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EDITOR

John Mancy

ASSISTANT EDITOR

Jacquie Mancy-Stuhl

Published by

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

The AAPLJ is Australia's first animal law journal. It has been published since 2008, to serve as a scholarly forum for principled consideration and spirited discussion of the issues of law and fact affecting the lives of non-human animals. The greatest threat to animals is passivity and ongoing acceptance of the status quo; a status quo most easily maintained through silence.

In this issue:

Glenys Oogjes discusses the development of the Land Transport of Livestock Standards and Guidelines (LTLSG) from her vantage point as a member of the Reference Group for the LTLSG and executive director of Animals Australia. Glenys argues that "(T)he current review process, and thus the review of the standards of livestock transport in Australia, has been flawed."

Dr **Gail Tulloch** and **Steven White** apply the "capabilities approach" for animals developed by Martha Nussbaum, as a "useful benchmark for assessing the extent to which institutional structures for the protection of animals ... incorporate justice for animals, nationally and internationally". The authors find that "the basic institutional structure through which we express our obligations to animals - animal welfare law, broadly conceived - leaves us a very long way short of realising justice for animals, in the way eloquently argued for by Nussbaum".

Alexandra McEwan and **Krishna Skandakumar** take an in-depth look at greyhound racing. They find that, with an estimated 17,000 Australian greyhounds killed annually,¹ viability of the "industry" depends upon over-breeding, which has apparently spawned a market for greyhounds as a live export 'commodity' and scientific research tool.

Lesley Instone,² draws on disciplines outside law in a way that provides an engaging 'reading' of the black letter law on companion animal management, with a focus on the legal construction of the 'dangerous dog' in the *Companion Animals Act* 1998 (NSW).

¹ as pups, or due to injuries sustained during racing, or as surplus dogs at the end of their racing 'career'.

² a cultural geographer with interests in human-animal relations and legal geographies

In the NOTES section, **Celeste Black** critiques proposals for achieving emissions reductions by way of camel “removals”, in the context of the Carbon Farming Initiative (an element of the Australian Government's new Clean Energy Plan). A recent presentation³ by the Chief Policy Advisor of Compassion in World Farming, **Peter Stevenson**, who played a leading role in winning the European Union bans on veal crates, battery cages and sow stalls, is reproduced in full, and Ven. **Alex Bruce** reflects on some future initiatives in animal welfare that were prompted by Peter's presentation.

The AAPLJ is intended for general information. Where possible, references are given so readers can access original sources or find more information. Information contained in the AAPLJ does not represent legal advice.

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

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

³ in the 2011 Voiceless Lecture Series.

CONTENTS

**Australian Land Transport Standards and Guidelines:
Is the new review process providing protection
for transported farm animals?**

Glenys Oogjes 8

A Global Justice Approach to Animal Law & Ethics

Dr Gail Tulloch and Steven White ... 29

**The welfare of greyhounds in Australian racing:
Has the industry run its course?**

Alexandra McEwan and Krishna Skandakumar 53

**Regulating Rover: Legislating the Public Place of
Urban Pet Dogs**

Lesley Instone 75

NOTES

Celeste Black - **Bringing back the bounty:
Climate change and animal control** 91

Peter Stevenson - **Farm animal law: Reflections from the EU** 102

Ven. Alex Bruce - **Animal Welfare, food security and
future directions** 114

Australian Land Transport Standards and Guidelines: Is the new review process providing protection for transported farm animals?⁴

*By Glenys Oogjes*⁵

The national Model Codes of Practice for farm animals commenced in the early 1980s as voluntary minimum standards. Around 2005, there was an agreed need to move to enforceable 'Standards' and associated advisory 'Guidelines' to replace the 'Codes'. This article looks at the first review under this new conversion process that commenced in 2006, the development of The Land Transport of Livestock Standards and Guidelines (LTLSG).⁶ From an animal welfare perspective it is not evident that there will be any significant benefits.

Why are legally enforceable Standards needed?

It is important that there is some critical assessment of the way in which we set standards for farm animals – they are at our mercy. A very large number of animals are subjected to transport across our large country, often over difficult terrain, extremes of temperature and long distances. During 2010 more than a million sheep and about 130,000 cattle were trucked from Western Australia across the Nullarbor Plain to the eastern States where prices were higher. Any transportation causes stress to animals due to additional handling and unfamiliar experiences, but even short trips can cause distress and injury if great care is not taken. According to recent industry surveys, an estimated 969.4 million

⁴ Adapted from a speech 'Land Transport Standards and Guidelines: Best way forward or are we all being taken for a ride?' at the RSPCA Queensland 2010 World Farm Animal Day Symposium 'Taking Stock: Farm animal handling and transportation' on 1 October 2010 in Brisbane Queensland.

⁵ Executive Director, Animals Australia and member of the Reference Group for the Land Transport of Livestock Standards and Guidelines.

⁶ The Land Transport Standards endorsed in May 2009 can be found at <http://www.animalwelfarestandards.net.au/land-transport/>

animals are transported 142 million kms. taking 1.84 million hours per year⁷ in Australia; the potential for suffering during transport is high.

Adding to this potential risk to welfare is that 'livestock' are commercial 'units' being traded. There is inherent competition between their welfare and the push to minimise the costs of transportation. Farmers will claim to the contrary, that they rely on the animals for their income, and thus have a commercial incentive to ensure the animals' welfare is protected.

The farmers' claim may work in the interests of some animals, some of the time, but the real commercial driver is 'productivity': return on investment across an entire enterprise. This is not a measure relevant to each individual animal, leaving many vulnerable. For example – in drought a farmer may wait for rain and find the feed disappears and his sheep or cattle deteriorate. Belatedly he decides to transport them for sale and/or slaughter by which time some, or even all, of the animals may be 'unfit' for transport. The truck driver allows them to be loaded for fear of losing future work and a much higher than usual death rate on the trucks occurs and many others suffer but are still sold for slaughter. The truck driver is paid, the farmer is still paid for the surviving animals, and is better off economically than either paying high prices for scarce supplementary feeding or shooting them all in the paddock with a nil return. Striving for a good economic return is not always synonymous with good animal welfare.

As an example, ABC radio⁸ reported on the thousands of cattle being trucked from WA to the east coast of Australia as the WA drought worsened. MLA Chief Economist, Tim McRae, said:

"Historically, we have seen cattle moving from west to east when the price differential is there, and that makes up for the transport costs.

It is a long way from the west to the east of Australia, and the principle of transporting animals for the shortest distance possible is out the window when the markets in Eastern Australia will pay good money. An estimated one million sheep and cattle were trucked across the Nullarbor over several months in 2010/2011.

7 From the Regulatory Impact Statement for the Land Transport Standards and Guidelines for the Welfare of Animals – Land Transport of Livestock, Animal Health Australia, 2008, <http://www.animalwelfarestandards.net.au/land-transport/>

8 ABC Rural online 28/9/10 'Cattle go east to avoid WA drought'
<http://www.abc.net.au/rural/news/content/201009/s3023813.htm>

This is why there has been a move to new Standards and Guidelines (S&G) for transport. Such measures help provide a legal standard that will be consistent across Australia. The Regulatory Impact Statement (RIS) states that: *Market forces alone would not be expected to solve these problems and intervention in the form of regulated standards is necessary.* Its introduction says the need for the S&Gs was, amongst other things, to minimise risks to livestock welfare and to meet community expectations.

The need for a transition from voluntary Codes to enforceable Standards:

The national Model Codes of Practice for farm animals were first written in the early 1980s as voluntary minimum standards. The incentive at the time was the emergence of the 'new' animal welfare movement, after Peter Singer's 'Animal Liberation' book was published⁹ and Animal Liberation organisations were established across Australia.

The reason for the genesis of the Codes was confirmed by an independent review of the origins of Codes of Practice in 2005 when the federal Government considered the best way forward to modernise Australia's approach to farm animal welfare:

Other early Codes were developed as national guidelines by the Commonwealth Bureau of Animal Health after the Australian Agricultural Council (AAC) in 1980 considered the mounting challenges by animal welfare interests to accepted methods of Australian livestock management and animal experimentation. In particular, the Council considered implications for the intensive animal industries and live animal exports with a focus on the conditions of transport of livestock over long distances, aspects of the slaughter of stock, intensive farming practices in the pig and poultry industries and the control of feral animals.¹⁰

It may therefore not be surprising to learn that these codes, introduced largely as a defensive measure, only reflected and permitted routine practices of the time. Neumann,¹¹ when discussing industry concern about the proposals for legal enforcement of welfare standards (the

9 Animal Liberation: A New Ethics for our Treatment of Animals, New York: New York review/Random House, 1975

10 Geoff Neumann & Associates P/L, Review of the Model Codes of Practice for the Welfare of Animals, Feb.2005 (p.3)

11 Ibid

subsequent S&G process) reported concerns of industry leaders given that historically the ... *involvement of the industries in Code development was based on documenting existing management practices and that compliance would be voluntary.*

They were heralded as new welfare codes regardless, with the intended implication that by their mere existence the welfare of farm animals was now protected or even improved. (Ironically, in my view, a similar subterfuge may be underway in regard to the introduction of deficient and largely unenforced S&Gs – this will be discussed further.)

Once completed, State legislators were successfully lobbied by farming interests to ensure State laws recognised the Codes and made compliance with them an exemption from prosecution for cruelty. So, cruel practices described in the codes, such as tail docking and castration of cattle, sheep and pigs, and dehorning and flank spaying of cattle, all without pain relief, and confinement of animals in cages and pens so small that doing the same to a companion animal would not be allowed, were thus lawful. Existing 1980s practices were immune from prosecution because the Codes existed, and animals saw no real change.

Neumann recognised and documented that situation in 2005, concluded significant change was needed, and said:

Thus unless Codes are subject to a review process, they may provide protection or perpetuate management practices that are no longer acceptable to the public.

An additional aspect that undermined even the Codes' potential 'educational' value - perhaps to improve practices of genuinely ill-informed operators - was the acknowledged lack of promotion, availability and thus awareness of the Codes. An early survey of the effect of the pig code¹² showed a lack of knowledge of the Code and little change due to its introduction. Similarly, a decade later in 2001, the Queensland Department of Primary Industries surveyed farmers to determine their awareness of the existence of livestock codes of practice

12 CG Winfield, Victorian Animal Research Institute (1991) 'Review of the Impact of the Code of Practice for the Welfare of the Pig'. It aimed to 'examine the impact which the Codes have had on practices at the farm level ... and the degree of acceptance and implementation of the Codes by industry'. It found that the Code had been poorly disseminated, and stated - 'Space allowances, water provision and environmental control were aspects of management most often considered not to comply with the Codes...'

relevant to their industry. Only a little over half (53 - 60%) of the surveyed farmers had even heard of the Code, and even less had a copy (beef and sheep industries 13%, dairy 14%, and pigs 27%). To our knowledge, there has been no systematic attempt by any jurisdiction to determine rates of compliance with the Codes.

The transition to regulated farm animal Standards:

In the mid 2000s, a combination of rising community interest in animal welfare and several incidents led some livestock industry leaders to fear change may be forced upon them. One such significant incident was the MV Cormo Express disaster. A shipload of Australian sheep was rejected by Saudi Arabia and, when other countries would not accept them either, the animals spent 10 weeks on the water. This drew international attention to Australia's attitude to sheep transport (albeit by sea) and to Australia's long-distance, long-duration road transports at a time when Europe was debating its own transport standards. This led directly to fear that international trade access for our animal products might be at risk (i.e. a ban on Australian beef based on welfare concerns) unless Australia could be seen to lift its game.

Concurrent federal government interest in welfare issues - heightened by trade access issues and unprecedented public concern manifested by thousands of letters to the federal Minister, particularly on live export - contributed to the establishment in 2004 of the Australian Animal Welfare Strategy (AAWS)¹³. Some thought Australia already had a good system and an AAWS would be as simple as the production of a colourful brochure¹⁴ (as our New Zealand neighbours had done) for use at international agricultural conferences. But others knew that voluntary Codes of Practice with variable and minimal compliance or assurance of compliance were not adequate and would no longer withstand international trade or Australian community scrutiny.¹⁵

Thus, decades after the national Model Codes were drawn up, a move to replace the 'Codes' with legally enforceable 'Standards' and associated advisory 'Guidelines' was agreed. In line with a key objective of the AAWS, the Primary Industries Ministerial Council (PIMC) agreed that

¹³ <http://www.daff.gov.au/animal-plant-health/welfare/aaws>

¹⁴ Personal knowledge of the author who was a member of the National Consultative Committee on Animal Welfare which proposed and then drafted the original AAWS documents.

¹⁵ The AAWS is much broader than farm animal codes development, but the other elements will not be addressed here.

the enforceable 'Standards and Guidelines' (S&Gs) should form the basis for consistent State/Territory regulations for farm animals (and others in due course). The 2005 Neumann report recommendations, although not closely followed (see further on this below), assisted to point the way for a mechanism for this to occur.

The land transport Codes were the first Codes to use the new review system – with the aim of determining which aspects would be regulated (Standards), and which would remain advisory/not enforceable (Guidelines). The review commenced in 2006 and is essentially still underway. This article addresses the transport Codes review process itself, the resultant provisions in the LTLSG, and the likely future enforcement challenges - all of which are inextricably linked.

The Review

In the distant past, the Code reviews were primarily a function of the Animal Welfare Committee (AWC). The AWC comprises representatives from each of the State/Territory agriculture department representatives and is part of the PIMC decision-making process. In the early years (1980-90s), the AWC would draft or update Codes and then send those drafts to stakeholders for comment before the AWC finalised the Code and sent it for ARMCANZ¹⁶/PIMC approval. Over the following decade, the process evolved with animal welfare and industry representatives and the Australian Veterinary Association and others joining working groups around a table to consider reviews of the Codes for poultry and pigs. This was supplemented by the introduction of some public consultation and regulatory impact documents.

With the AAWS-backed new system, the entire Code review management process was instead tasked (by contract) to Animal Health Australia. The system involves a broad Reference Group (around 40 or 50 stakeholder representatives) and a smaller writing group to produce drafts. As stated, the first review using this system was the development of the LTLSG which replaced seven species-specific transport Codes. The resultant document still proceeds via the AWC and the PIMC process for sign-off.

16 ARMCANZ – the Agriculture and Resources Management Council of Australia and New Zealand, the committee that was renamed PIMC.

As a member of the Reference Group for the LTLSG and representing one of the only two animal welfare groups around the table (the other being RSPCA Australia), I have been in a position to observe the process. Primary concerns include that many livestock and transport industry-based Reference Group members were wary of enforceable standards and additional compliance costs, or reluctant to accept change to current practice. This should not surprise – Neumann spoke to many stakeholders and canvassed their views, and in his report stated:

...there is a general concern that involvement of the industries in Code development was [originally] based on documenting existing management practices and that compliance would be voluntary. The move in some jurisdictions to mandate provisions and the move to repeatedly review and potentially incorporate increasingly more onerous requirements, result in some apprehension about the ultimate outcome.

In general, livestock producers want less regulation rather than more; yet find that their involvement in the consultation and development leads to minimal standards that may become binding.¹⁷

The review involved numerous face to face meetings and extensively documented drafts, but in my (informed) view, scientific facts and known welfare parameters played a secondary role to industry concerns and commercial interests during the review, resulting in Standards which are arguably lower than the current Codes. For example – for sheep and cattle in the former Codes the maximum time they could be left without water during assembly, transport and unloading was 36 hours, extended to 48 hours only if a number of conditions were met (it was seen as exceptional extended time). Now in the new LTLSG the maximum time off water (TOW) for these animals is to be 48 hours (albeit there is an unenforceable guideline indicating a number of parameters to be considered if TOW is to exceed 36 hours).

Further, with sheep there can even be an extension past 48 hours if it seems that there is a risk of hypothermia in Southern Victoria and the truck would need to remain stationary for some time (to reduce wind chill). Of course exposing sheep to hypothermia by the truck being forced to drive on to meet a deadline should not be condoned, but how is it that, in closely settled southern Australia, a journey (and thus TOW) can be said to be 'properly' planned if it would exceed 48 hours?

¹⁷ Neuman, above 6, page 10

Given that part of the reason for reviewing these transport Codes was to ensure Australian welfare arrangements were defensible in the face of tighter EU welfare requirements, and thus ensure continued trade access, I doubt this outcome could be seen as successful.

One can imagine that the large and diverse Reference group was not in agreement about these standards – and this is reflected in the introduction to the Land Transport Standards document:

While these standards reflect a high level of agreement about the welfare aspects of land transport, it is recognised that there are some contentious issues where it has not been possible to reach complete agreement at this time.

Indeed there was an entire Appendix¹⁸ in the LTLSG Regulatory Impact Statement (RIS) outlining the issues that the Reference Group could not agree on. Whilst consensus is sought in the meetings of such reference groups, the reality of the dynamics of the process is that the livestock industries have an (unofficial) power of veto in decision-making – if they determine that they cannot, or will not, accept a particular Standard, invariably the proposed Standard is varied (watered down) or becomes merely a Guideline.

The role of science:

In addition to concern about the predominance of industry influence on the review and thus the resultant Standards, the process also discounted scientific considerations. After the LTLSG were 'finalised' in 2009, three further issues were identified, and the PIMC stated that further work was required to resolve them,¹⁹ including:

- a decision of the maximum 'time off feed' for bobby calves;
- consideration of new demands by industry to reverse a Reference Group decision to ban the use of electric prods on pigs; and
- consideration of a new demand from some egg and chicken producers to be permitted to transport 'spent' hens and broiler breeder birds distances that would require more than 24 hours off water (the maximum in the new Standards).

¹⁸ Appendix 8.

¹⁹ http://www.mincos.gov.au/_data/assets/pdf_file/0009/1767051/pimc-15-long-resol.pdf

These issues will be discussed here in turn as 'case studies' to illustrate the pressures exerted within the Reference Group and through outside political lobbying by industry leaders to maintain the status quo and to avoid true consideration of the growing body of animal welfare science and sound scientific opinion.

A decision on the maximum 'time off feed' for bobby calves²⁰

At the end of the LTLSG review process, and after protracted debate about key issues such as the age at which the young calves are transported (5th day of life to 10th day), the time they are permitted to be transported and/or kept off liquid feed (12 – 30 hours), bedding and space on transports, the LTLSG failed to provide adequately for the welfare of these vulnerable young unweaned animals. The PIMC was lobbied heavily (by Animals Australia) and conceded there was considerable disquiet.²¹ It agreed further work was needed to quickly resolve the welfare arrangements for bobby calves, and particularly to establish a 'Time Off (liquid) Feed' (TOF), meaning milk. In May 2009 PIMC suggested that this resolution should occur within 12 months, but it is not yet complete at the time of writing (November 2011).

Animals Australia (and RSPCA Australia) sought to spare young bobby calves the extended period without sustenance, enduring transport and then often cold and uncomfortable holding before slaughter up to 30 hours later. The usual scenario for the unwanted male (and some female) dairy calves transported to slaughter is that they are:

This is not primarily about long distances (few calves are transported for more than 12 hours), and it is not usually the fault of the transporter; it is just the current arrangement to suit all those along the supply chain. The animal welfare groups suggested, and during discussion the Australian Livestock Transporters Association concurred, that the usual practice be changed, that the buying systems be adjusted to rationalise the process and deliver the calves to the abattoir instead for an afternoon killing shift. Alternately, it was suggested the calves be fed later (in the middle of the day), taken for sale and transported to the abattoir that

20 A bobby calf is defined as 'A calf not accompanied by its mother, less than 30 days old, weighing less than 80 kg liveweight, and usually a dairy breed or cross'.

21 Email on 20/3/2009 from Dr Bond, CEO of AHA to Reference Group members reporting the outcome of the PISC meeting, and stating that 'partly due to an email campaign... (A)round the table, there was a strong sentiment, that more decisive, quicker action was appropriate and necessary'.

afternoon or into the evening, and slaughtered at first shift. The time off liquid food would be some 18 hours only.

But, rather than embrace the need for a change to reduce the period of stress and hunger for the calves during their last day (or two) of life, the dairy industry was keen to *use* 'science' to demonstrate that keeping a calf off liquid food (any sustenance) for 30 hours was physically acceptable, and thus 'shore up' the defence of the current system. In late 2009, industry peak body Dairy Australia commissioned Melbourne University researchers to examine the issue. Prior to commencement of the research, and based on a single New Zealand study, the 'Bobby Calf Reference Group', a sub-group of the LT Reference Group, at its final meeting adopted a recommendation that the Standard be 30 hours TOF for bobby calves (with industry leaders informally indicating it could be altered dependent upon the study outcome). This recommendation was opposed by Animals Australia and RSPCA Australia.

The University of Melbourne study, led by Dr Andrew Fisher, was to measure behaviour and the metabolic state of 5-to-10-days-old bobby calves, managed according to industry best practice, in response to various times off feed up to 30 hours. The outcome, in lay terms, showed that the physical indicators such as energy status (particularly blood glucose levels) declined over time – related to feed withdrawal rather than transport per se. The researchers concluded in 2010 that -

'best practice calf management would have a feed withdrawal period of not more than 24 hours', ... but that '30 hours maximal feed withdrawal is defensible as an outer legal limit beyond which those responsible could theoretically face prosecution'.²²

The 60 calves in the study were from a single well-run farm, where the operators were aware of the study and the need to provide adequate colostrum, good shelter accommodation and feed prior to the study.²³ It, therefore, cannot be assumed that the calves were typical of those in the industry. Dairy industry insiders have advised that it is highly likely that a high proportion of unwanted bobby calves are not managed according to industry best practice, and that many would:

22 Fisher A, Mansell P, Stevens B, Conley M, Jongman E, Lauber M, Hides S (2010). Determining a suitable time off feed of bobby calf transport under Australian conditions. Dairy Australia Project no. TIG 124, May 2010.

23 Ibid

- *be less than in their fifth day of life when transported (this trial included a spread of calves from 5 to 10 days of age),*
- *be colostrum deprived, and not well fed on the farm of origin,*
- *not be housed appropriately (i.e. not kept indoors until sale, and/or*
- *not have had access to water on the farm of origin.*

The researchers also noted the likely bias of their sample and recommended further work be undertaken to monitor similar parameters in commercial practice to determine the typical status of calves deprived of milk for up to 30 hours.

In addition to the concern about the validity of the sampled calves, there is significant doubt about the design and interpretation of the study.²⁴ Despite this doubt, Dairy Australia has defended the 30 hours TOF on the basis of 'science'.²⁵

Earlier in 2011, a Regulatory Impact Statement was prepared to assess the costs to industry of any proposal to introduce an enforceable standard for TOF for bobby calves of 30 hours, 24 hours or 18 hours. The 'cost' to the calves at this most vulnerable time of their lives was harder to measure. At the time of writing, the PIMC was yet to determine the detail of the Standard, but it is assumed the Standard will be 30 hour TOF; if adopted this will mean virtually no change to current bobby calf transport arrangements, indeed it will continue to accommodate even those who market bobby calves interstate and are termed 'outliers' by Dairy Australia.

Use of electric prodders on pigs during transport

Another example of industry deciding that current practice should prevail and that sound science be ignored, is the belated request by the transport industry to be permitted to continue using electric prodders to

²⁴ A more detailed explanation of the flaws and limitations of the University of Melbourne study is set out in the Animals Australia submission to the RIS - <http://www.animalwelfarestandards.net.au/land-transport/bobby-calf-time-off-feed-submissions/> Submission 5. An independent scientific critique by Professor Clive Phillips, commissioned by Animals Australia and described in the submission, is available upon request. And a similar assessment can be found in the Queensland DEEDI submission - <http://www.animalwelfarestandards.net.au/land-transport/bobby-calf-time-off-feed-submissions/> Submission 14.

²⁵ For e.g. The Weekly Times 27/01/2011 'Bobby calf plan angers Animals Australia' - http://www.weeklytimesnow.com.au/article/2011/01/27/287601_latest-news.html

assist the loading and unloading of pigs being transported to slaughter. During the LTLSG review it had been acknowledged that electric prodders were unacceptable for pigs on welfare grounds and alternatives ('moving boards' and 'flappers') must be used instead.

But subsequent to the PIMC adoption, an OH&S argument was raised that large breeding boars or sows (referred to as 'choppers' and usually over 120kg) can be difficult to move and can be aggressive or dangerous to workers. And so commenced a 'mini' review of the use of electric prods for pigs. Again the animal welfare group representatives on the convened sub-group of the LT Reference Group indicated their opposition; the industry representatives explained how difficult it would be without prodders; and the government and scientists present provided factual information, but did not 'take sides'.

Published science confirms what we observe in pigs reacting to the electric prods, and of course intuitively knew: electric prods hurt and distress pigs. A Canadian study²⁶ found that during loading for transport, compared with using a board and paddles and even compressed air blast and pads, pigs moved using an electric prod had:

- a higher rate of slipping and falling
- more and longer vocalisations
- a higher heart rate during loading, unloading and in lairage before slaughter
- a higher lactate concentration in blood at slaughter, higher pH values in muscles resulting in higher blood splashed hams.

The authors found that due to animal welfare, bruising and increased blood splatter, electric prods should be replaced by other methods.

It was clear that the scientific, ethical, and even meat quality arguments could be sustained against any electric prod use, but this 'mini' review was intended to only address the OH&S issues posed during the handling of the large pigs. However, the debate in a special 'reference group' on the issue was soon canvassing the (limited) use of electric prods on much smaller pigs.

26 Correa JA, Torrey S, Devillers N, Laforest JP, Gonyou HW, Faucitano L. 2010, Effects of different moving devices at loading on stress response and meat quality in pigs. *Animal Science*. 88(12):4086-93

In the end, without further consultation with all stakeholders, a recommendation was adopted by PIMC in November 2010 that will allow electric prods to be used (sparingly) on pigs larger than 60kg during transport.²⁷ This change will mean that prods can be used on all of the 'baconers' (pigs grown larger for smallgoods) and a portion of the 'porkers' (slaughtered at a younger age for fresh pork). This outcome makes a nonsense of the purported reason for this 'mini review' which was to reduce risks from large, heavy and potentially dangerous ex-breeding pigs. Furthermore, it ignores the science.

This backward step in the handling of pigs defies good sense and precedent. Australian Pork Limited's QA program does not allow electric prod use 'on farm', yet now electric prods can be used as these pigs are sent to slaughter. There was no 'Regulatory Impact Statement' prepared for this 'new' Standard, meaning that there are no likely adjustment costs. It is therefore a clear indicator that this merely reflects current (bad) practice.

Battery hen transport – reconsideration of the maximum 'time off water' (TOW)

As with the electric prodder issue for pigs, just as it appeared the transport standards review had concluded, a belated appeal came for the agreed 24 hours TOW for poultry to be altered. It seems some large egg layer and broiler breeder poultry facilities that usually transported their (low value) 'spent hens' long distances to the few abattoirs that would kill them, had not previously realised the Standards would restrict this.

The solution to this too – as with the Dairy Australia commissioned research to consider 30 hours TOF (rather than a lesser time) – was for the Australian Egg Corporation to commission some research to find support for a period off water of greater than 24 hours. Even as a member of the S&G reference group, I was not privy to the proposal to review this Standard, nor to the design of the research.

