals.¹⁷⁹

* Recently completed LLB (Hons) at James Cook University. The author would like to thank Dominique Thiriet and Dr Tom Middleton for their invaluable advice.

176 Angela Corcombe, *Ethical Eating: How to Make Food Choices That Won't Cost the Earth* (Penguin Books, 2008) 12.

177 Katrina Sharman, 'Farm Animals and Welfare Law: An Unhappy Union' in Peter Sankoff and Steven White in *Animal Law in Australasia* (Federation Press, 2009) 35, 37.

178 Peter Singer, *Animal Liberation* (HarperCollins, 2009) 97.

179 Barristers Animal Welfare Panel, Publications, Submission to Attorney-General to Refer Animal Welfare Laws to ALRC (3 Sept. 2008) <<http://www.bawp.org.au/publications>>; Katrina Sharman, 'Farm Animals and Welfare Law: An Unhappy Union' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (Federation Press, 2009) 35, 51; Deborah Cao, Katrina Sharman and Steven White, *Animal Law in Australia and New Zealand* (Lawbook Co. 2010) 185; Malcolm Caulfield, *Handbook of Australian Animal Cruelty Law* (Animals Australia, 2008) 51; for further information regarding the limited nature of protection for farm animals please see the aforementioned books. It should be noted that compliance with Model Codes of Practice (which can be found at Australian Government, Department of Agriculture, Fisheries and Forestry, *Australian Animal Welfare Standards and Guidelines* (Model Codes of Practice) <http://www.daff.gov.au/animal-plant-health/welfare/model_code_of_practice_for_the_welfare_of_animals>) will constitute a defence or exemption to cruelty in nearly all states: see for example: Prevention of Cruelty to Animals Act 1986 (Vic) ss6-7; Prevention of Cruelty to Animals Act 1985 (SA) s43; Animal Welfare Act 2002 (WA) s25 and Animal Welfare (General) Regulations 2003 (WA) regulation 6; Animal Care and Protection Act 2001 (Qld) ss13-16, 40; Animal Welfare Act 1992 (ACT) ss20-21, 24; Animal Welfare Act 2000 (NT) ss24-25, 79(i)(a); Prevention of Cruelty to Animals Act 1979 (NSW) ss34A(1) and (3), Prevention of Cruelty to Animals (General) Regulations 2006 (NSW) regulation 19 and schedule 21.

The reality is that current animal protection laws are failing farm animals.¹⁸⁰ In the absence of legislation that effectively protects them from suffering, an alternative for people who refuse to contribute to the plight of these animals is to change diet and lifestyle. This may include adopting a vegetarian or vegan diet.

A vegetarian is 'a person who eats foods which are free from any ingredients derived from the slaughter of animals (including chicken and fish).'¹⁸¹ A vegan may be defined as:

*someone who tries to live without exploiting animals, for the benefit of animals, people and the planet. Vegans eat a plant-based diet, with nothing coming from animals - no meat, milk, eggs or honey, for example. A vegan lifestyle also avoids leather, wool, silk and other animal products for clothing or any other purpose.*¹⁸²

Vegan and vegetarian diets are gaining popularity.¹⁸³ In response to a survey commissioned by the Vegetarian/Vegan Society of Queensland, 5%

180 Malcolm Caulfield, Handbook of Australian Animal Cruelty Law (Animals Australia, 2008) 11.

181 Who We Are and What We Do (5.2. 2007) Australian Vegetarian Society <<http://www.veg-soc.org/cms/html/modules.php?name=Content&pa=showpage&pid=41>>.

182 Why Vegan? The Vegan Society <<http://www.vegansociety.com/become-a-vegan/why.aspx>> Please note that although the wider definition of vegan also includes avoidance of leather, wool, silk etc for clothing and other purposes, this article is limited to the discussion of food and its labelling only.

183 Voiceless, From Label to Liable: Scams, Scandals and Secrecy-Lifting the Veil on Animal Derived Food Product Labelling in Australia, May 2007, 12. There are also a number of other initiatives aimed at reducing consumption of animal products for example, International campaigns such as Meatless/ Meat Free Mondays have also emerged in an attempt to encourage people to go meat free at least once a week (Who We Are (2011) Meatless Mondays Australia.<<http://meatlessmondays-australia.com/about-meatless-mondays-australia/>>) Furthermore, the benefits of a plant based diet are being touted by a growing number of advocates including former U.S President Bill Clinton (Angela Haupt, 'Me, Give Up Meat? Vegan Diets Surging in Popularity', U.S News: Health (online), 24 July 2012 <<http://health.usnews.com/health-news/articles/2012/07/24/me-give-up-meat-vegan-diets-surging-in-popularity>>), cancer survivor Kris Carr (Kris Carr, Crazy Sexy Diet (Globe Pequot Press, 2011) 11) and actress Emily Deschanel (Sarah Miller, 'Interview With Emily Deschanel', Women's Health (online), 21 December 2009 <<http://www.womenshealthmag.com/life/emily-deschanel-talks-to-womens-health>>). Even burger chain McDonald's have announced that they will open two vegetarian only restaurants in India this year (Tom Rowley, 'McDonald's Launches First Vegetarian Restaurants to Target Indian Pilgrims', The Telegraph (online), 4 September 2012 <<http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/9520047/McDonalds-launches-first-vegetarian-restaurants-to-target-Indian-pilgrims.html>>).

of people described themselves as vegetarian and one per cent, vegan.¹⁸⁴ In addition to opposing animal exploitation, people may choose a vegan or vegetarian diet for health, religious and/or environmental reasons. There is abundant evidence that a vegan or vegetarian diet may be healthier than the standard diet,¹⁸⁵ and that eliminating or reducing animal product consumption has environmental benefits.¹⁸⁶ Some religions prescribe or promote a vegan/vegetarian diet.¹⁸⁷

Although avoiding animal products to follow a vegan or vegetarian diet is relatively simple when consuming a whole foods diet, devoid of processed food, it becomes more difficult when packaged foodstuffs are consumed. Because a significant amount of processed food is consumed in Australia,¹⁸⁸ an important issue arises as what is in the foodstuff and how it was produced. This may be assisted by labelling, the purpose of which is to inform consumers. But does existing labelling protect vegans and vegetarians from unwittingly consuming animal products in accordance with their ethical, health or environmental concerns? In practice, avoiding hidden animal ingredients in food can be quite difficult.

For example, bread may contain duck feathers, and this does not have to be written on the label.¹⁸⁹ Emulsifiers such as 471 and 481 may be animal or

184 The Vegetarian/ Vegan Society of Queensland Incorporated (VVSQ), 'A Pound of Flesh' (February 2010) <<http://www.scribd.com/doc/26880337/APF-VVSQ>> However, it should be noted that when questioned further it was discovered that only 2% actually ate a vegetarian diet and only 1 of the 1202 people randomly selected ate a vegan diet.

185 A vegan or vegetarian diet may reduce the 'risks of developing chronic diseases such as obesity, heart disease, colorectal cancer and type 2 diabetes' (GE Fraser, 'Vegetarian Diets: What Do We Know of Their Effects on Common Chronic Diseases?' (2009) 89 Am J Clin Nutr 1607S-1612S cited in Sue Radd and Kate A Marsh, 'Practical Tips for Preparing Healthy and Delicious Plant- Based Meals' (4 June 2012) MJA Open 1 Suppl 2, 41.)

For a comprehensive discussion on the benefits of a plant based diet please also see, T. Colin Campbell and Thomas M. Campbell, *The China Study: Startling Implications for Diet, Weight Loss and Long Term Health* (BenBella Books, 2006).

186 According to the United Nations, the livestock sector is 'one of the top two or three most significant contributors to the most serious environmental problems' (Food and Agriculture Organisation of the United Nations, *Livestock Long Shadow: Environmental Issues and Options*, 2006, xx).

187 For example Jainism, Hinduism, Buddhism, Seventh Day Adventist.

188 Paola Espinal and Christine Innes-Hughes, *Apparent Consumption of Selected Foods and Household Food Expenditure* (PANORG, 2010) 14 <http://sydney.edu.au/medicine/public-health/prevention-research/news/reports/Monit_update_apparentconsumption_161210.pdf>.

189 See Part II for further explanation.

plant derived¹⁹⁰ and, unless stated on the packaging, the consumer has no immediate means of knowing from which source they are derived. Palm oil may be listed under the generic term ‘vegetable oil’.¹⁹¹ (Palm oil is an ethical concern because, when not sourced in a sustainable manner, it can have devastating effects on the surrounding people and environment,¹⁹² particularly endangered species including the Sumatran tiger, the Sumatran Orangutan and Bornean Orangutan.)¹⁹³ Whilst this may be acceptable for the average consumer, it is not for people who are trying to avoid animal products, and products that have caused animal suffering, even if present in minute quantities.

Given the importance for vegans and vegetarians of knowing the precise composition of the foodstuffs they buy, they require adequate labelling to protect them from unwittingly eating animal products if vegan/vegetarian labelling is not present and the ingredients list is not sufficiently informative, or if such labelling exists but is misleading. Adequate labelling is also important to protect producers of ethical food products from unfair advantage by others. This has a flow on effect to the consumer.

This article analyses the regulatory framework for vegan and vegetarian food labelling in Australia to see whether it provides adequate protection to vegan and vegetarian consumers and producers of vegan and vegetarian products. Part I focuses on the existing regulatory framework. The *Australian Consumer Law* (formerly *Trade Practices Act 1974* (Cth)) is examined with particular reference to its application to ‘humane’ labelling claims. These types of cases are arguably closest in nature to vegan and vegetarian food, as they fall under the wider ambit of animal welfare concerns and these types of products are generally purchased by ethical consumers seeking to ‘advance the cause of animal welfare.’¹⁹⁴ The *Australia New Zealand Food Standards Code* is also considered. Part II examines the role of

190 Animal-Derived Food Additives (September 2007) Vegetarian Victoria <<http://www.vegetarianvictoria.org.au/healthy-living/animal-derived-food-additives.html>>.

191 Food Standards Code Australia and New Zealand Standard 1.2.4 – Labelling of Ingredients (11 Oct 2012) cl 4(c).

192 What is Palm Oil? WWF <http://www.wwf.org.au/our_work/saving_the_natural_world/forests/palm_oil/>.

193 Charlotte Louise Richardson, ‘Deforestation Due to Palm Oil Plantations in Indonesia: Towards the Sustainable Production of Palm Oil’ (2010) 11 <<http://www.palmoilactiongroup.org.au/downloads.html>>.

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

self-regulation and independent third party certifiers with regard to vegan and vegetarian food products in Australia. In Part III, the labelling frameworks of the United Kingdom (UK) and European Union (EU) are examined. The UK and EU have been chosen for comparison because the UK has a similar legal system to Australia's and both the UK and EU have trade links with Australia, making them ideal jurisdictions for comparison in relation to vegan and vegetarian food labelling. Also, the EU is often seen as being a world leader in animal welfare protection,¹⁹⁵ having banned veal crates, battery cages for layer hens and sow stalls.¹⁹⁶ Part IV makes some suggestions for reform.

I THE AUSTRALIAN REGULATORY FRAMEWORK FOR VEGAN AND VEGETARIAN FOOD LABELLING

There is no legislation specifically regulating labelling of food products for the benefit of consumers who wish to avoid unwittingly consuming animal products.

A review panel led by Dr Neal Blewitt AC undertook a comprehensive examination of food labelling law and policy, following a decision by the Council of Australian Governments (COAG) and the Australia and New Zealand Food Regulation Ministerial Council (Ministerial Council) in 2009. The final report 'Labelling Logic: Review of Food Labelling Law and Policy' was tabled in 2011.¹⁹⁷ It recommended that 'generalised consumer values issues'¹⁹⁸ were best left to 'market responses to consumer demand'¹⁹⁹ and consumer protection laws.²⁰⁰ In its Response to the Recommendations

195 C Sunstein, 'The Rights of Animals' (2003) 70 University of Chicago Law Review 387, 392-393 cited in Peter Stevenson, 'European and International Legislation: A Way Forward for the Protection of Farm Animals?' in Peter Sankoff & Steven White (eds) *Animal Law in Australasia* (Federation Press, 2009) 307, 307.

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

197 Labelling Logic: Review of Food Labelling Law and Policy (2011) <<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/Content/home>>.

198 Ibid 97.

199 Ibid.

200 Ibid.

of Labelling Logic: Review of Food Labelling Law and Policy,²⁰¹ the Commonwealth Government agreed that this was the most appropriate method of dealing with these issues.²⁰² Examples of generalised consumer values issues identified in the report included concerns such as animal welfare, human rights and environmental sustainability.²⁰³ As veganism and vegetarianism are motivated by one or more of these issues, it is necessary to examine whether and, if so, how the Australian Consumer Law is capable of protecting the interests of vegetarians and vegans, and to analyse the suitability of using the Australia New Zealand Food Standards Code ('the Code') for this purpose.

A *The Australian Consumer Law*

The *Australian Consumer Law* ('ACL'), found in schedule 2 of the *Competition and Consumer Act 2010* (Cth) ('CCA'), formerly the *Trade Practices Act 1974* (Cth) ('TPA'), consolidated Commonwealth, State and Territory legislation to create a single, unified consumer law.²⁰⁴ Unlike the TPA, the ACL applies broadly to natural persons and corporations,²⁰⁵ and covers a variety of areas including product safety,²⁰⁶ unfair contracts²⁰⁷ and consumer guarantees.²⁰⁸

Until the commencement of the ACL on January 1, 2011, the relevant provisions with regard to food labelling claims were s52, s53(2) and s55 TPA. The corresponding sections in the ACL are s18(1) misleading or deceptive conduct, s29(1) false or misleading representations about goods or

201 Response to the Recommendations of Labelling Logic: Review of Food Labelling Law and Policy (2011) <[http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/ADC308D3982EBB24CA2576D20078EB41/\\$File/FoFR%20response%20to%20the%20Food%20Labelling%20Law%20and%20Policy%20Review%209%20December%202011.pdf](http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/ADC308D3982EBB24CA2576D20078EB41/$File/FoFR%20response%20to%20the%20Food%20Labelling%20Law%20and%20Policy%20Review%209%20December%202011.pdf)>.

202 Ibid 11.

203 Labelling Logic, above n 22, 97.

204 Ven. Alex Bruce, 'Labelling Illogic? Food Animal Welfare and the Australian Consumer Law [2]' (2012) 8 *Australian Animal Protection Law Journal* 6, 9-10; SG Corones, *The Australian Consumer Law* (Lawbook Co, 2011) 37.

205 Clive Turner, *Australian Commercial Law* (Lawbook Co. 2011) 312.

206 ACL pt 3-3

207 Ibid pt 2-3.

208 Ibid pt 3-2, div 1.

services and s33 misleading conduct as to the nature etc. of goods. With the exception of 'person' instead of 'corporation' the wording of s18 ACL mirrors that of s52 TPA. So most case authorities interpreting s52 will remain applicable to the ACL.²⁰⁹

The Australian Competition and Consumer Commission ('ACCC') rates food and food product labelling claims highly on the consumer protection agenda.²¹⁰ Commissioner Sarah Court has said that credence claims are, 'a new priority area, particularly those in the food industry with the potential to have a significant impact on consumers.'²¹¹ As a result there has been an increasing number of court proceedings and investigations relating to 'humane' animal welfare claims in recent years,²¹² in addition to generally misleading food and drink labelling.²¹³

Animal welfare claims are used by suppliers to try to influence consumers²¹⁴ who are 'hoping to advance the cause of animal welfare'²¹⁵ by, for example, purchasing free range eggs²¹⁶ or meat from chickens who roam freely.²¹⁷ In

209 Eileen Webb, 'Misleading or Deceptive Conduct: The New s52, s18 ACL' (September/October 2011) 106 Precedent 16, 17.

210 ACCC Update Issue 34- Online Version, News Briefs, Accuracy of Olive Oil Claims Tested (2013) <<http://www.accc.gov.au/content/index.phtml/itemId/1064580#toc4>>.

211 Australian Competition and Consumer Commission, 'ACCC Institutes Proceedings Against Luv-a-Duck for False, Misleading and Deceptive Conduct' (Media Release, MR 54/13, 15 March 2013) <<http://www.accc.gov.au/media-release/accc-institutes-proceedings-against-luv-a-duck-for-false-misleading-and-deceptive>>.

212 Australian Competition and Consumer Commission v Bruhn [2012] FCA 959; Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2) [2012] FCA 19; Australian Competition and Consumer Commission v Pepe's Ducks Ltd (2012) (Court Transcript not yet available- Commonwealth Courts Portal #VID470/2012); Australian Competition and Consumer Commission v Luv-a-Duck Pty Ltd (Filed 15 March 2013- Commonwealth Courts Portal #VID200/2013).

213 For example Australian Competition and Consumer Commission v Nudie Foods Australia Pty Ltd [2008] FCA 943; Australian Competition and Consumer Commission v Kingisland Meatworks and Cellars Pty Ltd [2012] FCA 859; Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd [2004] FCA 516;

two infringement notices paid by The Big Olive Company Pty Ltd in relation to misleading 'extra virgin' olive oil claims (May 2012) <<http://www.accc.gov.au/content/index.phtml/itemId/1053067>>; investigation into the potentially deceptive nature of Primo Pork products being labelled 'RSPCA Free Range'.

214 Ven. Alex Bruce, 'Labelling Illogic? Food Animal Welfare and the Australian Consumer Law [1]' (2012) 7 Australian Animal Protection Law Journal 5, 19.

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

216 Bruce, above n 39.

an attempt to satisfy consumer demand,²¹⁸ ‘food animal products accentuating animal welfare will be subject to careful scrutiny under the misleading or deceptive conduct provisions of the ACL.’²¹⁹ "The ACL has suddenly been invested with a significant responsibility."²²⁰

Despite an increase in court proceedings, there is still little Australian case law on ‘humane’ food labelling claims,²²¹ and none on vegan/vegetarian food labelling.²²² Cases involving ‘humane’ claims are considered in greater detail here than other cases involving misleading or deceptive conduct, as they are arguably more applicable to vegan/vegetarian food labelling. ‘Humane’ food cases and vegan/vegetarian labelling issues have animal welfare concerns in common, and involve products generally purchased by ethical consumers.

Marketers who claim falsely that animal products have been raised ‘humanely’ can undercut genuinely ‘humane’ producers of (for example) free-range eggs where operating costs are higher.²²³ Or, "false marketers" may price their products in a similar range to genuine ‘humane’ products in order to obtain a higher profit.²²⁴ A similar situation may arise in relation to vegan/vegetarian food labelling as these products can also attract a premium price. As there is no requirement under the ACL that a complainant be a consumer (as defined in s3 ACL) in order to use the unfair practices provisions (e.g. s18, s29 & s33),²²⁵ producers of genuine vegan/vegetarian products could potentially bring actions against

217 Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2) [2012] FCA 19.

218 Bruce, above 39, 11.

219 Ibid.

220 Ibid 19.

221 Australian Competition and Consumer Commission v G.O Drew Pty Ltd [2007] FCA 1246; Australian Competition and Consumer Commission v C.I & Co. Pty Ltd [2010] FCA 1511; Australian Competition and Consumer Commission v Bruhn [2012] FCA 959; Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2) [2012] FCA 19; Australian Competition and Consumer Commission v Pepe’s Ducks Ltd (2012) (Court Transcript not yet available- Commonwealth Courts Portal #VID470/2012); Australian Competition and Consumer Commission v Luv-a-Duck Pty Ltd (Filed 15 March 2013- Commonwealth Courts Portal #VID200/2013).

222 To the author’s knowledge at time of writing.

223 See for example Australian Competition and Consumer Commission v Bruhn [2012] FCA 959, [17].

224 See for example Australian Competition and Consumer Commission v G.O Drew Pty Ltd [2007] FCA 1246, [21].

225 ACL ss 237, 238.

competitors engaging in misleading or deceptive practices.²²⁶ If successful, such actions would have a positive flow on effect to the consumer.

The remedies that may result from use of the unfair practice provisions- i.e incorrectly labelling a product 'humane' or vegan or vegetarian - will depend upon which section of ACL the respondent is deemed to have breached. Chapter 5 of the ACL includes pecuniary penalties (for breaches of s29 and s33),²²⁷ and injunctions (for breaches of s18, s29 and s33).²²⁸ The effect of civil pecuniary penalties is that they are likely to promote certainty for consumers and businesses.²²⁹ Non-punitive orders²³⁰ are also available, with such remedies as an order prohibiting similar conduct for a specified period,²³¹ establishing an education and training program for employees,²³² or advertising as specified in the order.²³³

It is important to note that there are no punitive consequences for a breach of s18, only non-punitive civil remedies, with the main remedy being a remedial order.²³⁴ In the most serious cases the ACCC may seek a punitive order under s29 or s33 instead,²³⁵ in order to impose punishment, promote personal and general deterrence and send a compliance message.²³⁶ Private litigants, most often competitors, may use s18 to obtain remedies under s243 ACL as their primary concern may be recovering loss or damage actually suffered.²³⁷ It is also relatively easy to prove a breach of s18 as all that has to be shown is that a statement or conduct is 'inconsistent with the truth,'²³⁸

226 ACL s 243.

227 ACL s 224.

228 ACL s 232.

229 Jacqueline Downes, 'The Australian Consumer Law – Is It Really a New Era of Consumer Protection?' (2011) 19 Australian Journal of Competition & Consumer Law 5, 23.

230 ACL s 246.

231 ACL s 246(2)(b).

232 ACL s 246(2)(b)(ii).

233 ACL s 246(2)(d).

234 ACL s 243.

235 SG Corones, *The Australian Consumer Law* (Lawbook Co., 2011) 451.

236 Commonwealth of Australia, *Compliance and Enforcement: How Regulators Enforce the Australian Consumer Law* (2010) 6.

237 Corones, above n 60, 448.

238 *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181, 201.

which the court must determine by using an objective test.²³⁹ However, even if a plaintiff proves it was misled, the court may find there was no breach of s18 if the reason this occurred was due to an erroneous assumption unsupported by fact of law,²⁴⁰ or if a plaintiff did not take reasonable steps to protect its own interests.²⁴¹

Unfortunately, it is as difficult to compensate a vegan or vegetarian consumer who has unwittingly consumed animal products because of misleading labelling, as it is to compensate a purchaser of non-organic eggs that were labelled organic.²⁴² Therefore, it is essential that the ACL act as a sufficient deterrent to prevent this behaviour from occurring in the first place. Case law shows the potential to profit from mislabelling products,²⁴³ so it is essential that the risk of prosecution and the resulting financial loss be higher than the potential gain.²⁴⁴ "A pecuniary penalty that is not sufficiently high enough to dissuade both the contravenor and like-minded people from further contravention will not serve the purpose of the TPA."²⁴⁵

Although the ACL allows for pecuniary penalties of up to \$1.1 million if the person is a body corporate, or \$220,000 if it is not,²⁴⁶ the pecuniary penalties awarded in the 'humane' labelling claims have ranged from \$50,000²⁴⁷ to \$400,000.²⁴⁸ Additional remedies have included varying requirements for

239 Ibid 202.

240 McWilliam's Wines Pty Ltd v McDonald's System of Australia Pty Ltd (1980) 33 ALR 394, 404.

241 Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd [1982] HCA 44; (1982) 149 CLR 191, 199.

242 Gray J stated in Australian Competition and Consumer Commission v G.O Drew Pty Ltd [2007] FCA 1246 at [26], 'it is difficult to assess compensation for someone who has consumed non-organic eggs. Therefore, creating a system providing for consumers to claim loss would be open to abuse.'

243 Australian Competition and Consumer Commission v C.I & Co Pty Ltd [2010] FCA 1511, [14]; Australian Competition and Consumer Commission v Bruhn [2012] FCA 959, [17]; Australian Competition and Consumer Commission v G.O Drew Pty Ltd [2007] FCA 1246, [21].

244 Arie Frieberg, *The Tools of Regulation* (Federation Press, 2010) 270.

245 Australian Competition and Consumer Commission v Bruhn [2012] FCA 959, [47].

246 ACL s 224(3).

247 Australian Competition and Consumer Commission v Bruhn [2012] FCA 959, [60]; Australian Competition and Consumer Commission v C.I & Co. Pty Ltd [2010] FCA 1511, [9].

248 Australian Competition and Consumer Commission v Pepe's Ducks Ltd (2012) (Court Transcript not yet available- Commonwealth Courts Portal #VID470/2012) This information was obtained from Australian Competition and Consumer Commission, 'Pepe's Ducks to

advertising and injunctions restraining respondents from repeating the behaviour.²⁴⁹ It remains questionable whether the ACL really acts as a sufficient deterrent.²⁵⁰

Although there are no precedents under the ACL/TPA relevant to vegan/vegetarian labelling, ‘humane’ cases provide an indication of the protection the Act can provide, and its limitations.

B *Australia New Zealand Food Standards Code*

Another regulatory instrument relevant to vegan/vegetarian food labelling is the *Australia New Zealand Food Standards Code* (‘the Code’). Food Standards Australia New Zealand (FSANZ) was established by the *Food Standards Australia New Zealand Act 1991* (Cth),²⁵¹ and is responsible for the development of the Code. The Code's main objective is public health and safety.²⁵² Its enforcement is the responsibility of the States and Territories.²⁵³

The Code requires labelling of all ingredients contained in a food product²⁵⁴ in descending order of weight,²⁵⁵ with some exceptions.²⁵⁶ There are mandatory warning and advisory statements and declarations that must be made in relation to certain foods or foods containing certain substances.²⁵⁷ For example if a product contains royal jelly the label must contain a statement warning that, ‘this product contains royal jelly which has been

Pay \$400,000 arising from false, misleading and deceptive conduct’ (Media Release, MR 274/12, 19 December 2012) <<http://www.accc.gov.au/media-release/pepes-ducks-to-pay-400000-arising-from-false-misleading-and-deceptive-conduct>>

249 Australian Competition and Consumer Commission v G.O Drew Pty Ltd [2007] FCA 1246, [3], [4].

250 See for example, Australian Competition and Consumer Commission v G.O Drew Pty Ltd [2007] FCA 1246, [14] and [9].

251 Section 12.

252 See for example Food Standards Australia New Zealand Act 1991 (Cth) s 3; Food Standards Australia New Zealand, About FSANZ (25 January 2013) <<http://www.foodstandards.gov.au/scienceandeducation/aboutfsanz/>>.

253 Australia New Zealand Food Standards Code (22.2.2013) <<http://www.foodstandards.gov.au/foodstandards/foodstandardscode.cfm>>.

254 Food Standards Code Australia and New Zealand Standard 1.2.4 – Labelling of Ingredients (11 Oct 2012) cl 3.

255 Ibid cl 5.

256 Ibid cl 3.

257 Food Standards Code Australia and New Zealand Standard 1.2.3 – Mandatory Warning and Advisory Statements and Declarations (11 July 2011).

reported to cause severe allergic reactions and in rare cases, fatalities, especially in asthma and allergy sufferers.²⁵⁸ Other allergens that must be declared include sulphites in concentrations of 10mg/kg or more, cereals containing gluten, crustacean, egg, fish and fish products (except isinglass), milk, peanuts, sesame seeds, soybeans, and tree nuts (other than coconut).²⁵⁹

Although vegetarians and vegans are afforded some protection under the Code because it requires animal-derived allergens, such as fish, dairy, eggs and royal jelly, to be listed on foods owing to safety concerns, this author contends that the list of allergens scope should be widened to include meat. This would protect allergic individuals, and would be consistent with the public health and safety purpose of the Code.²⁶⁰ Mounting evidence suggests red meat is an allergen.²⁶¹ A potential cause of meat allergy is tick bite.²⁶² Reactions can be severe and may include tongue swelling, throat restriction and/or shortness of breath.²⁶³ The potential for serious consequences arising from a susceptible individual unwittingly ingesting meat appears to be a compelling reason for adding it to the list of potential allergens.

Apart from the abovementioned allergens, the Code affords little protection to vegetarian and vegan consumers. This may be because those issues which are not deemed a health and safety risk, are not a priority.²⁶⁴ The Food Labelling Hierarchy in *Labelling Logic* lists food safety as the most

258 Ibid cl 3(1).

259 Ibid cl 4.

260 See for example Food Standards Australia New Zealand Act 1991 (Cth) s 3; Food Standards Australia New Zealand, About FSANZ (25 January 2013) <<http://www.foodstandards.gov.au/scienceandeducation/aboutfsanz/>>.

261 Australasian Society of Clinical Immunology and Allergy (ASCIA) Tick Allergy (January 2010) <<http://www.allergy.org.au/patients/insect-allergy-bites-and-stings/tick-allergy>>; Sheryl A Van Nunen, Kate S O'Connor, Lesley R Clarke, Richard X Boyle and Suran L Fernando, 'An Association Between Tick Bite Reactions and Red Meat Allergy in Humans' (2009) 190 (9) Med J Aust 510, 510.

262 Australasian Society of Clinical Immunology and Allergy (ASCIA) Tick Allergy (Jan.2010) <<http://www.allergy.org.au/patients/insect-allergy-bites-and-stings/tick-allergy>>

263 Sheryl A Van Nunen, Kate S O'Connor, Lesley R Clarke, Richard X Boyle and Suran L Fernando, 'An Association Between Tick Bite Reactions and Red Meat Allergy in Humans' (2009) 190 (9) Med J Aust 510, 510.

264 Bruce, above n 39, 10.

important concern, followed by preventative health, new technologies and lastly consumer values issues.²⁶⁵ Listing meat products in the Code would benefit vegan and vegetarian consumers who may try to avoid animal products for reasons of allergies or health, as well as for ethical or environmental reasons.

In 2003, FSANZ received an application for exemption from the requirement to declare isinglass (fish bladder) used in the production of beer and wine.²⁶⁶ The FSANZ approved the application on the basis that scientific testing concluded that isinglass used in the fining process for beer and wine did not pose a health risk for fish allergic individuals.²⁶⁷ Submissions were also received opposing the change, due to concern about the impact on vegetarian and vegan consumers. However, FSANZ decided these concerns were irrelevant as they went beyond the scope of the application.²⁶⁸ One reason provided was that manufacturers have the option of providing information as to the suitability of a product for vegans and vegetarians voluntarily in order to satisfy customer demands, and should they mislead consumers in this regard the breach would be covered by consumer protection laws.²⁶⁹ FSANZ also suggested that where information was not provided on the labelling, vegan and vegetarian consumers could contact the supplier to ascertain whether the product was vegan or vegetarian suitable,²⁷⁰ or refer to information provided on websites run by vegan and vegetarian advocacy groups.²⁷¹ This seems to provide an unnecessary burden on advocacy groups to not only provide information as to the suitability of drink and food products, but also to ensure that that information is current. The FSANZ suggestions are also impractical and unreasonable in requiring consumers to either make inquiries prior to

265 Fig.3: Food Labelling Hierarchy, Labelling Logic: Review of Food Labelling Law and Policy (2011) 41 <<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/Content/home>>.

266 Food Standards Australia New Zealand, Application A490 – Exemption of Allergen Declaration for Isinglass (6 January 2003).

267 Food Standards Australia New Zealand, Final Assessment Report: Application A490- Exemption of Allergen Declaration for Isinglass (20 March 2009) 29.

268 Ibid 23.

269 Ibid.

270 Ibid 24.

271 Ibid.

shopping, or to phone a manufacturer while standing in the supermarket to ascertain the suitability of the selected product.

FSANZ rejected an application to have all packaged food not clearly being sold as animal products labelled 'suitable for vegetarians' or 'not suitable for vegetarians.'²⁷² The applicant was seeking the amendment so vegetarian consumers could ascertain whether a food was suitable for them, on the basis of 'moral... and/or religious principles and/or environmental concerns and/ or perceived health benefits.'²⁷³ FSANZ stated that, amongst other things, it was not aware of any evidence indicating a risk to consumer health in the absence of labelling such as the one proposed,²⁷⁴ and it was not aware of any evidence regarding the health benefits of a vegetarian diet.²⁷⁵ Additionally, using a domestic food standard 'aimed at regulating the quality and safety of foods to fulfil needs based on moral and/or religious beliefs and/or for environmental reasons is a purpose that goes beyond the intent of *Food Standards Australia New Zealand Act 1991*.'²⁷⁶ A solution to this issue would be to expand the scope of the Act to include ethics.

C How the Existing Regulation Works in Reality - a Hypothetical Scenario

In order to illustrate how the combined provisions of the ACL and Food Standards Code are relevant to vegan and vegetarian food labelling, let us consider a hypothetical scenario:

Uncle Bernie's Fresh Bread sells its bread through various supermarket chains. The label of its wholemeal bread lists the following ingredients: whole wheat flour, water, baker's yeast, iodised salt, vinegar, emulsifiers (vegetable derived) 471 and 481, vitamins - thiamine and folate. The label states that the bread is 'suitable for vegetarians and vegans.' However, Uncle Bernie's Fresh Bread uses l-cysteine as a processing aid. L-cysteine is commonly used as a dough conditioner and is mainly derived from human

²⁷² Food Standards Australia New Zealand, Application 545 – Vegetarian Labelling (23 August 2004).