In this case, the standard to be determined concerns treatment of 'depleted' and vulnerable egg layers, many with osteoporosis and broken

27 http://www.mincos.gov.au/_data/assets/pdf_file/0010/1840177/pimc-communique.pdf

'Council endorsed the use of electric prodders during the loading, transport and unloading of pigs 60 kgs live weight or more, where other reasonable action to cause movement have failed, and there is reasonable risk to the safety of the driver or the pig(s). Council requested a review of the use of pig prodders during transport in five years'.

bones.²⁸ The standard industry practice involves birds being quickly and often roughly pulled from cages or collected from sheds and pushed into low crowded travel crates where they cannot stand up. They may travel over long distances, bad roads, bad weather, all just to be slaughtered. Many birds will have broken bones (from the cages and depopulation) and will suffer the pain of those breaks all the journey.²⁹

Although the research has yet to be revealed or published, a decision has been taken already that there will be no 'Regulatory Impact Assessment' before a recommendation is put to the PIMC to vary this TOW standard. This is a clear indicator that nothing is likely to change, i.e. the manner in which spent hens are treated will be unchanged by the resultant new Standard.

Instead of introducing measures to improve welfare (to, at least, reduce the duration of the transport of vulnerable birds during their last day or two of life) we now seem to have a system in place that allows a moulding of scientific information to justify the status quo. These three examples illustrate that this new review process is not about science informing and guiding needed improvements to animal welfare. Rather in my view, science has been commissioned to shore up a preferred industry practice and thus to provide a veneer of respectability to the blocking of logical humane reform.

Other issues

The following canvasses additional issues related to the likely effectiveness of the new LTLSG -

Compliance and enforcement

The Regulatory Impact Statement (RIS) for the LTLSG assumed compliance with the existing Codes as the 'base case' – despite levels of compliance being unknown (as discussed earlier). Still, even during the

²⁸ Studies have shown that 1 in 6 hens inside battery cages live with broken bones. And the incidence of bone fractures of spent hens at the abattoir was even higher – flocks ranged from 24% of birds to 58% of birds, with a mean of 40%.

Parkinson G (1993), "Osteoporosis and bone fractures in the laying hen", Final report of work at the Victorian Institute of Animal Science, Attwood (internal research report)

²⁹ Gregory N & Wilkins L (1989), "Broken bones in domestic fowl: handling and processing damage in end-of-lay battery hens", *British Poultry Science*, vol 30 (555-562)

review and as stated in the RIS, State regulators indicated that they did not intend to spend more on enforcement than current efforts:

Verification, auditing and enforcement costs will be incurred by the relevant government agencies if and when the proposed standards are adopted by regulations or the appropriate legal mechanism. However, most state and territory departments advise that there is unlikely to be any significant increase in enforcement costs of the proposed standards relative to the base case.³⁰

Record keeping

Another example of where the adopted Standards fail, on a most crucial issue which affects even the ability of agencies to enforce (if they find the will and/or the resources), is in regard to record-keeping. This is largely not required during transport under the adopted LTLSG. Thus, monitoring and auditing will not be significantly assisted by the new regime. This is unacceptable when even in the 'Principles' section of the LTLSG it is rightly stated that:

'Transport can be stressful to livestock: and it is therefore essential that effective management practices are in place to minimise any risks to livestock welfare.'

..... At the start of the journey, the owner or agent should communicate to the driver accurate information on water provision, to ensure appropriate water management throughout the journey. The pre-transport phase has an important impact on the successful management of livestock during transport.

Yet, the text of the relevant Standard provides:

*SA1.2 For a journey reasonably **expected to exceed 24 hours**, there must be one or more documents that accompany the livestock and that specify:*

30 Regulatory Impact Statement - Australian standards and guidelines for the welfare of animals - Land transport of livestock. Public Consultation version:, March 2008, page vii

- i) the date and time that the livestock last had access to water*
- ii) the date and time of livestock inspections and any livestock welfare concerns and actions taken*
- iii) emergency contacts*

A person in charge who is transferring responsibility for livestock to be further transported for longer than 24 hours must provide a document with this information to the next person in charge.

If one was to ignore the words in **bold**, this standard may be reasonable. However, a 2007 survey by the Australian Livestock Transporters Association (ALTA) found that 93% of all livestock journeys were under 24 hours in duration in Australia, hence the Standard does not apply to the majority of livestock transporting in Australia. This information was available to and known by the Reference group drafting the Standards.

Despite 'robust' discussion on the issue, the livestock industries (excluding ALTA) refused to accept any enforceable requirement for a written record (of the time animals last had access to water) to accompany animals during most journeys. This will allow, for example, a group of animals to be curfewed on a property (held in yards off feed and water to prevent soiling during transport) for a day or more, then to be transported for up to 24 hours with no need for any records. These animals may arrive at an abattoir and be held without water for further hours, often overnight. The permitted 48 hours off water for cattle and sheep may easily be exceeded without any written record being required. There is no way the TOW standards can be enforced without paperwork; this situation fails to protect the welfare of the animals and fails to provide the community with any assurance that animals are being treated well.

Why should simple paperwork not be kept with consignment of animals during their transport? The answer to that question does not appear to be exorbitant costs; the RIS considered the new requirement for documentation for journeys (greater than 24 hours), indicating that the cost was minimal, an estimated five extra minutes for the livestock owners or drivers to record extra information on the usual 'National Vendor Declaration' (the NVD is a widely used form introduced mainly to declare freedom from disease).

However, the current NVDs (for the different species) do not currently indicate the TOW, and even the bobby calf NVD fails to require the time the young calves were last fed. Without the requirement being in the Standards, there is no current plan for TOW to be incorporated in the NVDs. ALTA has publicly called for the NVD to be altered and for such records to be required,³¹ and thus again highlighting the failure of the S&G process to lead the reform process.

Public concerns

A public consultation on the proposed LTLSG occurred from March to May in 2008 and consultants (ENVision Environmental Consulting³²) provided a summary report of the feedback. The issues people mentioned were numerous, but the most often mentioned in written submissions included:

- The need to reduce travel times and time off water (across all species)
- Opposition to the use of electric prodders and concern about the use of blunt trauma for humane destruction (currently recommended for newborns)
- The need for clearer and stricter requirements for loading densities and travel in extreme temperatures.

There were many species specific concerns, too – e.g. related to bobby calf standards; the manner in which poultry is caught for transport, and the large numbers carried in each hand to crates; and the proposed extension to time off water (travel times) for sheep in cold conditions. Despite this feedback, these major issues were not significantly addressed, and most were not addressed at all in the final standards.

In addition to the written submissions, there was provision for respondents to give online feedback to structured questions about the proposed S&G. Some questions were designed to seek respondents' views on the likely effectiveness of the draft S&G. This public/industry consultation survey revealed that more than half the respondents

31 Media release 10/2/2011 – 'New animal welfare laws will not work, warns rural trucking industry',

<http://www.alta.org.au/>

32 The Envision report can be accessed in full:

http://www.animalhealthaustralia.com.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=90D1EB13-E437-6B89-6D97-993909B1027D&siteName=aahc

'disagreed' that the new Standards would help protect the welfare of transported animals. For example:

Cattle, 59% of respondents 'disagreed' that the Standards would help protect the welfare of cattle during transport.

Pigs, 56% 'disagreed' that the new Standards would help protect the welfare of pigs during transport.

Poultry, 72% 'disagreed' that the new Standards would help protect the welfare of poultry during transport.

Sheep, 60% 'disagreed' that the new Standards would help protect the welfare of sheep during transport.

As a participant in the process, and armed with the additional information provided by industry leaders and government legislators during the review process, I have grave doubts about the current review process. It must be altered.

So, will these Standards improve the welfare of transported animals?

Education and awareness: Regardless of the failure to deliver reasonable and enforceable national Standards for livestock transport, some changes to the benefit of animals may subsequently occur. The mere review of the old transport codes has already increased industry awareness of the sensitive nature of livestock transport due to media coverage of the bitter disputes (as outlined above). The mere introduction of the new S&Gs – State by State as they are introduced into Regulations - may also raise awareness and improve compliance (regardless of the low standards they contain). It is also evident that animal protection groups, including Animals Australia, will seek to have the various jurisdictions adopt higher Standards into State legislation, over and above the agreed national S&Gs.³³ The publicity

³³ Whilst one aim of the national S&Gs was to encourage a nationally consistent set of livestock standards (i.e. to be adopted in all jurisdictions), the minimal 'lowest common denominator' outcomes has led to at least the Tasmanian Government announcing it would totally ban sow stalls by 2017, whereas the national Standards (adopted in 2007) only envisage a reduction of time in sow stalls (to 6 weeks/pregnancy) by 2017. In Victoria, a Regulation already makes it an offence to use an electric prod on a pig during transport, and we are advised that will not be altered when the transport

generated will help raise awareness, and may also increase the political will to increase efforts to enforce the Standards.

Greater efforts by industry to provide education tools for farmers, transporters, agents, saleyard and abattoir managers and workers, etc may also occur due to heightened community concern. The Meat and Livestock Australia (and partners)'s 'Is It Fit to Load?' guide³⁴ is an example of a practical education tool (currently being reviewed). There is also an MLA-funded initiative to develop a video and web-based information, posters and leaflets to increase awareness of and to assist operators to interpret the new S&G on transport.

Industry quality assurance (QA) systems, particularly TruckCare³⁵ exist, but so far adoption is inadequate. Only a small portion of the commercial livestock companies, and few if any farmers or very small operators are part of TruckCare, so they will not be reached by QA programs. There seems to date to be insufficient commercial or market access incentive for the adoption of TruckCare; saleyards, agents, abattoirs must require such 'assurance programs' if this is to work to the advantage of the majority of transported animals.

Enforcement: State governments have said they do not intend to spend more on compliance with the S&G than they did with the Codes, and that was minimal. It will therefore clearly require some further community pressure to force greater surveillance and thus protection of transported animals.

The future Code/Standards review process?

As outlined, there are considerable concerns with the review process and the outcomes. In particular, the most recent reviews have not been so much based on sound science, as science being essentially 'used' to justify current practice.

Geoff Neumann and Associates when reviewing the system in 2005 said this issue should be considered when developing the review system, and particularly:

standards are introduced in that State. The suggested 30 hours off feed Standard for bobby calves will also be re-examined, and possibly reduced in several States rather than adopted.

34 <http://www.mla.com.au/Publications-tools-and-events/Publication-details?pubid=2558>

35 http://www.alta.org.au/Directory/Document_PublicView.asp?Select=9917&site=286

- *Use of scientific evidence* – the importance of a very clear and well-founded perspective on contemporary animal welfare science as a basis for code development.
- *Scientific committee* – a high level scientific committee to provide credibility to the content and development process.

Unfortunately, the current process has not given science the importance Neumann recommended. It is our strong view that there is an urgent need for an independent scientific review committee made up of eminent animal scientists who first make recommendations based on the welfare needs of the animals. In this we can look to the Farm Animal Welfare Council in the UK, and the European Food Safety Authority in Europe (previously the Scientific Veterinary Committee). In both cases their science-based conclusions lead to Directives or laws – albeit taking into account the need for change to be phased in rather than immediately impose new standards.

There is also the inherent bias of this system (not expanded upon here) where the S&G Reference group is dominated by industry representatives (2-5 from each species group) with a modus operandi that effectively provides them with ultimate veto on any standard they feel they cannot, or do not wish to, comply with. Add to this the PIMC decision-making process itself, which is administered by government departments whose main clients are rural livestock industries, and no-one should be surprised that the animal welfare voice, the voice for the plight of the animals, is lost or drowned.

The other area of concern is the lack of adequate 'public consultation'. The practice for the most recent reviews (poultry code, pig code and transport S&G) has been to place a single advertisement in the Weekend Australian newspaper and in a single rural/farming newspaper in each State, and then to rely on farming groups and several State departments of Agriculture to advise their contacts (i.e. farmers). Most community members are totally unaware they have been consulted! This is totally inadequate when such Standards reflect upon the moral basis of the entire community.

Conclusion

In March 2011, a workshop was held to consider current concerns³⁶ about the S&G review process, and these issues may be progressed in coming months. Animals Australia and RSPCA Australia have put forward significant suggestions for reform relevant to the need for an independent animal welfare scientific report, changes to the representation and chairing of the relevant stakeholder and writing groups, and improved public consultation arrangements to ensure awareness and input to the process. Even if adopted, it is not likely that a full independent scientific review will occur for the review of the Cattle and the Sheep Codes of Practice as they are underway, and it is not clear if, or when, other reforms will be introduced.

The current review process, and thus the review of the standards of livestock transport in Australia, has been flawed. Any change in the short term to reduce the suffering of one billion animals transported each year in Australia will, in my view, be **despite** this process rather than **because** of it. There is some hope that there will be some improvement to the review system³⁷ and, along with heightened community awareness campaigns, there will be greater pressure on government and industry to understand that the status quo is no longer acceptable.

36 The Workshop was initiated because the sheep and cattle industries had threatened to withdraw from the process and withdraw funding for their industries' Code review due largely to the Tasmanian Government decision to ban sow stalls, i.e. not accept the national Pig Code standards.

37 The AAWS Business Plan for the development of the standards and guidelines is to be reviewed – an outcome of the March Workshop. The current Business Plan - http://www.animalhealthaustralia.com.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8B6B0F2D-EB11-066A-7C27-F04ED8843491&siteName=aahc

A Global Justice Approach to Animal Law & Ethics

By Dr Gail Tulloch and Steven White¹

This article is concerned with the emergence of a paradigm of global justice, from its earliest expression by Jeremy Bentham in 1789 through to today, to Peter Singer's well-known preference utilitarianism and Martha Nussbaum's less well-known capabilities approach, with its emphasis on global justice. By providing a theoretically determined, practically applicable set of capabilities for realising justice for animals, Nussbaum has made an important contribution to animal ethics, and one which is used in this article to assess the extent to which contemporary Australian animal law satisfies the requirements of justice.

The momentum towards global justice parallels a complementary momentum towards an increasingly "legalised" regulation of animal welfare. Although there is no general, federal animal welfare statute in Australia, the States and Territories have adopted codes of practice for the regulation of many aspects of animal welfare, and there is now a well-established national strategy that endorses consistency in the content and adoption of these codes. At an international level, no coherent animal protection regime has been established. However, several developments highlight an increasing legalisation of animal welfare protection. These include regional initiatives of the European Union, increased interest in animal welfare on the part of the World Organization for Animal Health (OIE) (including the endorsement of voluntary welfare codes) and emergence of a campaign for a universal declaration on animal welfare.

The central thesis of this article, though, is that these domestic and international regulatory developments fall well short of realising the requirements for justice that flow from Nussbaum's capabilities approach. In order to contextualise the work of Nussbaum, Part I surveys some familiar ground by briefly tracing the development of the field of animal ethics, taking it up to the present day. Part II explores

¹ Dr Gail Tulloch is a philosopher and an adjunct research fellow in the School of Humanities, Griffith University. Steven White lectures in animal law at Griffith Law School, Griffith University.

the capabilities approach in some detail, elucidating how Nussbaum extends the approach to include justice for animals. Having established the requirements for justice for animals suggested by the capabilities approach, Part III then assesses the extent to which domestic Australian law, and international law, satisfies these requirements.

Part I: Animal Ethics

Initially, there was thought to be no connection between humans and other animals. Animals have long been considered inferior to humans, and different in kind, not merely in degree – though this firm boundary was problematised by Darwin’s *The Origin of Species*.² In Judaeo-Christian ethics, God gave humans dominion over animals – moderated by injunctions towards kindness. The medieval notion of the great Chain of Being, with man at the apex, expressed this. The philosopher Kant argued that animals were not rational or autonomous, and so their lives were not ends in themselves. On Kant’s view, in his *Lectures on Ethics*,³ our duties to animals are merely indirect duties towards humanity, and if we treat animals kindly, we strengthen the disposition to behave kindly towards humans – like exercising a moral muscle on a proxy object.

The corollary for Kant was that animals could appropriately be treated as means to our ends. For Kant, moral duties can only be to self-conscious beings. Only such beings can be members of the moral community. Animals could thus be relegated to beings of secondary concern – if concern at all - for want of a soul, of rationality (construed in a particular, narrow way), of autonomy, or of language.

The Christian notion was, at best, one of human stewardship and at worst, human dominion over the rest of nature, including animals. This exacerbated the long-established prejudice in western culture in favour of rationality as the defining and unique characteristic of human beings, widely associated in the Enlightenment with Rene Descartes, who argued that like clocks or robots, animals were but machines that moved and made sounds but had no feelings. In such a context it was easy to portray animals as quasi-clockwork animated robots – “furry clocks”. Such a conception rationalised vivisection, for creatures with no

2 Charles Darwin, *On the Origin of Species* (Modern Library 1998).

3 Immanuel Kant, *Lectures on Ethics* (Harper & Row, 1963).

consciousness could feel no pain.

Sentience

Jeremy Bentham, the founder of utilitarianism, was the first major figure in Western ethics to advocate in 1789 the direct inclusion of animals in our ethical thinking, and to suggest a connection between humans and other animals. As he memorably argued:

What else is it that should trace the insuperable line? Is it the faculty of reason or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal than an infant of a day or a week, or even a month old. But suppose they were otherwise, what would it avail? The question is not Can they reason? nor Can they talk? but Can they suffer?⁴

In this way, Bentham addressed the issue of the boundary between human and animal and introduced the concept of sentience – or the capacity to feel pleasure and pain – as the central criterion of issues of animal ethics. This was the driving force behind the POCTA (prevention of cruelty to animals) tradition of legislation that still prevails today. It is an animal welfare framework, evident in the work of the RSPCA and the work of some animal activists.

Peter Singer's work is grounded in this Benthamite tradition, and he further argues that the difference between humans and animals is one of degree, not of kind, i.e. not absolute, and that the boundary is quite porous.⁵ The connection is thus quite close.

Circles of Compassion

As early as the 2nd century AD, the Stoic philosopher Hierocles created a vivid metaphor for extending the boundaries of our moral concern. Imagine, he argued, that each of us lives in a series of concentric circles, the nearest being our own body, and the furthest being the entire universe. The task of moral development is to move the outer circles

⁴ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (B J H Burns and H L A Hart (eds), Clarendon Press, 1789/1996) 283.

⁵ See, eg, Peter Singer, *Practical Ethics* (3rd ed, Cambridge University Press, 2011).

progressively to the centre, so that one's relatives become like oneself, strangers like relatives, and so on. Singer adopts this metaphor, and argues for explicitly extending the circle of one's concern beyond the boundary of one's own species, to include animals, and, ultimately further, to the whole environment. Why we should do this is meant to be intuitively obvious; at least, learning to see it so is the path of enlightenment in some religions. Humans appear to have built-in resistance, however.

Speciesism

Speciesism was the second great driving idea in animal ethics after sentience. It was a term coined by Richard Ryder and popularised by Singer. It means a prejudice or attitude of bias in favour of members of one's own species against those of members of another species. Speciesism obviously picks up on the unfavourable connotations of racism and sexism, and the movements to extend equal consideration to the interests of coloured people and of women – which is why animal welfare has been called the last social justice issue.

The bumper sticker slogan might be “We are speciesist to ignore sentience” – the imperative of sentience. The task to change deep-seated, unreflective notions of the species barrier is the task we face now, and it is perhaps the hardest of all, because the attitudes are so entrenched, and the economic incentives to persist with cost-cutting, production-line, inhumane treatment of animals are so great. Pope Benedict has condemned the ‘industrial use of creatures, so that geese are fed in such a way as to produce as large a liver as possible, or hens live so packed together that they become just caricatures of birds’.⁶ It is in this context that the argument to expand our circle of compassion appeals to considerations of animal welfare, but also makes a transition to animal rights, as sentient beings who deserve quality of life.

It would be hard to overestimate the contribution of Peter Singer to the welfare of animals, in Australia, America, the United Kingdom, and worldwide. He is clearly the best-known Australian philosopher, and a true public intellectual. The publication of *Animal Liberation* in 1975 was a watershed moment and provided a framework and an inspiration to many, as it does still.

⁶ Joseph Cardinal Ratzinger, *God and the World: A Conversation with Peter Seewald* (Ignatius Press, 2002) 78-79.

One of us accepted Singer's position for a long time⁷, and certainly the concept of sentience is central, as is the opposition to cruelty which is its corollary. But the focus of both is primarily negative, with an indirect appeal to empathetic identification with those animals most like us, and appealing to quality of life – whether human or animal - needs specification if it is to be more than vague.

There's an even better theoretical approach that has emerged, which is more broad-ranging and specific, and grounds positive guidance for action. It's the capabilities approach, advocated by philosopher Martha Nussbaum and Amartya Sen, Nobel prize-winning economist. Together, they pioneered a Quality of Life approach to human capabilities in the context of aid and human development, tied to the UN Declaration of Human Rights.⁸

Part II: The Capabilities Approach

The capabilities approach was first articulated in *The Quality of Life*, published in 1993, based on their research in a World Institute for Development Economics Research study for the UN University.⁹ The book comprises papers from a 1988 conference in Helsinki, which they organised for WIDER.

Nussbaum defends the capabilities as universal objective norms, rejecting cultural relativism and the charge that all universals are bound to be insensitive to regional and cultural specificity. That's an important argument to make, and especially necessary at this time, when cultural or customary tradition may be put up as a defence to unacceptable practices - as occurred in Australia in the debate over live animal exports to Indonesia.¹⁰

7 Actually since the early 1970s, when as a postgraduate student Gail Tulloch heard Singer give a paper on Speciesism in the Monash University Philosophy Department.

8 Universal Declaration of Human Rights, GA res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

9 Marsha C Nussbaum and Amartya Sen (eds), *Quality of Life* (Oxford University Press, 1993).

10 See, eg, Editorial, *The Australian*, 1 June 2011, 1, 2 & 17; Tim Lindsey, 'Cattle Exports to Asia are Inevitably a Live Issue', *The Australian*, 9 June 2011, 14; Greg Sheridan, 'Ignorance, hysteria to trigger backlash', *The Australian*, 10 June 2011, 2; Brian Williams, 'Home Truths at Odds with Export Ban', *The Australian*, 24 June 2011, 15; and Stuart Rintoul, 'Ignorance and Anti-Semitism Behind Kill Ban', *The Australian*, 24 June 2011.

It is an important point to bear in mind when she extends the approach to animals, as she did in 2002, when she was at the Australian National University in Canberra to present the Tanner Lectures on Human Values.¹¹ The title of the three-lecture series was “Beyond the Social Contract: Towards Global Justice”, and the three lectures were on “Capabilities and the Mentally Disabled”, “Human Capabilities Across National Boundaries”, and “Justice for Non-Human Animals”.¹²

Nussbaum and Animal Ethics

So, what does the capabilities approach, as extended by Nussbaum, have to offer? It appeals for animal welfare based on rights derived from their capabilities – which are outlined. The approach lists ten capabilities, nine of which also apply to animals, so it is a continuum approach. It stresses how much more has to be considered and provided for than is implied by sentience, and covers the whole range of animals, including in zoos, rodeos, museums, and laboratories. It involves a radical paradigm shift in outlook, and has huge practical implications. It’s observable, and makes it easy to identify where the shortcomings fall. It is one of the most exciting developments in animal ethics.

In addressing ethics for non-human animals, Nussbaum argues that the capabilities approach is the best basis, theoretically and practically, and for extending the focus beyond traditional appeals to compassion and humanity to considerations of justice for non-human animals – the subtitle of the third Tanner Lecture, taken from a John Rawls epigram which preceded it. The Lecture is preceded by two other epigrams - one from Aristotle, and one from the *Nair* case considered by the Hindu Kerala High Court in 2000, which affirmed animals as ‘beings entitled to dignified existence’.¹³ Nussbaum derives from this some fundamental entitlements: *freedom to* adequate opportunities for nutrition and physical activity; *freedom from* pain, squalor, cruelty and fear; *freedom to* act in ways characteristic of the species, *to* opportunities for interacting, and *to* enjoy light and air in tranquillity.

11 Published as Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Belknap Press, 2006).

12 The last of these became the core of her chapter contribution to Cass R Sunstein & Martha C Nussbaum (eds), *Animal Rights: Current Debates and Future Directions* (Oxford University Press, 2004).

13 *Nair v Union of India*, Kerala High Court, No 155/1999, June 2000.

This may to some echo the Five Freedoms – freedom from hunger and thirst; from discomfort; from pain, injury, disease; from fear; and to perform normal behaviour - which been influential and a valuable guide to policy since their formulation in 1965. Nussbaum’s approach goes further, however. It is in the penultimate section of the Tanner Lecture “Toward Basic Political Principles: The Capabilities List” that the strength of the capabilities approach really emerges, for the plausibility of her practical and policy prescriptions feeds back into the theoretical persuasiveness of her argument.

Nussbaum lists 10 capabilities, and individuals may be said to have an interest in expressing these capabilities. This goes for animals too. The capabilities are considered in turn, with their implications for our use and treatment of animals.

The first is *Life*, which entails animals are entitled to continue their life, whether or not they take a conscious interest in it. This puts pressure on the meat industry to reform its harmful practices, as well as problematising killing for sport (hunting and fishing) and for fur.

Bodily Health is the second entitlement, and where animals are under human control, this entails laws banning cruel treatment and neglect, confinement and ill treatment of animals in meat and fur industries; forbidding harsh or cruel treatment for working animals, including circus animals, and regulating zoos, aquaria and parks, as well as mandating adequate nutrition and space. Nussbaum points to the anomaly that animals in the food industry are not protected as domestic animals are, and recommends that this anomaly be eliminated.

Bodily Integrity is the third entitlement, which would prevent the declawing of cats and other mutilations, such as tail-docking, that make the animal more beautiful to humans. It would not ban forms of training that are part of the characteristic capability profile, such as training horses or border collies.

Senses, Imagination, and Thought constitute entitlement four, and entail access to sources of pleasure such as free movement in an environment to please the senses and which offers a range of characteristic activities.

Emotions are entitlement five. Nussbaum argues that all animals experience fear, and many experience anger, resentment, gratitude, grief, envy, and joy, while a small number can experience compassion.

Hence they are entitled to lives where it is open to them to have attachments to others, and not have these attachments warped by isolation or fear. While this is understandable in relation to domestic animals, it is overlooked in relation to zoo and farm animals and research animals.

Practical Reason (entitlement six) involves the extent to which a creature has a capacity to frame goals and projects and plan his or her life. To the extent that such a capacity is present, it ought to be supported, by such policies as room to move around and opportunities for a variety of activities (compare entitlement four above).

Affiliation is entitlement seven. Nussbaum argues that animals are entitled to form attachments, and to relations with humans that are rewarding rather than tyrannical, as well as to live in ‘a world public culture that respects them and treats them as dignified beings.’¹⁴

Other Species (capability eight) calls for the formation of an ‘interdependent world in which all species will enjoy cooperation and mutually supportive relations with one another’.¹⁵ This does not, and has not applied in nature and so calls, in Nussbaum’s words, ‘for the gradual supplementation of the natural by the just’.¹⁶ This would seem to entail human intervention, and is the least persuasive of the capabilities.

Play is capability nine, and is central to the lives of all sentient animals. It entails adequate space, light and sensory stimulation, and the presence of other species members.

Control Over One’s Environment (capability 10) has two aspects in the case of humans – political and natural. For nonhuman animals, it entails being respected and treated justly, even if a human guardian must go to court, as with children, to vindicate those entitlements. The analogue of human property rights is respect for the territorial integrity of their habitat, domestic or wild, and the analogue of work rights is the rights of labouring animals to dignified, respectful labour conditions.