²⁷³ Food Standards Australia New Zealand, Notice of Rejection of Application 545 – Vegetarian Labelling (21 August 2009) 1.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Ibid 2.

hair, poultry feathers or hog hair.²⁷⁷ Although the Food Standards Code requires all ingredients to be listed on the label,²⁷⁸ Uncle Bernie's has not fallen foul of the Code which also states that if the ingredients are used as a processing aid in accordance with standard 1.3.3, they do not have to be listed on the ingredients label.²⁷⁹ The difficulty for the bread company is that it has stated on its label that the product is 'suitable for vegetarians and vegans', when the l-cysteine is potentially not suitable for either group. Thus, the company has potentially breached s18, s29 and/or s33 ACL. It could be subject to a complaint to the ACCC, subsequent investigation and possible court proceedings. Alternatively, a group of vegan and vegetarian consumers could approach the ACCC and ask it to commence a class action on the group's behalf,²⁸⁰ or another bread manufacturer who sells genuine vegan and vegetarian bread may choose to commence its own court proceedings.²⁸¹

However, the current regulations will only assist where the company has labelled the bread 'suitable for vegetarians and vegans.' If Uncle Bernie's Fresh Bread does not make claims as to its suitability for those groups on its label, it will not contravene any laws. L-cysteine could be used in the bread and vegans/vegetarians could unwittingly purchase and consume the product, with no legal recourse available. The courts have previously indicated that it is the consumers' responsibility to take reasonable care to protect their own interests,²⁸² with what is deemed a reasonable step being dependent on the circumstances.²⁸³ In the hypothetical scenario, steps that may be taken include consulting the label (which, as has already been determined, will not provide assistance) or consulting a store employee for clarification on the bread's suitability. Another option is to contact Uncle Bernie's directly to enquire whether it used l-cysteine. However, even if

277 Jeanne Yacoubou, L-cysteine in Bread Products Still Mostly Sourced from Human Hair, Duck Feathers, Hog Hair (9 March 2011) The Vegetarian Resource Group Blog <<http://www.vrg.org/blog/2011/03/09/l-cysteine-in-bread-products-still-mostly-sourced-from-human-hair-duck-feathers-hog-hair/>>.

278 Food Standards Code Australia and New Zealand Standard 1.2.4 – Labelling of Ingredients (11 Oct 2012) cl 3.

279 Ibid cl 3(d).

280 ACL s 237.

281 ACL s 243.

282 Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd [1982] HCA 44; (1982) 149 CLR 191, 199.

283 Ibid.

these steps are deemed ‘reasonable,’ they may still be impractical. For example, the employee may have little, or incorrect, knowledge of the product at this level of specificity and, as mentioned previously, contacting Uncle Bernie’s directly may prove difficult if the consumer has to do this whilst standing in the store. This example illustrates an area where the current law is failing vegan and vegetarian consumers.

D Assessment of the Existing Regulatory Framework

The ACL and the Food Standards Code present a number of difficulties. As previously mentioned, the Food Standards Code is primarily concerned with health and safety, and hidden animal products are beyond the scope of the *Food Standards Australia New Zealand Act 1991* (Cth) unless it is recognised as a health issue²⁸⁴ (e.g. mad cow ingredients). As a result the only protection afforded by the Code in relation to animal ingredients is for those that are known allergens, and the general provision that ingredients must be listed on the label.²⁸⁵ The exemption allowing ingredients used as a processing aid in accordance with standard 1.3.3 to be omitted²⁸⁶ is of particular concern to vegans/vegetarians.

It is difficult to fully ascertain the efficacy of the ACL in protecting ethical concerns because it has not yet been fully tested in relation to ‘humane’ labelling claims, and not at all in relation to vegan/vegetarian labelling. However, some difficulties are apparent.

First, the ACL covers a vast array of consumer issues including misleading or deceptive conduct,²⁸⁷ unconscionable conduct,²⁸⁸ unfair contract terms,²⁸⁹ and consumer guarantees.²⁹⁰ This expansive nature of the ACL means a

284 Food Standards Australia New Zealand, above n 98, 2.

285 Food Standards Code Australia and New Zealand Standard 1.2.4 – Labelling of Ingredients (11 Oct 2012) cl 3.

286 Ibid cl 3(d).

287 ACL s 18.

288 ACL pt 2-2.

289 ACL pt 2-3.

290 ACL pt 3-2 div 1.

large amount of complaints to follow up,²⁹¹ notwithstanding the ACCC's commitment to pursuing misleading food labelling claims.²⁹²

Secondly, a lack of precedent and clear legal definitions for ethical claims may hinder prosecution. There is limited case law regarding 'humane' claims and none regarding vegan/vegetarian food. In relation to 'free range' eggs, for example, the Department of Agriculture, Fisheries and Forestry has stated that using consumer protection legislation for prosecution of inaccurate labelling could prove difficult in practice owing to the lack of clear legal definitions for egg production systems, and the difficulty involved in collecting evidence.²⁹³ Presumably these definition and evidence problems also translate to vegan and vegetarian food labelling, as there is no legal definition for either term. The ACCC has provided a definition for vegan food in its Food Descriptors Guidelines,²⁹⁴ stating that 'most consumers would understand vegan produce as not being made from, or perhaps not even coming into contact with any animal product, animal by-product or derivative of animal product.'²⁹⁵ Alternatively, a definition from the dictionary could be used, as occurred for the term 'organic' in *ACCC v G.O Drew Pty Ltd*.²⁹⁶ The Macquarie Dictionary defines a vegan as 'someone who follows a strict vegetarian diet which excludes any animal product.'²⁹⁷ But use of either definition may still prove problematic as neither defines precisely what an animal product is and whether that includes processing agents. There is no room for ambiguity in the definition. It is essential that a product represented as being of a certain

291 For example a search of <<http://www.austlii.edu.au>> reveals 56 cases that involved the ACCC 2012 alone. There would also be many investigations that do not proceed to court.

292 ACCC Update Issue 34- Online Version, News Briefs, Accuracy of Olive Oil Claims Tested (2013) <<http://www.accc.gov.au/content/index.phtml/itemId/1064580#toc4>>

293 Australian Government, Review of Layer Hen Housing and Labelling of Eggs in Australia- Truth of Labelling in Production Methods (13 April 2007) Department of Agriculture, Fisheries and Forestry <<http://www.daff.gov.au/animal-plant-health/welfare/reports/layer-hen/labelling>>.

294 Australian Competition and Consumer Commission, Food Descriptors Guideline to the Trade Practices Act (November 2006) <<http://www.accc.gov.au/content/item.phtml?itemId=771468&nodeId=303812cdfa698071341bf9fac983066&fn=Food%20descriptors%20guidelines.pdf>>.

295 Ibid 12.

296 Australian Competition and Consumer Commission v G.O Drew Pty Ltd [2007] FCA 1246, [40].

297 Macquarie Concise Dictionary (University of Sydney, 4th ed, 2006) 1354.

standard is in fact of that standard. False labelling disadvantages not just the consumer of a product but also competitors.²⁹⁸

Having a clear definition or standard for vegan and vegetarian food is also necessary to avoid innocent mislabelling. It is easy for a producer to make such an error given the small amounts of ingredients and processing aids which may be involved. A clear definition would also provide certainty, consistency and predictability, thus having the added effect of increasing consumer confidence.

Finally, as illustrated in the hypothetical scenario, the ACL is only useful if misleading claims as to the vegan and/or vegetarian suitability of a product are made. It does not protect a vegan/vegetarian consumer if no claims are made at all regarding the product, or if ingredients are vague (e.g. emulsifiers 471, 481, 491 which can be animal or plant based) or not required to be listed, such as processing agents.²⁹⁹

II THIRD PARTY CERTIFICATION SCHEMES AND SELF-REGULATION

While some protection may be afforded to vegan and vegetarian consumers under the Food Standards Code and the ACL, as discussed in Part II, the Code is not comprehensive and the ACL also has its limitations. The problem goes beyond simply misleading claims on the packaging. Vegan and vegetarian consumers may receive inadequate or inaccurate information when contacting a company, by email or phone, to determine if a product is suitable. This issue may be remedied by third party certification which is a system of formal recognition that a business has met specified standards or adopted certain processes,³⁰⁰ a system Frieberg sees as having more credibility when the certifying party is objective and independent of the organisation being certified.³⁰¹ Another method is self-regulation, when an organisation or association develops rules or standards that it monitors

²⁹⁸ Trade Practices Commission v Pacific Dunlop Pty Ltd [1994] FCA 1043, [17].

²⁹⁹ Food Standards Code Australia and New Zealand Standard 1.2.4 - Labelling of Ingredients (11 Oct 2012) cl 3(d).

³⁰⁰ Frieberg, above n 69, 151.

³⁰¹ Ibid 152.

and enforces against itself, its members or a larger community.³⁰² Third party certification schemes and self-regulation exist for all manner of products, not just food.

A Vegan and Vegetarian Certification Schemes

Vegan

No third party vegan certification scheme operates within Australia.³⁰³ The Vegan Society NSW lacks the resources to do so, and recommends the scheme run by the UK Vegan Society.³⁰⁴ Australian businesses may also choose to become vegan certified by the US Vegan Action organisation.³⁰⁵ Groups that represent vegans and/or vegetarians operate most vegan and vegetarian third party certification schemes, and are more likely to understand the consumers' moral and social concerns.³⁰⁶

(a) UK Vegan Society Certification Scheme

The UK Vegan Society's certification process is relatively simple. Interested businesses complete an application detailing the ingredients and production methods used.³⁰⁷ The application is assessed and the Society contacts the business with any queries.³⁰⁸ If the Vegan Society is confident its criteria have been met, the business signs a Merchandising Agreement (licensing contract),³⁰⁹ and pays a fee based on its total annual turnover,³¹⁰ allowing it to use the Society's symbol. This certification scheme appears to be quite popular. More than 400 businesses are registered to use it,³¹¹ about 5% of them Australian,³¹² the remainder international exporters.³¹³

302 Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 1999) 39.

303 For Business (14 May 2012) Vegan Society NSW <<http://www.vegansocietynsw.com/vs/html/business.html>>.

304 Ibid.

305 Ibid.

306 Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press, 1995) 308-309.

307 Businesses- Trademark- Applications The Vegan Society <<http://www.vegansociety.com/businesses/trademark/applications.aspx>>.

308 Ibid.

309 Ibid.

310 Businesses- Trademark- Solutions The Vegan Society <<http://www.vegansociety.com/businesses/trademark/solutions.aspx>>

311 Trademark Search The Vegan Society <<http://www.vegansociety.com/trademarksearch.aspx?ad=677747>>.

312 Ibid.

(ii) US Vegan Action Certification

The 'Certified Vegan' trademark administered by the Vegan Action group operates in much the same way as the UK Vegan Society's trademark. However, its application process appears to be more thorough than the UK Vegan Society in that it also reviews the product 'which may involve laboratory testing and contact with the suppliers and manufacturers.'³¹⁴ Use of the 'Certified Vegan' logo is not as popular in Australia as the UK scheme. A search of the list of certified companies revealed that only one Australian company was certified,³¹⁵ and further enquiries revealed that very few Australian companies apply for certification.³¹⁶

Vegetarian

(a) Australian Vegetarian Society

The Australian Vegetarian Society operates a third party certification system that covers food and/or other products such as cosmetics, household products and clothes.³¹⁷ If a manufacturer meets its standards, the Society will permit the use of its symbol.³¹⁸ Interested companies complete a compliance assurance form for each product listed on its licensing application,³¹⁹ pay a fee, if their application satisfies the Society,³²⁰ and are then permitted to use the Vegetarian Society symbol.³²¹

313 Examples include Redwood Wholefood Company which is based in England, Fry's Family Foods based in South Africa, Angel Food based in New Zealand.

314 Ibid.

315 Registered Companies (2012) Vegan Action <<http://vegan.org/certify/companies-and-websites/>>.

316 Email from Krissi Vandenberg (Vegan Action) to Melanie Cole, 19 September 2012.

317 The Australian Vegetarian Society Product Acceptance Program (2 May 2007) Australian Vegetarian Society <<http://www.veg-soc.org/cms/html/modules.php?name=Content&pa=showpage&pid=43>>.

318 Ibid.

319 Ibid.

320 Ibid.

321 Ibid.

(b) Vegetarian Society UK

The Vegetarian Society UK also runs a third party certification scheme, 'Vegetarian Society Approved', that is used by some Australian businesses.³²² To obtain certification, products must satisfy strict criteria such as being free from animal flesh or ingredients resulting from slaughter; if eggs are used, they must be free range; no GMO's; no animal testing; and no cross contamination which means that where non-vegetarian products are manufactured on the same production line, thorough cleaning must be carried out before vegetarian production starts.³²³

B Conclusion

Although third party certification may provide some assurance for vegan and vegetarian consumers, one potential problem is their voluntary nature. As Baldwin and Cave note, 'where membership is not exhaustive, the public may prove to be ill protected by a regime that controls the most responsible members of a trade or industry but leaves unregulated those individuals or firms who are the least inclined to serve the public interest.'³²⁴

Another issue in relation to vegan products is that although the UK Vegan Society and US Vegan Action will certify Australian products, the absence of a domestic certification body is problematic. Having to use an overseas scheme may be seen as impractical, and may also encourage more businesses to self-regulate, with potential issues arising of whether products being labelled as vegan or vegetarian suitable are in fact so.

Ultimately, the vegan consumer suffers as a result of fewer certified vegan products being on the shelf. If vegan groups lack the resources to administer their own scheme, perhaps they could collaborate with the Australian Vegetarian Society to operate a scheme that specifies vegan and/or vegetarian; or the Society could expand its scheme, to cover vegan and vegetarian food.

322 Approved Products Vegetarian Society <<http://www.vegsocapproved.com/corporate08/products.asp>>.

323 Ibid.

324 Baldwin and Cave, above n 127, 127.

III VEGAN AND VEGETARIAN FOOD LABELLING LAW AND POLICY IN THE U.K. AND EUROPEAN UNION

To try to determine whether the Australian system can be improved, other schemes, such as are used in the UK and EU, need to be assessed. There are estimated to be more than a million vegetarians and over half a million vegans in the UK,³²⁵ and 12 million vegetarians in Europe.³²⁶ As in Australia, there is no mandatory labelling system regarding the suitability of processed food for vegetarians or vegans.³²⁷ However, there are independent third party certifiers such as the Vegan Society (UK), Vegetarian Society (UK),³²⁸ and European Vegetarian Union,³²⁹ and there is legislation which may afford limited protection to vegan and vegetarian consumers.

United Kingdom

The regulatory instruments most relevant to vegan and vegetarian food labelling in the UK are the *Food Safety Act 1990* (UK), *Trade Descriptions Act 1968* (UK) and *General Food Regulations 2004* (UK). All contain provisions applicable to misleading labelling.³³⁰ In addition, the Food Standards Agency (FSA), which was established by the *Food Standards Act 1990* (UK),³³¹ is responsible for the development of food policy³³² and the provision of advice and information to the general public.³³³

325 Number of UK Vegetarians (2012) Vegetarian Society (UK) <<http://www.vegsoc.org/page.aspx?pid=753>>.

326 Animal Scars Create Demand for Vegetarian Ingredients (13 January 2006) Food Navigator, cited in Voiceless, From Label to Liable: Scams, Scandals and Secrecy-Lifting the Veil on Animal Derived Food Product Labelling in Australia, May 2007

327 Voiceless, From Label to Liable: Scams, Scandals and Secrecy-Lifting the Veil on Animal Derived Food Product Labelling in Australia, May 2007.

328 Please see Part III for more information on these schemes.

329 The European Vegetarian Label <<http://www.v-label.info/en/home/info.html>>.

330 Food Safety Act 1990 (UK) c 28, cl 16, ss 14 and 15; Trade Descriptions Act 1968 (UK) c 29, ss 1-4; General Food Regulations 2004 (UK) No 3279, s 4.

331 Section 1.

332 Food Standards Act 1990 (UK) c 28, s (6)(1)(a).

333 *Ibid* s 7.

In this advisory capacity, the FSA routinely issues guidance notes on various topics to assist food businesses, food industry representatives and others to understand regulations.³³⁴ In 2006, after consultation with various stakeholders including members of the UK Vegan and UK Vegetarian Societies, the FSA issued guidance on the terms ‘vegan’ and ‘vegetarian’ in food labelling.³³⁵ The guidance notes provide that:

*The term ‘vegetarian’ should not be applied to foods that are, or are made from or with the aid of products derived from animals that have died, have been slaughtered, or animals that die as a result of being eaten. Animals means farmed, wild or domestic animals, including for example, livestock, poultry, game, fish, shellfish, crustacea, amphibians, tunicates, echinoderms, molluscs and insects.*³³⁶

It further provides that ‘the term “vegan” should not be applied to foods that are, or are made from or with the aid of animals or animal products (including products from living animals).’³³⁷

In Australia there are no similar guidelines for the term vegetarian, and the definition for vegan provided by the ACCC in its Food Descriptors Guidelines³³⁸ is not quite as explicit as the UK version because it does not emphasise that products derived from living animals such as dairy and eggs - are also not vegan. The UK framework appears to provide slightly greater protection for consumers.

334 Guidance Notes (2012) Food Standards Agency <<http://www.food.gov.uk/business-industry/guidancenotes/>>.

335 FSA Published Guidance (updated November 2012) Food Standards Agency <<http://www.food.gov.uk/multimedia/pdfs/fsapublishedguidance.pdf>>.

336 Food Standards Agency, ‘Guidance on the Use of the Terms “Vegetarian” and “Vegan” in Food Labelling’ (6 April 2006) 4.

337 Ibid.

338 Australian Competition and Consumer Commission, Food Descriptors Guideline to the Trade Practices Act (November 2006), 12 <<http://www.accc.gov.au/content/item.phtml?itemId=771468&nodeId=303812cdfa698071341bf9f1ac983066&fn=Food%20descriptors%20guidelines.pdf>> states- ‘most consumers would understand vegan produce as not being made from, or perhaps not even coming into contact with any animal product, animal by-product or derivative of animal product.’

European Union

As the UK is a member of the EU,³³⁹ any directives or regulations issued by the European Parliament are applicable to the UK also.³⁴⁰ The abovementioned *General Food Regulations 2004* (UK) provides for the enforcement of Regulation (EU) No.178/2002 from the European Parliament. The EU is widely regarded as a world leader in animal welfare protection,³⁴¹ and it also appears to be more progressive with regard to protecting the interests of vegan and vegetarian consumers, many of whose plant-based diets are due to animal welfare concerns.

In October 2011, the European Parliament and the Council adopted Regulation (EU) No 1169/2011 which concerns the provision of food information to consumers.³⁴² The significance of this regulation is that it provides legal definitions for use of the terms vegan and vegetarian,³⁴³ which virtually mirror the FSA UK's definition developed in 2006.³⁴⁴ Although declaring whether a product is vegan or vegetarian suitable is still only voluntary,³⁴⁵ the effect of the new law is that if a manufacturer labels as suitable a product that does not comply with the legal definition in the regulation, the consumer could commence civil proceedings against the manufacturer.³⁴⁶ However, despite much excitement from vegan and

339 Countries European Union <http://europa.eu/about-eu/countries/index_en.htm>.

340 Consolidated Treaty Establishing the European Community [2006] OJ C321 E/1, 153 cited in Peter Stevenson, 'European and International Legislation: A Way Forward for the Protection of Farm Animals?' in Peter Sankoff & Steven White (eds) *Animal Law in Australasia* (Federation Press, 2009) 307, 308.

341 Sunstein, above n 20.

342 Questions and Answers on the Application of the Regulation (EU) No 1169/2011 (31 January 2013) Europa <http://ec.europa.eu/food/food/labellingnutrition/foodlabelling/docs/qanda_application_reg1169-2011_en.pdf>.

343 European Food Information Act (Draft) (2010) Article 34(6).

344 European Food Information Act (Draft) (2010) Article 34(6) states- 'The term "vegan" should not be applied to foods that are, or are made from or with the aid of, animals or animal products (including products from living animals).' 'The term "vegetarian" should not be applied to foods that are, or are made from or with the aid of products derived from animals that have died, have been slaughtered, or animals that die as a result of being eaten.'

345 Regulation (EU) No 1169/2011 Article 36 (3)(b).

346 Food Labelling- Vegetarian and Vegan (update 2010) Vegetarian Society <<http://www.vegsoc.org/page.aspx?pid=767>> After extensive research the author was unable to find a primary source for this information.

vegetarian groups,³⁴⁷ compliance with the voluntary provisions in article 36(3)(b) of the Regulation - which relates to vegan and vegetarian food - is listed as a required action without a deadline.³⁴⁸ As a result, there is no guarantee as to when this Regulation will come into effect.

The guidance notes issued by the UK's FSA regarding the use of the terms 'vegan' and 'vegetarian',³⁴⁹ have provided a clear standard. The implementation of Regulation (EU) No 1169/2011 will further protect vegan and vegetarian consumers by providing a legal definition for the terms. Providing clear standards will assist in proving that a manufacturer has misled consumers if a product has been labelled vegan or vegetarian suitable, but does not conform to these standards. Manufacturers will be able to understand exactly what is required of them,³⁵⁰ and mislabelling through simple error or misunderstanding is arguably less likely to occur. The capacity of a consumer to sue a manufacturer in accordance with Regulation (EU) No 1169/2011 may act as a deterrent. Competitors could also rely on the definition for court action. For these reasons, the misleading conduct provisions contained in the UK legislation, and Regulation (EU) No 1169/2011, may be more effective than the use of the ACL in Australia.

IV SUGGESTIONS FOR REFORM

Although the UK and EU regulatory frameworks offer slightly greater protection for vegan and vegetarian consumers than the Australian regulatory framework, they are far from perfect. UK and EU consumers may be more confident that manufacturers who label their products as vegan or vegetarian suitable have a clearer idea of the meaning of the terms, but the voluntary nature of such labelling poses a problem. If a product is

347 See for example Campaigns Vegan Australia <<http://veganaustralia.org.au/campaigns.html>>; Food Labelling- Vegetarian and Vegan (update 2010) Vegetarian Society <<http://www.vegsoc.org/page.aspx?pid=767>>; 'Vegan'- a Legally Protected Term The Vegan Society <<http://www.vegansociety.com/news/%60vegan%E2%80%99-%E2%80%93-a-legally-protected-term.aspx>>.

348 EuroCommerce, 'Regulation (EU) No 1169/2011- Future Work on Food Information to Consumers' (Briefing, 12 November 2012) <http://www.iib.org.tr/files/downloads/PageFiles/%7Bbfe1fdbe-3324-4576-ab11-3067b678ee61%7D/Files/FoodInformationRegulation_CommissionFutureWork.pdf>.

349 Food Standards Agency, 'Guidance on the Use of the Terms "Vegetarian" and "Vegan" in Food Labelling' (6 April 2006) 4.

350 Frieberg, above n 69, 271.

not marked as being vegan or vegetarian suitable, or has not been certified by a third party,³⁵¹ consumers still have to examine the ingredients on the label, and may have to contact the manufacturer to determine if a product is animal derivative free, the same as their Australian counterparts.

Despite this, the UK and EU frameworks provide at least one possible solution to improve the Australian system. A particular difficulty that was identified in relation to the ACL is the lack of a clear, legal definition for the terms vegan and vegetarian in the Act or any other instrument. In the UK this problem has been partly remedied by the introduction of guidelines to assist manufacturers who choose to label their products as vegan or vegetarian suitable.³⁵² In Australia, the description in the ACCC food descriptors guidelines could be expanded to precisely define what constitutes an animal product.³⁵³ The definition could then be given some form of legislative backing which would assist the public, the ACCC and the courts to determine whether labelling on a food product constitutes misleading or deceptive conduct. To avoid uncertainty and inconsistency, the definitions would need to be drafted in accordance with the meanings understood by vegans and vegetarians themselves.

Another difficulty with the present system, here and in the UK and EU, is that even if third party certification can act as a guarantee for consumers, businesses are not legally required to have their products certified.³⁵⁴ Making independent certification of vegan and vegetarian products compulsory would provide greater certainty and increase consumer confidence. However, there would be a risk that, to avoid costs of compulsory certification, some manufacturers might choose not to state that their products are vegan or vegetarian suitable, thereby limiting choice even further and creating more uncertainty.

The *Australia New Zealand Food Standards Code* could be modified to address problems such as exceptions that allow some ingredients to be excluded from the label. As ethical concerns are beyond the scope of the *Food*

351 Such as Vegan Society (UK), Vegetarian Society (UK) or European Vegetarian Union.

352 Food Standards Agency, 'Guidance on the Use of the Terms "Vegetarian" and "Vegan" in Food Labelling' (6 April 2006).

353 Australian Competition and Consumer Commission, above n 171.

354 Baldwin and Cave, above n 127, 127.

Standards Australian New Zealand Act 1991 (Cth),³⁵⁵ from which the code derives its authority, a solution to this problem would be to amend the Act to allow for ethical concerns such as veganism and vegetarianism to be addressed by the Code.

Two obvious areas could be addressed by the Code. First, it could be altered to require that *all* ingredients must be listed. No exceptions - such as processing aids,³⁵⁶ no generic terms such as 'vegetable oil' (which may be palm oil),³⁵⁷ nor vague terms such as emulsifier 471 (which may be derived from plant or animal sources) – should be allowed. This would expose "hidden" animal ingredients and support consumers' right to know what is in their food, irrespective of how minute the quantities might be, and whether or not they might be deemed a health risk. Secondly, if a product is vegan or vegetarian suitable it should be compulsory to label it so. And if a product is not suitable, then that should also be stated on the label.³⁵⁸ While this would be a significant advantage to ethical consumers, both suggestions would also mean that manufacturers would incur costs to alter their labelling.³⁵⁹ In its rejection of application A545- Vegetarian Labelling,³⁶⁰ FSANZ stated that the cost to implement such a measure would likely be disproportionate to the benefit derived,³⁶¹ and that it would only benefit a small group yet costs would likely be distributed amongst all consumers.³⁶² There was no data supplied to corroborate this statement, however if proven correct, this reform may be considered impractical. Of course, this solution would also require a clear definition for vegan and vegetarian to be entrenched in the Food Standards Code to enable it to be effective.

355 Food Standards Australia New Zealand, Notice of Rejection of Application 545 – Vegetarian Labelling (21 August 2009) 2.

356 Food Standards Code Australia and New Zealand Standard 1.2.4 - Labelling of Ingredients (11 Oct 2012) cl 3(d).

357 Ibid cl 4(c).

358 Food Standards Australia New Zealand, above n 628, 1.

359 Ibid 2.

360 Food Standards Australia New Zealand, Notice of Rejection of Application 545 – Vegetarian Labelling (21 August 2009).

361 Ibid 2.

362 Ibid.

V CONCLUSION

This article examined the regulatory framework for vegan and vegetarian food labelling in Australia, and found that it did not provide adequate protection for vegan and vegetarian consumers. Analysis of the UK and EU systems provided limited suggestions for reform. Possible ways of addressing the inadequacies in both regulatory frameworks have been identified. It is unlikely that these suggestions will be implemented, as ethical shopping is not currently a priority of regulators. However, given the growing number of vegans and vegetarians, it is likely that regulators will need to grapple with this problem sooner rather than later.

Animal Law Student Research In Australia

Animal law is a fast developing field of research in Australia and is increasingly becoming a topic of choice for research students. Below are some recent and current research projects by postgraduate and undergraduate students in Australian universities.

Awarded PhDs

Ven. Alex Bruce

Australian National University (2012)

Putting the Chicken Before the Egg: The Potential for the Australian Consumer Law to Advance Food Animal Welfare Initiatives

This thesis explores the potential for the Australian Consumer Law to advance food animal welfare initiatives and to address welfare issues associated with the religious slaughter of animals. By “food animals” I mean the chickens, cows and pigs processed and slaughtered in Australia for human consumption. Evidence suggests that consumers are prepared to pay a price-premium for welfare-friendly food animal products as a way of expressing their own values in advancing the cause of food animal welfare.

The Commonwealth government does not intend to *directly* regulate food animal welfare or the religious slaughter of animals. Instead, the 2011 *Labelling Logic Report* into national food labelling discloses the Commonwealth’s intent to *indirectly* regulate these issues through market forces underpinned by competition and consumer policy. Food animal welfare and religious slaughter practices are characterised by the *Labelling Logic Report* as “consumer values issues” best regulated by preventing suppliers from making misleading or deceptive claims, such as “free range”, in marketing their food animal products.

In an increasingly competitive food product market, it is anticipated that demand for ethically produced food animal products will signal producers of consumer preferences for food animal welfare practices. In safeguarding this consumer demand, the Commonwealth government intends the ACL to play a key role in preventing suppliers from exploiting consumer demand for welfare-friendly food animal products by preventing misleading or deceptive marketing claims.

Accordingly, this thesis investigates the theoretical and legal assumptions underpinning the ability of the ACL to achieve these regulatory objectives. It concludes that case law will enable the ACL to prevent “positive” but misleading claims associated with food animal products. However, it also demonstrates how legal difficulties associated with conceptualising silence as misleading or deceptive conduct will mean that a failure to advise consumers that meat has been derived from animals slaughtered according to religious ritual is unlikely to breach the ACL - *BruceA@law.anu.edu.au*

Siobhan O’Sullivan

University of Sydney (2008)

Animal Visibility and Equality in Liberal Democratic States: A Study Into Animal Ethics and the Nature of Bias in Animal Protection Regulation

Animal welfare legislation does not consistently protect all nonhuman animals against all harms under all circumstances. Through an analysis of current legislative arrangements and the origins of animal protection law, and an examination of popular attitudes towards animal cruelty, this study seeks to comment on the role of visibility in informing the level and type of state-sponsored interest protection an animal receives. It is argued that different types of animals enjoy different levels of visibility and that an animal’s level of visibility influences the extent to which the state is willing to intervene to protect the animal from harm.

These findings are significant because the highly politicised nature of the lives of many nonhuman animals raises questions about the appropriateness of an animal welfare legislative regime which is biased, and which also

tends to favour those animals who are most readily visible. It is argued that the practice of regulating animal welfare by use of legislative instruments that are inconsistent is problematic from the perspective of liberal principles because liberalism places a heavy emphasis on the concept of equality. Similarly, the practice of preferential treatment for the most visible is not consistent with democratic values because it removes citizens from the process of establishing agreed-upon standards for animal protection.

In conclusion, it is argued that because some animals have been effectively drawn into the liberal democratic political landscape, the principle of equitable treatment should be applied to the manner in which the state regulates animal use. Such an approach would mean that animal use would be regulated according to the same values that are applied to other areas of political society. It would also have the effect of establishing what the community views as the appropriate level of nonhuman animal interest protection, by challenging the existence of a double standard predicated on the principle of low visibility - *siobhano@unimelb.edu.au*

PhD candidatures

Rebekah Eyers

Griffith University

Animal welfare regulation in Qld saleyards

This thesis seeks to analyse the existing barriers to improved welfare outcomes for the farmed animals in this system, and to note the elements which may be conducive to improving these outcomes. This thesis discusses some of the small changes that can be made to existing legal structures, regulation and regulatory culture to aid a transition to a system that better enforces the duty of care responsibility of Queensland saleyard users. Principles of Gunningham and Grabosky's 'Smart Regulation' approach will be the focus of the discussion on how to address, remove or help prevent existing barriers to reducing cruelty in this framework - *rebekah.eyers@griffithuni.edu.au*

Jed Goodfellow

Macquarie University

Farm Animal Welfare Law Enforcement in Australia: Current and Future Research

The welfare of animals used for the production of food and fibre is becoming an issue of increasing concern for the Australian public. Numerous exposés revealing serious cases of animal cruelty within processing and production facilities and the live animal export trade have led to a growing public discourse on the treatment of farm animals including the regulatory arrangements responsible for managing that treatment. This research engages in a regulatory analysis of those arrangements. In particular, it investigates standard-setting and enforcement processes, as well as governance arrangements with a particular focus on the nature of the institutions currently responsible for administering welfare legislation in the agricultural context.

The analysis will be largely focused within the theoretical constructs of governance legitimacy and regulatory capture. Empirical investigation including interviews with key regulators in each jurisdiction and statistical analyses of standard-setting and enforcement actions will inform the analysis. The thesis will conclude with considering options for reform in light of legitimacy flaws identified within current arrangements -
Jed.goodfellow@mq.edu.au

Alexandra McEwan

Australian National University

Reconsidering Australia's Animal Protection Regime through a Lens of Violence

This thesis aims to analyse Australia's animal protection laws and regulation through the lens of violence. The objective is to advance understanding of how we regulate human obligations towards other animals in ways that take account of cultural practice, the symbolic role of animals

in speaking about other matters, and the strengths and limitations of a regulatory approach. I focus on the question of how violence towards animals is conceived in Australia's criminal justice system and within the nation's broader animal welfare framework. Both aspects of Australia's animal protection regime have been widely criticised. Some critics call for tougher sentencing for cruelty offences, others point to conflicts of interests which allegedly bias the development of animal welfare codes and policies.