14 Nussbaum & Sen, above n 8, 316.

15 Ibid 317.

16 Ibid.

Only *Practical Reason* does not fit smoothly with animals, and much of what it requires can be derived from the criteria for flourishing. However, even excluding it, if the other nine capabilities were taken seriously, it would transform the common conception of how much needs to be provided as basic conditions for animals – not just life, health, and the maintenance of bodily integrity, but opportunities to experience the senses, imagination and thought, emotions, affiliation, relations with other species, play, and control over the animal’s environment. Yet it is hard to think of a single instance where these capabilities are currently allowed for.

Nussbaum recognises these rights need international cooperation, via accords, such as the *UN Declaration of Human Rights*, as well as the "ineliminability" of conflict between human and animal interests. Some bad treatment of animals, she argues, can be eliminated without serious loss of human wellbeing. In the use of animals for food, for example, she suggests setting the threshold on focussing on good treatment during life, and painless killing. In the use of animals for research, she argues much can be done to improve the lives of research animals, without stopping useful research. It is unnecessary and unacceptable for primates used in research to live in squalid, lonely conditions. Nussbaum advocates asking whether the research is really necessary; focussing on the use of less complexly sentient animals; improving the conditions of research animals including terminal palliative care; removing psychological brutality; choosing topics cautiously so no animal is harmed for a frivolous reason; and making a constant effort to develop experimental methods (such as computer simulation) that do not have bad consequences. The Australian 3 Rs approach – Replace, Refine, Reduce – has some affinity to Nussbaum’s approach here.¹⁷

As earlier emphasised, Nussbaum comes from a justice perspective, fitting the issue into a global justice approach. The capabilities approach is an operational definition of ‘Quality of Life’ and of sentience and what animal welfare entails. It emphasises a “freedom to” approach, by contrast with the “freedom from” emphasis of sentience and speciesism – valuable as they were as precursors.

¹⁷ The 3R’s are included in the NHMRC’s Australian Code of Practice for the Care and Use of Animals for Scientific Research (7th ed, 2004), adopted under State/Territory legislation: Animal Welfare Act 1992 (ACT) s 21; Animal Research Act (NSW) s 4; Animal Welfare Act (NT) ss 24, 25; Animal Care and Protection Act 2001 (Qld) ss 49, 91; Animal Welfare Act 1985 (SA) s 3; Animal Welfare Act 1993 (Tas) s 34; Prevention of Cruelty to Animals Act 1986 (Vic) s 7; Animal Welfare Act 2002 (WA) s 5.

Nussbaum emphasises the need for international cooperation, via accords, such as the *UN Declaration of Human Rights*. Such an accord, in the area of animal welfare, is being sought, and may be a great step forward (this is considered in Part III). But even before such an accord is achieved, perhaps we should consider our current export trade practices. Many Australians watched the *60 Minutes* program ‘Ship of Shame’, showing smuggled footage obtained during the *Cormo Express* controversy, and exposing that there was expensive equipment donated by Australia that was lying idle, while traditional barbarous practices went on.¹⁸ We are reluctant to extradite our citizens to jurisdictions where capital punishment exists. Perhaps it is time we became a little more squeamish and a little less cowardly towards Australian animals that we are knowingly sending to a brutal fate. We cannot avoid the responsibility of this knowledge in the name of trade or cultural relativism, or avoid the dirty hands our complicity incurs.

Now history repeats itself. On 30 May 2011 ABC’s *Four Corners* program exposed the cruelty involved in the slaughter of Australian cattle in Indonesia by ignorant, untrained slaughtermen, despite a decade of Australian aid, training, and supply of equipment.¹⁹ The hard-hitting footage was filmed by Lyn White of Animals Australia, who had earlier exposed similar cruelty in Middle East abattoirs. It caused a furore. The public response was huge, with nearly a quarter of a million signatures on an online petition organised by Get Up,²⁰ Animals Australia, and the RSPCA, which circulated widely and quickly, through new social media channels, as well as widespread and ongoing newspaper and television coverage. Assisted by the fact that the Commonwealth Parliament was sitting, the result was an immediate temporary ban on 12 of the abattoirs involved. One issue was whether halal killing proscribed stunning the animals before slaughter, as recommended by Australia, who had supplied stun guns that were ignored. Also at issue were whether the entire live export trade should be suspended, and the general risk of sending Australian animals to destinations with no animal protection laws.

18 Richard Carleton, ‘Ship of Shame’, *60 Minutes*, 21 September 2003

<<http://sixtyminutes.ninemsn.com.au/article/259096/ship-of-shame>>.

19 Sarah Ferguson, ‘A Bloody Business’, *Four Corners*, 30 May 2011

<<http://www.abc.net.au/4corners/stories/2011/05/30/3228880.htm>>.

20 See GetUp!, ‘Ban Live Export’ <<http://www.getup.org.au/campaigns/animals/live-export/ban-live-export>>.

The events highlighted the need for international regulation, as Nussbaum advocates, as well as the need for animal welfare issues to be adequately addressed politically and legally at the federal, state, and industry level in Australia – which has clearly not been the case. Two private members’ bills introduced into the Parliament seeking a phased or immediate end to the trade were defeated on the floor of Parliament on 18 August 2011.²¹ Trade to Indonesia resumed in August 2011.²²

In this context, Nussbaum's bottom line threshold of good treatment during life and painless killing must surely be the benchmark.²³ It is the pointy end of animal ethics and global justice – where the rubber hits the road. The footage was unforgettable, and what is now so publicly known cannot and will not be ignored (to draw on the words of TS Eliot in his poem *Gerontion*, ‘After such knowledge, what forgiveness?’).

With the growing prominence of animal ethics issues, community involvement is crucial, as are the many organisations that work in animal welfare and rescue. One of the most prominent is the RSPCA. The name RSPCA stands, of course, for the Royal Society for the Prevention of Cruelty to Animals. That is a Benthamite welfare approach, based on a conviction of the importance of animals’ sentience, and at the time it also went with an anti-vivisection approach. We have argued here for a positive, capabilities approach that spells out what sentience amounts to for animals, but the importance of a concern for cruelty remains. It is not surprising, then, that there has been public pressure for stricter penalties in such cruelty cases. This public pressure is important in educating politicians and bureaucrats charged with implementing the *Australian Animal Welfare Strategy*,²⁴ as well as

21 Live Animal Export Restriction and Prohibition Bill 2011 and Live Animal Export (Slaughter) Bill 2011. At the time of writing, Tony Zappia MP is reportedly to submit a Notice of Motion to the federal Labor caucus, seeking a prohibition on live export to those countries that cannot guarantee mandatory stunning before slaughter: see Animals Australia, ‘New push to address live export cruelty’ <<http://www.animalsaustralia.org/features/new-push-to-address-live-export-cruelty.php>>. It should be pointed out that this would be a higher standard than currently applies in Australia, given that slaughter without pre-stunning is permitted where “approved arrangements” are in place for ritual slaughter: see Ven Alex Bruce, ‘Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of the Religious Slaughter of Animals’ (2011) 34 UNSW Law Journal 351, 356-363.

22 Matt Brown, ‘Live cattle exports arrive in Indonesia’ ABC News, 16 August 2011 <<http://www.abc.net.au/news/2011-08-16/first-live-export-ship-arrive-in-indonesia/2842124>>.

23 See also Temple Grandin, ‘Why Do I Still Work for the Industry?’, Afterword in Temple Grandin and Catherine Johnson, *Animals Make Us Human* (Houghton Mifflin Harcourt, 2009).

24 DAFF, *The Australian Animal Welfare Strategy* (Commonwealth of Australia, 2005, revised eds, 2008 and 2011). The most recent edition can be found at <http://www.daff.gov.au/_data/assets/pdf_file/0004/1986223/cic-102054-aaws.pdf>.

magistrates, and so leading to legal reform. A more detailed consideration of the extent to which the capabilities approach is reflected in domestic animal welfare, and internationally, is considered in Part III.

Part III: The Capabilities Approach and Animal Law

The capabilities analysed in Part II are characterised by Nussbaum as ‘basic political principles that will guide law and public policy in dealing with animals’.²⁵ This implies the need for these principles to be given some form of institutional expression.²⁶ The focus of this Part will be on animal welfare law as a particular means of giving institutional effect to these principles.

In particular, this Part explores the extent to which Nussbaum’s political principles are reflected in domestic and international law. Domestic law because Nussbaum acknowledges, at least with respect to human capabilities, that the promotion of global justice begins with a responsibility on the part of individual nations to promote capabilities. International law because of the need for collective global action and for what Nussbaum calls a ‘thin’ system of global governance, necessary to realise a global justice.

Domestic Law

If the capabilities identified by Nussbaum are basic political principles, then it might be expected that they would be grounded in a nation’s constitution. As Nussbaum suggests:

the capabilities approach suggests that each nation should include in its constitution or other founding statements of principle a

25 Above n 10 499.

26 The nature of the political principles suggested by an extension of justice to animals, and associated institutional expression, may of course vary widely. While this article focuses on the philosophical arguments of Martha Nussbaum, other important accounts can be found in the political theory literature: see, eg, Robert Garner, *The Political Theory of Animal Rights* (Manchester University Press, 2005); Alasdair Cochrane, *An Introduction to Animals and Political Theory* (Palgrave Macmillan, 2010); and Siobhan O’Sullivan, *Animals, Equality and Democracy* (Palgrave Macmillan, forthcoming).

*commitment to animals as subjects of political justice and a commitment that animals will be treated with dignity.*²⁷

In Australia there is no constitutional enshrinement of such a commitment, either at the Commonwealth level or at State and Territory level.²⁸ There is very little prospect that such recognition will be incorporated by referendum in the Commonwealth *Constitution* for a very long time, given the unhappy record of past referenda proposals on controversial issues.

Some States and Territories have established Charters of Rights, but these are outside their respective Constitutions and, although this is a point not beyond legal argument, they are confined to “human rights”.²⁹

There is, in Australia, some authority for robust public discussion of animal welfare issues being protected under the implied freedom of political communication found in the *Constitution*. In the case of *Lenah Game Meats v ABC*,³⁰ Justice Kirby stated:

Many advances in animal welfare have occurred only because of public debate and political pressure from special interest groups. The activities of such groups have sometimes pricked the conscience of human beings. Parliamentary democracies, such as Australia, operate effectively when they are stimulated by debate promoted by

27 Above n 10 504.

28 The issue of animal welfare was not considered in the Constitutional Conventions of the 1890s. Animals were only considered in the context of free movement between the States, including in debate about whether the power to prohibit the introduction of ‘vegetable and animal diseases’ should be left to the States or specifically conferred on the Commonwealth: Steven White, ‘Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for reform?’ (2007) 35 Federal Law Review 347, 363.

29 See, eg, Charter of Human Rights and Responsibilities Acts 2006 (Vic) (this Act provides that ‘[o]nly persons have human rights’: s 6(1)); and Human Rights Act 2004 (ACT) this Act provides that ‘[o]nly individuals have human rights’: s 6). Tasmania is exploring the introduction of a charter, with a suggested model stating that the Charter should apply only to ‘natural persons’: Department of Justice, A Charter of Human Rights and Responsibilities for Tasmania, 2010 39. Of course, the concept of legal ‘personhood’ is flexible, and there is no rational reason for why it could not plausibly extend to non-human animals: see Gary L Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (Columbia University Press, 2008); Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009) ch 8; Steven M Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Publishing, 2000). In the United States, the Animal Legal Defense Fund (ALDF) is building support for a national ‘Animal Bill of Rights’: ADLF, ‘Animal Bill of Rights’

<http://org2.democracyinaction.org/o/5154/p/dia/action/public/?action_KEY=5078>.

30 (2001) 208 CLR 199.

*community groups. To be successful, such debate often requires media attention. Improvements in the condition of circus animals, in the transport of live sheep for export and in the condition of battery hens followed such community debate. Furthermore, antivivisection and vegetarian groups are entitled, in our representative democracy, to promote their causes, enlisting media coverage, including by the appellant. The form of government created by the Constitution is not confined to debates about popular or congenial topics, reflecting majority or party wisdom. Experience teaches that such topics change over time. In part, they do so because of general discussion in the mass media.*³¹

And the earlier High Court decision of *Levy v State of Victoria*³² established that protection of freedom of political communication extends to protection of non-verbal political conduct, such as protest. This is so despite the relevant protest in *Levy* – illegally entering an area designated under regulation for duck hunting – being held to be validly restricted, on the basis that the restrictive law was not disproportionate to achieving the competing public interest of public safety.

However, constitutional protection of discussion of, and protest about, animal welfare matters is one thing, a ‘commitment to animals as subjects of political justice’, as framed by Nussbaum, quite another.

Absent constitutional protection or Commonwealth legislative intervention, the regulation of animal welfare in Australia has developed in a piecemeal way at a State and Territory level. The Commonwealth has never sought to exercise primary legislative responsibility for animal welfare. Ostensibly this is because there is no constitutional head of power specifically addressing animal welfare. However, there is little doubt the Commonwealth could rely indirectly on other heads of power to regulate many aspects of animal welfare currently addressed by the States and Territories.³³ A proposal for national legislation, introduced by then Senator Andrew Bartlett in

³¹ Ibid 287.

³² (1997) 189 CLR 579.

³³ In 2007, the then Federal Minister for Agriculture Fisheries and Forestry, responding to representations on the need for nationally consistent animal welfare legislation, asserted that ‘[u]nder the Constitution it is possible for the Commonwealth to legislate unilaterally however states, territories and the Commonwealth have agreed with the current approach regarding animal welfare and are reluctant to change the arrangements at this time’ (letter dated 8 January 2007, copy on file with author).

private members bills in 2003 and 2005, failed to attract the support of the major parties and therefore was unsuccessful.³⁴

At a State and Territory level the standard regulatory approach in place today for the treatment of animals is rooted in measures first introduced more than a century ago.

This approach entails an acceptance that animals are, in strictly legal terms, personal property, objects or chattels.³⁵ The common law continues to classify animals as property. Statute law entrenches this status, but modifies the ways in which ‘animal property’ may legitimately be used, principally through animal welfare laws.

Animal welfare statutes universally include a general prohibition standard (no unnecessary cruelty) and, in various forms, a general duty standard (duty to take steps to meet the welfare needs of an animal). The duty of care of standard, explicitly outlined in Queensland legislation, reflects a statutory expression of the Five Freedoms. These general standards are usually supported by particular offences, such as provisions restricting tail docking and debarking.

Both standards, and the more specific offences, are consistent with two principles identified by Nussbaum, bodily integrity and bodily health. As Gail has suggested, though, the principles argued for by Nussbaum extend significantly beyond the Five Freedoms and mere absence of cruelty. It is reasonably clear that, even before we get to exemptions, most capabilities identified by Nussbaum are not addressed in contemporary Australian animal welfare legislation.

34 In a submission to a Senate Committee reviewing the proposed legislation, the Department of Agriculture, Fisheries and Forestry (DAFF) stated: ‘The bill proposes the development of a national animal welfare system but would not establish a comprehensive national regime for animal welfare given the limitations imposed by the constitution.

Significant areas of animal welfare would not be covered, eg ownership or treatment of animals by individuals within each of the States for purposes unrelated to interstate or overseas trade and commerce . . . The Commonwealth could regulate such issues only if the States referred the matter of animal welfare to the Commonwealth’: DAFF, Submission No 191 to Senate Rural and Regional Affairs and Transport Legislation Committee, Parliament of Australia, National Animal Welfare Bill 2005, 9 December 2005, 7

<http://www.aph.gov.au/Senate/committee/rrat_cte/completed_inquiries/2004-07/animal_welfare05/>.

35 The leading critique of the property status of non-human animals is provided by Gary L Francione, *Animals, Property and the Law* (Temple University Press, 1995).

A key feature of the standard State and Territory regulatory approach is the grant of an exemption from the cruelty and duty of care standards in respect of significant categories of animals, including farm animals.

Early in the 20th century, the States began including exemptions for particular types of farming practices, such as the dehorning of cattle, castration, spaying, ear-splitting and branding.³⁶

In a further significant expansion of this area of exemption in the 1970s and 1980s, the States shifted to a model of blanket exemptions for farming practices. Jamieson gives the example of Victoria which in 1980 amended anti-cruelty legislation to provide that 'no farming activity would infringe the Act when undertaken "in accordance with accepted farming practice"'.³⁷

The reason for this process of exemption is not difficult to identify. As Jamieson suggests:

*Australia being a country so heavily dependent even today on the activities of its rural sector, one would expect in any utilitarian humanist calculation substantial concessions to that industry from the operation of the anti-cruelty laws in recognition of its fundamental importance to the Australian economy.*³⁸

The significance of these exemptions was not lost on animal welfare advocates, and they were effective in provoking a governmental response. In the late 1970s and early 1980s, codes of practice emerged as a regulatory strategy for addressing farm animal welfare. According to the Neumann Report (a review commissioned by the federal Government as part of its development of the *Australian Animal Welfare Strategy* (AAWS)):³⁹

The first code of practice developed in Australia appears to be that for poultry with the initiative driven by the chicken meat and egg industries that coopted government and welfare groups to a committee

36 Philip Jamieson, 'Duty and the Beast: The Movement in Reform of Animal Welfare Law' (1991) 16 University of Queensland Law Journal 238, 250.

37 Ibid. Some animal welfare statutes continue to use this form of exemption: see, eg, Animal Welfare Act 2002 (WA) s 23 (defence to a charge of cruelty to show act was done 'in accordance with a generally accepted animal husbandry practice' and 'in a humane manner').

38 Jamieson, above n 35, 249.

39 DAFF, above n 23.

to develop a code in the late 1970's. This later developed into the Model Code of Practice for the Welfare of Animals - Domestic Poultry. Other early Codes were developed as national guidelines by the Commonwealth Bureau of Animal Health after the Australian Agricultural Council (AAC) in 1980 considered the mounting challenges by animal welfare interests to accepted methods of Australian livestock management and animal experimentation. In particular, the Council considered implications for the intensive animal industries and live animal exports with a focus on the conditions of transport of livestock over long distances, aspects of the slaughter of stock, intensive farming practices in the pig and poultry industries and the control of feral animals.⁴⁰

Over time a number of model codes of practice were developed, addressing different farm animal species and the range of settings in which they are located. The goal was to achieve a measure of uniformity in the regulation of animal welfare. However, this goal has not been realised, and this makes it hard for Australia to provide a coherent account of, and assurances about, animal welfare regulation, both nationally and in an international context. In substantive terms, too, there have been problems of application, content and enforcement. The Neumann Report summarises the position well:

Codes are not considered regulatory documents in several jurisdictions but can be used as a defence in proceedings in most States and Territories. This means that if an animal owner is complying with a code, even though a provision in the code may be seen as cruel by some groups, a successful prosecution would be unlikely. Thus unless Codes are subject to a review process, they may provide protection or perpetuate management practices that are no longer acceptable to the public. Partly because of the variable way in which Codes are used under State and Territory legislation there is little consistency in enforcement of any provisions. Most importantly, however, it is a lack of inspectorial resources and will to enforce that appears to impact most on Code enforcement. This inconsistent approach to the purpose and enforcement of Codes in the face of international scrutiny and rising community expectations reflects poorly on Australia's position as a major livestock producing and exporting country. In their current form it appears that Codes do little to provide consistency, provide poor support to regulators, result in

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

considerable additional work producing codes suitable to some States and generally satisfy few expectations.⁴¹

As noted above, the federal Government, working with the States and Territories, is pursuing a national AAWS. The process commenced in 2005. A revised AAWS document was published in 2008, and a further revised document in 2011.⁴² The AAWS emphasises a commitment to national consistency and harmonisation, with codes of practice a key issue, under the 'goal' of 'National systems'.⁴³

In line with Neumann Report recommendations, a new code development process has commenced. Mandatory standards and guideline principles are to be used in codes, and the codes are to be adopted by every State and Territory, to create a nationally consistent approach.⁴⁴

However, it seems clear that the broader structure of exemption from overriding cruelty and duty of care obligations will remain in place. This ensures that a range of farming practices, including intensive farming, will continue to be endorsed. Such practices are clearly at odds with the Five Freedoms. By definition, this means the operation of the codes, old and new, and animal welfare legislation more broadly with respect to farm animals, do not incorporate to any significant extent recognition of the capabilities identified by Nussbaum.

International Law

If it is clear that even in a developed country like Australia animal welfare regulation falls well short of extending justice to most animals, at least in the terms conceived by Martha Nussbaum, what is the position internationally?⁴⁵

41 Ibid 9-10.

42 Above n 23.

43 Ibid 21-22.

44 The process is being managed by Animal Health Australia: for background see Animal Health Australia, 'Australian Animal Welfare Standards and Guidelines' <<http://www.animalwelfarestandards.net.au/>>. For a contextual analysis of the code development process, as part of the broader regulation of animal welfare law, see Keely Boom and Elizabeth Ellis, 'Enforcing Animal Welfare Law: The NSW Experience' (2009) 3 Australian Animal Protection Law Journal 6.

45 For a political analysis of international animal protection developments, including the extent to which they are likely to accord with 'old welfarism', 'new welfarism' and 'animal rights' see Caley Otter at al, 'Laying the Foundation for an International Animal Protection Regime' (2011) 1(2) Journal of Animal Ethics (forthcoming).

In setting out the principles of a global institutional structure necessary to give effect to her capabilities approach for humans, Nussbaum includes the principle of cultivating ‘a thin, decentralized, and yet forceful global public sphere’.⁴⁶ Included under this principle is a ‘range of international accords and treaties that can be incorporated into the nations’ systems of law through judicial and legislative action’.⁴⁷ These include, for example, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Universal Declaration of Human Rights*.

So far, analogous international accords have not been established addressing the interests of animals, subject to four qualifications.

First, there are accords developed at a regional level. The obvious example here is the work of the European Union. The EU now explicitly recognises the sentience of animals in one of its foundation treaties, the *Treaty on the Functioning of the European Union*.⁴⁸ Art 13 of this Treaty provides:

In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

The recognition of animal sentience and the importance of animal welfare in this Treaty is consistent with the expectation expressed by Nussbaum that foundational, constitutional documents should recognise the claims of animals.⁴⁹ It should also then not be surprising that the EU is widely regarded as an international leader on animal welfare

46 Nussbaum, above n 10, 479.

47 Ibid 480.

48 Treaty on the Functioning of the European Union, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993).

49 Referring to the protocol precursor of this provision, Cochrane states that it ‘can be viewed as an explicit recognition by the EU that animals merit justice for their own sakes’: above n 25, 4.

issues, having banned veal crates in 2007, and with a ban on battery cages to take effect in 2012 and sow stalls in 2013.⁵⁰

Second, the OIE, or World Organisation for Animal Health, addresses animal welfare to some extent. The OIE was established in 1924 and has 178 member countries.⁵¹ The focus of the OIE is on the prevention and control of animal diseases.⁵² Animal welfare has only recently become a specific area of strategic concern, with an OIE Animal Welfare Working Group established in 2002.⁵³ Since 2005, the OIE has adopted nine animal welfare standards, addressing areas such as transport of animals by land, the use of animals in research and education and the slaughter of animals for human consumption.⁵⁴

The OIE now sees itself as a global leader on animal welfare.

The progress made by the OIE, to date, in relation to international animal welfare leadership is, by any standards, impressive. The future OIE *modus operandi* will be characterised by a commitment to communication, consultation, continuous improvement and incremental change . . . The notion of approaching animal welfare change management on a truly global, rather than a national basis, represents a significant paradigm shift.⁵⁵

The animal welfare standards are advisory only, and very broadly expressed. They have many of the shortcomings identified in our domestic codes of practice. They are wholly consistent with the principles underpinning an orthodox approach to animal welfare law, as reflected in Australian domestic regulation - i.e. 'humane' treatment

50 Peter Stevenson, 'European and International Legislation: A Way Forward for the Protection of Farm Animals?' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press 2009) 307, 308.

51 OIE (World Organisation for Animal Health), 'About Us' <<http://www.oie.int/en/about-us/>>.

52 OIE, 'Organic Rules of the Office International Des Epizooties' (appendices to International Agreement for Creation of an Office International Des Epizooties in Paris) <<http://www.oie.int/about-us/key-texts/basic-texts/organic-rules/>>.

53 OIE, 'The OIE's Objectives and Achievements in Animal Welfare' <<http://www.oie.int/animal-welfare/animal-welfare-key-themes/>>.

54 *Ibid.*

55 ACD Bayvel, 'The Globalisation of Animal Welfare: A New Zealand and Australian Perspective on Recent Developments of Strategic Importance' (Paper presented at AAWS International Animal Welfare Conference, Gold Coast, Australia, 31 August-3 September 2008) <http://www.daff.gov.au/animal-plant-health/welfare/aaws/aaws_international_animal_welfare_conference>.

should be extended to animals, but only to the extent this does not hinder overriding human interests.⁵⁶

Third, there are international agreements that give effect to the protection of free-ranging animals, especially where they are endangered. An important example is the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*.⁵⁷ Such treaties generally include requirements for humane treatment of animals in one form or another, and so do have welfare implications. However, they are seriously limited in giving effect to the sorts of political principles argued for by Martha Nussbaum, where the focus is on the extension of justice to individual animals. This is because ‘the goal in international law with regard to animals is to conserve them to prevent them becoming extinct as a species, not to conserve them because each individual animal can experience pain and/or pleasure’.⁵⁸

Fourth, a *Universal Declaration on Animal Welfare* has been proposed for adoption by the United Nations. Led by the World Society for the Protection of Animals (WSPA), some countries, many animal welfare groups and more than two million individuals have pledged their support for the proposed Declaration.⁵⁹ The 2008 *AAWS* points out that ‘Australia has also been working with other international bodies such as the World Society for the Protection of Animals on issues such as the development of a Universal Declaration on Animal Welfare’.⁶⁰

A universal declaration would be symbolically significant. As the *National Human Rights Consultation Report* recently pointed out, ‘[w]hile international declarations are not generally binding documents

56 For an incisive account of the way in which law transforms cruel practices into ‘necessary’ or ‘humane’ treatment see Peter Sankoff, ‘The Welfare Paradigm: Making the World a Better Place for Animals?’ in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press 2009) 1, 7.

57 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975).

58 Alexander Gillespie, ‘Animals, Ethics and International Law’ in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press 2009) 333, 352.

59 WSPA (World Society for the Protection of Animals), ‘Universal Declaration on Animal Welfare’ <<http://www.wspa-international.org/wspaswork/udaw/Default.aspx>>.

60 DAFF (2008), above n 23, 33. The 2011 *AAWS* refers to the proposed Universal Declaration as a ‘valuable guiding philosophy for efforts to improve the welfare of animals’, without explicitly stating Australia’s support: DAFF (2011), above n 23, 16.

and do not create any enforceable obligations for States that adopt them, they do have moral and political significance'.⁶¹ WSPA argues that:

A UDAW would inspire change at international, regional and national levels by: encouraging governments to improve their national animal welfare legislation; providing a basis for animal welfare legislation in countries where it does not currently exist; encouraging those industries which use animals to keep welfare at the forefront of their policies; mobilising and uniting the animal welfare movement behind a common goal; providing a useful framework to link humanitarian development and animal welfare agendas; and inspiring positive change in public attitudes towards animal welfare.⁶²

The draft recognises that 'animals are living, sentient beings and therefore deserve due consideration and respect'.⁶³ The body of the document requires that 'appropriate standards' on animal welfare be developed, that 'appropriate steps' be taken to prevent cruelty and that standards of animal welfare for each State be 'promoted, recognized and observed by improved measures, nationally and internationally'.⁶⁴ These requirements are very broadly expressed and aspirational at best. This flexibility is important in building a consensus and ensuring a large number of States sign up. In turn, adoption by a large number of States may also be a precursor to more specific declarations, and provide a platform for establishing binding treaties or protocols.

This will be a long-term process. The *Universal Declaration of Human Rights* was adopted in 1948,⁶⁵ but it was 1966 before subsequent multilateral treaties were adopted by the UN, starting with the *International Covenant on Civil and Political Rights*⁶⁶ and the

61 National Human Rights Consultation Committee, National Human Rights Consultation Report (Commonwealth of Australia, September 2009) 101.

62 WSPA, above n 58.

63 WSPA, 'Resources - Draft UDAW Text (2005) <http://www.animalsmatter.org/en/campaign_resources>.

64 Ibid cll 2, 3 and 4.

65 Universal Declaration of Human Rights, GA res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

66 International Covenant on Civil and Political Rights, opened for signature 19.12.66, 999 UNTS 171 (entered into force 23.3.76).

*International Covenant on Economic, Social and Cultural Rights*⁶⁷. Both came into force in 1976.

Significantly, Australian regulation of animal welfare would not be challenged by any provisions in the proposed Declaration. Given that Australian animal welfare is not consistent with the requirements for justice set out by Nussbaum, as argued above, it follows that such a declaration cannot provide the basis for extending justice to animals. At best, it might provide a stepping-stone in the direction of improved animal welfare outcomes, especially in developing countries.⁶⁸

As a final point in the realm of international law, the role of trade agreements, even if they do not focus specifically on animal welfare, is critically important. Trade agreements, such as those under the auspices of the World Trade Organization, can provide significant obstacles to institutionalising principled approaches to animal welfare. Countries with lower welfare standards may profit at the expense of countries with higher standards, and/or object that higher standards contravene free trade principles, on the basis that they impose an unfair trade barrier. However, despite the difficulties that such treaties have created for progressive reform, the main problem may in fact be ‘that governments are taking too cautious a view of the [trade] restrictions and using them as an excuse not to address . . . [animal] health and welfare problems’.⁶⁹

Conclusion

The capabilities approach for animals developed by Martha Nussbaum is theoretically well informed. It provides a coherent, practical set of principles for understanding what might be required to achieve global justice for animals. Those same principles also provide a useful benchmark for assessing the extent to which institutional structures for the protection of animals, such as animal welfare law, incorporate justice for animals, nationally and internationally. It is possible to point

67 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

68 WSPA suggests that the Declaration, even in draft form, is already having this effect, highlighting the passage of a Malaysian animal welfare law for zoo animals, which followed shortly after Malaysia pledged support for the Declaration in 2008: WSPA, ‘WSPA Welcomes Closure of Cruel Malaysian Zoo’, 22 June 2011 <http://www.wspa.org.au/latestnews/2011/closure_of_cruel_Malaysian_zoo.aspx>.

69 Stevenson, above n 49, 331. For a detailed account of the effect of GATT and the WTO on animal welfare see Stevenson, *ibid*, 315-331.

to some progressive, incremental improvements in protection of animal welfare in recent years, nationally and internationally. However, the basic institutional structure through which we express our obligations to animals - animal welfare law, broadly conceived - leaves us a very long way short of realising justice for animals, in the way eloquently argued for by Nussbaum.

The welfare of greyhounds in Australian racing: Has the industry run its course?

By Alexandra McEwan and Krishna Skandakumar¹²

Of the 7,500 greyhounds born [in Victoria each year], approximately only 1,000 will live a full life span - Judge GD Lewis AM, 1.8.08³

Australia's greyhound racing industry is the third largest in the world.⁴ More than 50 racetracks operate across the country, the majority in New South Wales.⁵ In 2009, total 'stake money' (amount put at risk by punters Australia-wide) was almost \$74 million.⁶ Despite its popularity and profitability, this form of "entertainment" raises intractable animal welfare issues.

Industry viability rests on the over-breeding of dogs. Based on current estimates,⁷ something like 17,000 greyhounds are killed in Australia each year - as pups, due to injuries sustained during racing, or as surplus

1 This paper has been developed as part of a post-doctoral study by Alexandra McEwan (PhD Candidate, Australian National University College of Law) and for a tutorial presentation in the ANU undergraduate course Animals and the Law, by Krishna Skandakumar (Fifth year Law/Actuarial Studies student) The authors acknowledge and thank Professor Alex Bruce, College of Law, ANU and Ms Dominique Thiriet, Lecturer, Faculty of Law, James Cook University for their encouragement and comments on the drafts of this paper. Any errors are the authors' own.

2 This paper is dedicated by Krishna to Sri Skandakumar, for his ongoing support, and by Alex to Dino - RIP.

3 Covering Letter to Mr Rob Hulls, Minister for Racing, Victoria 1.8.08 in Judge GD Lewis AM, A Report on Integrity Assurance in Victoria's Racing Industry (2008), 5.

4 According to ANZGA figures, about 20,500 greyhounds were born in 2001, compared to the United States (32,000), and Ireland (23,000). World Greyhound Racing Federation, Protests Mount Over Export of Racing Greyhounds to Korea Melbourne, Australia (n.d.)

<<http://www.worldgreyhoundracingfederation.com/index.php?mode=info&view=news&t=2>>.

5 Australia Greyhound Racing, Race Tracks (n.d.) <<http://australiagreyhoundracing.com/greyhound-race-tracks/victoria-greyhound-tracks/>>.

6 Greyhounds Australasia, Australasian Racing Statistics (n.d.)

<<http://www.galtd.org.au/GreyhoundsAustralasia/index.php?q=node/111>> .

7 Estimate based on 1) Covering Letter to Mr Rob Hulls, Minister for Racing, Victoria 1.8.08 in Judge G. D Lewis AM, A Report on Integrity Assurance in Victoria's Racing Industry, (2008) which notes that approximately 15% of greyhounds bred for racing in Victoria each year live a full life span and 2) The number of litters registered in Australia suggests that at least 20,000 dogs are bred each year, cited in Tim Mitchell, 'Less Breeding Best for Dogs' Waverley Leader (Melbourne), 16.8.11,5.

dogs at the end of their racing 'careers'.⁸ It is reasonable to assume that the market for the use of greyhounds in research,⁹ for teaching in veterinary schools,¹⁰ and as a live export 'commodity'¹¹ has emerged in response to this over-breeding of dogs.

Greyhound adoption programs have flourished, but based on estimates from Victoria, adoption 'saves the lives' of only about 4-to-5 % of the greyhounds in need of re-homing.¹²

As animals are property at law,¹³ they do not enjoy an inalienable right to life. Under Australian anti-cruelty statutes,¹⁴ killing a dog is not an offence unless the act of killing causes "unnecessary" suffering and pain. "Animal sports" remain contentious in the debate about definition of the "necessity" test, as a qualification to the offence of animal cruelty.¹⁵ But, even by conservative standards, the number of greyhounds killed yearly is shocking, and the corollary export industry inconsistent with the way Australia has sought to position itself as an animal welfare role model in Asia and Oceania.¹⁶

It is against this background that this article explores welfare issues in the greyhound industry, arguing that, despite recent regulatory reforms and industry efforts to improve welfare standards, there is sufficient evidence available to conclude that this form of animal use can no

8 Judge G.D Lewis AM above n 5, 5.

9Lorna Edwards, 'Hounded to death ' The Sydney Morning Herald (Sydney), 25 October 2004, 19.

10 University of Queensland, About Us (2011) School of Veterinary Science Education Memorial Program University of Queensland <<http://www.uq.edu.au/vetschool/about-emp> >.

11 Alison G. Jones, 'Australia's Damaging International Trade Practice: The Case Against Cruelty to Greyhounds' (2005) 14 Pacific Rim Law & Policy Journal, 677.

12 Judge G.D. Lewis AM above n 5, 5; Greyhound Adoption Programs: Victoria (www.gap.grv.org.au), New South Wales (www.gapnsw.org.au), Queensland (www.greyhoundpets.org.au), Tasmania (www.gaptas.org.au), Western Australia (www.greyhoundsaspets.com.au), South Australia (www.gapsa.org.au), Australian Capital Territory (www.communitiesonline.org.au/group.php?id=386).

13 Steven White 'Exploring Different Philosophical Approaches to Animal Protection in Law' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (The Federation Press, 2009), 79.

14 Animal Welfare Act 1992 (ACT); Prevention of Cruelty to Animals Act 1979 (NSW); Animal Welfare Act 1999 (NT); Animal Care and Protection Act 2001 (Qld); Prevention of Cruelty to Animals Act 1985 (SA); Animal Welfare Act 1986 (Tas); Prevention of Cruelty to Animals Act 1986 (Vic); Animal Welfare Act 2002 (WA).

15 Philip Jamieson, 'Duty and the Beast: The Movement in Reform of Animal Welfare Law' (1991) 16 University of Queensland Law Journal, 238.

16 Jones, above n 13, 678. World Organisation for Animal Health, *Regional Animal Welfare Strategy: Asia, the Far East and Oceania* (2008), 3.

longer be justified as ‘necessary’. While the authors accept that, given the strength of the racing industry in Australia, this position may be considered politically untenable, the US experience may be noted, where greyhound racing is now unlawful in most states.

Much of the Australian greyhound welfare debate takes place in "grey" literature. We found little Australian legal scholarship on animal welfare in greyhound racing. Animal Law textbooks, published in Australia at the time of writing, do not deal with the issue in detail.¹⁷

BACKGROUND

Notes on the history of greyhound racing in Australia

Greyhounds arrived in Australia with the First Fleet and were initially used for their ability to catch live game. Racing began to be conducted as coursing events in the 1860s, using live wallabies as bait.¹⁸ A decade or so later, live hares were imported to promote the ‘sport’. By the 1880s, coursing was organised on enclosed courses with patrons paying admission charges to watch and bet on the events.¹⁹

In the late 1920s, Owen Smith commercialised greyhound racing in the US by establishing the first racing track.²⁰ As the ‘sport’ gained patronage, practices on the racetrack changed. Each dog was placed into a box at the start of the track and enticed to chase an artificial lure, known as a ‘tin hare’.²¹ Although the greyhound is recognised as a placid breed,²² it was for its blistering straight-line speed that the dog

17Deborah Cao, *Animal Law in Australia and New Zealand* (Lawbook Co, Thomson Reuters (Professional) Australia Ltd, 2010); Peter Sankoff and Steven White (eds) *Animal Law In Australasia: A New Dialogue* (Federation Press, Sydney, 2009).

18 Australian Institute for Gambling Research, *Australian Gambling Comparative History and Analysis: Project Report*, (Australian Institute for Gambling Research University of Western Sydney for Victorian Casino and Gaming Authority, 1999), 82.

19 Ibid.

20 Paul Tracey, ‘Going to the Dogs! Labor and “Tin Hare” Racing’ 2 *The Hummer* ‘10 (Winter)’ (1998).

21 Linda Beer, Jan Wilson and John Stephens, ‘Improving the Welfare of the Racing Greyhound – A GRV Perspective’ (paper presented at International Animal Welfare Conference, Queensland on 31.8 to 3.9.08); Tracey, above n25.

22A study by The Centre for the Interaction of Animals and Society (University of Pennsylvania School of Veterinary Medicine) found that the greyhound is rated the most docile or least aggressive dog by breed. Kevin Pitstock, ‘Research Finds Greyhounds Are The Safest’ 8 July 2008.

<<http://www.australianracinggreyhound.com/australian-greyhound-racing/animal-welfare-australian-greyhound-racing/research-finds-greyhounds-are-the-safest/2036>>.

was chosen for commercial racing. The greyhound racing industry exploded in the US. Several other countries followed suit. New Zealand, Australia, Ireland, Spain and England embraced track-racing schemes in the early 20th century. Although the Australian industry gained some benefit from the growth of Totalisator Agency Board (TAB) and broadcast coverage in the late 1990s, greyhound racing remains the least favoured of the three racing codes (thoroughbred, harness, and greyhound) in betting, attendance and general public interest.²³ It is considered the ‘poor cousin’ of the other codes ‘when it comes to the distribution of TAB revenues’, and is largely ‘restricted to a relatively small band of devotees’.²⁴

Greyhound racing and the utilitarian calculus: Why the scales fall in favour of the interests of animals

Australia’s current animal welfare framework and anti-cruelty laws constitute a form of ‘legal welfarism’ by which the scope of protection provided to animals is determined by the types of conduct that will maximize the efficient use of animals as property.²⁵

The *Australian Animal Welfare Strategy (AAWS)* identifies six key categories of animal use.²⁶ Greyhounds in the racing industry fall within category 5 ‘animals used for work, recreation, entertainment and display’. They are considered working dogs in sport for the purposes of the *AAWS*.

The animal welfare paradigm accepts human use of animals, though tempers this stance by conceding that the animals involved should be treated humanely. This utilitarian approach allows for animal use on the basis that the pain and suffering endured by non-human animals may be justified or necessary where it is perpetrated in pursuit of a socially recognised human benefit or ‘by the perceived need of society as interpreted by our legislators’.²⁷ It is via this balancing act and ultimately the side on which the scales fall that specific forms of animal

23 Australian Institute for Gambling Research, above n 23, 83.

24 Ibid.

25 Gary Francione, *Animals, Property and the Law* (1995) 253; Seymour, George, ‘Animals and the Law: Towards a Guardianship Model’ (2004) 29 *Alternative Law Journal* 183.

26 Commonwealth of Australia, *Australian Animal Welfare Strategy and National Implementation Plan 2010 -14*, (Department of Agriculture, Fisheries and Forestry, 2011), 8.

27 John Webster, ‘Animals for Sports’ in *Animal Welfare: Limping Towards Eden* (Blackwell Publishing, 2005), 205.

use and associated practices are imbued with legitimacy. The question of whether animal use is for a legitimate purpose generally accords with a hierarchy in which animal use for food and research has strong moral claims,²⁸ by tying them to questions of life and death for the human species. In comparison, animal use for non-essential purposes such as entertainment, sport, or luxury items, has a weaker moral claim.

Having stated the orthodoxy it remains possible to reassess whether, over time, a given form of animal use may have lost its legitimacy according to the utilitarian calculus. This article takes as its premise that the killing and mistreatment of greyhounds in the racing industry can no longer be considered legitimate. In particular, the viability of the Australian greyhound racing industry requires the large-scale killing of greyhounds each year, either as pups, as a result of injuries sustained on the race track, or as surplus dogs at the end of their racing ‘careers’.²⁹ The over-breeding and large-scale killing of greyhounds can be construed as gratuitous killing for sport or entertainment. The export of live greyhounds raises the broader question of Australia’s accountability for animal welfare standards post-export.³⁰

Integrity issues

Over the past decade the integrity of the racing industry has come under some intense scrutiny. In August 2008, Judge GD Lewis submitted a report on integrity assurance (the *Lewis Report*)³¹ to the Victorian Minister for Racing. During the same period, barrister Malcolm Scott chaired an independent Review of integrity in the racing industry in NSW (the *Scott Review*).³²

The Lewis Report

During Report consultations, Judge Lewis was made aware of ‘many significant matters relating to criminal activity within the racing industry’.³³ Following examination of an anonymised Australian Crime Commission (ACC) report, the judge was convinced that ‘criminal

28 Ibid, 205 -206.

29 Judge G.D. Lewis, above n 5, 5.

30 See Jones, above n 13 for an in-depth discussion of this issue.

31 Judge G.D Lewis AM, A Report on Integrity Assurance in Victoria’s Racing Industry (2008).

32 Malcolm Scott, 2008 Independent Review of the Regulatory Oversight of the NSW Racing Industry: Report, (June 2008).

33 Judge GD Lewis above n 57, 7.

activity in the industry was rampant'.³⁴ *Lewis Report* recommendations included the establishment of an independent Racing Integrity Commissioner, with stand alone and independent statutory powers, and a scheme for consistent drug screening of animals.³⁵ In September 2009 the Victorian Government enacted the *Racing Legislation Amendment (Racing Integrity Assurance) Act 2009* (Vic) in order to implement Judge Lewis's key recommendations.³⁶

The Scott Review

In November 2007, the NSW Minister for Gaming and Racing appointed barrister Malcolm Scott to chair a Review to examine whether the relevant industry control bodies had adequate powers and procedures in place to provide effective and efficient regulatory oversight of the three codes of racing.³⁷ In relation to the greyhound industry an important part of the background context for the Review was the Independent Commission Against Corruption's (ICAC) *2000 Greyhound Report – Investigation into Aspects of the Greyhound Industry* which found that 'the Chief Steward had acted corruptly by helping to fix races in collusion with certain owners and trainers'.³⁸ Recommendation 11 of the ICAC Report stated:

That the GRA review its policies and procedures to ensure that overlap between the regulatory and promotional aspects of its operations are minimised to as great an extent as possible, that relationships between staff and industry participants are appropriate, and that conflicts of interests are properly identified and managed when they arise.

Nearly a decade later the *NSW Audit Office Report: Managing the Amalgamation of the Greyhound and Harness Racing Regulatory Authority* (March 2008)³⁹ suggested that little had changed. The Report noted the tension between 'integrity' and 'viability' for the racing industry and the pressure to 'remain competitive in the face of declining

³⁴ Ibid, 11.

³⁵ State of Victoria, Implementation the Recommendations Arising from the Review of Integrity Assurance in Victorian Racing Industry by Judge Gordon Lewis AM (n.d.).

³⁶ State of Victoria, The Office of the Racing Integrity Commissioner, Office of Racing Integrity Commissioner, 2010 <<http://www.racingintegrity.vic.gov.au/home>>.

³⁷ Covering Letter from Malcolm Scott to The Honourable Graham West MP, 4 June 2008 in Malcolm Scott, 2008 Independent Review of the Regulatory Oversight of the NSW Racing Industry: Report, (June 2008).

³⁸ Scott, above n 58, 4.

³⁹ Cited in Scott, above n 58, 7.

participation levels'.⁴⁰ As a result the industry was torn between 'maximising the use of funds to make the code as attractive as possible...while maintaining confidence in the viability of racing.'⁴¹ The Scott Review and Lewis Report were concerned with NSW and Victoria, but the resultant recommendations had an impact beyond their originating jurisdictions, leading to amendments to the *Greyhound Australasia Rules* which have been adopted by State and Territory greyhound racing control bodies. The amendments concentrated on drug screening including specimen collection and analysis, procedures to support accurate animal identification, and breeding. The purpose of these reforms was to improve integrity standards for punters, but the welfare of animals in the racing industry has also benefitted.

Regulation of animal welfare in the racing industry

Australian States and Territories have primary jurisdiction for the preparation and enforcement of anti-cruelty legislation.⁴² Although cruelty to a live animal is a criminal offence, killing an animal is not unlawful per se.⁴³ Killing or authorising the killing of an animal by the animal's owner constitutes lawful disposal of property, as long as the pain and suffering inflicted on the animal during the act of killing does not amount to cruelty.⁴⁴

In Australian States and Territories, animal welfare for the racing codes is regulated under industry-specific legislation (See Appendix A for a summary of the relevant State and Territory legislation). Within this scheme, Greyhound Australasia publishes the Rules of Greyhound racing and many of these are adopted, via resolution, into State or Territory Local Rules.⁴⁵ Local Rules take precedence over Greyhound Australasia's Rules.⁴⁶ Queensland and Victoria's regulatory systems are representative of the current Australian approach.

40 Ibid.

41 Ibid.

42 Commonwealth of Australia, The Australian Animal Welfare Strategy and National Implementation Plan 2010 - 2014 (2011), 15 <http://www.daff.gov.au/_data/assets/pdf_file/0004/1986223/aaws-nip.pdf> .

43 Malcolm Caulfield, Handbook of Australian Animal Cruelty Law (Animals Australia, 2008), 139.

44 Prevention of Cruelty to Animals Act 1985 (SA); Animal Care and Protection Act 2001 (Qld); Animal Welfare Act 1986 (Tas); Animal Welfare Act 2002 (WA); Animal Welfare Act 1992 (ACT); Animal Welfare Act 1999 (NT); Prevention of Cruelty to Animals Act 1979 (NSW); Prevention of Cruelty to Animals Act 1986 (Vic). Malcolm Caulfield (2008), 18; Caulfield, 2008.

45 Greyhound Australasia Rules, Rule 8 (01/01/2011).

46 Greyhound Australasia Rules, Rule 7 (01/01/2011).

Queensland

Queensland has seven greyhound racing venues.⁴⁷ The primary anti-cruelty statute, the Animal Care and Protection Act (2001) (Qld) (ACPA), does not affect the application of the Racing Act 2002 (Qld).⁴⁸ Hence, a person who lawfully does an act or makes an omission authorised under the Racing Act 2002 (Qld) that would constitute an offence under the ACPA, is taken not to commit the offence by reason only of doing the act or making the omission.⁴⁹

The Racing Act 2002 (Qld) requires that Racing Queensland Limited (RQL) have a policy for the welfare of licensed greyhounds.⁵⁰ The Racing Queensland Local Rules of Racing (the Qld Rules)⁵¹ provide for the application of RQL's Animal Welfare Policy.⁵² The industry's rules and policies are statutory instruments.⁵³ The RQL Animal Welfare Policy (the Policy) covers animals while they are racing, training and undertaking activities associated with racing or training.⁵⁴ Under this policy, which is limited in its scope to licensed animals, RQL undertakes to 'investigate allegations of cruelty to registered animals' and may 'institute disciplinary action against a person found to be treating animals cruelly'.⁵⁵ For 'serious breaches of animal welfare' industry integrity officers are responsible for referring acts of cruelty to the Royal Society for the Prevention of Cruelty to Animals (RSPCA) for investigation and possible prosecution. Although the Policy adopts the ACPA meaning of cruelty, it goes on to state that 'activities that are permitted under the Act and/or the rules of racing will not be considered

47 Greyhound Racing < <http://www.racingqueensland.com.au/greyhounds.aspx> > .

48 Animal Care and Protection Act 2001 (Qld), s7 (1) (c).

49 Animal Care and Protection Act 2001 (Qld), s 7 (2).

50 Animal Care and Protection Act 2001 (Qld), 81 (s).

51 Racing Queensland Limited, Local Rules of Racing (Greyhound Racing) (2011).

52 Racing Queensland Limited, Animal Welfare Policy (July, 2010).

53 Within the meaning of the Statutory Instruments Act 1992 (Qld), Racing Act 2002 (Qld), s 79.

54 Racing Queensland Limited, above n 87, 1.

55 Racing Queensland Limited, above n 87, 3.

acts of animal cruelty'. The blanket exemption from the ACPA for acts or omissions under the Racing Act implies that some practices that are currently lawful under the Rules would otherwise amount to cruelty. Further, it is unclear as to what amounts to a 'serious breach': would this amount to an act of aggravated cruelty under ACPA? How are these standards measured and how is consistency maintained in relation to what amounts to a breach and the seriousness thereof?

The Policy refers to several Rules as having been made for the policy. Hence, responsibility for animal welfare compliance is shared in some respects by integrity officers and stewards. Under the Racing Act, stewards are responsible for ensuring compliance with the Rules. It appears that stewards' primary responsibility is the conduct of race days, and that on these days the attending steward would be responsible for investigating, prosecuting and adjudicating on any animal cruelty offences that might come to the steward's notice. Beyond this, Rule 27 deals with minimum kennelling standards for greyhounds, such as the provision of clean water. This extends a steward's responsibilities to kennel inspections and, thus, the day-to-day care of dogs.

The Scott Review was critical of the traditional role of steward as investigator, prosecutor and adjudicator of breach to the Rules. Matters of law and natural justice aside, there was a lingering perception that it was inappropriate for the same person to gather evidence, prosecute on that evidence and then adjudicate on that prosecution.⁵⁶

As acts or omissions amounting to cruelty are criminal offences under the ACPA with possible maximum penalties of 2 years imprisonment, it seems that separating these roles would provide natural justice for the defendant and also improve standards of integrity (and animal welfare) by protecting stewards against potential undue influence towards leniency for welfare-related breaches of the Rules.

Under the present system, some steward's decisions can be appealed to the Racing Appeal Tribunal, constituted under the Act.⁵⁷ However, as the only appellant under the current system would be a defendant - a steward, as adjudicator, would not appeal his/her decision - there is no way of testing whether the penalties imposed reflect the seriousness of

⁵⁶ Scott above, 58, 16.

⁵⁷ Racing Act 2002 (Qld), s 95.

the breach. Certain decisions, such as a disciplinary action related to a licence,⁵⁸ can be the subject of appeal to the Queensland Civil & Administrative Tribunal (QCAT).⁵⁹ The authors were unable to locate any QCAT decisions relating to animal welfare or any prosecutions by RSPCA Queensland relating to greyhounds. This absence of prosecutorial activity may reflect high standards of compliance with the Rules, a chronic lack of referral of possible cruelty offences to the RSPCA, low levels of prosecution post referral, or a pervasive lack of enforcement?

Victoria

Victoria has 13 registered greyhound racetracks.⁶⁰ The industry is regulated under the Racing Act 1958 (Vic). Unlike the ACPA in Queensland, the Prevention of Cruelty to Animals Act 1986 (Vic) (PCTA) does not provide a blanket exception for acts or omissions under the Racing Act. The PCTA provides that, in relation to the treatment and management of animals (other than a farm animal or class of farm animals), *PCTA* does not apply, except to the extent that it is necessary to rely upon a Code of Practice as a defence.⁶¹

Under the *Racing Act* 1958 (Vic), RVL is responsible for ‘regulating the registration, breeding, and kennelling of greyhounds for racing’.⁶² Welfare is not explicitly mentioned in the *Racing Act* 1958 (Vic). However, complaints about the conduct of any registered person or about the welfare of a greyhound are dealt with under the Rules,⁶³ and stewards are charged with enforcing the Rules. Local Rule 42 deals specifically with greyhound welfare. A breach of the welfare rule is an offence. Several Rules are deemed Serious Offences. Rule GAR 106(3) requires the last registered owner of a greyhound to advise the board if the dog is to be retired as a pet, a breeding greyhound, a Greyhound Adoption Program greyhound, or has been humanely euthanized by a veterinarian. A failure to notify is a serious offence, attracting a maximum penalty of 400 penalty units (1 unit = \$50: a total fine of \$2,000).

58 Racing Act 2002 (Qld), 150 (1) (a) (ii).

59 Racing Act 2002 (Qld), 150.

60 Greyhound Racing Victoria, ‘Clubs’, (n.d.) <<http://www.grv.org.au/Clubs.aspx>>.

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

62 Racing Act 1958 (Vic), s77(1) (da).

63 Greyhound Racing Victoria, A Code of Practice for the Greyhound Industry Dealing with Greyhound Premises and the Keeping and Welfare of Greyhounds, (March 2008), 5.