Against this background I investigate two intersecting issues. The first is a regulatory problem; given the widespread criticism of Australia's animal protection regime, how would one establish a coherent reform agenda? Would the concept of violence (and violence prevention) form a suitable foundation for a reinvigorated animal protection scheme? Such an approach might more accurately reflect animal cruelty and animal welfare as aspects of a larger phenomenon of violence in society. This possibility, however, raises a second, analytic question: how to develop and apply a concept of violence relevant to an analysis of Australia's animal protection regime - McEwana@law.anu.edu.au

Steven White

Griffiths University

The regulation of animal welfare in two key contexts: treatment of farm animals and treatment of companion animals.

It will be argued that the prevailing regulatory approach to animal welfare, emerging in the mid-19th century, assumes an ethic in which animal interests are routinely overridden by human interests. This ethic of subordination remains durable, despite the emergence of compelling critiques of this understanding of the significance of animals. Given this durability, what is the regulatory framework that has been built around this ethic?

Subordinate questions include: how are the purposes of the regulation of the treatment of companion and farm animals framed? What are the regulatory

standards that apply to the treatment of companion and farm animals, federally and in Queensland? How are these regulatory standards applied in practice (what monitoring and enforcement activities are conducted, who conducts these activities and what are the enforcement outcomes)? Finally, what differences are there in the regulation of the welfare of companion and farm animals? - steven.white@griffith.edu.au

LLM thesis - in progress

Bethany Hender

University of Sydney

The Development of Australian Animal Welfare Standards: A Democratic Process?

Australian Animal Welfare Standards do not face the same parliamentary scrutiny as primary legislation yet they have a significant impact on the law. Therefore, it is important to ensure that Standards are developed through a democratically legitimate process. My research will determine whether the development process adheres to democratic principles, and what impact the public consultation phase has on the final Standards - bethanylhender@gmail.com

Jo Kennedy

Flinders University

An Inter-Agency Service Gap: Disjuncture in the Rehabilitation of Animals and Humans

The plight of unwanted companion animals has been eclipsed in the public imagination by the enormity of the injustice toward production animals. About 40,000 dogs a year are destroyed in animal welfare institutions such as the RSPCA and Animal Welfare League. This analysis

will be of an inter-agency service gap: the disjuncture in the rehabilitation of animals and humans. It is contended that offenders in pre-release and dogs that have been declared 'unsuitable' for adoption due to age or temperament, are both in need of an intervention that involves animal welfare and corrections in their co-rehabilitation.

The long-term objective is the co-placement of both these vulnerable animal cohorts in a structured, therapeutic, non-speciesist environment that will assist in the rehabilitation of both - *kenn0041@uni.flinders.edu.au*

MPhil - in progress

Katrina Craig

University of Queensland

This thesis analyses the legal standards and welfare guidelines that regulate the treatment of Australian farmed animals, with an emphasis on intensive farming practices and the live export industry. Current legislative provisions are largely directed towards companion animals, while animals used for production of meat and other by-products are only afforded protection under guidelines loosely underpinned by statutory schema. As such, the welfare standards designed to protect domestic animals appear to be relative to the extent that these animals affect productivity and profit. The welfare of farmed animals is therefore placed secondary to their capacity to contribute to Australia's economy. As a result, intensive farming and live export practices have greater prominence in Australia's agricultural industry than the alternatives of extensive farming and chilled or frozen export. The legal framework offers little incentive to reform these practices.

The thesis will propose a revised framework for Australian legal standards and guidelines on farmed animals, with the aim of striking a balance between the interests of the Australian agribusiness industry, on the one hand, and animal welfare, on the other. The research will examine the role

of non-ideal theory in political philosophy and use this as a framework to explore the relationship between the political and economic realities of agribusiness and the ideal of respect for animal welfare. It will be argued that seeking and achieving a balance between these ideals is critical for the development of Australia as a progressive nation, committed to respecting and advancing animal welfare in the international arena. The thesis will conclude that reform is more likely to be achieved and maintained by seeking a balanced approach, as it provides a tangible compromise between two existing objectives of the Australian agricultural industry -
katrina.craig@hotmail.com

Bachelor of Law Honours Thesis - completed

Tony Bogdanoski

University of Technology Sydney (2006)

The Marriage of Family Law and Animal Rights: A Union Doomed from the Start?

This thesis examines the problem of 'pet custody' which, although yet to be fully felt in the Australian legal context, emerged from animal rights law and left an indelible mark on the practice of North American family law. It involves the growing phenomenon of former spouses and partners resorting to litigation to keep family pets following relationship breakdown. Animal rights theory is drawn upon in the thesis to analyse whether family courts ought to treat family pets merely as chattels, or as something more, when asked to resolve these intractable disputes.

Family pets, or companion animals, are in a complicated position in Australian family law. On the one hand, their welfare is protected by state animal cruelty laws. However, they are inconsistently treated as mere chattels by judges for the purposes of the disposition of assets following relationship breakdown. It is argued that the interests of companion animals, and those of their human guardians, would be better served by removing this inconsistency, but not on the basis of a blanket

implementation of a ‘best interests’ model analogous to that used in resolving child custody disputes. Instead of relying wholly upon property law principles in deciding with which party the pet(s) should remain, this thesis argues that the courts should further the interests of both human and non-human parties by formulating a set of principles derived from *both* parenting and property. It is argued that this is a logical conclusion as family pets are neither human children nor inanimate property. It also avoids establishing any one overriding or paramount consideration, in contrast to the best interests of the child model applied to parenting or child custody law - tony.bogdanoski@sydney.edu.au

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Is it Really Vegan or Vegetarian? An Assessment of the Current Regulatory Framework Regarding Food Labelling and the Case for Change.

Consumers who follow a vegan or vegetarian diet require sufficient information to enable them to exercise their choice. The current Australian regulatory landscape comprises measures including consumer protection laws, food standards, self-regulation and independent third party certification, providing limited protection for most consumers but no clear, comprehensive and effective protection for vegans and vegetarians. This thesis assesses the current regulatory framework in Australia in the light of Teubner’s Regulatory Trilemma, and explores whether food labelling law and policy in the United Kingdom and European Union provide a comprehensive solution to the problem.

Suggestions for reform of the Australian regulatory framework are provided to assist in the development of a framework that satisfies all three components of Teubner’s Regulatory Trilemma, in order to provide greater certainty for vegan and vegetarian consumers - melanie.cole@my.jcu.edu.au

NOTES

A Roadmap from Europe: Reflections on the 2013 Voiceless Law Lecture Series with Antoine Goetschel

By Emmanuel Giuffre³⁶³

Since 2007, Voiceless has collaborated with universities and professional associations across the country to develop Australia's first annual animal law lecture series. The Voiceless Animal Law Lecture Series annually invites a key international scholar or animal law practitioner to make a series of presentations to lawyers, academics, politicians, students and the broader community. This year's keynote speaker was Swiss animal advocate Dr Antoine Goetschel.

Goetschel was instrumental in developing the animal protection movement in Switzerland. In 1992, he advocated for reforms to the Swiss Constitution that protected the "dignity" of living creatures in the use of animal reproductive or genetic material, and played a major role in the reform of Swiss law to recognise animals as sentient beings.

Goetschel was influential in the establishment of the office of the "Animal Protection Advocate", the first such position, and one that Goetschel held from 2007 to 2010 in the Canton of Zurich.³⁶⁴ He also worked to establish the "Foundation for the Animal in the Law", an academic and legal not for profit organisation, which publishes widely on Swiss, European and global animal law issues.³⁶⁵

³⁶³ Emmanuel Giuffre (BA (Politics and Int. Relations), LLB (Hons)) is Legal Counsel for Voiceless, the animal protection institute.

³⁶⁴ In this position, Goetschel pursued around 180 cases per year and represented the interests of animals in criminal cases as a public official.

³⁶⁵ Foundation for the Animal in the Law, < <http://www.tierimrecht.org/de/stiftung/>>.

In his presentations in eight cities, Goetschel highlighted the development of the animal protection movement in Switzerland and across Europe, and suggested that the European model might be used as a “roadmap” for Australia's animal protection regime. This paper is a summary of the writer’s reflections on Goetschel’s key observations and recommendations. It briefly considers their application in an Australian context.

A European model for animal welfare

Animals, ethics and the law

Goetschel frames animal protection law reform in terms of ethics, which he sees as shaping human thought and behaviour, and as the source of meaningful social justice law reform. All social justice movements – civil rights, environmentalism or animal protection – stem from an ethical need to correct a perceived social injustice.

Goetschel acknowledges that for ethics to translate into meaningful law reform, irrespective of the ethical weight or justification for that reform, the position needs to find support from a popular majority. In terms of animal protection, Goetschel's view is that effective law reforms require an ethical consensus that the law should recognise and protect the intrinsic moral worth of animals.

As part of this ethical development, Goetschel suggests that society must become better informed of the ethical dilemmas inherent in the animal protection debate – including the consumption of animals and the use of animal products – and must move away from a moral complacency that says: “yes to the product, but no to the method of production”. That is, many individuals will choose to ignore ethical issues associated with animal production methods, while continuing to enjoy benefits derived from animal products. For individuals to lead a more ethically consistent life, they must be prepared not to say “yes to the product” until they can also legitimately say “yes to the method of production”.

According to Goetschel, the countries that have reached an ethical consensus are also those that recognise animal protection in their constitutions. Such constitutional recognition has enabled progressive animal welfare law reforms in these countries. Swiss consumers, for example, have developed an acute awareness of animal welfare issues in the last 30 years, demonstrated by their willingness to pay higher prices for organically and humanely produced meat. This consumer awareness has been reflected in Swiss law reforms,³⁶⁶ enabled by their constitutional recognition of the “dignity” of animals. For example:

- In 1978, in response to consumer outrage at the inhumane method of producing *foie gras*, Switzerland banned the force feeding of animals.³⁶⁷
- In 1981, Switzerland established requirements for the housing of chickens, effectively eliminating battery cages and making aviaries the most common method of raising hens.³⁶⁸
- In response to changes in consumer expectations, Switzerland also partially banned the use of sow stalls, the tail docking of pigs and the castration of pigs without anaesthetic.³⁶⁹
- Penalty rates have dramatically increased for animal cruelty offences, as has the number of cruelty cases prosecuted.³⁷⁰

Of course, it takes time to develop an ethical consensus. The first calls for the “dignity of creatures” to be included in the Swiss Constitution were made in 1980, some 20 years before the constitutional amendment was

366 Swiss Federal Veterinary Office, 2nd Animal Welfare Report (Sept. 2012) Federal Administration <<http://www.bvet.admin.ch/themen/tierschutz/index.html?lang=en>>.

367 Federal Act on Animal Protection 1978 (Switzerland); Bruce A. Wagman and Matthew Liebman, *A Worldview of Animal Law* (Carolina Academic Press, 2011) 69.

368 Animal Protection Ordinance 1981 (Switzerland); Bruce A. Wagman and Matthew Liebman, *A Worldview of Animal Law* (Carolina Academic Press, 2011) 69.

369 Compassion in World Farming, *The Welfare of Pigs in the European Union* (9 August 2013) Compassion in World Farming <http://www.ciwf.org.uk/what_we_do/pigs/state_of_eu_pigs/pig_welfare_explained.aspx>

370 Foundation for the Animal in the Law, *Annual Report on the Animal Criminal Cases of Switzerland*, (27 November 2012) Foundation for the Animal in the Law <http://www.tierimrecht.org/de/PDF_Files_gesammelt/GutachtenStrafpraxis2011.pdf>.

eventually adopted.³⁷¹ Similarly, the campaign for constitutional recognition of animals in Germany began in the late 1980s, and was achieved over a decade later, in 2002.³⁷² This also does not include global developments in the animal protection movement over several generations. Such reforms develop incrementally after extensive and long term social, legal and political campaigning by animal advocates.

Animals as “property”, mere “objects” or “things”

In most countries, animals have only the status of property, and thus devoid of legal personhood and rights. As property, animals can be acquired, owned, used, exploited, transferred and terminated – at the discretion of their legal owners. Many consider this property status the most influential factor in the continued abuse, neglect and exploitation of animals.³⁷³

Goetschel acknowledges that the status of animals as mere “objects” or “things” is largely out of step with community expectations; that society mostly recognises the science behind animal sentience and the distinction between animals and inanimate objects. Society generally acknowledges the importance of animals, particularly companion animals, in daily human lives. This public sentiment has been reflected in the legislation of those European nations, including Germany,³⁷⁴ Austria,³⁷⁵ Switzerland,³⁷⁶ France³⁷⁷ and Poland,³⁷⁸ where animals are given a legal status above simple

371 Ibid.

372 Erin Evans, ‘Constitutional Inclusion of Animal Rights in Germany and Switzerland: How Did Animal Protection Become an Issue of National Importance?’ (2010) *Society and Animals* 18, 231-250.

373 See for example Gary L. Francione, *Animals, Property and the Law* (Temple University Press, 1st ed, 1995); Steven M Wise, *Rattling the Caf : Toward Legal Rights for Animals* (2000, Perseus Publishing).

374 Bundesgesetzblatt (German Civil Code, 27 July 2011) Sections 90a, 251 and 903, English version at <http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf>; Zivilprozessordnung (German Code of Civil Procedure, 5 December 2005) Sections 765a, 811c, English version at <http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html>.

375 Allgemeines b rgerliches Gesetzbuch (Austrian Civil Code of 1811), Sections 285a and 1332a <[http://www.jusline.at/Allgemeines_Buergerliches_Gesetzbuch_\(ABGB\)_Langversion.html](http://www.jusline.at/Allgemeines_Buergerliches_Gesetzbuch_(ABGB)_Langversion.html)>.

376 Art. 641a Zivilgesetzbuch (Swiss Civil Code of 10 December 1907), English version at <<http://www.admin.ch/ch/e/rs/2/210.en.pdf>>.

377 Code civil (French Civil Code, 21 March 1804) Art. 524 and Art. 528, English version at <http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf>.

objects, without necessarily changing their status as the “property” of their legal “owners”.

For example, Article 641a of the Swiss Civil Code (2013) states:

“1 Animals are not objects.

2 Where no special provisions exist for animals, they are subject to the provisions governing objects.”

Similarly, s 90a of the German Civil Code (2011) states:

“Animals are not things. They are protected by special statutes. They are governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided.”

The German Civil Code (s 903) also maintains this distinction, stating:

“The owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence. The owner of an animal must, when exercising his powers, take into account the special provisions for the protection of animals.”

In recognising animals as more than objects, animals are given a distinct legal status. According to Goetschel, the reclassification in these jurisdictions has led to positive animal welfare outcomes and the enactment of a number of civil law protections for animals. For example, in Switzerland, compensation and reasonable veterinary costs must be paid in the case of the injury or death of an animal.³⁷⁹ Swiss courts may transfer the legal ownership of an animal to another individual, as with child custody in family disputes.³⁸⁰ Swiss courts also recognise an animal’s legal entitlement

378 Polish Animal Protection Act 1997 (Poland) Art. 1, English version at <<http://www.eswacares.org/laws/poland-animal-protection-act-1997-en.pdf>>

379 Obligationsrecht (Federal Act on the Amendment of the Swiss Civil Code (Part 5: The Code of Obligations) of 30 March 1911) Article 42, English version at <<http://www.admin.ch/ch/e/rs/2/220.en.pdf>>.

380 Above n 14, Art. 651a.

to claim inheritance where it is bequeathed property in a will.³⁸¹ Goetschel asserts that these civil protections derive from the legal recognition of animals as a distinct category, rather than objects or things.

The Swiss Constitution has been amended to protect the “dignity of the creature” in the use of animal reproductive and genetic material.³⁸² The dignity of creatures has subsequently been incorporated into South Korean legislation.³⁸³ Legally protecting the dignity of animals goes further than merely protecting the “welfare” of animals in a traditional sense, which Goetschel likens to Jeremy Bentham’s theory of protecting animals from cruelty due to their ability to “suffer”.³⁸⁴ In recognising the dignity of animals, the law is able to protect the intrinsic moral worth of all living beings, not simply those that science can confirm have the ability to “suffer”. Goetschel asserts that by acknowledgement of the dignity of animals in legislation, society can effectively question whether the use or misuse of animals – for food, scientific experimentation, clothing or even sexual interest – can be legitimated, regardless of whether or not it can be proved that the animal suffered in the course of that use or misuse.

Irrespective of these advancements in animal welfare, Goetschel does not foresee a fundamental shift from the “property” status of animals occurring in the short to medium term, nor any move away from humanity’s use and exploitation of animals. Goetschel points to the relational inequity between the right of animal owners to use and exploit their property – a right he acknowledges as being almost a “fundamental human right” in capitalist society – and the interests of animals to promote and protect their own lives and liberty. Accordingly, his view is that it is this inequity that should be resolved and achieved, without a fundamental shift from their property status, by recognising the intrinsic value or “dignity” of animals in the law.