Appeals from stewards' decisions are heard by the Racing Appeals and Disciplinary Board with appeals from the RADB going to the Victorian Civil and Administrative Tribunal (VCAT).⁶⁴ VCAT has affirmed that it can hear appeals as to matters from a steward's decision.⁶⁵

Documented welfare issues in Australian greyhound racing

The authors found little information in the public domain reporting failures to meet welfare standards, such as details of penalties for breaches of Rules, or of injuries sustained on the race track, kennel inspection reports, or cruelty matters referred to the RSPCA by officers responsible under State and Territory legislation. Where information was available it was reported in ways that made it difficult to confidently portray an accurate or consistent cross-jurisdictional picture. To some extent this observation reflects the Animals in Work, Recreation, Entertainment and Display *AAWS* Working Group Review finding that 'the dispersed nature of the groups involved in the sector made the monitoring of Rules and Codes developed by "peak industry bodies" difficult to undertake'.⁶⁶ With the exception of the excerpts from the *Lewis Report*, the following summary is therefore limited in that it does not present an analysis of original data. It does however convey what have been identified as key greyhound welfare issues in Australia's racing industry.

As well as noting the difficulties associated with monitoring of Rules and Codes, an Animals in Work, Recreation, Entertainment and Display *AAWS* Working Group review, conducted in 2006, identified weaknesses in Australia's regulation of welfare of animals in this category:

- A lack of legislation pertaining to animals in Work, Recreation, Entertainment and Display activities;
- That existing animal welfare legislation was considered by some to be relatively ineffective;

64 Racing Act 1958 (Vic) Ss 83B and 83OH.

65 *Atkinson & Burns v Greyhound Racing Victoria* [2003] VCAT 1046 (21 August 2003).

66 Steve Atkinson, *AAWS Animals in Work Sport Recreation and on Display: Review of Existing Animal Welfare Arrangements* : Executive Summary (2006), 7.

- There were little formal training systems within the sector;⁶⁷
- In relation [to] greyhound racing, the ‘hobby nature’ of the industry was identified as the greatest barrier to addressing animal welfare.⁶⁸

RSPCA Australia has raised these concerns:

- The lack of comprehensive regulation of greyhound racing in relation to breeding, rearing, training and competition;
- Hurdle racing involves a high risk of injury;
- The level of over-breeding and over-supply of greyhounds in the industry, indicated by the high level of ‘wastage’, specifically those bred for racing but who do not go on to compete;
- That a large proportion of dogs ‘that are deemed unsuitable for competitive racing, become injured, or are simply not considered fast enough, are euthanased’.⁶⁹

Large scale killing

The Lewis Report reported on integrity assurance in the Victorian Racing Industry. "Integrity" was restricted to encouraging fair competition and protecting owners, trainers and punters from corrupt practices at any level.⁷⁰ Notwithstanding, the judge went outside the Review terms of reference to make a point about the large-scale killing of greyhounds in Victoria:

Among the responsibilities of Greyhound Racing Victoria is licensing and registration.

GRV endorses the safety and welfare of greyhounds through the GAP [Greyhound Adoption Program]. However, this program is extremely limited in placing in a domestic environment only 4.2% of greyhounds bred . Statistics provided by GRV in respect of 2006 showed that just over 7,500 (7,680) live greyhound pups were born.

67 Nik Branson, Mia Cobb and Paul McGreevy, Australian Working Dog Survey Report 2009, (Commonwealth of Australia, 2010), 15; Atkinson, above n 101, 7.

68 Atkinson, above n 101, 6.

69 Royal Society for the Prevention of Cruelty to Animals Australia, What is the RSPCA position on greyhound racing? (12 August 2011). <http://kb.rspca.org.au/What-is-the-RSPCA-position-on-greyhound-racing_242.html>.

70 Judge G. D Lewis AM, above n 57, 7.

4,000 of these pups are registered as racing greyhounds. Of these, about 700 dogs are kept for breeding purposes, or retained by their owners as pets. A further 320 dogs will pass successfully through GAP. That leaves about 3,000 fit young dogs who are killed” [i.e. in Victoria every year]

From the original 7,500, the remaining 3,500 dogs, which are registered as racing greyhounds, do not make it to the track. I accept that the greater proportion are killed because they are too slow to race. The conclusion which can be drawn, is that of the 7,500 greyhounds born, approximately only 1,000 will live a full life span.

GRV acknowledged that many of the litters, which are registered, would produce pups, with no real prospects of success and facing a very bleak future GRV should use its regulatory powers to control registration to breed, to minimise the present carnage involving young and healthy dogs.⁷¹

An example from Qld

Greyhound Australasia’s Rules require an owner to advise the controlling body if a dog has been euthanased on its retirement from racing,⁷² and Queensland’s Local Rules cover aspects of breeding, including insemination. There is no requirement to report on the number of dogs killed before they are licensed. Yet, it is during the years prior to being licensed for racing that the ‘carnage’ of young and healthy dogs occurs. If animals are brought into existence for the purposes of a specific industry, it seems reasonable that the regulations should take a life span approach. Lack of attention to the welfare of young dogs seems inconsistent with the purpose of the Racing Act 2002 (Qld) which includes safeguarding the welfare of all animals involved in racing.⁷³

A corollary of over-breeding is the export trade of greyhounds to Asia. China and South Korea reportedly receive regular shipments.⁷⁴ These nations reportedly purchase surplus dogs that are too slow to race by Australia standards,⁷⁵ yet ‘lack substantive welfare regulation which

71 Ibid, 5.

72 Rules of Greyhound Racing of Greyhound Racing Authority (Qld), r106 (3).

73 Racing Act 2002 (Qld), s 4 (1) (c).

74 Jones, above n 13, 678.

75 Ibid.

would deter acts of cruelty'.⁷⁶ In June 2011, Chinese animal welfare groups urged Australia to ban the export of greyhounds for use in racing in Macau. According to an investigation undertaken by the *South China Sunday Post*, 383 healthy greyhounds exported from Australia to Macau were culled at the Canidrome racetrack during the previous year.⁷⁷ Reportedly, racing animals may be deemed unsuitable for re-homing due to what are considered behavioural problems.

Animal welfare issues associated with the live export of greyhounds are comparable to those raised in relation to the live export of cattle. The Federal government's response to the public outcry prompted by the cruel treatment of cattle, as shown on the *ABC 4 Corners* program in May 2011,⁷⁸ include a new arrangement by which exporters will be required to provide assurances that Australian livestock exported to Indonesia will be managed in a manner consistent with *World Organisation for Animal Health* standards and guidelines.⁷⁹ The Government has also initiated investigations into how similar arrangements might be extended to all export markets for Australian livestock. The principles for these investigations include traceability or accounting of animals through the supply chain, independent auditing to ensure conformity with requirements, and accountability of exporters, and public transparency.⁸⁰ The same arrangements should be applied to the export of animals other than livestock, including greyhounds exported for sport or entertainment.

Lessons from other jurisdictions

The United Kingdom

In the US and the UK awareness raising campaigns and media coverage of greyhound welfare related incidents have led to significant legal

⁷⁶ Ibid, 678-679.

⁷⁷ 'Animal groups seek to ban greyhound exports to Macau', *Macau Daily Times*, 6 June 2011.

<<http://www.macaudailytimes.com.mo/macau/25950-Animal-groups-seek-ban-greyhound-exports-Macau.html> at 1 October 2011>; *Animals Asia*, 'Walk for Greyhounds', pleads with people to write letters to both the Irish and Australian government encouraging the banning of exports of greyhound animals.

⁷⁸ Australian Broadcasting Corporation, 'A Bloody Business', *4 Corners*, 30 May 2011,

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

⁷⁹ Commonwealth of Australia, DAFF's statement to the Senate Committee inquiry into Animal Welfare Standards in Australia's live export markets' Senate Committee inquiry into 'Animal Welfare Standards in Australia's live export markets', 10 August 2011. <<http://liveexports.gov.au/news/daff-statement-to-senate-committee-100811>>.

⁸⁰ Ibid.

reform. In the UK in 2006 public outrage was sparked by *Sunday Times* reports of a builder's merchant, David Smith, having killed and buried up to 10,000 greyhounds at £10 a time, on land near his home in Seaham County Durham. Although Smith admitted to killing and burying thousands of former racing greyhounds, the RSPCA (UK) did not bring charges on the basis of animal cruelty laws. The organisation had concluded that the dogs had been killed humanely. After six months of investigation, the Environment Agency prosecuted Smith under the *Pollution Prevention and Control Regulations 2000 (UK)* for burying the greyhounds without a permit.⁸¹

What became known as *Seaham* led to an Associate Parliamentary Group for Animal Welfare (APGAW) inquiry into welfare issues surrounding greyhounds in England.⁸² The APGAW made recommendations aimed at improving welfare standards including measures to reduce the number of unwanted dogs, for example, by 'matching the number of dogs allowed in the industry with the numbers that can be rehomed at the end of their racing career',⁸³ access and inspection of race tracks and regulations requiring annual publication of injuries data. It also recommended the industry 'be regulated by a broadened independent body', according to a 'set of publically agreed principles', with 'equal weight of influence from all of the different interest groups involved'.⁸⁴ An inquiry into the industry's regulatory system was conducted concurrent with the APGAW review.⁸⁵ Overall, *Seaham* led to a 'significant expression of public disgust' and pressure on the UK Government to introduce primary legislation with 'the purpose of formally regulating greyhound racing as a publicly licensed activity'.⁸⁶ The outcome was the enactment of *The Welfare of Racing Greyhounds Regulations*⁸⁷ under the *Animal Welfare Act 2006 (UK)*.

81 'Greyhound killer to face tougher sentence' *The Guardian* (UK), 16 February 2007.

<<http://www.guardian.co.uk/uk/2007/feb/16/ukcrime.animalwelfare>>.

82 The Associate Parliamentary Group for Animal Welfare, *The Welfare of Greyhounds: Report of the APGAW Inquiry into the Welfare Issues Surrounding Racing Greyhounds in England* (2007).

83 *Ibid.*, 6.

84 *Ibid.*, 8.

85 Bernard Donoghue, 'Independent Review of the Greyhound Industry in Great Britain', (Report by Lord Donoghue for The British Greyhound Racing Board and National Greyhound Racing Club, 27th November 2007).

86 *Ibid.*, pg 87.

87 2010 (UK).

The United States

In the US, a national non-profit organization dedicated to the welfare of greyhounds, *GREY2K USA*, has been instrumental in raising public awareness of animal welfare issues in the greyhound racing industry. *GREY2K USA* focuses on law reform through ‘state legislatures, at the ballot box, and in the courts’.⁸⁸ Forms of ‘institutionalised abuse and mistreatment’,⁸⁹ reported by the organisation include confinement of dogs in cages for periods of 20 hours or more per day, the size of track cages, in which a larger greyhound would not be able to stand fully erect, and the frequency and severity of injuries sustained during racing.⁹⁰ *GREY2K USA* has also lobbied in relation to the number of dogs killed per year. As in Australia, this occurs through a process of culling litters for pups unsuitable for racing, due to injury sustained on the track, or by euthanizing dogs at the end of their racing careers. Some welfare issues that have resulted in penalties under the US anti-cruelty statute for those working in the greyhound industry have included the use of rabbits and wild jackrabbits as live lures for the purposes of training,⁹¹ neglecting to provide medical care,⁹² abandonment and starvation,⁹³ and overcrowding and abuse committed during transportation.⁹⁴

Massachusetts

In an article published in *Animal Law*, in 2001, Erin Jackson summarised the major animal welfare in Massachusetts’ greyhound industry as follows:

- The magnitude of dogs killed as pups and at the end of their racing careers
- The use of live lures for the purposes of training;
- Neglecting to provide medical care;
- The frequency and severity injuries on the track;
- Abandonment and starvation;
- Overcrowding and abuse committed during transportation;
- Illicit drug use; and

88GREY2K USA, ‘Who Are We?’, <<http://www.grey2kusa.org/who/index.html>>.

89 Addie Patricia Asay, ‘Greyhounds: Racing to their Death’, 32 *Stetson Law Review* (2003), 443.

90 Grey2K USA, ‘Fact sheet: Greyhound Racing in the United States’ (6th October 2011).

<http://www.grey2kusa.org/about/fact_sheets.html> at 18 October 2011>.

91 Asay, above n 125,438.

92 Ibid.

93 Ibid, 441.

94 Ibid, 442.

- The size of cages in which greyhounds may be kept for long periods.⁹⁵

Jackson also recounted that during the late 1980s and 1990s (1986, 1992 and 1999) fires at the O'Donnell-Pike Kennel Compound killed 28, 87, and 8 dogs respectively. The buildings in which the dogs were housed lacked basic fire safety features and the regulations at the time did not address such requirements.⁹⁶

At the time of Jackson's publication greyhound racing was legal in 17 states in the United States.⁹⁷ By 2011 this number had plummeted to seven. largely due to the advocacy efforts of *GREY2K USA* and several other animal protection agencies.⁹⁸

According to GREY2K USA, commercial dog racing in the US peaked in the 1980s. However, competition from other forms of gambling, combined with growing public awareness of the cruelty of dog racing, resulted in a steady decrease in racetrack patronage⁹⁹ Reportedly, between 2002 and 2009 the amount gambled on greyhound racing declined by 53% and state revenue had declined by 57%.¹⁰⁰ This background of declining industry profitability provides fertile ground for community advocacy aimed at abolishing greyhound racing across the US.

GREY2K USA grew out of a 2000 effort to ban racing in Massachusetts¹⁰¹ and in 2001 commenced a national campaign to raise awareness of cruelty in the greyhound racing industry.¹⁰² In 2008, the 'Committee to Protect Dogs', a coalition of organisations comprising the Massachusetts Society for the Prevention of Cruelty to Animals, Greys2K USA and the Humane Society of the United States, filed a

95 See Erin N Jackson, 'Dead Dog Running: the Cruelty of Greyhound Racing and the Bases for its Abolition in Massachusetts' *Animal Law* (7) (2001) 175, 176.

96 *Ibid*, 182.

97 *Ibid*, 176.

98 GREY2K USA, State by State, <<http://www.grey2kusa.org/action/states.html>>.

99 GREY2K USA, History (n.d.) <<http://www.grey2kusa.org/about/history.html>>.

100 GREY2K USA, National Fact Sheet, 6 October 2011, 3.

101 Eric Moskowitz, 'The final lap for greyhounds in Mass.' *The Boston Globe* (Boston), 26 December 2009 <http://www.boston.com/news/local/massachusetts/articles/2009/12/26/in_massachusetts_a_final_lap_for_greyhounds/>.

102 Grey2K USA, Greyhound Racing in the United States: Fact Sheet , 6 October 2011, 3.

petition to enact *the Greyhound Protection Act*, which would ban pari-mutuel dog racing from 1 January 2010.¹⁰³

The Indirect Initiative process

The initiative referendum process, also known as an ‘indirect initiative’, has been part of the Massachusetts Constitution since 1918 and was ratified by voters as Article XLVIII of the Article of Amendment.¹⁰⁴ This provides for citizens of Massachusetts to initiate legislation by way of petition. Any 10 registered voters may file a proposed law or constitutional amendment with the Attorney General. The Attorney General certifies the proposal according to certain criteria and the petitioners are then provided with a summary of the proposed measure. The petition may be qualified for submission to the legislature. This involves the petitioners obtaining ‘the signatures of registered voters equal in number to not less than 3% of all votes cast for the Governor at the preceding state election’.¹⁰⁵ The petition is then filed in the General Court.¹⁰⁶ What is known as a ‘qualified measure’ goes to the legislature for enactment. For a proposed law, if the legislature does not enact the measure it is placed on the ballot for public approval.¹⁰⁷ The petitioners are required to obtain additional signatures ‘of registered voters equal in number to one-half of one percent of the entire vote cast for Governor at the last state election’.¹⁰⁸ If this is achieved the petition is included in the next state election ballot.

Passage of the *Greyhound Protection Act*: Massachusetts Question 3

In November 2008, Massachusetts voters approved a ballot that saw the enactment of the *Greyhound Protection Act*.¹⁰⁹ *An Act to Protect Greyhounds*, also known as *Massachusetts Question 3*, was one of three initiated state statutes that appeared on the November 2008 ballot.¹¹⁰ Passage of Question 3 meant the state's two greyhound racetracks had to

103 George L. Carney, JR v& Others V Attorney General & Another 451 Mass 803 (2008).

104 Robert G. Stewart, ‘The Law of Initiative Referendum in Massachusetts’ 12 *New England Law Rev.* (1976-77), 455.

105 *Ibid.*, 457

106 *Ibid.*, 457.

107 *Ibid.*, 456.

108 *Ibid.*, 457.

109 GREY2K USA, Massachusetts (2011) <<http://www.grey2kusa.org/action/states/ma.html>>.

110 *Ibid.*

close by January 1, 2010. A 53.6% vote approved Q3 (42% against).¹¹¹ In 2009, a pro-racing group, Protection of Working Animals and Handlers (POWAAH), sought a judicial inquest, claiming Q3 proponents had violated election laws by knowingly publishing false information and offering inducements to voters. The challenge failed. The ‘final lap’ for greyhounds in Massachusetts occurred on 26 December 2009.¹¹² Enactment of *An Act to Protect Greyhounds* was the culmination of almost a decade of legal advocacy.

DISCUSSION

As outlined above, US and UK greyhound welfare related law reform has been driven mainly by media coverage of critical events and sophisticated community awareness programs that integrate legal advocacy. The Australian public has yet to be confronted by a *Seaham* incident and currently lacks a national legal advocacy organisation dedicated to greyhound welfare. This may explain why Australia has not seen national coordinated advocacy targeting abolition of greyhound racing. The lack of critical incidents attracting media coverage also means that, to date, there has been little pressure for formal inquiries into animal welfare in the racing industry.

The tendency in Australia has been for the greyhound racing industry to respond to what is currently ad-hoc public pressure with some tightening of its industry rules and support for state-based Greyhound Adoption Programs (GAP). Much of recent reform has centred on drug screening. Tighter regulatory measures aimed at eliminating the use of illicit drugs has obvious benefits for the dogs involved, however the main aim of these reforms has been to improve industry integrity for punters.¹¹³ The establishment of GAPs has grown out of community concern for the killing of greyhounds on their retirement from the racing industry. However, these programs also provide a credible public relations platform for the racing industry to present itself as animal welfare-friendly. Although the emergence of associations such as *The Friends of the Hound*¹¹⁴ and GAP is encouraging, these organisations focus on rescue rather than legal advocacy. In 2004, the Chief Executive Officer of *Greyhounds Australasia*, the peak racing industry

111 The Commonwealth of Massachusetts, Return of Votes for Massachusetts State Election November 4 2008, 3 December 2008, 51.

112 Moskowitz, above n 137.

113 Scott, above n 58; Judge G. D Lewis AM, above n 58.

114 Friends of the Hound, <<http://www.friendsofthehound.org.au/about.htm>> .

body, identified the adoption program as a ‘double edged sword’ because ‘with that comes an awareness: people are starting to question what happens to them [the dogs] after they finish racing’.¹¹⁵

The key to legal reform in Massachusetts was the availability of the direct initiative process, but what drove the success of the 2008 ballot to ban pari-mutuel dog racing was the work of advocacy groups to expose the treatment of greyhounds, to create the public will towards legislative change. In Australia, there is a need to advocate for greater transparency in the greyhound racing industry, how it manages breaches of welfare-related racing Rules, the referral of possible cruelty offences, and the outcomes of those referrals. Based on the regulatory systems in Queensland and Victoria, areas of practice in need of improved reporting standards include:

- 1) Summary data on breaches of animal welfare related Rules of Racing and the penalties applied. Reference to Queensland’s *Animal Welfare Policy*, for example, indicates that this would encompass Greyhound Australasia Rule no.106, welfare of greyhound, Rules 79-84, drug screening and Queensland Local Rule 27, minimum standard for kennelling. This could constitute a discrete area of reporting.
- 2) Codification of welfare offences under the Rules (as suggested in the Scott Review). This would involve setting out the elements of the offence and the elements relevant to sentencing. As part of this, if stewards’ responsibilities were limited to minor offences some welfare offence would be referred on at the outset.
- 3) Where other authorised officers have responsibility for referral of possible cruelty offences to the RSPCA, regular publication of data as to the number and nature of those referrals.

In addition, it seems appropriate that the racing industry have reporting accountability for all dogs bred for the purposes of use in the industry. This could involve tracking dogs over their life span and data collection regarding the number of young dogs killed before they start racing, dogs exported to Asian racing markets, euthanasia subsequent to injuries sustained on the track, and those euthanased when they are no longer useful for racing. The RSPCA and veterinary surgeons involved in providing euthanasia services for the greyhound industry could report

¹¹⁵ Edwards, above n 11.

on the numbers of dogs euthanased each year and the reasons for euthanasia (e.g. post-injury or ‘retirement’). The suggestion that the RSPCA take on such reporting responsibilities is made with awareness of its limited resources. The Australian public indirectly pays for the majority of animal cruelty policing activity and prosecutions as only 2% of the RSPCA’s income comes from the Commonwealth, State or Territory governments.¹¹⁶ Advocacy efforts must therefore be directed to secure appropriate funding for animal cruelty law enforcement.

A barrier to legislative reform may be the fact that current inter-code agreements as to how TAB payments are distributed among the three racing codes does not necessarily correspond to each codes’ wagering turnover. For example, in NSW, greyhound racing accounts for 17 % of wagering turnover, but it receives 13% of the total payments made by the NSW TAB to the three racing codes.¹¹⁷ In the past 11 years, greyhound racing has subsidised thoroughbred and harness racing in NSW by 92 million. The situation in Queensland is similar.¹¹⁸ It would seem there are powerful interests beyond the greyhound racing industry with an interest in maintaining the *status quo*.

Conclusion

This article explored welfare issues in the greyhound industry arguing that, despite recent regulatory reforms and industry efforts to improve welfare standards, there is sufficient evidence to conclude that this form of animal use can no longer be justified as ‘necessary’. The UK and US examples suggest raising awareness of current practices, through the media and targeted advocacy campaigns are indispensable in achieving law reform. In Australia, improving industry transparency is an important first step, and there is substantial room for improvement. The need to be able to trace the lives of dogs bred for the racing industry, using a life-span approach, has been stressed. The racing industry is well placed to assume this responsibility, by using its regulatory powers and increasing publication of this information.

In our view, the large scale killing and other practices which cause harm to greyhounds is best considered as part of a larger system of structural

¹¹⁶ Cao, above n 19.

¹¹⁷ Productivity Commission, above n 41, 16.24.

¹¹⁸ D Brasch, ‘Qld Greyhound Racing’s \$18 million TAB Shortfall’, Greyhounds Queensland (online) (2006), 5, cited in Productivity Commission, above n 41, 16.24.

violence in which various exploitative practices between humans filter down to adversely impact upon greyhounds. This is reflected in the ways in which regulatory measures taken to improve integrity and protect the ‘average punter’ from corrupt practices have an indirect positive effect on the most animals. A key example is the recent changes made in relation to drug screening. Ultimately the interests of humans and animals are inter-dependent. It is hoped that the welfare of greyhounds caught up in the gambling industry will attract further attention and principled debate.

APPENDIX A

State and Territory Racing Acts

State	Current Racing Act
Victoria	<i>Racing Act 1958 (VIC)</i>
New South Wales	<i>Greyhound Racing Act 2009 (NSW)</i>
Tasmania	<i>Racing Regulation Act 2004 (Tas)</i>
ACT	<i>Racing Act 1999 (ACT)</i>
Western Australia	<i>Western Australian Greyhound Racing Association Act 1981 (WA)</i>
Northern Territory	<i>Racing and Betting Act 2011 (NT)</i>
Queensland	<i>Racing Act 2002 (Qld)</i>

State and Territory Greyhound Regulatory Bodies

State	Regulatory Body
Victoria	Greyhound Racing Victoria (GRV)
New South Wales	Greyhound Racing New South Wales (GRNSW)
Tasmania	Greyhound Racing Tasmania (GRT)
ACT	Canberra Greyhound Racing Club (CGRC)
Western Australia	Western Australian Greyhound Racing Authority (WAGRA)
Northern Territory	Greyhound Racing Northern Territory (GRNT)
Queensland	Racing Queensland Limited (RQL)

Regulating Rover: Legislating the Public Place of Urban Pet Dogs

By Lesley Instone¹

In contemporary Australian society significant shifts in pet cultures and urban living are occurring. The dog is moving from the backyard to take a place in the home as family member at the same time as backyards are shrinking and cities increase in density. Humans and dogs are increasingly relying on public open space for exercise and social interaction. New approaches to the regulation of public space and dogs have accompanied these changes. A shift is evident from laws related to controlling stray dogs to current legislation that regulates owners and controls access to public space for dogs.

Increased restrictions on dogs outside the home have limited the range of public spaces available for use by dogs and their humans. Processes of gentrification and privatisation have heightened surveillance of who can use public spaces and what sorts of activities are permitted in them. Increased regulation, densification and changing human-animal relations create a complex mix of factors that raise the question of the role law plays in shaping the place and space of urban pet dogs.

The combination of urban social and regulatory change forges new spatialities and subjectivities. Legislation related to pet dogs not only reflects changing urban forms and lifestyles: it also simultaneously enacts particular modes of human-dog relation, shaping the possibilities that urban space and emerging pet relations can take. Legal spaces, such as prohibited zones and off-leash areas, are embedded in broader social and political claims and both geographers² and legal scholars have become interested in law as a cultural site for the production of urban spatialities.

¹ Lesley Instone teaches in geography and environmental studies at the University of Newcastle. She is a cultural geographer with interests in human-animal relations and legal geographies..

² Blomley, N K (1994) *Law, space, and the geographies of power*. Guilford Press, New York xi.

This article takes up these concerns in relation to legislation regarding pet dogs, in particular the NSW *Companion Animals Act 1998*, and how it shapes human-dog relations with/in public spaces.

I begin with a brief overview of the legal geographies perspective that frames this article, before outlining the history of NSW dog legislation. The main features of the *Companion Animals Act 1998* are analysed as a prelude to exploring the figures of the human and dog enacted in the legislation, and ways in which these figures help shape urban space. Finally, this article explores the complex interrelations of changing urban and regulatory spaces and tentatively suggests some ideas as to how we might re-figure the place of dogs in urban space.

Legal Geographies and the Space of Law

The relationship between law and space within geography, law and anthropology is attracting increasing interest.

The nascent field of legal geographies is fashioning investigation into ‘the way in which situated legal practices ... contribute to the spatialities of social life’³. Legal geography is concerned with the complex interactions between space, law and society as constitutive of social life.⁴ Critical geographers understand space as not just physical and cartographic, but as relational. Doreen Massey contends that space is the product of interrelations, and thus is never fixed, but always in a state of becoming as relations unfold.⁵ In this sense, space is understood as created through various cultural technologies and practices which include the law. Law both produces space and in turn is shaped by the socio-spatial contexts in which it is embedded.⁶ Law creates regulatory spaces such as land use zones, it defines boundaries and ‘localises people’s rights and obligations in space’.⁷ Law and space are mutually constituted in complex and multiple ways that are always historically contingent.

3 Delaney 2006: 68 cited in von Benda-Beckmann, Franz, von Benda-Beckmann, Keebet, and Griffiths, Anne (eds) (2009) *Spatialising law: an anthropological geography of law and society*. Abingdon, Oxon: Ashgate Publishing group, 2.

4 See Blomley, N.K., D Delaney, and R Ford eds *The Legal Geographies Reader: Law, power, and space*. Blackwell.

5 Massey, Doreen (2005) *For Space*. Sage

6 Blomley, above n 1, 51.

7 von Benda-Beckmann, Franz, von Benda-Beckmann, Keebet, and Griffiths, Anne (eds) (2009) *Spatialising law: an anthropological geography of law and society*. Abingdon, Oxon: Ashgate Publishing group, 5-6.