381 Above n 14, Art. 482.4.

382 Bundesverfassung (Switzerland) (Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101) Article 120, English version at <http://www.servat.unibe.ch/icl/sz00000_.html>.

383 Animal Protection Act 2007 (South Korea) Article 3, English version at <<http://www.koreananimals.org/animals/apl/2007apl.htm#a3>>.

384 Jeremy Bentham, *The Principles of Morals and Legislation*, (1789) Animal Rights Library <<http://www.animal-rights-library.com/texts-c/bentham01.htm>>.

Animal protection – a national agenda

Goetschel considers it the responsibility of the State to protect the welfare of animals - rather than to delegate such responsibility to non-State entities. He also considers animal protection should be legislated at a national level, and that the application and enforcement of animal protection legislation is significantly undermined by inconsistent approaches to animal protection on a provincial basis. Australia, for example, does not have a consistent national approach to animal protection, with the Australian Government leaving it to states and territories to enact their own similar, but often fundamentally disparate, animal protection regimes. This is a similar situation to that in Switzerland, the United States and Italy.

For Goetschel, a uniform approach to animal protection should be a priority, even if such legislation is based on traditional “welfarist” notions of protecting animals from “unnecessary”, “unreasonable” or “unjustifiable” cruelty. Goetschel's view is that harmonising state and territory legislation would result in a strengthening of animal protection legislation, and that jurisdictions with weaker protections would be brought into line with those that had stronger protections. Harmonisation would also allow for a comparative analysis of the effectiveness of animal protection law enforcement, including prosecution and sentencing outcomes, and more easily accommodate national legislative reforms.

Constitutional recognition

Goetschel's primary recommendation is for the intrinsic value or dignity of animals to be recognised and protected in national constitutions.

Several countries, including Switzerland,³⁸⁵ Germany,³⁸⁶ Austria³⁸⁷ and Slovenia³⁸⁸, have acknowledged animals in their constitutions. For

385 Bundesverfassung (Switzerland) (Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101) Article 80, English version at <http://www.servat.unibe.ch/icl/sz00000_.html>.

386 Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany, 23 May 1949) Article 20a, English version at <http://www.gesetze-im-internet.de/englisch_gg/basic_law_for_the_federal_republic_of_germany.pdf>.

387 Bundes-Verfassungsgesetz (Federal Constitutional Law, Austria, 1 October 1920) Article 11(1)(8), English version at <http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.pdf>.

example, animal protection has been included in the Swiss Constitution, establishing the mandate for the “Confederation” or Federal legislation to deal with animal welfare issues, including the keeping and use of animals, animal experimentation, the import of animals or animal products, and animal trade, transport and slaughter.³⁸⁹

In addition, Article 120(2) of the Swiss Constitution states:

“The Federation adopts rules on the use of reproductive and genetic material of animals, plants, and other organisms. It takes thereby into account the dignity of the creature and the security of man, animal and environment, and protects the genetic multiplicity of animal and plant species.”

In 2002, Germany incorporated animal protection into its constitution, with Article 20a stating:

“Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.”³⁹⁰

Animal protection has also been included in the Indian Constitution. Since 1950, Article 48, which dealt with agriculture, essentially prohibited the slaughter of cows, calves and other milk and draught animals.³⁹¹ In 1974, further provisions were introduced, including Article 51A(g), which made it a duty of every Indian citizen:

388 Ustava Republike Slovenije (Constitution of the Republic of Slovenia, Official Paper RS, Nr. 33/91, I,42/97, 66/00, 24/03, 69/04 and 68/06, of 23 December 1991) Article 72, English version at <http://www.wipo.int/wipolex/en/text.jsp?file_id=180804>.

389 Bundesverfassung (Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101) Article 80, English version at <http://www.servat.unibe.ch/icl/sz00000_.html>.

390 Basic Law for the Federal Republic of Germany (Germany) Article 20a, English version at <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

391 The Constitution of India (India) Article 48, English version at <http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm>.

*"to protect and improve the natural environment including forests, lakes, rivers, and wildlife, and to have compassion for living creatures."*³⁹²

According to Goetschel, the constitutional recognition for animals is necessary because of their property status. As Goetschel views the use and exploitation of property as a "fundamental human right," he sees constitutional protections as the only means of properly limiting this right to restore a balance between human and animal interests. He also claims that constitutional recognition can, at least theoretically, elevate animal protection to the same level as fundamental human protections that are commonly enshrined in constitutions, such as freedom of speech, religion, teaching and, relevant to the issue of animal exploitation, freedom of commerce and the right to property.

As a result of constitutional recognition and stronger civil protections, Goetschel says Swiss law now requires a balancing act between the interests of animals and humans.³⁹³ For example, certain scientific experiments on animals have been banned by the Swiss High Court on the basis that animal welfare outweighed the human interest in performing the experimentation.³⁹⁴

An independent animal advocate

Robust statutory protections are futile unless adequately applied, enforced and prosecuted. Goetschel notes that, although animal protection should be the responsibility of the state, there is often a lack of political will when it comes to animal protection, and this directly impacts on law enforcement

392 The Constitution of India (India) Article 51A(g), English version at <http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm>.

393 Swiss Federal Veterinary Office, above n 3; Article 120; Article 1, 3, 4.2, 17, 26 Swiss Animal Welfare Act of 16 December 2005, English version at <http://www.bvet.admin.ch/themen/tierschutz/index.html?lang=en>; Article 16.2, 25 and 105 Animal Welfare Ordinance of 23 April 2008, English version at <http://www.bvet.admin.ch/themen/tierschutz/index.html?lang=en> Accessed 9 August 2013.

394 Zurich University Institute for Neuroinformatics and Politechnical Institute v Zurich Animal Experiments Commission, 2C_421/2008 and 2C_422/2008 (7 October 2009) (Federal Court of Switzerland).

and prosecution efforts. He cites political pressure from corporate lobby groups – such as the agricultural, pharmaceutical and fashion industries – as a likely reason for this lack of political will.

Goetschel supports the appointment of an independent animal protection advocate to represent animals in court proceedings and to perform an oversight role over the enforcement and prosecution of animal protection legislation. For Goetschel, this role cannot be left to police officers, the state attorney (or in the Australian context, the Department of Public Prosecutions) or other state authorities, as these entities are unfortunately subject to capture by powerful lobby groups. Further, this role cannot be left to animal owners, as there is an inherent conflict between the interests of “owners” and “their animals”. While he says there is a role for private charitable organisations, such as the Royal Society for the Protection of Animals (RSPCA), Goetschel's view is that these organisations - often limited in funding and resources - should not be exclusively relied upon by the state to enforce and prosecute animal cruelty offences.

In 1991, the Canton of Zurich instituted the role of the animal protection advocate, the first such position worldwide.³⁹⁵ Zurich's animal protection advocate was a specialist in animal law, responsible for overseeing animal cruelty complaints, supervising criminal investigations, representing or appointing a representative for animals in court proceedings, collating evidence, appointing witnesses and appealing against judicial decisions. Importantly, although the Zurich animal advocate was designated and funded by the Canton of Zurich, the attorney had no “natural” person or “legal entity” as a client, and accordingly, was not bound by client instructions – whether from animal owners, animal protection organisations or the State. The Zurich office was abolished in the process of unifying the Swiss Criminal Procedure Code in 2010. Goetschel was the animal welfare attorney in the Canton of Zurich from 2007 to 2010, and during this period, he observed that there were far more animal welfare cases in Zurich than in

395 Kantonales Tierschutzgesetz (Cantonal Animal Welfare Act of 2 June 1991, Zurich) Section 17,

[http://www2.zhlex.zh.ch/App/zhlex_r.nsf/WebView/C1256C610039641BC1256036003AE538/\\$File/554.1_2.6.91_22.pdf](http://www2.zhlex.zh.ch/App/zhlex_r.nsf/WebView/C1256C610039641BC1256036003AE538/$File/554.1_2.6.91_22.pdf); Kantonale Tierschutzverordnung (Cantonal Animal Welfare Ordinance of 11 March 1992, Zurich) Sections 13 – 15,

[http://www2.zhlex.zh.ch/App/zhlex_r.nsf/WebView/C1256C610039641BC1256036003AE55F/\\$File/554.11_11.3.92_23.pdf](http://www2.zhlex.zh.ch/App/zhlex_r.nsf/WebView/C1256C610039641BC1256036003AE55F/$File/554.11_11.3.92_23.pdf)

other cantons, higher fines and a great impetus for authorities to enforce animal protection legislation.

Goetschel also encourages the establishment of a comprehensive national database on animal protection law to assist law enforcement. In 1981, such a database was established in Switzerland, and continues to be maintained by the Foundation for the Animal in the Law, an independent not-for-profit organisation, in co-operation with Swiss authorities. The Swiss database is a compendium of all Swiss animal protection legislation. It also contains details of animal cruelty cases, court transcripts, prosecution and conviction rates, and sentencing data. Importantly, the information was collated on a national basis from all courts and tribunals. The database facilitates law reform by allowing for a comparative analysis of national animal cruelty law, as well as enforcement, prosecutions and judicial decisions.

A roadmap for Australia?

The enactment of stronger civil and constitutional protections for animals, the harmonisation of state and territory animal welfare regimes, the establishment of an independent animal advocate, and the development of a national animal law database would all significantly strengthen the legal protection of animals in Australia. Significant questions arise, however, in the application of these reforms in an Australian context.

An ethical dilemma

Goetschel says converting ethics into meaningful law reform requires the finding of a popular majority or “ethical consensus” that subscribes to a particular ethical perspective. In Australia, it is debatable whether an ethical consensus exists with respect to animal protection. While many might accept that animal protection is a powerful and rapidly growing social justice movement, attitudes toward animal protection are far from aligned. For example, while most Australians would denounce wanton acts of cruelty toward domestic pets, hundreds of millions of farm animals are

raised for human consumption in factory farms.³⁹⁶ The same can be said for the slaughter of millions of Australian kangaroos for both commercial sale and deemed ecological purposes.³⁹⁷ On this basis, it is arguable that our collective sentiment is not sufficiently aligned to enable truly progressive animal welfare reforms to gain political traction.

In this writer's view, while Australian animal advocates strive for progressive law reforms, it is important to avoid seeking inopportune short-term successes. For instance, while harmonising state and territory welfare laws is fundamentally a good thing, there is a risk that jurisdictions with weaker protections will not be "brought into line" with stronger jurisdictions, but that the opposite will in fact occur. That is, if national public and political sentiment is not supportive of progressive reforms, the process of unifying state and territory laws may result in a weakening of those standards to the lowest common denominator.

An inherent conflict of interest

The recommendation that animal protection is the responsibility of the state, and accordingly, should not be delegated, may also prove problematic in an Australian context. At a state and territory level, animal welfare is enforced by a combination of state and territory branches of the RSPCA, local police and the departments of primary industries (DPI). The DPI is generally tasked with, on the one hand, promoting the profitability of primary industries, and on the other, protecting animal welfare. A similar conflict is apparent at a Commonwealth level, with animal welfare being the responsibility of the Department of Agriculture, Fisheries and Forestry (DAFF). The outcome of this conflict can be seen in the low level of enforcement of animal cruelty in Australia. The vast majority of animal law enforcement and prosecution in Australia is carried out by the RSPCA. While the work of the RSPCA and other charities must be commended, resource constraints and limited funding are obvious obstacles to these

396 Voiceless, the animal protection institute, *Factory Farming* (2013) Voiceless, the animal protection institute <<https://www.voiceless.org.au/the-issues/factory-farming>>.

397 Voiceless, the animal protection institute, *Kangaroos* (2013) Voiceless, the animal protection institute <<https://www.voiceless.org.au/the-issues/kangaroos>>.

private organisations achieving effective enforcement and prosecution outcomes.

While the implementation of an Australian independent animal advocate would be ideal in helping to resolve this conflict, Australia first needs to address this issue in the current animal welfare regulatory and enforcement framework. A possible way to resolve this conflict, at least at the Federal level, would be to set up a truly *independent* office of animal welfare – i.e. a publicly funded, politically neutral department that could focus solely on promoting, protecting and improving welfare outcomes for all animals. On 27 May 2013, the Greens party introduced into the House of Representatives the *Voice for Animals (Independent Office of Animal Welfare) Bill 2013* (Bill), which was intended to establish such an independent office.³⁹⁸ A similar Bill was introduced into the Senate.³⁹⁹ The proposed office would focus on welfare issues concerning the Commonwealth. It would also propose reforms to animal welfare legislation and standards nationally, and advise the Commonwealth on the possible harmonisation of animal welfare laws of the Commonwealth, states and territories.⁴⁰⁰ The Bill currently lacks support from Australia's major political parties. There has been little support for such an office to be set up on a state and territory basis.

The Australian Labor Government endorsed the idea of an Inspector General of Animal Welfare and Live Animal Exports.⁴⁰¹ However, this office was seen as being largely concerned with overseeing or legitimising

398 Explanatory Memorandum, *Voice for Animals (Independent Office of Animal Welfare) Bill 2013*, The Parliament of the Commonwealth of Australia, House of Representatives, circulated by authority of Adam Bandt MP <http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5056_ems_ca412586-104b-4742-9ccc-d84484ac3b2a/upload_pdf/13134EMBandt.pdf;fileType=application%2Fpdf>.

399 Explanatory Memorandum, *Voice for Animals (Independent Office of Animal Welfare) Bill 2013*, The Parliament of the Commonwealth of Australia, Senate, circulated by authority of Senator Lee Rhiannon <http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s918_ems_81ff38f0-bdff-47ae-9bb0-503b6a0dedc6/upload_pdf/13174em.pdf;fileType=application%2Fpdf#search=%22legislation/ems/s918_ems_81ff38f0-bdff-47ae-9bb0-503b6a0dedc6%22>.

400 Explanatory Memorandum, *Voice for Animals (Independent Office of Animal Welfare) Bill 2013*, above n 36.

401 Department of Agriculture, Fisheries and Forestry, Inspector General of Animal Welfare and Live Animal Exports (1 August 2013) Department of Agriculture, Fisheries and Forestry, <<http://www.daff.gov.au/animal-plant-health/welfare/inspector-general-of-animal-welfare-and-live-animal-exports>>.

the live exports regulatory framework, and not with the promotion of animal welfare on a national level. There were also concerns with the independence of the Inspector General, with the office continuing to sit within the existing DAFF framework.

Constitutional protections

The Australian Constitution has proved difficult to amend. Under s 128 of the Constitution, an amendment must first be passed by an absolute majority in both Houses of the Commonwealth Parliament, and then at a referendum the proposed alteration must be approved by a 'double majority'. That is:

- a national majority of electors in the states and territories
- a majority of electors in a majority of the states (i.e. at least four out of six states).^{402, 403}

Since Federation, Australians have voted to enact 44 constitutional amendments, with only eight being successful.⁴⁰⁴ By comparison, Switzerland has seen 15 constitutional amendments since 1999⁴⁰⁵, and Germany, 55 constitutional amendments since its inception in 1949.⁴⁰⁶ Although amendments to the German Constitution only require a two-third majority from both parliament and the electorate, the Swiss Constitution has similar constitutional requirements to those set out in s 128 of the Australian Constitution. Accordingly, while it may be argued that the Australian Constitution is logistically difficult to amend, it may also be that

402 Australian Electoral Commission http://www.aec.gov.au/elections/referendums/Referendums_Overview.htm

403 Commonwealth Constitution s 128.

404 Australian Human Rights Commission, Constitutional reform: Fact Sheet - Historical Lessons for a Successful Referendum, (2013) Australian Human Rights Commission <<http://www.humanrights.gov.au/publications/constitutional-reform-fact-sheet-historical-lessons-successful-referendum>>.

405 Development of the Swiss Federal Constitution of 1999: Legal memorandum (2013) Mrza za izgradnju mira <<http://www.mreza-mira.net/wp-content/uploads/Development-of-the-Swiss-Federal-Constitution-of-1999-July-2013.pdf>>.

406 Patrick Bahners, 'What distinguishes Germany's Basic Law from the United States Constitution' *Frankfurter Allgemeine Zeitung* (online) 2009 <<http://news.nd.edu/news/11779-human-dignity-and-freedom-rights/>>.

the Australian electorate has a *culture aversion* to amending that Constitution.

It is also relevant to note that the Australian Constitution contains very few *human* rights. The framers of the Australian Constitution debated the adoption of a “Bill of Rights”, or the incorporation of human rights into the Australian Constitution, however, the proposal was ultimately defeated.⁴⁰⁷ In his Boyer Lecture broadcast on Human Rights Day, the then Chief Justice of the High Court of Australia, Murray Gleeson, stated that “the Australian Constitution, as a plan of government for a federal union, is largely concerned with pragmatism rather than ideology”.⁴⁰⁸ As a result, there are only five explicit human rights in the Constitution.⁴⁰⁹ This may be compared with the Swiss Constitution which protects fundamental rights (including, but not confined to, the protection of human dignity, equality before the law, the right to life and to personal freedom and to freedom of religion), citizenship and political rights. This is particularly poignant when considering the possible recognition of animal rights in the Australian Constitution, a document that barely protects the rights of humans.