Critical legal geographers⁸ advocate thinking about the spatial and legal in performative terms. David Delaney uses the term nomosphere to describe the ‘cultural-material environs that are constituted by the reciprocal materialisation of the legal and the legal signification of the sociospatial’.⁹ He understands these contexts as the ‘complex, shifting and always interpretable blending of words, worlds, and happenings in which our lives are always embedded and through which our lives are always unfolding’.¹⁰ This charts a path between geographical determinism and legal instrumentalism¹¹ as well as refusing a purely discursive constructionism. The performative turn in legal geography posits that materiality and discourse are not opposites and that law and space are re/produced through how they are enacted in everyday practices.¹² From this perspective it is ‘not just about bodies in or moving through space but the spatialities thereby produced, reproduced and transformed through routine and novel enactments’.¹³ As such, law is lived and enacted in material and embodied ways. These observations have substantial implications for how we might consider public space. From a performative perspective, dog walking makes public space, even as its regulated in and shaped by such spaces.

The law related to animals has traditionally focused on rights and welfare issues. However, Huss contends that the emerging field of Animal Law encompasses a wider gamut to include issues of housing, family law, human-animal relations, veterinary issues, estate planning and the like.¹⁴ The extension of the ambit of Animal Law recognises a move beyond rights and welfare frameworks to consider animals within the broad compass of everyday social life. Such an approach blurs the boundary between humans and animals and opens for consideration

8 See Delaney, David (2010) *The spatial, the legal and the pragmatics of world-making: nomospheric investigations*.

Hoboken: Routledge-Cavendish; Blomley, N K (2004) *Unsettling the city: urban land and the politics of property*. Routledge, New York.

9 Delaney, David (2004) *Tracing displacements: or evictions in the nomosphere*, *Environment and Planning D: Society and Space* 22, 851.

10 Delaney, David (2010) *The spatial, the legal and the pragmatics of world-making: nomospheric investigations*.

Hoboken: Routledge-Cavendish, 26.

11 Blomley, above n 1.

12 Delaney, above n 9, 14.

13 *Ibid* 17.

14 Huss, Rebecca J. (2009) *The pervasive nature of animal law: how the law impacts the lives of people and their companions*, *Valparaiso University Law Review* 43 (3), 1132; The Law Society of NSW Young Lawyers (2010) *Animal Law Guide*, New South Wales. NSW: The Federation Press.

issues beyond those only concerned with the impact of the law on humans who have animal companions.¹⁵

Hogg characterises law as an assemblage of heterogeneous elements that are discursive, social and technical, and that it ‘represents, constitutes, and evaluates spaces in diverse ways’.¹⁶ Such a conceptualisation draws attention to the socio-legal status of urban companion animals, and their place in society, and directs consideration of the sorts of bodies and spaces that are constituted by specific regulatory frames and practices.

History of Dog Legislation: From Dog to Companion Animal

The *Dog and Goat Act 1898* (NSW) and its replacement, the *Dog Act 1996* (NSW), were mainly concerned with the control of stray and unwanted dogs. The *Dog Act 1966* vested control with local government, charged with the community responsibility of managing dogs at large. In essence the control of the ‘dog as dog’ was the object of the Act. The Dog Act made ‘no requirements that a dog should be contained on private property’¹⁷ and no provision for dogs to be on a leash in public although dogs were meant to be under effective control. The focus of the Act was more on removing the problem of stray or unwanted animals rather than on restricting owners and dogs in everyday life.

In 1981 the Dog Act was amended to bring in leash laws. This was the ‘first time in the history of legislation in NSW an attempt was made to control the access of dogs to public places’.¹⁸ The amendment made it an offence to walk a dog off the leash except in specified off-leash areas. Concomitantly, new approaches to dog management were emerging at this time, culminating in the foundation of the urban animal management movement, marked particularly by the publication in 1992

15 Huss, Rebecca J. (2009) The pervasive nature of animal law: how the law impacts the lives of people and their companions, *Valparaiso University Law Review* 43 (3), 1132-1133.

16 Hogg, R. (2002) Law’s other spaces, *Law Text Culture* 6, 32.

17 Borthwick, Fiona (2009) Governing pets and their humans: dogs and companion animals in New South Wales, 1966-98, *Griffith Law Review* 18, 194.

18 Law Reform Commission NSW (1988) Report 52 (1988) Community Law Reform Program: Tenth Report - Liability for Injuries Caused by Dogs. Available at: <http://www.ipc.nsw.gov.au/lrc.nsf/pages/r52toc>, 10.

of Dick Murray's *Dogs in the urban environment: a handbook for municipal management*.¹⁹

Urban animal management (UAM) measures were introduced with the aim of making dog owners more accountable,²⁰ controlling the dog in public space (rather than controlling strays),²¹ and promoting a greater role for public education.

The UAM movement provided an impetus and direction for significant legislative change, and the NSW *Companion Animals Act 1998 (CAA)* was introduced. As well, the *CAA* emerged from considerable social changes in pet relations, growing pet ownership, changing work, social and leisure lifestyles and emerging pet cultures in the latter decades of the 20th century. It also responds to the trend that dogs are now a largely urban phenomenon in Australia. The priority of controlling dogs was strengthened to include spatial restriction and more accountability for dog owners. The new Act not only restricts the access of dogs to most public space, but the lives of owners are constrained in relation to how and where they can interact with their pet outside the home. The far-reaching provisions for spatial and behavioural constraints on dogs and humans were, and continue to be, passionately contested.

The *CAA* was a most debated piece of legislation.²² The Act took three and a half years to develop due to the community debate which necessitated extensive community consultation, and more than 10,000 submissions were received. When the draft bill eventually reached Parliament there was again extended debate with over 90 amendments proposed.²³ The provision of off-leash space, the restriction of companion animals on public transport, the prohibition of dogs from many facets of urban public life, and the issue of dog faeces continue to

19 Duckworth, Jane (2009) Not every dog has his day: the treatment of dogs in Australia. Axiom Creative Enterprises, 291.

20 Hawkes, Judith (1999) NSW animal management legislation – a progress and change: what the new deal specifically requires of local authorities throughout NSW, Urban Animal Management Conference Proceedings 1999.

21 Baetz, Annela (1992) Why we need animal control, Urban Animal Management Conference Proceedings 1992.

22 Cohen (1998) Companion Animals Bill, Second Reading NSW Legislative Council Hansard (1998) Accessed November 6, 2006 from <http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LC19980701046>;

Miller, R. and G. V. J. Howell (2008) Regulating consumption with bite: building a contemporary framework for urban dog management, *Journal of Business Research* 61: 525-531; Hawkes, above n 19.

23 Hawkes, above n 19.

be contentious concerns, highlighting the unsettled question of the place of dogs as companions in contemporary Australian society.

Regulating care and management: the CAA

The *CAA* states that:

The principal object of this Act is to provide for the effective and responsible care and management of companion animals (s3A).

Companion animals referred to in the Act are cats and dogs, but this is an open category and what counts as a companion animal can be prescribed under the regulations. The *CAA* increases regulation related to dogs. It requires compulsory microchipping and registration, codifies responsibilities of companion animal owners and outlines the declaration and control of Dangerous Dogs. Assistance animals are also included along with procedures for seized or surrendered animals. The Act also establishes a range of offences and penalties.

The *CAA* also places the dog in a wider context of relationships that requires balancing companion animal needs with those of other animals, owners, non-owners, the environment and wildlife.²⁴ In part, this reflects the rise of urban sustainability and changing attitudes towards nature in the city involving new understandings of urban open space as constituent of biodiversity and conservation networks. The *CAA* diminishes the freedom to choose how to control dogs and where dogs and their owners can both go as these are stipulated within the legislation.²⁵ The Act also lists a range of prohibited spaces for dogs and requires the provision of at least one off-leash space in each local government area. These provisions are implemented through local government where Companion Animal Management Plans typically classify public space as either prohibited to dogs, conditionally available for off-leash activity, or only accessible to dogs on the leash.

Borthwick characterises the new legislation as a shift in modes of governing from controlling dogs (as in the Dog Act) to governing dog owners, and from a ‘more collective response to animal-human relations

²⁴ Borthwick, above n 16, 192.

²⁵ Ibid 195.

to a more individualised one'.²⁶ The Act requires self-regulation by dog owners to conform to socially-sanctioned performances of human-dog relations when in public space. Dogs in public space are the responsibility of their owners, rather than a community responsibility as was the case for stray animals under previous legislation.

The focus of the *CAA* is not animal protection. It is more concerned to provide public safety – that is public spaces which are free from the threat of dog bite or attack:²⁷ '[i]n essence, [the rules are to] protect people and other animals from the perceived dangers of dogs'.²⁸ Miller and Howell see the *CAA* as a 'big stick' legal approach based on the orientation that 'dogs cause problems and that enforcement of urban animal management laws are the solution to all dog-related issues'.²⁹

The emphasis on regulation, policing, fines, segregation and enforcement figure the dog as a 'problem' in need of control, so that constraint, prohibition and containment constitute what counts as 'effective and responsible care and management' under the Act. In relation to public space, the *CAA* adopts a spatial strategy of delineation and prohibition, as well as deploying strict inclusions and exclusions to define the place of dogs in public life.

The *CAA* not only figures the dog-as-problem and codifies the category of dangerous dogs, it also generates new human categories that together help shape the qualities of human-dog relations. Donna Haraway reminds us that the notion of 'companion animal' is a recent term emerging from the work of vet schools and dog-assistance programs in the late 1970s concerned with the human health and well-being dimensions of pets.³⁰ New terms, Haraway notes, 'mark changes in power, symbolically and materially remaking kin and kind',³¹ as well as

26 Ibid 186; 189.

27 See Van de Kuyt, Neva (2001) Prevention of dog attacks in public places. a local government strategy adopted by 11 Victorian Councils. Urban animal management conference; 2001. Accessed November 8, 2004 from <http://www.ava.com.au/content/confer/UAM/proc01/vandekuyt.htm>; Miller, R. and G. V. J. Howell (2008) Regulating consumption with bite: building a contemporary framework for urban dog management, *Journal of Business Research* 61.

28 Miller, R. and G. V. J. Howell (2008) Regulating consumption with bite: building a contemporary framework for urban dog management, *Journal of Business Research* 61, 525.

29 Ibid 526

30 Haraway, D. (2008) *When species meet*. Minneapolis: University of Minnesota Press, 135.

31 Ibid 135.

spawning new relationships and spaces. Further, Haraway affirms that companion species – as a ‘co-constitutive link between dogs and people’³²– necessitates a two-way relation. We too (humans) are companion animals. The NSW companion animals legislation constructs us (humans) at the same time as delineating the space and categories of the dog, principally through the codification of the responsibilities of dog owners, engendering the emergence of a new figure – the ‘responsible dog owner’.

The technique of figuration is a useful tool for delving further into the co-production of humans, dogs, law and space. Figures are concerned with ‘constructions of identities, bodies, practices, and objects that govern how a particular cultural actor ... takes shape as a specific entity’.³³ Figures are thus useful to reveal the processes of complex cultural worlds that build them and the effects that stem from them.³⁴ Figuration highlights the materialisations of discursive legal construction and their embodied relations. Different figures materialise different bodies that enact different human-dog relations.³⁵ Alongside the generalised figure of the dog-as-problem and the specific figure of dangerous dogs, it is possible to discern three historically specific figures of the human, emergent in the *CAA*, each with distinct spatialities (involving various inclusions and exclusions) and subjectivities (involving various rights and obligations). These are: the Responsible Dog Owner (RDO), and by implication its converse, the Irresponsible Dog Owner (IDO), and the absent referent, the Non-Dog Owner (NDO). Legal geographer David Delaney sees figures as abstract categorical social entities that are each positioned in relation to social space and broader contexts. As Delaney notes ‘the distinctions law makes shape material worlds’,³⁶ and ‘the corporality of our bodies, and how they are included and excluded from the public realm, cannot be thought of outside of the spatial relations that constitute bodies’.³⁷

32 Ibid 134.

33 Bettany, Shona and Daly, Rory (2008) Figuring companion-species consumption: a multi-site ethnography of the post-canine Afghan hound, *Journal of Business Research* 61, 410.

34 Ibid 410.

35 Figures are not exclusive and may vary in relation to the particular spatio-legal settings we are positioned in at various times. We are all multiply figured. See Delaney, above n 9, 75.

36 Delaney, David (2001) Making nature/making humans: law as a site of (cultural) production, *Annals of the Association of American Geographers* 91(3), 489.

37 Raha Shome 2003 in Delaney, above n 13, 18.

Part 3 of the *CAA* sets out the responsibilities of dog owners with the aim of both regulating and educating citizens to become Responsible Dog Owners (RDOs). The RDO and their dog are grudgingly permitted in public space as long as they conform to community expectations. RDOs, in consort with their dogs (human-dog assemblages), are better understood as self-governing bodies that come into being through the repeated performances of the RDO responsibilities of scooping, leashing, controlling and obedience. Haraway notes that '[b]eing a pet seems to be a very demanding job for a dog' and the 'self-control and ... emotional and cognitive skills'³⁸ required of the dog are equally obligatory for the human. Becoming an RDO is an everyday, active commitment from both animal and human.

The irresponsible dog owner (IDO) is a social pariah, much hated by both the RDO and NDO. When a dog is deemed a nuisance dog or categorised as dangerous, the owner plummets automatically into the IDO category. Even smaller actions, such as failing to pick up faeces, dog barking and the like, condemn the owner to this rank. The IDO is a spoiler, blamed for a dog's behaviour and for creating contestation of the place of dogs in the urban [space]. The figure of the IDO is also a scapegoat, a figure of blame and vengeance that deflects attention from the problematic way in which the law structures human-dog relations through fines, sanctions, rules and spatial constraint. The individualisation inherent in the Act, drives discourses of personal responsibility and individual censure when human-pet relationships go wrong.

The non-dog owner (NDO) is the absent referent that haunts the *CAA*. The NDO is the unmentioned norm in the law and in social discourse against which behaviour is judged. The NDO is the accepted figure of urban life uncontaminated by messy human-dog relations, a body able to claim rights rather than responsibilities, a body able to move freely across all the surfaces and mobilities of the modern city. Even though probably a minority figure (figures show that of those Australians who do not currently own a pet, 53% would like to do so in the future),³⁹ the NDO personifies the threat that if dog owners don't manage their dogs in a way that conforms to the expectations of NDOs they will be denied access to an even wider range of public spaces.

38 Haraway, Donna (2003) *The companion species manifesto: dogs, people, and significant otherness*. Chicago: Prickly Paradigm Press, 38.

39 PetNet, <http://www.petnet.com.au>.

These three figures are historically situated relations that are mutually constituted in relation to the figure of the dog-as-problem (or the dangerous dog). As Haraway notes, ‘articulating bodies to each other is always a political question about collective lives’.⁴⁰ We can speculate about the extent to which the figure of the RDO reflects a desired citizen who is docile, compliant, affecting and offending no one, dutiful, law-abiding, non-polluting, and definitely not messy. The RDO has to earn the right to public space through repeated performances of compliance. The figures of RDO, IDO and NDO draw on discourses of individual personal responsibility. These are figures not marked by race, class and gender, yet white middle-class notions of what counts as good manners and proper behaviour percolate below the surface.⁴¹ The figures help mask the dynamics of class and gender that shape specific cultures of dog ownership.⁴² In this way individualisation works to assert a singular notion of human-dog relations.

The space of the bite: the figure of the dangerous dog

The figures of RDO, IDO and NDO engendered by the *CAA* articulate with the figures of the dog enacted in the *CAA*. The legislation codifies dangerous dogs as a specific category of the generalised figure of the dog-as-problem. While the Act ignores human difference in terms of race, class and gender, it does pay attention to the breed of dog, listing some as restricted and creating a class of ‘dangerous dogs’ who are subject to severe physical restrictions. Much of the Act is devoted to the categorisation and subsequent regulation of dangerous dogs.

Section 16(1) of the *CAA* creates an offence ‘if a dog rushes at, attacks, bites, harasses or chases any person or animal ... whether or not any injury is caused to the person or animal’.

The figure of the dangerous dog dominates discourse of public safety and is used to justify stringent and generalised control. The single broad category of dog aggression – from rushing to biting – places all dogs *not* on a continuum of behaviour but into distinct categories of

40 Haraway, above n 29, 207.

41 Uddin, Lisa (2003) Canine citizenship and the intimate public sphere *Invisible Culture: An electronic journal for Visual Culture*, 6.

42 For example, the expression of masculinity through dog fighting, especially among working class males. See Evans, Rhonda, Gauthier, DeAnn K. and Forsyth, Craig J. (1998) Dogfighting: Symbolic Expression and Validation of Masculinity, *Sex Roles: A Journal Of Research* 39.

dangerous/not-dangerous. Dogs are one or the other and the vagaries of domestication as an active ongoing task are diminished in this binary construction. It also obscures the specific geography of dog bite and homogenises fear of attack across an undifferentiated public space. While dog aggression is an important and serious matter, dog attack appears to have a distinct spatiality. Dogs are territorial creatures and have their own distinct ideas of spatiality, which spaces are desirable, which spaces need defending and so on. Statistics show that:

*Over 60% of dog bites occur either at home or in the home or backyard of a family member, a friend or a neighbour. Only about a third of reported dog bite incidents occur in public places.*⁴³

Some data suggests dog bites are extremely unusual in parks, with only 4% reported in parks in NSW.⁴⁴ Research suggests also that dog attacks are more common in the inner-city than outer suburbs.⁴⁵ The geographies of dog aggression warrant further investigation, especially on the ways in which the modes of categorisation deployed in the Act actively construct the issue as much as they reflect a problem.

Emphasis on the figure of the dangerous dog is evident on the companion animals web pages of the NSW Department of Local Government (URL) where ‘Dog attack reporting’ is a bold heading in the middle of the page linking to detailed statistics of dog attacks in NSW. No other statistics are highlighted or easily accessible from the site. A recent legislative amendment, clause 33A of the *Companions Animals Regulation 2008*, requires all councils to report dog attacks in their area within 72 hours of receiving information of the event. No burden of proof is required to substantiate a dog attack.⁴⁶ A dangerous dog ruling imposes harsh physical penalties on the dog – muzzling and caging – rules that Miller and Howell point out do not apply to crocodiles, poisonous creatures, or panthers.⁴⁷ Yet the Companion Animal Council notes that:

43 Australian Companion Animal Council, http://www.acac.org.au/pet_care.html. See also Cynthia A. McNeely & Sarah A. Lindquist (2007) *Dangerous Dog Laws: Failing to Give Man’s Best Friend a Fair Shake at Justice* J. Animal Law 3.

44 Miller & Howell above n 27.

45 Bibby, Paul (2009) *City dogs have more bite than country cousins* Sydney Morning Herald May 2 2009.

46 Miller and Howell above n 27, 526.

47 Ibid 526.

*Legislation and punitive measures that target dangerous and stray dogs, and place controls on dogs in public areas have proven to be only marginally effective in addressing this problem.*⁴⁸

Likewise, Spanish research on the introduction of dangerous breed legislation revealed the legislation had little impact on the epidemiology of dog bites.⁴⁹ The figure of the dangerous dog constitutes an urban spatiality of fear and division. The dualistic categorisation of dangerous/not-dangerous enshrined in the *CAA* is a blunt and ineffective tool. While practices to control dangerous dogs and to protect public safety are important, my point here is that the emphasis given to the dangerous dog may help create the problem as much as controlling it.

The public safety focus of the *CAA*, its oversimplification of dog aggression into one category, exclusion of dogs from key arenas of urban life, and focus on fines and other penalties⁵⁰ creates a perceived conflict between humans and dogs, and dog owners and non-dog owners. While the figures of dangerous, nuisance and dog-as-problem remain dominant, more ‘companionable’ and positive approaches to human-dog relations in urban space remain sidelined and unexplored.

The place of dogs in urban public space: towards new socio-legal practices

Animal geographers have suggested that animals be understood as a marginal ‘social group’ subjected to all manner of socio-spatial inclusions and exclusions.

As such, animals are caught up in a range of social networks and ‘enmeshed in complex power relations with human communities’.⁵¹ Urban research has highlighted the changing nature of public space, especially in relation to processes of privatisation and gentrification. The decline in urban public space has been accompanied by intensified surveillance and control of ‘undesirable’ people, who are often ‘moved

48 Companion Animal Council Australia, above n 42.

49 Rosado, Belen, Garcia-Belenguer, Sylvia, Leon, Marta and Palacio, Jorge (2008) Spanish dangerous animals act: effect on the epidemiology of dog bites, *Journal of Veterinary Behaviour: Clinical Applications and Research* 3(1): 38.

50 Miller and Howell, above n 27, 529.

51 Philo, Chris (1995) Animals, geography, and the city: notes of inclusions and exclusions, *Environment and Planning D: Society and Space* 13(6): 655-681.

on' under the guise of campaigns for cleanliness and safety.⁵² As Hae notes, the law is used not just to delineate urban space, but to classify and control behaviour that is considered undesirable. Further, she notes the proliferation of

*Security cameras, street furniture design leading to the criminalization of urban activities, usually directed at most marginalized groups and the protection of middle class citizens and their norms.*⁵³

Mitchell terms the processes and practices of privatization and gentrification that have resulted in the criminalization of everyday urban activities as 'judicial anti-urbanism'.⁵⁴ Judicial anti-urbanism resonates with the provisions of the *CAA* in its work of regulating and controlling humans and dogs in public space through the norm-setting figures of the NDO and RDO, and the fines and penalties attached to everyday activities of dogs in public space (eg leashing, scooping, etc). More general debates about who has the 'right to the city' might be usefully extended to the inclusion of nonhumans and our un/willingness to share space with our animal companions. However, the possibility of extending rights to 'canine citizens' to socialize, communicate and exercise in public space would require rethinking the very idea of a 'right',⁵⁵ and what rights to the city might entail. At the very least we might consider what it would take to have dogs together with their humans recognised as legitimate members of the public.

Delaney characterises 'quality of life ordinances' typical of gentrification and privatisation, such as 'no sitting', and in the case of the *CAA* 'no dogs', as a 'bundle of negative traces' or non-rights that constitute 'spatial purification projects'.⁵⁶ The provisions of the *CAA* materialise public space as human space through physical barriers (fenced off-leash areas), signs, maps, and so on, that constantly remind dog owners that their place in the city is conditional and subsidiary.⁵⁷ The location of

52 Staeheli, Lynn A. and Mitchell, Don (2008) *The people's property? Power, politics and the public*. New York: Routledge.

53 Hae, Laam (2011) *Legal geographies – the right to spaces for social dancing in New York City: A question of urban rights*, *Urban Geography* 32(1), 137.

54 Don Mitchell (2005) in Hae, *ibid*, 137.

55 Wolfe, Cary (2010) *Before the law: animals in a biopolitical context*, *Law, Culture and the Humanities* 6(8), 12.

56 Delaney, above n 9, 92-3.

57 Instone, L. and Mee, K. (2011) *Companion Acts and companion species: boundary transgressions and the place of dogs in urban public space*, in Bull, Jacob (Ed.) (2011) *Animal Movements • Moving Animals: essays on direction*,

off-leash areas (at least in some municipalities) in poorly planned and unattractive spaces with few facilities reinforces the marginal status of dogs and their humans outside the home.⁵⁸ Off-leash space is enacted as 'exceptional' and bracketed off. Understood as a spatial purification project the *CAA* works against rethinking the city as a multispecies shared space. Clearly, urban public space is not homogenous and rights and rules vary across spaces: strict division is always an ideal rather than a reality. In everyday practice rules are resisted, spaces and identities overlap. Yet, the requirement to perform a purified urban space has significant consequences.

Where and how we draw the line between humans and animals, human-only and shared space, inclusion and exclusion, public and private is unsettled and actively disputed. Cities are at the forefront of redefining human-dog relations and new regulatory frameworks, 'social contracts and even political alignments'⁵⁹ are emerging. However, it is uncertain as to what direction this might take.

Haraway says relations with pets involve two beings 'getting on together'⁶⁰ and we need legislation that enhances co-existence rather than laws that amplify segregation and exclusion, and take a primarily punitive approach. Haraway suggests we think about 'companion species' as a becoming,⁶¹ rather than a bundle of responsibilities and constraints. Companion species, she says, is a sort of contact zone whereby humans and dogs become more interesting to each other, more open to surprises, more inventive, and more attuned to each other.⁶² The figures of compliance, disobedience and segregation/purification (RDO, IDO & NDO) and their companions – the dog-under-control, the dangerous dog, and the dog-as-problem – do not proffer a productive basis for forging better ways of 'getting on together'. Instead they reassert the human-centred city in opposition to nature and animals, governed through neatly zoned and partitioned space and populated by compliant, responsible citizens.

velocity and agency in humanimal encounters. Uppsala: Crossroads of knowledge series at the Centre for Gender Research, University Printers, Uppsala.

58 Ibid.

59 Olson, Roberta J. M. and Hulser, Kathleen (2003) *Petropolis: a social history of urban animal companions*, *Visual Studies* 18(2), 140.

60 Haraway, above n 37.

61 Haraway, above n 29.

62 Haraway above n 37.

The current regulatory system, to some extent at least, creates the very human-dog conflict it seeks to reduce, as well as creating conflicts over urban space, and who can use it.

It has been argued that the *CAA* reduces exercise and socialisation possibilities for dogs, and so potentially increasing the incidence of dogs-as-problem.⁶³ To keep dogs healthy and happy and well-behaved they need to be properly socialised and to have regular outings for fitness and social interaction. Dogs and owners are a substantial group of park/open space users,⁶⁴ yet as Newby notes they are given scant attention in the planning of urban public spaces thereby reinforcing the dog-as-problem through poor integration and design.⁶⁵

Urban design needs to take account of how issues of barking, under-exercised, and bored dogs are created if modes of positive rather than punitive control are to characterise our cities.⁶⁶ Planners argue that ‘while separation is warranted in some instances, it should not be a philosophy upon which to base an area-wide strategy for dogs’.⁶⁷

Notions of the city and human-animal relations are changing, suggesting new possibilities for a multispecies city, or ‘anima urbis’.⁶⁸ Such a city will require a community-based approach of constructive co-habitation.⁶⁹ Ralph Acampora argues that cross-species encounters need to be welcomed and encouraged in the city and that ‘multispecies neighbourhood’ is a helpful ethical concept to guide new practices of living well together.⁷⁰ Creating such a neighbourhood will require planners, designers and law-makers to include dogs (and other species) as rightful residents of the city with specific needs and requirements. New modes of regulation will be needed, ones that reinforce the sharing of space and the positive features of human-dog interaction.

63 Miller and Howel, above n 27.

64 Harlock Jackson Pty Ltd (1995) Public open space and dogs. Camberwell, Vic: Petcare Information and Advisory Service August 1995, 5.

65 Newby, Jonica (1999) *The animal attraction: humans and their animal companions*. Sydney: ABC Books for the Australian Broadcasting Corporation.

66 Duckworth, above n 18, 303.

67 *Ibid.*, 5, 18.

68 Wolch, Jennifer (2002) *Anima Urbis*, *Progress in Human Geography*, 26(6): 721-742.

69 Acampora, Ralph (2004) *Oikos and Domus: On constructive co-habitation with other creatures*, *Philosophy & Geography* 7(2).

70 *Ibid.*

As cities become less hospitable to dogs⁷¹ with intensified competition for open space and increasing privatisation and gentrification, new approaches to regulation are vital.

The powerful figures of the absent referents of NDO and dog-as-problem can be challenged as unquestioned norms. The alternative, perhaps, will be the extension of ‘canine-cam’ from the breeder to the street where surveillance and subjugation usher in the ‘birth of the kennel’ in ever more rigid forms.⁷² Research shows that dogs decrease social isolation and that they are catalysts in knitting people and communities together. Dogs are an important aspect of urban sociality, facilitating social encounters, building community knowledge-sharing and reciprocity.⁷³ Perhaps it would be possible to build legislation that enacts the figure of the dog-as-companion: a figure of constructive cohabitation and mutually active relation. The paradox of high levels of household dog ownership characterised by family-style human-dog relations on the one hand, combined with regulation based on the figure of the dog-as-problem to be controlled and segregated in public space on the other, can only result in further debate and heated disputes, and an extension of the spatial purification of urban space. Such a situation does not help to build the positive features of urban neighbourhood life. Law, space, humans and animals are mixed up in complex entanglements in contemporary urban society, and contestations over the space of the dog, and the place of the dog, are ultimately about negotiating the boundaries of human-dog relations.

71 Newby, above n 64.

72 Haraway, Donna (2000) Birth of the kennel: a lecture by Donna Haraway, The European Graduate School. Available at: <http://www.egs.edu/faculty/donna-haraway/articles/birth-of-the-kennel/>

73 Jackson, V. (2005) Meeting in the park: Are dog owners who talk to one another contributing to social capital and is this a valid tool to promote responsible pet ownership? Urban Animal Management Conference Proceedings 2005. www.uam.net.au/PDFs/PUB_Pro05_VirginiaJackson_Meetinginthepark.pdf.

NOTES

Bringing back the bounty: Climate change and animal control

*Celeste M Black*¹

Introduction

Although many reports suggest that the use of bounties is ineffective in the control of “pest” animals in Australia, it is surprising to see that a bounty-like mechanism has recently been instituted by the Federal Government and, perhaps more surprisingly, that its justification is global warming.

The Carbon Farming Initiative,² one element of the new Clean Energy Plan,³ is a mechanism that provides incentives for particular activities by way of the issue of free offset units that may be sold into carbon markets. One category of activity nominated in the Plan relates to the reduction of introduced animal emissions (through reducing methane emissions) and the population targeted first is the wild camels of central Australia.

This note will provide a brief overview of the Carbon Farming Initiative by way of context and will then describe the proposals for achieving emissions reductions by way of camel “removals”. It is suggested that the inclusion of introduced animal control programs on the grounds of concerns for greenhouse gas emissions is likely to be ineffective as the price signal is based on global warming impacts (which are minimal compared to other contributors such as farmed livestock); whereas the harm arguably sought to be mitigated is more obviously landscape damage and negative impacts on economic interests including pastoral activities. The mechanism is therefore inappropriate.

¹ Senior Lecturer, Faculty of Law, University of Sydney. Any opinions expressed are entirely those of the author.

²Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth) (CFI Act).

³ The Clean Energy Plan comprises 13 pieces of legislation, where the centrepiece is the Clean Energy Bill 2011 (text passed by both Houses and now awaiting Royal Assent (as at 18 November 20 11).

The use or misuse of bounties

Some detailed published studies question the effectiveness of bounties as a means of controlling introduced animal species.⁴ A bounty can be understood as a sum of money paid as a financial incentive to destroy a specified introduced animal where such an incentive is necessary to encourage control efforts to the level desired by government.⁵ Bounties have been used in Australia since 1830, when the first bounty payments were an attempt to control dogs in Sydney and surrounding areas,⁶ and are still used from time to time today⁷ but, most importantly, studies show that at least until 1998 “there is no documentation of an Australian control program involving bounty payments that has, to the satisfaction of all participants, effectively addressed the problems resulting from introduced pests.”⁸ Many explanations have been offered for this failure including fraud (“fraud has been synonymous with bounty payments throughout the world”⁹) and, ironically, the risk that, if the bounty is sufficiently high, it provides an incentive to “farm for bounties”, that is, to ensure that populations are not reduced below a level where a continuous supply of animals (and therefore continuing income) is available.¹⁰ Given the inherent difficulties in designing an effective bounty scheme, it is somewhat surprising that this type of mechanism will be utilised under the guise of controlling greenhouse gas emissions, which will now be described.

Australia’s new Clean Energy Package

As at the date of writing, the key element of the Australian Government’s strategy to tackle climate change, the carbon pricing mechanism, has finally received the approval of both houses of

4 The seminal study on this subject is acknowledged as MJ Smith, *The Role of Bounties in Pest Management with Specific Reference to State Dingo Control Programs (1990)* (study project submitted to Charles Sturt University – Riverina) (Role of Bounties).

5 Hassell & Associates P/L, *Economic evaluation of the role of bounties in vertebrate pest management*, prepared for the Bureau of Resource Sciences (1998) 5 (Economic evaluation).

6 *Ibid* 2.

7 For example, in October 2011, the Victorian Government commenced a bounty program for foxes (\$10 per scalp) and wild dogs (\$50 per skin) with a total commitment of \$4 million. See Victoria, Department of Primary Industries, *Victorian Fox and Wild Dog Bounty* at <http://dpi.vic.gov.au/agriculture/pests-diseases-and-weeds/pest-animals/fox-wild-dog-bounty>.

8 Economic evaluation, above n 5, 2.

9 *Ibid* 8, referring to Role of Bounties, above n 4.

10 Economic evaluation, above n 5, 8-9.

Parliament.¹¹ The centrepiece of the Clean Energy Package is the creation of a carbon price, with effect from 1 July 2012, to both reduce emissions and to incentivise the switch to clean energy.¹² The pricing scheme is in the form of an emissions trading scheme with an initial fixed price period. This means liabilities for emissions covered by the scheme¹³ must be met with carbon units but, in the three-year initial fixed-price period, units will be available for a fixed (set) amount. After these first three years, the scheme will move to a flexible price period where unit pricing will be determined by the market, with a cap and floor operating as an interim measure. Importantly for current purposes, agriculture and other land-based activities will not be covered by the carbon price mechanism (land-based activities such as agriculture will not be required to surrender carbon units to cover emissions)¹⁴ but land-use based measures to reduce emissions and sequester carbon will be incentivised through the Carbon Farming Initiative described below, where this scheme commences in December 2011.

The Carbon Farming Initiative: General overview

Under the Clean Energy Plan, the Government has decided that special purpose schemes will provide incentives for both abatement and carbon sequestration activities with respect to land use, which contribute an estimated 23% of Australia's greenhouse gas emissions.¹⁵ The Plan includes the Carbon Farming Initiative (CFI), the Biodiversity Fund¹⁶

11 Clean Energy Bill 2011 (approved by the Senate on 8 November 2011).

12 Australian Government, Securing a clean energy future: The Australian Government's climate change plan (2011) (Securing a clean energy future).

13 It will measure CO₂-equivalent (CO₂-e) emissions (covering carbon dioxide, methane, nitrous oxide and perfluorocarbons from aluminium smelting, see Clean Energy Bill 2011 (Cth) cl 5, definition of "greenhouse gas") from the stationary energy sector, transport (domestic aviation, domestic shipping, rail transport, and non-transport use of fuels), industrial processes and non-legacy waste and fugitive emissions resulting in over half of Australia's emissions being directly covered by the mechanism and two-thirds of emissions covered when indirect effects are taken into account. Securing a clean energy future, above n 12, 27.

14 Securing a clean energy future, above n 12, 28.

15 Department of Climate Change and Energy Efficiency, Design of the Carbon Farming Initiative Consultation Paper Annotated with section references from Carbon Credits (Carbon Farming Initiative) Bill 2011 Exposure Draft 22/12/2010 <<http://www.climatechange.gov.au/government/submissions/~media/government/submissions/20110901-CFI-Annotated-consultation-paper-PDF.pdf>>.

16 Established for projects to protect biodiverse carbon stores and secure environmental outcomes from carbon farming, i.e. reforestation and revegetation in areas of high conservation value including wildlife corridors, rivers, streams and wetlands; management and protection of biodiverse ecosystems, including publicly owned native forests and land under

and the Carbon Farming Futures program.¹⁷

Under the CFI, recognised offsets entities will be entitled to the issue of an Australian Carbon Credit Unit (ACCU) for each tonne of CO₂-e emissions abated or sequestered with respect to an eligible offsets project.¹⁸ There will be a direct link between the CFI and the Clean Energy Plan through the use of ACCUs to meet liabilities under the carbon pricing mechanism. During the fixed price period (1 July 2012 to 30 June 2015), liable parties will be able to meet up to 5 per cent of their obligations using eligible ACCUs¹⁹ and from 1 July 2015 onwards (the flexible-price period) there will be no limit to the surrender of eligible ACCUs.²⁰ Credits generated under the CFI that are recognised for Australia's obligations under the Kyoto Protocol will be designated as Kyoto ACCUs and will be eligible ACCUs; these units may then also be sold into the international compliance market.²¹ Non-Kyoto ACCUs may be sold into the international and domestic voluntary markets (such as Australia's National Carbon Offset Standard²²). In addition, the Federal Government has committed \$A250m over six years to a Carbon Farming Initiative non-Kyoto Carbon Fund that will purchase non-Kyoto ACCUs, further bolstering the market.²³

Two broad categories of so-called “offsets projects” will be eligible for

conservation covenants or subject to land clearing restrictions; and action to prevent the spread of invasive species across connected landscapes. Securing a clean energy future, above n 12, 94.

17 Projected to support research and development, measurement approaches and action on the ground to reduce emissions or store carbon, Ibid 95.

18 CFI Act pt 2.

19 Securing a clean energy future, above n 12, 50; Clean Energy Bill 2011 (Cth) cl 125(7). During the fixed period, where the five per cent limit is exceeded, the number of eligible ACCUs that equals the excess will be credited for the next eligible financial year: at cls 125-129.

20 Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth) s 3.27.

21 Non-Kyoto compliant Australian carbon credit units derived from emissions sources and sinks that would have been credited with a Kyoto ACCU if the abatement had occurred before the end of the relevant accounting period for the Kyoto Protocol first commitment period (31 December 2012 for reforestation and avoided deforestation activities, or 30 June 2012 for all other activities) or any other type of ACCU prescribed in regulations will also feed into the domestic compliance market.

22 The National Carbon Offset Standard provides a voluntary standard for those organisations that seek to become “carbon neutral”. A review of the NCOS is currently underway. A recently released discussion paper includes the proposal that ACCUs be eligible under the Standard. Department of Climate Change and Energy Efficiency, Review of the National Carbon Offset Standard: Discussion Paper (30 August 2011)

<<http://www.climatechange.gov.au/government/initiatives/national-carbon-offset-standard.aspx>>.

23 Securing a clean energy future, above n 12, 94.

the issue of ACCUs: “sequestration offsets projects” and “emissions avoidance offsets projects”.²⁴ A sequestration offsets project is a project to remove carbon dioxide from the atmosphere by sequestering it in living biomass (such as trees), dead organic matter and/or soil.²⁵ Emissions avoidance offsets projects include agricultural emissions offsets projects²⁶ and introduced animal emissions offsets projects.²⁷ Although reforestation and soil carbon projects are internationally recognised as having the potential to contribute to carbon sequestration efforts and changing agricultural practices (such as manure management and efforts to reduce methane production) are seen by many as worthy of further investigation, the inclusion of emissions produced by introduced animals is unique to Australia. (As this activity is not internationally recognised, the ACCUs produced through these projects will be non-Kyoto units.) The argument would presumably proceed as follows: a measure of anthropogenic greenhouse gas production should include emissions produced by introduced animals (as opposed to native animals, which are implicitly not anthropogenic) where this can include livestock as well as those introduced animals that are not under human control or ownership, so-called “feral” animals. By reducing the number of introduced/feral animals, so will anthropogenic greenhouse gas emissions be reduced. This is reflected in the meaning given to “introduced animals” as animals not native to Australia but excluding livestock.²⁸

Two critical components of the project approval process is the approval of a methodology and an assessment for additionality. The methodology must provide the calculation of the net abatement amount for the project and describe project rules for monitoring, record keeping and reporting.²⁹ Methodologies are designed to relate to a type of project, where a specific project seeking to rely on the methodology must also be individually approved. Under the CFI, the methodology

24 CFI Act s 5 definition of “offsets project”.

25 Ibid s 54.

26 Although it is outside the scope of this paper, it should be noted that agricultural emissions offsets projects may present a whole host of animal welfare issues as they incentivise intensive farming practices. See, eg, Submission by Humane Society International regarding the proposed methodology: Destruction of methane generated from manure in piggeries (2011). Available at <<http://www.climatechange.gov.au/en/government/initiatives/carbon-farming-initiative/methodology-development/methodologies-under-consideration/destruction-of-methane-from-manure-in-piggeries.aspx>>.

27 CFI Act s 53.

28 Ibid s 5 definition of “introduced animal”.

29 Ibid s 106.

approval process requires a person to apply to the Domestic Offsets Integrity Committee (DOIC) (an independent expert panel) for endorsement of the proposed methodology.³⁰ The submitted methodologies are published on the Department of Climate Change and Energy Efficiency website and public comments are requested, for a period of at least 40 days.³¹ The DOIC will then make a determination whether to endorse the methodology and notify the Minister. A methodology has already been lodged with respect to camel “removals” (described below).

The other necessary factor relates to additionality. This is a test to see if the activity would not have been taken otherwise and is based on a business as usual test. Under the CFI, additionality will be assessed based on the type of activity undertaken (internationally, additionality is more commonly assessed on a specific project basis). A “common practice test” will be applied and, where an activity is undertaken by 5% or less of the comparison group, the activity will be deemed to be uncommon and therefore additional.³² Project types will be included on a positive list or a negative list based on this assessment (as well as consideration of other environmental and economic criteria) where the lists are to be included in regulation.³³ Draft regulations with the initial positive and negative lists have already been released and the management of feral camels on land that is not conservation land has been included on the positive list, thereby clearing another hurdle for these projects.³⁴

Feral camel management as an offset activity

A preliminary question may well be, why feral camels? Implicitly there must have been a motive for including introduced animal management in the CFI and then specifically listing camel management on the positive list. Although the link was not explicitly made in the Explanatory Memorandum to the CFI Bill, it is probably not a coincidence that the first national strategy developed under the

30 Ibid s 108.

31 Ibid s 112.

32 Department of Climate Change and Energy Efficiency, Commentary on the exposure draft Regulations dealing with the positive and negative lists of activities under the Carbon Farming Initiative (5 August 2011) <<http://www.climatechange.gov.au/government/submissions/draft-regulations-positive-negative-lists-for-cfi.aspx>>.

33 CFI Act s 41.

34 Draft Carbon Credits (Carbon Farming Initiative) Regulations 2011 (Cth) reg 30(1)(j).

Australian pest animal strategy³⁵ has been the National Feral Camel Action Plan.³⁶ This plan was finalised in the same month that the Discussion Paper on the design of the CFI was released³⁷

As mentioned in the previous section, a methodology has already been submitted which relates to the “removal” of feral camels. The methodology was submitted by a private entity³⁸ and the consultation period closed on 30 June 2011.³⁹ The methodology contemplates the “removal” of camels, where this is euphemistically defined as an activity causing the “untimely demise” of the animal through humane means.⁴⁰ Four methods are offered: shoot-to-kill from aerial platforms (where the carcasses are left); ground-based shoot-to-kill (again carcasses are left); mustering for transportation to an abattoir; and mustering for processing on-site for pet meat.⁴¹

The principle underlying the methodology is that there will be an emissions reduction benefit due to the premature death of the camel, effectively avoiding the methane emissions that would otherwise have been produced by the animal had it lived out its natural lifespan. The methodology determines the baseline emissions based on an estimated average camel lifespan of 30 years and an average age on “removal” of 14.23 (as average age is used as it was considered that it would be difficult to determine the actual age of the camel).⁴²

35 Department of the Environment and Water Resources, Australian pest animal strategy - A national strategy for the management of vertebrate pest animals in Australia (2007) available at

<<http://www.environment.gov.au/biodiversity/invasive/publications/pest-animal-strategy.html>>.

36 National Resource Management Ministerial Council, National Feral Camel Action Plan (2010) available at

<<http://www.environment.gov.au/biodiversity/invasive/ferals/camels/index.html>>.

37 Department of Climate Change and Energy Efficiency, Design of the Carbon Farming Initiative: Consultation Paper (November 2010).

38 All but one other methodology have, to date, been developed and submitted by the Department of Climate Change and Energy Efficiency.

39 Northwest Carbon Pty Ltd, Management of large feral herbivores (camels) in the Australian rangelands (2011) (Camel Methodology). The methodology is available on the Department of Climate Change website at

<[http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/methodology-](http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/methodology-development/methodologies-under-consideration/management-of-feral-herbivores.aspx)

[development/methodologies-under-consideration/management-of-feral-herbivores.aspx](http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/methodology-development/methodologies-under-consideration/management-of-feral-herbivores.aspx)>. The decision of the DOIC with respect to this methodology application has not yet been released.

40 Camel Methodology, section 4.

41 Ibid section 5.1.

42 Ibid section 9.1. The application includes a detailed explanation of how the average age has been calculated.

Preliminary comments

Many issues are raised by the inclusion of introduced animal management generally in the CFI and by this proposed methodology specifically. As noted by Hassell and Associates in their report on the effectiveness of bounties, bounties are justified on the basis that the extra payments correct a market failure (insufficient incentive to remove the animals) and their effectiveness is therefore very price sensitive.⁴³ Under the CFI, the incentive comes by way of an ACCU that can be sold into the voluntary carbon credits market, where the price for the units will be determined by the market, not fixed. The alternative mechanism provided to realise the value of non-Kyoto ACCUs is through the Non-Kyoto Carbon Fund where the Government has indicated that units will be purchased under a competitive tendering system, again providing no certainty as to price.⁴⁴ So, it is difficult to see how the scheme's effectiveness can be ensured. The documentation included in the appendix to the methodology application indicates the intention to sell the rights to units on the forward market,⁴⁵ thereby achieving a fixed price for the specified number of units, but such forward contracts would inherently involved a discount factor and so may undermine the effectiveness of the price signal. This highlights the difference between a standard bounty, where the price is based on an evaluation of the damage done by an introduced animal population to the environment (such as biodiversity) and/or farming interests, and CFI pricing which focuses solely on global warming impacts.

Other issues illustrated by the history of the use of bounties in Australia that would be relevant in this case include the fraud problem. Traditional bounties require the surrender of a physical piece of the animal (such as a scalp or pelt) before a bounty can be claimed. The CFI proposed camel methodology, in contrast, includes record keeping based on GPS coordinates, records of ammunition used, and signed declarations to verify removals for aerial removals.⁴⁶ An evaluation must be undertaken to determine if this and the records for the other proposed activities are sufficient to prevent fraud. Another problem highlighted from the experience with bounties is that the target populations may easily rebound from removals due to the reduction of

⁴³ Economic evaluation, above n 5, 9.

⁴⁴ Australian Government, Multi-Party Climate Change Committee, Clean Energy Agreement (2011) p 40.

⁴⁵ Camel methodology, above n 39, 52.

⁴⁶ Ibid 27.

competition for limited resources. The Hassell report identifies a number of studies that have shown that, for example, an annual cull rate of 70% was required to prevent feral pig populations from increasing⁴⁷ and it is suggested that the camel removals are unlikely to achieve that level of removal rate, especially given the large range of camels in Australia.

On the specific issue of inclusion of such activities in a scheme to address global warming, it must first be pointed out that reductions such as these are not taken into account under the Kyoto protocol; they have not been recognised by the international community as legitimate abatement activities and there is no indication that this will change in the near future (if ever).

One might suggest that, if the reduction in “feral” camel populations should be counted as a greenhouse gas abatement activity, why not reward or incentivise the reduction in cattle or pig herds rather than simply trying to manage the waste that the current numbers produce. In addition, the methodology application shows that the calculation of emissions abatement for the camels (0.96t CO₂-e per camel per annum, based on methane emissions factored for the global warming potential) has not been based on actual measurement of methane emissions of camels but has been based on an analogy to Tier 1 animals (such as cattle). It has been suggested by the submission of the Australian Camel Industry that this is incorrect.⁴⁸ Rather, the submission suggests that camels should be grouped along with alpacas and llamas, where their methane production is lower, although no scientific evidence is currently available regarding camel methane emissions.⁴⁹ The classification of camels alongside cattle as ruminants is based on the UN IPCC assessment of emissions for the purposes of managing national greenhouse gas inventories⁵⁰ and, it is suggested, is unlikely to be abandoned. The most current IPCC guidelines suggest an enteric fermentation emission factor for cattle in Oceania of 60 kg CH₄ per

⁴⁷ Economic evaluation, above n 5, 8.

⁴⁸ Submission by Australian Camel Industry Association Inc (30 June 2011) available on the Department of Climate Change and Energy Efficiency website at <<http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/methodology-development/methodologies-under-consideration/management-of-feral-herbivores.aspx>>.

⁴⁹ Ibid.

⁵⁰ United Nations Intergovernmental Panel on Climate Change, Guidelines for National Greenhouse Gas Inventories (2006), vol 4, ch 10, Emissions from livestock and manure management, 10.27.

head per year⁵¹ compared to 46 kg CH₄ per head per year for camels⁵² and the calculation in the methodology application appear to be consistent with these estimates.⁵³

Welfare issues likely to arise

A final and significant preliminary concern raised by the methodology is whether adequate safeguards are in place to protect the welfare of the target camels. Such concerns were raised in the submissions by Humane Society International⁵⁴ and Animal Liberation Victoria.⁵⁵

Although the methodology application states in a number of places that all animal welfare standards will be adhered to, including the *Model Code of Practice for the Welfare of Animals: the Camel*⁵⁶ and the *Model Code of practice for the Welfare of Animals: Feral livestock animals*,⁵⁷ serious concerns still remain. The *Camel Model Code* is focussed on mustering and management of camels and does not address the commercial shooting of camels that is proposed by the first and second activities under the methodology. The more general *Feral Livestock Code* does address shooting but only briefly. It is suggested that many of the same, well-documented welfare issues will arise with respect of the killing of “feral” camels as now arises with respect to kangaroo shooting, such as non-fatal shots and orphaned young.⁵⁸ There are also particular concerns raised by shooting from aerial platforms.⁵⁹

51 Ibid 10.29.

52 Ibid 10.28.

53 This should be compared to the relatively low emission factors for other types of livestock that could potentially be targeted as “feral” introduced animals: sheep (factor of 8); goats (factor of 5); and swine (factor of 1.5). The highest emission factor after cattle is buffalo at 55 and then deer at 20. Ibid.

54 Submission by Humane Society International (30 June 2011).

55 Submission by Animal Liberation Victoria (23 June 2011).

56 Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: The Camel*, 2nd edition (CSIRO Publishing, 2006).

57 Standing Committee on Agriculture, Animal Health Committee, *Model Code of practice for the Welfare of Animals: Feral livestock animals* (1995).

58 See, eg, Wildlife Protection Association of Australia Inc and Minister for the Environment, Heritage and the Arts and Director-General of the Department of Environment and Climate Change (NSW) (party joined) [2008] AATA 717 (15 August 2008).

59 This issue was highlighted in the Humane Society submission and was the subject of an action with respect to the culling of goats in *Animal Liberation Ltd v Department of Environment and Conservation* [2007] NSWSC 221 (8 March 2007).

In summary

The overarching concern raised by the CFI camel management proposal is that it is a rather crude instrument to address the complex issues raised by the “feral” camel population in Australia. The Federal Government has clearly stated that it views “feral” camels as causing significant damage to the natural environment as well as human interests across a large area of Australia and that this threat warrants better management of the camel population.⁶⁰ It is suggested that any initiatives to reduce camel numbers, as advocated by the Government, must be designed in light of the many challenges highlighted in the Action Plan. Although the Government could decide that a bounty-type system is a viable option (even though history has highlighted the likelihood of failure), the creation of such an incentive by way of the Carbon Farming Initiative is inappropriate as the incentive is based on a valuation of the damage to the climate due to emissions rather than being based on the value to the community of mitigating the environmental and agricultural damage arguably caused by the camels. The price signal is therefore unlikely to provide the correct incentive to achieve the desired degree of population management.

⁶⁰ National Feral Camel Management Plan, above n 36, 3.

Farm animal law: Reflections from the EU

Peter Stevenson¹

The European Union (EU) comprises 27 Member States with a population of 502 million and 23 official languages. It is the world's largest importer of agricultural products and, together with the US, the world's leading agri-food exporter.

Three institutions combine to formulate EU legislation. Under the EU Treaty it is only the European Commission that can propose new legislation. The Commission's proposal is considered and developed by the European Parliament and the Council of Ministers who must jointly agree the legislation in a co-decision procedure. In the case of agriculture and farm animal welfare, the Council consists of the Agriculture Ministers of the 27 Member States.

EU legislation takes the form of Directives or Regulations. Both are legally binding.

Sentient beings

EU legislation on animal protection is underpinned by the EU Treaty which recognises animals as 'sentient beings'.

In 1991 we presented to the European Parliament a petition with over one million signatures calling for animals to be given a new status in law as 'sentient beings'. This led to a Declaration recognising animals as sentient beings being annexed to the Treaty of Rome – the EU's founding Treaty. The Declaration, though welcome, was non-binding. We continued to lobby and a few years later a legally binding Protocol was annexed to the Treaty and in 2007 a full Article was inserted into the body of the Treaty.

Article 13 of the Treaty provides that in:

¹ Chief Policy Adviser for Compassion in World Farming.

“formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research ... policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals”.

Ban on barren battery cages

In 1996 the EU’s expert body – then called the Scientific Veterinary Committee – produced a report which stressed that hens have powerful drives to lay their eggs in a nest, peck and scratch in the ground, dust-bathe and perch. None of these natural behaviours is possible in the battery cage. The report concluded that “because of its small size and its barrenness, the battery cage as used at present has inherent severe disadvantages for the welfare of hens”.

On the basis of this report the Commission proposed a Directive that would give hens a little more space in their cages. We then lobbied the Parliament arguing that if the EU wished to make good its claim to base its decisions on the scientific evidence it should prohibit battery cages - not just make them a bit bigger.

We also pointed out that industry data showed the extra farm-level costs of producing barn or free range eggs instead of battery eggs were relatively small. Consumers could change to non-cage eggs for a few pence more per week - provided supermarkets charged no more extra than was needed to cover the additional cost of producing these eggs.

The Parliament and the Council listened to these arguments, rejected the Commission’s proposal and in 1999 banned the use of barren battery cages as from 1st January 2012. Many egg producers and some Member States have pressed for the ban to be postponed but the Commission, the Parliament and the Council have stressed that there is no justification for postponement and that the ban must come into force in 2012. Heartening to see government holding firm despite intense pressure.

Farmers were given an extremely generous phase out period of 12.5 years the thinking being that during this period a substantial proportion of cages would come to the end of their working life and so farmers would in any event have to invest in new housing.