Addressing animals as “property”

Goetschel's view is that a fundamental shift from the property status of animals is not required, as long as the relational inequity between the interests of animal owners and animals are reconciled through legal reform. However, even the strongest legislative protections require a balancing act between human and animal interests, and without first addressing the property status of animals, human interests are likely to prevail.

For example, while India’s Constitution contains arguably the most

407 Australian Human Rights Commission, How are human rights protected in Australian law? (2006) Australian Human Rights Commission <<https://www.humanrights.gov.au/how-are-human-rights-protected-australian-law>>.

408 Chief Justice Murray Gleeson, Boyer Lectures - Four Aspects of the Constitution, (10 December 2000) ABC Radio National <<http://www.abc.net.au/radionational/programs/boyerlectures/the-rule-of-law-and-the-constitution/3341020>>.

409 The civil protections included in the Constitution include the right to vote (s 41)[not exactly a right to vote - the right is in the legislation], to not have your property unjustly acquired (Section 51 (xxxi)), to a trial by jury (Section 80), to freedom of religion (Section 116) and to freedom from discrimination on the basis of residency (Section 117).

progressive animal welfare protections in the world,⁴¹⁰ in practice those constitutional protections are not necessarily enforced or judicially upheld.⁴¹¹ This point is illustrated in *Mohd Habib v State of Uttar Pradesh*, where a group of butchers sought to overturn Article 48 of the Indian Constitution. Article 48 effectively provides that the State must take steps to prohibit the slaughter of cows, calves and other milk and draught animals.⁴¹² The butchers' justification for seeking to overturn the Article was that their livelihood depended on the slaughtering of animals, and accordingly, that they had a "fundamental right" to kill animals.⁴¹³ In what seems to be a compromise, the court ruled against the butchers' attempt to strike down the constitutional provisions, but did not go so far as to denounce their trade as a constitutional violation. In essence, the case illustrates that without addressing the property status of animals and, according to Goetschel, the "fundamental right of humans to exploit animals", legislative and constitutional reform will continue to be severely restrained in protecting the welfare of animals in practice.

Conclusion

This paper has examined Goetschel's key observations in his 2013 Voiceless Law Lecture Series presentation, reflected upon his consideration of the fundamentals of animal ethics and the law, the implications of the legal status of animals as property, and the need to strengthen the legal standing of animals. Ways in which European laws have developed to recognise animals, including through constitutional reform, have been considered.

While Goetschel's recommendations could (and should, in the writer's view) be used as a "roadmap" for law reform in Australia, it has been argued that certain obstacles will inevitably arise in their application in

410 Article 48 of the Indian Constitution deals with agriculture, and essentially prohibits the slaughter of cows, calves and other milk and draught animals. In 1974, further provisions were introduced, including Article 51A(g), which made it a duty of every Indian citizen: "to protect and improve the natural environment including forests, lakes, rivers, and wildlife, and to have compassion for living creatures."

411 See, for example, Bruce Wagman and Matthew Liebman, *A Worldview of Animal Law* (Carolina Academic Press, 2011), 262.

412 The Constitution of India (India) Article 48. English version at <<http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm>>

413 Wagman and Liebman, above n 46, 265.

Australia. This is not intended to question the validity of Goetschel's recommendations. Nor is it suggested that animal advocates should not strive to achieve the kinds of legal protections proposed, in the long term. What has been considered are some of the obstacles we may face when striving for these reforms in the short to medium term.

Goetschel's presentation reinforces the importance of the Voiceless Animal Law Lecture Series in keeping the Australian animal protection movement informed of international concepts, promoting discussion and lively debate, and assisting the cross-pollination of new initiatives from other jurisdictions.

Animal Welfare Sentencing in New Zealand, and the Pro-Bono Panel of Prosecutors for the SPCA, Auckland

By Anita Killeen⁴¹⁴

No specific agency in New Zealand is given responsibility and resources to enforce the *Animal Welfare Act 1999*. Most ill-treatment prosecutions are brought by the Society for the Prevention of Cruelty to Animals (SPCA), a non-government agency lacking a secure source of funding, and reliant upon donations. The Ministry of Primary Industries deals with most prosecutions relating to the treatment of farm animals. Police may also bring prosecutions under the *Animal Welfare Act 1999* (although this is rare).

Resources to investigate and prosecute offences against animals are limited. The Auckland SPCA's operating funds come almost exclusively from public donations and the cost of prosecutions is financially challenging. The

414 Former Chief Prosecutor, Serious Fraud Office in New Zealand (2003 – 2010). Auckland barrister. NZ. International member American Bar Association Animal Law Committee.

author joined the Auckland SPCA Board of Directors in 2009 and found that, on occasion, there was no money to fund animal welfare prosecution. As a result, the writer established the Pro Bono Panel of Prosecutors (Pro Bono Panel) to ensure that all cases meeting the Solicitor-General guidelines, as being appropriate to be prosecuted, could be brought to court.

The Pro Bono Panel comprises 21 legal practitioners (Queens Counsel, Crown prosecutors, barristers and solicitors). Panel members conduct prosecution cases without charge to the Auckland SPCA. As a result, since 2009 the Auckland SPCA has not had to spend any of its charitable funds on prosecution. The Pro Bono Panel has also been instrumental in lobbying for legislative change.

This article reviews *Auckland Society for the Prevention of Cruelty to Animals v Paulette Taki*⁴¹⁵, the first completed prosecution conducted by the Pro Bono Panel for the SPCA Auckland. Amendments to the *Animal Welfare Act 1999* made by the *Animal Welfare Amendment Act 2010* are also considered.

Auckland Society for the Prevention of Cruelty to Animals v Paulette Taki⁴¹⁶

This prosecution, conducted by the Pro Bono Panel⁴¹⁷ for the SPCA Auckland, resulted in a prison sentence and, the writer considers, a strong judicial message to animal abusers.

Judge Wade sentenced Paulette Taki to three months' imprisonment on 12.2.2010. Taki was also ordered to pay \$3,938 reparation to the Auckland SPCA, and prohibited from owning or being a caregiver for any dog, pursuant to s 169 of the *Animal Welfare Act 1999*, for five years.

Taki had pleaded guilty to two charges under s 12(a) of the *Animal Welfare Act*, for 1) failing to provide an animal with proper and sufficient food and

415 District Court, Auckland CRI-2008-004-15941, 12 February 2010, Judge Wade.

416 Ibid at note 2.

417 through David Jones QC and Erin McGill

water; and 2) failing to provide an animal with protection from, and rapid diagnosis of, any significant injury or disease. At that time, the maximum penalty for an offence under s 12(a) *Animal Welfare Act* was a \$25,000 fine and/or six months' imprisonment (s 25 *Animal Welfare Act*). Taki was also sentenced on two charges of breaching a community work order.

In December 2007, an Auckland SPCA inspector received information from a member of the public that a very thin dog had been found locked under a house. The finder had already removed the dog from under the house to give it water. Auckland SPCA inspectors rescued the dog on Christmas Eve and named her "Eve".

The inspector gave evidence of having seen a female Staffordshire terrier cross in an emaciated state, with ribs, spine, hips, and pelvic bones all clearly visible. Extreme muscle wastage was obvious over her body. Masses of old faeces and empty bowls were under the house where the dog had been found.

Veterinary reports confirmed the dog was in an emaciated condition and suffering from anaemia, due to an extreme flea burden (literally draining the blood from her). When found, Eve weighed 10kg, about half her normal body weight. She could barely lift her head to acknowledge the inspector's presence. After a regime of good quality dog food, de-worming, and de-fleaing, the dog's condition returned to normal.

A follow-up veterinary report concluded that the clinical symptoms, laboratory findings, and subsequent rapid recovery were consistent with inadequate nutrition being the primary cause of the emaciation, and that if the dog had been left under the house another 48 hours, she would have died. The SPCA believed she had been starved for five weeks, surviving on flies and faeces. Ownership of the dog was forfeited to the SPCA.

The New Zealand *Sentencing Act 2002* requires the Court to have regard to⁴¹⁸:

418 See section 8.

- The need to hold the prisoner accountable for the harm done to the victims of the offending.
- The need to promote a sense of responsibility for, and acknowledgement of, that harm.
- The need to provide for the interests of the victims of the offending.
- The need to denounce the offending and deter others from committing the same or similar offences.
- The need to assist in the prisoner’s rehabilitation and reintegration into society.

The Court must also have regard to the following principles:

- The gravity of the offending in the particular case, including the degree of culpability of the offender⁴¹⁹.
- To impose a penalty near to the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate⁴²⁰.

The judge considered a period of imprisonment to be the only appropriate sentence. The possibility of community work was rejected, because Taki had breached four previous community work orders, and also because it was clear the dog had been neglected for a very substantial period of time. As Judge Wade stated, “[t]his was a poor dog within 48 hours of dying, due entirely to your absolute total neglect.”⁴²¹

The New Zealand Court of Appeal in *R v Taueki*⁴²² establishes the orthodox approach to sentencing: the Court must first set the starting point based on the features of the offending, and then adjust that starting point according to any mitigating and aggravating features relating to the offenders.

⁴¹⁹ Section 8(a) of the Sentencing Act.

⁴²⁰ Section 8(d) of the Sentencing Act.

⁴²¹ *Ibid* at paragraph [10].

⁴²² [2005] 3 NZLR 372.

With respect to Taki, Judge Wade noted⁴²³:

“In this type of offending in particular, there is a need for general deterrence so that dog owners may know that they have serious responsibilities to look after their animals and that if they do not do so, condign punishment will follow as a matter of course and, if I were to deal with this case simply by way of the imposition of a community based sentence, in my judgment there would be no feature of general deterrence. I repeat, because of your personal track record of failing to comply with community based sentences, even if that were an available option, in theory it would be absolutely inappropriate in your case.”

The judge selected a starting point of three months’ imprisonment concurrently on each of the animal welfare charges, reduced to two months (concurrent with each other) in light of Taki’s early guilty plea and her lack of previous convictions in relation to animals. One month’s imprisonment was imposed on each charge of breaching community work orders, concurrent with each other but cumulative on the two months imposed for the animal welfare offences - for a total of three months’ imprisonment.

The judge also noted:

*“It is plain from the circumstances of your offending that you are totally unfit to have control of animals and I make an order ... disqualifying you from having any right of ownership of any dog for a period of five years.”*⁴²⁴

Amendments to *Animal Welfare Act 1999*

The Pro Bono Panel for the Auckland SPCA has been involved with drafting and filing submissions and appearing in front of Parliamentary

⁴²³ Ibid at paragraph [11].

⁴²⁴ Ibid at paragraph [11].

Select Committee hearings calling for, in particular, an increase in maximum sentences in animal welfare cases.

A private members bill to amend the *Animal Welfare Act 1999* was initiated by the Member for Tauranga, Simon Bridges, a former Crown Prosecutor, in early 2010. The amendment was designed to ensure that animal cruelty would be dealt with more appropriately and more effectively by New Zealand courts⁴²⁵. It was passed by unanimous vote in July 2010, increasing the maximum sentence for wilful ill-treatment of an animal from three to five years' imprisonment, and doubling the maximum fines to \$100,000 for an individual and \$500,000 for a company. Penalties were increased for other neglect and ill-treatment offences. The Act expanded the law relating to forfeiture of animals and disqualification from owning them. The amendment to the *Animal Welfare Act* also created a new offence of reckless ill-treatment.

Conclusion

The unanimous vote for the amendments to the Animal Welfare Act 1999 reflects Parliament's denunciation of animal cruelty offending. Judge Wade's sentencing decision suggests a growing judicial awareness of the seriousness of animal cruelty within the broader context of criminal offending. Is it too much to hope that a new era for animal welfare sentencing in New Zealand has dawned?

⁴²⁵ See: <http://www.nzlawyer magazine.co.nz/Archives/Issue130/130F1/tabid/2146/Default.aspx>

BOOK REVIEWS

Animal Law In Australasia - Continuing the Dialogue

2nd Edition (2013)

Edited by Peter Sankoff, Steven White & Celeste Black.

Publisher Federation Press ISBN 978 186287 930 0 (pbk)

This forceful collection of scholarly essays examines, from sixteen cogently argued positions, the diverse cruelties inflicted on animals in Australia and New Zealand, and explains how the laws of these two proud democracies allow these barbarities to persist in all our names.

Potent political and economic forces arrayed against real reform of animal protection law are subjected to a first-hand dissection.⁴²⁶ Sue Kedgley provides a first-hand account of the political and economic forces that explain why "so little progress" has been made in improving conditions for animals in New Zealand. Referring to proposed animal welfare reforms,⁴²⁷ Kedgley quotes a recent Cabinet paper warning that:

Animal welfare matters because our trading partners and consumers want us to do the right thing by our animals ... One rogue producer, or even isolated cases of poor animal welfare ... could do immeasurable market damage to our reputation as a responsible agricultural producer and affect our exports.

There's a probing examination of the enemy within: the ways that humans find to justify their own failure to ensure the humane treatment of other species.⁴²⁸ Elizabeth Ellis explores the "attendant rationalisations and the implications of living with the pretence that animals are protected when the facts suggest otherwise".

426 By former NZ Greens Party MP Sue Kedgley. Ch. 15.

427 viz, "changes to the Animal Welfare Act 1999, and a new Animal Welfare Strategy", 341.

428 Elizabeth Ellis, "The Animal Welfare Trade-Off or Trading Off Animal Welfare? Ch. 16.

*A society shaped by untruths about animal treatment is arguably not well placed to deal with its most vulnerable citizens or with the complex global challenges, such as climate change and the mass movement of peoples, likely to accompany the progress of the 21st century.*⁴²⁹

The complexities of Australasian animal welfare regulation, its design and its enforcement, are analysed, and found seriously wanting by former RSPCA prosecutor and PhD candidate,⁴³⁰ Jed Goodfellow:

".... the current and projected approach to animal welfare regulation within the non-domestic realm over-emphasizes efficiency and cost savings objectives to the detriment of legitimacy values such as accountability. Delegation of most inspection responsibilities to industry and the adoption of an enforcement strategy that takes a dialogic approach to dealing with non-compliance fails to reflect key features of the regulatory environment and mischaracterises the nature of animal welfare offences.

*Animal welfare offences are not simply technical rule violations or 'side effects' of business operations. A regulatory system that seeks to manage animal mistreatment, rather than prohibit it, will not be acceptable to the broader community.*⁴³¹

The predecessor publication, *Animal Law In Australasia - A new dialogue*, was the first comprehensive scholarly book on animal law issues in Australia when it was published four years ago. The 2013 edition contains five of the original chapters, thoroughly updated of course, and many new or previously ignored areas for scholarly consideration, including the "uneven regulation" of the welfare of fish "including aquaculture and the 'wild caught' sector (Celeste Black), whale hunting and live exports (Ruth Hatten), WTO obstacles to setting meaningful animal welfare standards

429 Ibid, p365.

430 Reflecting emergence of a growing base of postgraduate research in Australian animal law. For a detailed list of animal law related research theses, see (2013) 9 AAPLJ 48-53.

431 "Animal Welfare Law Enforcement: To Punish or Persuade?", 183, 206.

(Amokura Kawharu), wild animals and the law (Dominique Thiriet), regulation of scientific animal use (Andrew Knight), animal cruelty sentencing (Annabel Markham) and animals and entertainment (Jackson Walkden-Brown). In "Moral Panics⁴³² and Flawed Laws: Dog Control in New Zealand", David Tong & Vernon Tava look at Australasian laws in relation to "dangerous dogs".

Extensive footnotes, tables of cases and legislation, and a detailed index make *Animal Law in Australasia: Continuing the Dialogue* a stimulating and informative teaching aid, in conjunction with one's preferred textbook. It is essential reading to all who wish to better understand "the multi-faceted, politically-charged field"⁴³³ of relationships between humans and animals.⁴³⁴
- *John Mancy*

The 2013 Voiceless Anthology

Selected by JM Coetzee, Ondine Sherman, Wendy Were and Susan Wyndham
Publisher Allen & Unwin
ISBN 978 1 74331 330 5

The 2013 Voiceless Anthology is "a collection of the best entries in the inaugural Voiceless Writing Prize, designed to recognise the best Australian short fiction and non-fiction that has at its heart the place of animals in the world we have made."

432 as in media-fuelled 'moral panics'; see esp. p119-120.