A key factor that gives authority and integrity to EU legislation in this field is the fact that it is based on scientific evidence. Before the Commission draws up proposed legislation, it receives a detailed report from its expert body; today this is the Scientific Panel on Animal Health and Welfare of the European Food Safety Authority. This report reviews the relevant scientific literature.

From 2012 only three systems will be lawful in the EU: free range, barn and regrettably ‘enriched’ cages. These cages provide just a little extra space as compared with barren battery cages and perches, a nest box and litter. However, these facilities are so meagre and the extra space so small that enriched cages cannot properly fulfil the birds’ welfare needs. We are pressing farmers not to use enriched cages.

The ban on barren cages is being increasingly supported by retailers and other food businesses, many of whom are going further and are also refusing to sell or use eggs from enriched cages. All German, Dutch, Belgian and Austrian supermarket chains are now cage-free on shell eggs. Many UK retailers are cage-free on shell eggs and some are cage-free on products that contain egg as an ingredient.

McDonald's is the EU’s largest food service company. Over 90% of McDonald’s eggs across 23 EU countries are now free-range. Unilever, one of the EU largest food manufacturers, is cage-free in its mayonnaise and dressings across Western Europe and has committed to use only cage-free eggs in the Czech Republic, Poland, Slovakia and Hungary.

Breeding sows

There are two main kinds of pigs on farms: breeding sows whose role is to produce piglets and fattening pigs who are reared for their meat.

In intensive production most sows are confined throughout their 16.5 week pregnancy in gestation stalls. These metal-barred stalls are so narrow that the sow cannot even turn round. She is kept like this for one pregnancy after another, i.e. for most of her adult life. In an alternative version, the back of the stall is open so, to prevent her escaping, the sow is tethered to the floor by a neck or belly chain.

In 1991 the EU banned the tethering of sows from 2006. Then in 1997 the Scientific Veterinary Committee published a report that was highly critical of sow stalls. Armed with this and economic data showing that

housing sows in groups added little to the cost of producing pork, we pressed for an EU ban on stalls.

The industry responded by stressing the risk of aggression among group housed sows. We pointed out that many UK farmers had been using group housing for years and had learned the way to prevent aggression lay in avoiding competition at feeding and not mixing unfamiliar sows.

My experience is that politicians will only agree to a reform if they are convinced firstly that it enjoys wide public support, secondly that it is supported by scientific evidence, thirdly that it will not lead to a significant increase in costs and fourthly that the proposed alternatives are viable i.e. that they will not cause more problems than they solve.

In this case, politicians were convinced and in 2001 the EU enacted a ban on sow stalls. This comes into force on 1 January 2013. From that date sows will have to be housed in groups.

Unfortunately, the legislation allows, even after 2013, sows to be kept in stalls for the first four weeks of the pregnancy; this provision is criticised in a 2007 report by the European Food Safety Authority which concludes that allowing sows to be kept in stalls until four weeks after mating severely restricts their freedom of movement and causes stress and that the lack of exercise leads to impaired bone and muscular strength and reduced cardiovascular fitness. In the UK and Sweden gestation stalls have been banned for many years and the bans apply throughout the pregnancy; there is no ‘first four weeks’ exception.

I would like to see sows being kept outdoors or indoors in pens with a deep bed of straw. In the UK 40% of sows are kept free range.

Fattening pigs

In industrial systems most fattening pigs are kept indoors in conditions of extreme deprivation – in overcrowded, barren, often dirty sheds. Most are kept on bare concrete or fully slatted floors with no straw or other bedding. Stocking densities are often high.

In order to improve pig welfare, the EU Pigs Directive has since 2003 required pigs to “have permanent access to a sufficient quantity of material to enable proper investigation and manipulation activities”.

The Directive requires provision of materials “such as straw, hay, wood, sawdust, mushroom compost, peat”.

Scientific research shows that in natural conditions pigs are highly active, spending 75% of their day rooting, foraging and exploring. Such activities are impossible for factory-farmed pigs. Bored and frustrated, they turn to the only other ‘thing’ in their bare pens: the tails of other pigs. They begin to chew and then bite those tails.

To prevent tail biting, farmers slice off (dock) part of the piglet’s tail. Scientific research shows the correct way to prevent tail biting is not to dock the tails but to keep the pigs in good conditions. Recognising this, the Directive has since 2003 prohibited routine tail docking.

The Directive requires farmers to try to prevent tail biting by improving inadequate conditions. Only when they have done this are they permitted, if they still have a tail-biting problem, to tail dock. A scientific report by the European Food Safety Authority concludes that the major causes of tail biting are lack of straw and a barren environment. Thus a farmer who does not provide straw or some similarly effective material has not changed “inadequate conditions” and so cannot lawfully tail dock.

Currently, many pig farmers are failing to comply with the law on enrichment and tail docking but we are working hard to secure improved enforcement of these crucial laws which, if properly enforced, would make it impossible to keep pigs in barren factory farms.

The castration of pigs by means that involve the tearing of tissues has been prohibited in the EU since 2003. Despite this, most male pigs continue to be surgically castrated which invariably entails the tearing of tissues. In order to achieve improved compliance, the Commission has brought key stakeholders together and, in an interesting interplay between the law and voluntary action, a number of EU pig farmers and other stakeholders have agreed in the 2011 European Declaration on alternatives to surgical castration of pigs:

- from 1 January 2012, that surgical castration of pigs, if carried out, shall be performed with prolonged analgesia and/or anaesthesia, and
- secondly, castration should be abandoned by 1 January 2018.

Veal crates

In the veal crate system the calf is kept in a solid-sided crate of wood, so narrow that he cannot even turn round from the age of two weeks.

Peter Roberts, founder of Compassion in World Farming brought a private prosecution against a UK veal crate farm run, ironically, by monks. The prosecution failed but led to such a high degree of public concern that the UK government banned veal crates from 1990.

In the early 90s the UK exported 500,000 calves a year to continental veal crates even though the system had been banned in the UK. The UK also exported 2 million sheep a year for slaughter abroad. The live export trade was strongly opposed by the public but the government argued that under EU free trade rules they could not ban calf exports.

We brought judicial review proceedings against the government arguing that they had misadvised themselves as to the law. The case went all the way to the European Court. The case was lost but again had led to widespread awareness of the cruelty of veal crates.

At the same time a 1995 report by EU Scientific Veterinary Committee was highly critical of this system. Pursuant to this report and public pressure, in 1997 the EU banned the use of veal crates from 2007.

UK live exports have fallen dramatically since the mid 90s, though there continues to be a trade and we continue to campaign against it.

Chickens reared for meat

Broilers are chickens reared for meat. Intensively-reared broilers are kept in huge windowless sheds, so overcrowded that, as the birds grow bigger, one can barely see the floor so thickly 'carpeted' with chickens. Up to 50,000 chickens may be crammed into one of these sheds.

The Broilers Directive which came into force in 2010, is disappointing. It allows broilers to be stocked up to a maximum of 39 kg/m². Chickens weigh around 2 kg at slaughter, so 39 kg/m² means 19 chickens are crammed into each square metre; this represents severe overcrowding.

Despite its limitations, the Directive has made a start to legislating in this field. The EU has a good record in strengthening its legislation over time. For example, the 1991 Pigs Directive only banned the tethering of sows whereas the 2001 Directive went further and prohibited the use of sow stalls. Hopefully in time the Broilers Directive will also be strengthened.

Antibiotics

Antibiotics are used in three ways in industrial farming: therapeutically, as growth promoters, and as prophylactics to prevent disease. Antibiotics are regularly added to the feed and water of industrially reared animals to suppress the diseases that would otherwise be inevitable when large numbers of animals are crammed together in overcrowded conditions.

It has, for many years, been clear that the overuse of antibiotics in industrial farming is contributing to the emergence of bacteria that are resistant not only to the antibiotics used in farming but to related antibiotics used to treat serious human illness.

Alert to this danger, the EU banned the use of antibiotics as growth promoters in 2006. However, the very considerable prophylactic use of antibiotics means that antibiotic use in farming continues to pose a threat. In April this year the World Health Organisation said “the use of antibiotics in food animal production contributes to increased drug resistance. Approximately half of current antibiotic production is used in agriculture, to promote growth and prevent disease as well as to treat sick animals. With such massive use, those drug resistant microbes generated in animals can be later transferred to humans.”

The time has come for the use of antibiotics as growth promoters and as prophylactics to be prohibited worldwide. The only legitimate use of antibiotics in farming is therapeutically to treat individual sick animals. The prevention of disease should be achieved not by the use of antibiotics but by good housing, husbandry and hygiene.

Cloning

Just as the EU begins to unravel some of the worst aspects of factory farming, new threats appear.

The aim of cloning is to produce genetically identical copies of the highest yielding cows and fastest growing pigs. Most clones die during pregnancy. Of those that survive, many die in the early stages of life from problems including cardiovascular failure, respiratory difficulties or defective immune systems. Pregnancy abnormalities, difficult births and Caesarean sections are all more common with clones.

Cloning is arguably unlawful under EU Directive 98/58 which provides that: “Natural or artificial breeding or breeding procedures which cause or are likely to cause suffering or injury to any of the animals concerned must not be practised.” However, the position should be clarified by passing a law that expressly addresses cloning.

The European Parliament recently considered a proposed new Regulation on Novel Foods and voted for a ban - on animal welfare and ethical grounds - on the sale of meat and dairy products from clones and their descendants. The Commission and the Council were willing to ban the sale of food from clones but not from their descendants. The Parliament rightly argued that if the sale of food from the descendants is permitted cloning - with all its adverse impact on welfare – will be encouraged. The Parliament refused to dilute their position and eventually the conciliation procedure, between the Parliament and the Council, mandated by the EU Treaty failed to produce an agreement. Accordingly, the talks on the Regulation collapsed. This is the first time the Parliament has felt so strongly that it has rejected major new legislation which was not primarily about animal welfare because of its adverse implications for animal welfare.

The Commission will now have to produce a new proposal. I hope this will lead not just to a ban on the sale of food from clones and their offspring but a prohibition on the use of clones and their offspring on EU farms.

Hot on the heels of cloning comes genetic engineering. The Commission has commissioned a study to provide policy recommendations regarding the development and commercialisation of genetically engineered animals in the EU.

Genetic engineering often involves inserting a gene from one species into another species. For example, human growth genes have been inserted into pigs with the aim of producing faster growth. All too often genetic engineering entails animal suffering.

Legislation is urgently needed to prohibit both cloning and genetic engineering. The EU has previously acted positively in this field. In 1999 the EU prohibited the use of BST - bovine somatotrophin. BST is a genetically engineered version of the dairy cow's own growth hormone. It is administered to dairy cows to boost their milk yield despite that fact that yields are already so high that they have a detrimental impact on welfare. The EU's prohibition is based on a report by the Scientific Committee on Animal Health and Animal Welfare which concluded that "BST administration causes substantially ... poorer welfare because of increased foot disorders, mastitis, reproductive disorders and other production-related diseases."

Economic considerations

A key constraint to the EU – or other countries – introducing higher welfare standards is the cost of doing so. There is a perception that improved welfare entails substantially increased costs for farmers and much higher food prices for consumers. In some cases this will be so. However, analysis of industry data shows that in certain cases higher welfare farming adds little to farm level production costs. For example, a free range egg costs just over 2 UK pence – 3 Australian cents - more to produce than a battery egg. And housing sows in groups rather than stalls adds just 1-2 Eurocents – at most 3 Australian cents - to the cost of producing 1 kg of pork.

Moreover, improved welfare can lead to economic benefits. In better welfare systems, animals will tend to be healthier. This can lead to savings in terms of reduced expenditure on veterinary medicines and lower mortality rates. The provision of straw and/or additional space for finishing pigs can result in better feed conversion ratios and improved growth rates.

We need to challenge the notion that enhanced welfare is always economically burdensome. Research is needed to identify win-win scenarios where better welfare can also produce economic benefits.

WTO

Another major constraint is fear of the World Trade Organisation (WTO). The common view is that WTO member countries cannot restrict imports on animal welfare grounds. Hence the fear that any increase in EU welfare standards makes its farmers vulnerable to lower

welfare and thus cheaper imports from outside Europe. This concern led to the Broilers Directive being unambitious and fuelled the attempts – happily unsuccessful – to delay the ban on battery cages.

In fact this fear is not necessarily borne out by recent WTO case law. Article 3 provides that imported products must be afforded treatment no less favourable than “like” domestic products. The conventional wisdom is that in determining whether two products are not “like” one another – and so capable of being accorded different treatment – no account may be taken of the way in which they have been produced. From this viewpoint battery eggs and free range eggs are “like” products.

However, WTO case law has emphasised that, in assessing “likeness”, it is important to consider consumers’ tastes and habits, their perceptions and behaviour. If consumers view two products as different products *because of the way in which they have been produced*, the WTO may be prepared to accept that they are not “like” products. And that would mean that it would be permissible for one product - that which has been produced inhumanely – to be treated less favourably than a humanely produced version of the product.

Moreover, even where a measure is found to be inconsistent with the WTO rules it may be possible to justify it under the Article XX Exceptions. These permit measures to be taken that are necessary to protect, inter alia, public morals and animal health. WTO case law used to interpret these exceptions very restrictively but more recently it has been giving a wider scope to the exceptions.

Clearly the WTO continues to place tough restrictions on trade-related measures but it has nonetheless been accepting the need to find a proper balance between trade liberalisation and other legitimate public policy considerations. The EU has to a degree recognised this and accordingly its new Regulation on slaughter requires imported meat to be derived from animals that have been slaughtered to welfare standards equivalent to those of the EU.

The inefficiencies of industrial livestock production

We are often told that industrial livestock production is necessary to feed the growing world population. That it is super-efficient. But is it? Industrial production is dependent on feeding substantial quantities of

cereals and soy to animals. Research shows that the nutritional value consumed by animals in eating a given quantity of cereals is much greater than that delivered for humans by the resultant meat. Using cereals and soy as animal feed is a wasteful use not just of these crops but of the scarce land, water and fossil fuel energy used to grow them.

Through its dependence on feeding grain to animals, industrial livestock production is responsible for pollution. Much of the synthetic nitrogen fertiliser used to grow feed crops for animals and the nitrogen in concentrate animal feed is not absorbed by the crops and animals and runs off to pollute water and aquatic ecosystems. A new UN report states that “Intensive livestock production is probably the largest sector-specific source of water pollution”.

The drive to grow more animal feed has been a major factor in the intensification of crop production that is leading to erosion of biodiversity. Huge swathes of biodiversity-rich tropical rainforest and savannah are being cleared in South America to grow soy to feed industrially produced livestock. This releases huge amounts of stored carbon into the atmosphere, thereby contributing to climate change.

The high levels of meat consumption that have been made possible by industrial production are having an adverse impact on human health. Some meat and dairy products can be high in saturated fat; this is linked with obesity and an increased risk of heart disease and certain cancers. The recent UN report states “the number of undernourished people worldwide (1 billion) is matched by the number of those who are overfed and obese”.

These various damaging impacts are referred to as ‘negative externalities’. These represent a market failure in that the costs associated with them are borne by third parties or society as a whole and are not included in the costs paid by farmers or the prices paid by consumers of livestock products. There is growing recognition by bodies such as the World Bank and the UN Food and Agriculture Organisation of the need to internalise these externalities in the costs of meat and dairy production and thus in the price paid by consumers.

In conclusion, it is clear, using the EU as a case study, that legislation has a pivotal role to play in improving the welfare of farm animals. We must work closely with researchers who provide the scientific rationale

for legislative improvements and economists as we develop a greater understanding of how better welfare can sometimes be economically beneficial and how industrial production's adverse impact on the environment, biodiversity and human health and its inefficient use of crops, water, land and energy entail very real costs.

Animal Welfare, food security and future directions

*Ven. Alex Bruce*¹

Despite European Union (EU) initiatives² demonstrating a growing concern with the welfare of farm animals in the EU, it is clear that at least in the foreseeable future, livestock production through corporate-dominated intensive practices is set to continue. This is especially so as the world struggles to feed an ever-increasing population.

It's been estimated that by 2050 the world's population will reach 9 - 11 billion, with most population growth occurring in countries lacking the capacity to feed their populations.³ Moreover, income growth in, particularly, China and India has resulted in increased demand for more meat-based products.⁴

However, Peter Stevenson questions the assumption that increased livestock production is necessary to feed the growing world population. In this Note, I wish to share my reflections on future initiatives in animal welfare that were prompted by Peter's presentation. While the subject matter of the article is wide-ranging and sometimes speculative, the over-arching message is that formerly separate disciplines are converging to further the welfare of animals.

How we think about animals

A consistent theme in Peter's presentation involved attempts to reconcile recognition of the sentience of animals with animal industry practices. While Art. 13 of the EU Treaty requires the EU generally and Member States specifically to pay full regard to the welfare of animals in formulating policies, significant challenges remain in practically implementing this view.

1 Associate Professor, Australian National University, College of Law.

2 Discussed by Peter Stevenson (as above, and in an August 2011 talk, as part of the annual Voiceless Lecture Series, at the Australian National University College of Law).

3 Global Food Security: Facts, Issues and Implications 2011, Science and Economic Insights, Australian Bureau of Agricultural and Resource Economics and Sciences, Canberra, at 2 – 3.

4 P. Thornton, Livestock Production: Recent Trends, Future Prospects (2010) 365 *Philosophical Transactions of the Royal Society B (Biological Sciences)* 2853 at 2854 – 2855.

Most people in Western democratic societies accept that animals do not have legally recognised rights that should be protected and enforced over and above human rights or even human interests or preferences. This view is reinforced by a legal system that characterises animals as property to be exploited by their owners. Consistent with these views, most of the animals in Australia are not protected by animal welfare legislation because of the exceptions created by Animal Welfare Acts and Model Codes of Practice.

However, encouraging initiatives within Australia and some other countries suggest that the human-animal relationship is changing and developing in some very important ways. These developments and what they may mean for the future of animals and animal welfare law are introduced below.

Interdisciplinary Nature of Animal Law & Animal Welfare

Once, animal law and animal welfare were seen as the sole concern of animal rights activists. More recently, scientists, politicians, philosophers, lawyers and consumers have increasingly become aware of how animals are treated in society. An interdisciplinary approach to animals and animal welfare yields many benefits. Activists draw attention to social practices that are considered harmful to animals; lawyers explore ways of using legal processes to address those practices, and philosophers, sociologists and anthropologists work to create meaningful platforms to support the practical and legal action.

Wild Law

An example of this interdisciplinary scholarship is the emergence of "wild law" - geologists, environmental advocates, lawyers and philosophers working together to challenge the Aristotelian idea of the *scala naturae*, or natural scale, in which humans occupy the pinnacle of creation and exploit the environment and animals for human ends.

Wild law challenges this anthropocentric structure, viewing humans as just one species existing interdependently within a larger eco-system. In this larger context, it is argued that human laws should recognise and protect the natural eco-system - a system that is accorded enforceable

legal rights.⁵ Humans would no longer have any right to exploit the environment and animals if doing so would harm the environment. Wild law anticipates the development of "Earth Jurisprudence" in which laws reflect the balance between the rights of humans and the rights of the environment, including animals.⁶

Environmental Protection and Food Security

A good example of wild law in practice lies in the exploitation of animals to produce food for humans. Intensive farming of animals causes significant environmental degradation through the use of pesticides, overgrazing, water utilisation and land clearing.

In a 2006 report, *Livestock's Long Shadow: Environmental Issues and Options*, the United Nations' Food and Agriculture Organisation ("FAO") said the livestock sector (animals farmed for food) represented one of the most significant contributors to serious environmental problems at every scale, from local to global.⁷ These problems included contributing to climate change, land degradation, water depletion, and contamination and destruction of biodiversity.

The FAO Report was delivered at a time when one billion people suffer chronic hunger, with the United Nations estimating food production will need to increase by about 70% from 2005–07 average levels to feed the projected world population of 2050.⁸

Nations are beginning to focus on the issue of food security, i.e. ensuring that a country can produce sufficient food resources to meet its future needs. In 2010, the Prime Minister's Science, Engineering and Innovation Council (PMSEIC) issued a report: *Australia and Food Security in a Changing World*, in which Australia's strengths in its ability to produce food are discussed⁹.

5 C. Cullinan; *Wild Law: A Manifesto for Earth Justice*, 2002, Siber Ink and Green Books, South Africa.

6 M. Bell, Thomas Berry and an Earth Jurisprudence: An Exploratory Essay, (2003) 19(1) *The Trumpeter* 69.

7 *Livestock's Long Shadow: Environmental Issues and Options*, 2006, Food and Agriculture Organisation of the United Nations.

8 Issues Paper to Inform Development of a National Food Plan, Department of Agriculture, Fisheries and Forestry, June 2011, Canberra Australia at vi.

9 *Australia and Food Security in a Changing World*, 2010, Report of the PMSEIC Working Group, Canberra.

In relation to animals, the report also identifies challenges to Australia's ability to be food secure and contribute to global food security, including water use and management, soil nutrition and reliance on fertilisers, the need to accelerate advances in crop and livestock breeding.¹⁰ In this context research into the relationship between animal welfare, intensive animal farming, environmental and food security is urgently needed.

Science and Animal Welfare

Food security, environmental protection and the use of animals for human needs and desires raises issues of science and the way animals are used for scientific and medical research as well as teaching. What might scientific advances mean for animals and animal welfare?

Increasingly sensitive scientific equipment is clearly demonstrating that, contrary to Descartes' view, animals do feel pain and distress when harmed. This is particularly relevant to the religious slaughter of animals and the justifications for such slaughter practices.

More recent scientific research into the way animals' nervous systems and brains detect and transmit pain signals casts doubt on claims that the religious slaughter of animals is less painful than animals that have been stunned before slaughter. To what extent can ancient religious practices continue to be justified if advances in science show that they cause more pain to animals than secular methods of slaughter?¹¹

Animals have been used throughout history for medical experiments. In the 20th and 21st centuries, animals have been created specifically so that their body parts can be harvested and used to repair defective human body parts. Xenotransplantation is now a common medical procedure, especially involving the use of heart-valves from pigs to replace faulty human heart valves.

However, advances in stem cell therapy may make xenotransplantation redundant. Stem cells can be harvested from umbilical cords or even adult tissues. The cells can be engineered to create the tissues needed

¹⁰ Ibid at 14

¹¹ A. Bruce, Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of the Religious Slaughter of Animals (2011) 17(1) University of New South Wales Law Journal 62 (Forum: Religion and Australian Law).

for a patient's needs. Eventually, stem cell technology may enable entire organs to be grown for patients, thus eliminating any need to destroy animals for the purpose of harvesting their organs.¹²

Using stem cells in the creation of artificial or in-vitro meat is another interesting development. An animal stem cell is harvested and cultured into a form of test tube meat product. Given the extensive damage to the environment and food security caused by intensive animal farming, artificial meat may be a realistic alternative.¹³ Artificially grown meat may also replace the need for animals to be killed for their meat.¹⁴

Future possibilities. Meantime, urgent action is needed to harmonise and strengthen animal welfare law in Australia.

A Commonwealth approach to law reform

Australia's legal and regulatory regime is complex and inconsistent, often differing considerably between states and territories. A large part of the problem is that the Australian Constitution does not give express power to the Commonwealth Government to make laws with respect to animals and animal welfare.

However, could the Commonwealth Government rely on the trade or commerce power in s51(i) or the corporations power in s51(xx) of the Constitution to create a Commonwealth Animal Welfare Act?¹⁵

Within the poultry industry, two corporations Baiada and Inghams Enterprises supply about 80% of Australia's chicken meat, while the beef industry is dominated by four producers: Swift Australia, Cargill Australia, Teys Brothers and Nippon Meats, corporations that supply almost 50% of meat products. In these circumstances, the control of

12 S. Rafii and D. Lyden; Therapeutic Stem and Progenitor Cell Transplantation for Organ Vascularization and Regeneration (2003) 9(6) *Natural Medicine* 212.

13 S. McHugh, *Real Artificial: Tissue Cultured Meat, Genetically Modified Farm Animals and Fiction* (2010) 18 *Configurations* 181.

14 E. Pluhar, *Meat and Morality: Alternatives to Factory Farming* (2010) 23 *Journal of Agricultural Environmental Ethics* 455.

15 For example, the lack of direct constitutional power to make laws with respect to trade practices or consumer protection, did not prevent it creating the Competition and Consumer Act 2010 (Cth) (CCA) and the Australian Consumer Law (ACL) by relying on several different heads of power in the Constitution. Both the CCA and the ACL function as national regimes.

meat production by corporations may be a legitimate area of Commonwealth regulation under the corporations power in s51(xx). This is an important area for future research.

A Commonwealth Animal Welfare Act could also establish a well-resourced Australian Animal Welfare Authority that would be responsible for the national implementation and enforcement of a consistent animal welfare law throughout Australia.

Presently, there is no agreement concerning the philosophical or ethical foundations of animal welfare. This hinders the creation of a Commonwealth Animal Welfare Act, which requires a coherent philosophical foundation to support it.

In 2005, the National Animal Welfare Bill was examined by the Senate Rural Affairs and Regional Transport Committee. Despite many public submissions in support of the bill, the committee did not approve it. Instead, the committee recommended the continuing use of the Australian Animal Welfare Strategy as the principal mechanism for improving animal welfare,¹⁶ and the Bill lapsed.

Until such time as a philosophical consensus on animal welfare is achieved, the creative use of existing legal regimes has the potential to drive reform in this area. Internationally, attempts to create ‘animal attorneys’ have met with mixed results. In Switzerland in 2010, a proposal to ensure animals were specifically represented by lawyers in animal abuse cases was voted down, although in Zurich the position of animal attorney does exist.

Conclusions

Future advances in animal and animal welfare law require the imaginative use of existing knowledge and aspirational ideas. This process will be increasingly interdisciplinary as humans come to understand that caring for animals means caring for humans too. Kant was right in suggesting that not caring for animals can lead to humans causing harm to each other.

¹⁶ A Bartlett, ‘Animal Welfare in a Federal System: A Federal Politician’s Approach’ in *Animal Law in Australasia: A New Dialogue*, P Sankoff and S White (eds), The Federation Press, Sydney, 2009, p 387.

However, Kant would possibly agree that the interrelatedness of all species of life forms on the planet demands that humans re-think the fundamental assumptions that shape our understanding of animals and our relationship with them. Many of the issues Peter Stevenson discussed during his presentation are emotive and confronting. He explored industries and practices that generate strong feelings in most people and encouraged those in attendance to inform themselves about the ongoing challenges to animal welfare.

However, in doing so it is important to recall the advice of former High Court Justice Michael Kirby who admonished contributors to the debate about genetic technology:

Ignorance is not bliss. If you want to make an intelligent contribution to this argument you need to learn at least some genetics. Human engineering raises big moral issues. But the one cannot be understood without the other. How you should live depends in part on how the world is. If the power of genetics is to be used wisely, probable fact has to be distinguished from scarifying fantasy.¹³

Likewise, in the highly emotive area of animal welfare law, it is important to know the way the world is. It is important to distinguish ‘probable fact’ from ‘scarifying fantasy’ in the pursuit of reform.

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13 Hon Justice Michael Kirby AC CMG, Human Freedom and the Human Genome: The Ten Rules of Valencia, paper delivered to the International Workshop on Freedom and Risk Situations, Valencia, 25 January 1999, fn 43, on <www.highcourt.gov.au/speeches> (cited 27 September 2011).