433 in the most apt phrase of Jed Goodfellow, @ p206.

434 See generally Steven White, "Animal Law in Australian Universities: Towards 2015"; (2012) 7 Australian Animal Protection Law Journal 70

The judges chose 10 essays and stories that explore intricate relationships between humans and animals, and the special vulnerability of animals.

While all the pieces offer a distinctive perspective on the human-animal connection, some perspectives are more engaging than others.

The guilty confessions of a vegetarian whose everyday choices fail to live up to her ethical beliefs is honest, if somewhat unapologetic. Intelligently written, thoroughly researched and quite persuasive, it leaves one wondering how the writer could be unable to commit to her ethical beliefs.

An essay by indigenous authors, credited in part to the Bawaka country itself, is beautifully written and unique in perspective. The description of traditional hunting practices provides a respectful account of a human-animal relationship that is unexpectedly both respectful and submissive on the part of the human protagonists. It challenges the dynamic so often seen in animal-related stories; where the animal is the passive recipient of active human interaction.

Other stories suffer from being forced, too willing to ask us to believe in the close connection described without introducing us to the individual animal protagonist. *Kangaroo* describes an unbelievable connection formed in unlikely circumstances. While beautifully written and engaging to read, it left this reviewer no lasting impression of the relationship described and unmoved by its dramatic ending.

The other days, on the other hand, describes a similarly tragic circumstance in which the absence of a connection between humans and animals takes centre stage. Delicately woven, it is a stand out insofar as making a lasting impact long after one has read it.

Perhaps the most striking story, *Caged*, draws strong similarities between humans and animals, capturing the loneliness felt in captivity by different species.

Another set of pieces offers the animal not as a part of a personal relationship, but as the ever present other: the stranger whose presence is silent yet manages to shape the future of those around it. *The Horses* and *Not Long Now* represent that perspective.

Overall, the pieces are varied in perspective, style, content and message. Each is meritorious in its own right, appealing to a wide variety of reading references. The stories, difficult reading in parts due to the animal abuse described, are both surreal and accurate; while one may not believe the connection described between a joey and a convalescent young woman such as that in *Kangaroo*, one is left in no doubt that the farming practices described in *Caged* are an accurate reflection of the horrors of factory farming.

The anthology is a worthwhile read, likely to have a piece to cater to most preferences. - *Naty Guerrero-Diaz*.

Animal Wise

by Virginia Morell

Publisher: Black Ink

ISBN 9781863955966 (pbk.)

More animal lore than animal law? By any measure, this book by science journalist and author Virginia Morell is a riveting read.

A constant theme of the individual chapters - on ant teachers, altruistic rats, parrot linguistics, elephant memories, chimpanzees, fish, dolphins and dogs - is the importance of social structures and social skills, in acquiring and fostering intelligence, and the idea⁴³⁵ that the complexities of social living are the key evolutionary pressures in developing complex cognitive abilities.

Each chapters discloses something new about animal minds:

435 First advanced by Alison Jolly and Nicholas Humphrey, pioneers in the field of social cognition. *Animal Wise*, 114.

- Miniscule rock ants at the University of Bristol, showing how little neural tissue is required for impressive feats of cognitive processing,⁴³⁶ including "ant teachers" who patiently⁴³⁷ show others how to find their way to a new "home".
- Fieldworkers in the Venezuelan Ilanos spending decades compiling a parrot dictionary, converting thousands of 'peeps' from hundreds of parrotlets into spectrograms; then running these 'sound-images' through specialised computer programs that searched for and quantified subtle similarities and differences in their calls.⁴³⁸
- Complex social problems faced by male dolphin gangs in Shark Bay, Western Australia, as evidence of why dolphins need big brains. ("For one of the same reasons humans do: they're dealing with social uncertainty.")⁴³⁹

For those seeking social justice for all animal species it may be a depressing philosophical "truism" that values cannot be derived by facts; that it is an individual's ethical framework, not simply the facts of the matter, which guide that individual's action. However, as Marc Bekoff⁴⁴⁰ writes in a publisher's blurb, "we must use what we know about [animals] to make their lives better in an increasingly human-dominated world". - *John Mancy*

436 "The Ant Teachers", 27.

437 and, at a cost to itself, so that another individual can learn more quickly, in the adapted terms of an accepted definition of teaching in non-human animals, developed by animal cognition researchers Tim Caro and Marc Hauser. 39-45.

438 "Parrots in Translation", 93, 109.

439 Animal Wise, 195-6.

440 Author of The Emotional Lives of animals, The Animal Manifesto and Ignoring Nature No More.

Letters to the Editor

➤ Animal Welfare issues in the Greyhound Industry

*Caroline Hoetzer writes*⁴⁴¹:

Recent media reports of continuing greyhound deaths on and off the track have added weight to an urgent need to address the animal welfare issues raised by Alexandra McEwan and Krishna Skandakumar (“The welfare of greyhounds in Australian racing: Has the industry run its course?”).⁴⁴²

In April 2013 an Illawarra Mercury report on the deaths of three greyhounds at a Dapto (NSW) race meet told of one dog breaking its neck and another breaking its back. Greyhound Racing NSW reported to the media that it had “launched a full investigation into each of the individual injuries suffered at the meeting”.⁴⁴³ The results of this investigation have not been made public and attempts by the greyhound advocacy group *Greyhound Freedom* to gain details from industry representatives have met with strong resistance. On 5 June 2013, "Tuscan Storm", a 3-year-old greyhound, won race 12 at Shepparton (Vic.) but collapsed in the catching pen and was subsequently found to be deceased.⁴⁴⁴

The McEwan/Skandakumar article drew academic attention to the under-reported animal welfare issues in the greyhound industry. The article emphasised that although the greyhound racing industry is regulated by animal welfare legislation and industry rules, the current animal welfare paradigm, using a utilitarian approach, justifies or allows the use of animals by non-human animals and provides that their pain and suffering is necessary or justifiable where there is a recognised social benefit. The authors take as its premise that the killing and mistreatment of greyhounds

441 In an edited letter -Ed.

442 (2011) 6 AAPLJ 53.

443 Cydonee Mardon, “Investigation after three dogs die at Dapto”, Illawarra Mercury, 15 April 2013.

444 Greyhound Racing- Don't Bet On It Facebook update, 6 June 2013, <<https://www.facebook.com/GreyhoundActionAustralasia?fref=ts>>.

in the racing industry can no longer be considered legitimate according to the utilitarian calculus.⁴⁴⁵

These significant welfare issues result from a commercial racing and gambling industry that is not independently regulated. The insularity of the racing industry from public scrutiny means the majority of welfare issues are not reported to the media or recorded in any reports, industry or otherwise. The greyhound advocacy group *Greyhound Freedom* has determined that in 2012, 510 greyhounds fractured a bone or died from their injuries at a TAB greyhound track in Australia. There were 1583 further injuries, and 3386 greyhounds were scratched from scheduled races due to injuries. Injuries and deaths that occurred at the 20 non-TAB greyhound tracks in NSW cannot be determined as the stewards' reports are not publicly accessible.

Regulation of animal welfare in the racing industry comes under the primary responsibility of greyhound industry bodies, such as Greyhound Racing NSW which, according to its Animal Welfare Policy, "has primary responsibility for the control of greyhound and animal welfare in the NSW greyhound racing industry through the implementation of relevant policies, rules and regulations as well as information and education programs." Greyhound Racing NSW insists that clubs adhere to animal and greyhound welfare policies and regulations as a condition of their registration.⁴⁴⁶

The Greyhound Racing NSW Animal Welfare Policy provides that those involved in greyhound racing "must take appropriate action where ... cruelty or neglect is identified, including reporting offending parties to the RSPCA or other relevant authorities that are in a position [to] take action against an offender". The RSPCA does not generally intervene in the welfare of greyhounds in the racing industry. RSPCA Victoria President Dr Hugh Wirth was quoted in 2004 as stating that whilst he deplored the over-production of greyhounds for the racing industry, the official RSPCA

445 Alexandra McEwan and Krishna Skandakumar, "The welfare of greyhounds in Australian racing: Has the industry run its course?" (2011) 6 AAPLJ 53 at 56-57.

446 Greyhound Racing NSW, "Animal Welfare Policy", Nov. 2006, <<http://www.thedogs.com.au/Uploads/Userfiles/Animal%20Welfare%20Policy.pdf>>.

position is that there is no reason to ban greyhound racing.⁴⁴⁷ The RSPCA NSW gains its authority from the *Prevention of Cruelty to Animals Act 1979* (NSW), which does little to protect the welfare of greyhounds in the racing industry. The racing of greyhounds is not an offence under the Act, and, as the authors state, the killing of an animal is also not unlawful per se.⁴⁴⁸ As long as the pain and suffering inflicted on the animal during the act of killing does not amount to cruelty, it is lawful for an owner to dispose of his/her property.

This leaves the welfare of greyhounds in the hands of stewards who manage the operations of race meets. The role of the steward is to administer the racing rules, which involves the steward acting as investigator, prosecutor and adjudicator of breaches to the racing rules. As was highlighted in 2008, in an inquiry into the racing industry, this leaves little room for the separation of power needed to allow for due process to occur.⁴⁴⁹

Ultimately though, any rules relating to the welfare of racing greyhound are more related to ensuring fairness for the punters than the genuine welfare of the dogs. For example, examination of competing greyhounds prior to racing by a registered veterinarian under rule 37 relates to determining the fitness of the dog for racing.⁴⁵⁰ If the dog is not fit to race, the steward can order its withdrawal from the race. Under the racing rules, stewards have very limited power to intervene where welfare concerns potentially arise. Failure to provide adequate welfare of greyhounds is an offence under rule 106, and is punishable at the discretion of the steward by a fine and, most extremely, by expulsion from the racing industry (rule 95).⁴⁵¹ No provision

447 Lorna Edwards, "Hounded to death", Sydney Morning Herald, 25 October 2004, <<http://www.smh.com.au/articles/2004/10/24/1098556290613.html>>.

448 Alexandra McEwan and Krishna Skandakumar, "The welfare of greyhounds in Australian racing: Has the industry run its course?" (2011) 6 AAPLJ 53 at 59.

449 In 2007, the NSW Minister for Gaming and Racing appointed barrister Malcolm Scott to chair a Review (Malcolm Scott, 2008 Independent Review of the Regulatory Oversight of the NSW Industry Report (June 2008), cited in Alexandra McEwan and Krishna Skandakumar, "The welfare of greyhounds in Australian racing: Has the industry run its course?" (2011) 6 AAPLJ 53 at 61. The Scott Review was critical of this role of the steward, and also highlighted the high level of corruption in the racing industry.

450 Greyhound Racing NSW, "Greyhound Racing Rules", 1 January 2013.

451 Greyhound Racing NSW, "Greyhound Racing Rules", 1 January 2013.

is made for the seizure of greyhounds where any welfare concerns are raised.

It is for the owner's discretion what to do with the dog. As a chattel, it is lawful for an owner to dispose of his/her property. Under rule 105, the owner is required to notify Greyhound Racing NSW of any change in circumstances of a licenced greyhound, i.e. if it is retired as a pet, made a breeding greyhound, surrendered to a rescue organisation, exported, humanely euthanized by a veterinarian or is deceased.⁴⁵² Although rule 106 requires that if a greyhound has been euthanised by a veterinarian, the owner must include a veterinary certificate of euthanasia to Greyhound Racing NSW, this does not go so far as to require humane euthanasia.⁴⁵³

Racing greyhounds will continue to die on and off the track. There is no act of cruelty involved in greyhounds dying as a result of injuries sustained during a race. As long as the racing is legitimate and the pain and suffering inflicted on the animal during the act of killing does not amount to cruelty, there is no offence in the disposal or death of injured, slow or otherwise unwanted greyhounds. I agree with the authors that continuation of the racing industry can no longer be considered legitimate.

⁴⁵² Greyhound Racing NSW, "Greyhound Racing Rules", 1 January 2013.

⁴⁵³ Greyhound Racing NSW, "Greyhound Racing Rules", 1 January 2013.

➤ **Animal Law Teaching in Non-Law Disciplines:
Incorporation in Animal and Veterinary Science
Curricula.**

*Alexandra L Whittaker*⁴⁵⁴ writes:

Animal law, despite burgeoning interest amongst legal scholars and its multi-disciplinary nature, appears to have received little attention as a discipline area for animal and veterinary scientists. The increased focus on animal welfare within these curricula and in the public arena makes it appear remiss of educators in these programs to not consider this closely allied subject. Animal law provides the tools necessary for implementing welfare standards and reducing cruelty; activities integral to the interests of these professionals.

While many areas of animal law involving litigation can clearly only be performed by legal advocates, animal and veterinary scientists often find themselves involved in animal legal issues while occupying regulatory roles or advisory positions and acting as witnesses in court proceedings.

Many would argue that veterinarians should be subject matter experts in animal welfare by virtue of their training and experience.⁴⁵⁵ It follows that standards of care laid down in animal protection regulation should be highly influenced by veterinarians.⁴⁵⁶ However, it has been suggested that veterinarians have not taken a leadership role in educating others, including government departments and the public, regarding animal welfare matters.⁴⁵⁷

454 VetMB MBA DLAS DWEL Lecturer, School of Animal and Veterinary Sciences, Faculty of Sciences, The University of Adelaide Roseworthy Campus SA 5371

455 Larry Carbone, 'Expertise and Advocacy in Animal-Welfare Decision Making: Considerations for a Veterinary Curriculum in Animal Welfare'. (2010) 37 *Journal of Veterinary Medical Education* 36.

Sue VandeWoude, 'Development of a Model Animal Welfare Act Curriculum'. (2007) 34 *Journal of Veterinary Medical Education* 600.

456 VandeWoude, above n7.

457 Ibid.

A contributing factor to the seeming lack of engagement by these professionals may be unfamiliarity with the workings of the legal system and legal terminology. Education within their degree programs or at postgraduate level would help overcome such issues, and allow these professional groups to assume more active roles in animal legal debates.

Some inroads into this educational gap have been made in postgraduate veterinary education.⁴⁵⁸ However, little opportunity remains for studying animal law at undergraduate level.

In an attempt to address this, the School of Animal and Veterinary Sciences at the University of Adelaide has recently (2012) introduced an elective unit in animal law. It is thought to be the first course of its kind, in Australia, to be offered to students from a non-law background.

A key course objective is to emphasise the legal framework within the wider societal framework governing human interactions with animals, and to develop the ability to critique and articulate on such a framework. The course has a multi-disciplinary nature incorporating philosophy, economics and animal welfare science, in addition to law.

Animal law topics are mainly restricted to areas relating to animal protection and conservation. Learning outcomes are related to graduate employment roles, thus focussing on the ability of students to utilise legislative instruments in such activities as auditing animal enterprises, critiquing documents based on their evidence-base and enforceability, and acting as competent witnesses in court proceedings. Assessment strategy is aligned to these objectives. A major assessment involves a research essay on a topic relevant to animal law. This essay delves into the scientific background behind any perceived welfare issue, assimilates the various sources of law pertaining to the topic with a critique of the regulatory

⁴⁵⁸ The Australian and New Zealand College of Veterinary Scientists offers a “Fellowship in animal welfare science, ethics and law” http://www.anzcvcs.org.au/info/fellowship/subject_guidelines/; the European College of Animal Welfare and Behavioural Medicine also offer a specialty in animal welfare science, ethics and law http://www.ecawbm.org/index_11.htm as do the American College of Animal Welfare < <http://www.acaw.org/>>.

framework, and provides suggestions for future legislative reform where warranted.

To demonstrate the significance of animal law to their future career roles, and to allow students to assess the practical impacts of the law on animal enterprises, animal enterprise visits are included,⁴⁵⁹ where application of the law is assessed using an audit procedure⁴⁶⁰. This assists students in interpreting the legislation and assessing the practicality and enforceability of it in a real-life scenario. This appears to be the most enlightening aspect of the course to students as their idealism rapidly transforms to realism: brought about by an appreciation of the various stakeholder perspectives, and an understanding of the practical factors that impinge on enforceability.

While such a course represents only a limited foray into the discipline of animal law, the creation of knowledgeable advocates can only raise the profile of animal law debate, and help foster a legal environment responsive to change. It is hoped that other schools of animal and veterinary science will recognise the importance of knowledge of animal law to their graduates, and adopt similar courses in their curricula.

459 For example, a trip to an intensive piggery and a biomedical research facility.

460 This procedure involved students' assessing the animal unit in accordance with a checklist of criteria derived from the relevant primary and delegated legislation. Checklists covered criteria such as adequate provision of suitable food and water, suitability of ventilation, and cage or pen dimensions. For a piggery visit, students used an RSPCA-created checklist for routine inspections of pig farming enterprises.