

**LAWFUL CRUELTY:
SIX WAYS IN WHICH AUSTRALIAN ANIMAL WELFARE
LAWS PERMIT CRUELTY TOWARDS NONHUMAN
ANIMALS**

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ABSTRACT

The central argument of this thesis is that the very same laws that purport to *prohibit* cruelty towards nonhuman animals in Australia are responsible for *facilitating* it. Australian animal welfare statutes, regulations and Codes of Practice all state the prevention of cruelty towards nonhuman animals as their objective. They contain provisions which not only prohibit cruel conduct, but they also place positive duties on those who have a nonhuman animal within their custody and control to do certain things to ensure their basic welfare needs are met. Yet, nonhuman animals in Australia are lawfully treated with cruelty on a routine basis. They are confined to cages so small they cannot turn around, they have surgical procedures performed on their bodies without anaesthetic or pain relief, and they may be slaughtered without being rendered unconscious or insensible to pain. In all such cases, I argue that Australian animal welfare legislation not only fails to meet its stated objective of prohibiting cruelty, but that it actively permits it.

This thesis departs from existing literature on the topic of lawful animal cruelty by seeking to understand precisely *how* animal cruelty is lawful in Australia. Existing literature has established that Australian animal welfare provisions are inadequate, and fail to protect nonhuman animals from some of the worst cruelties. Yet, little has been said about precisely what legal mechanisms are operating to permit such cruelty. A critical understanding of not only *what* the law allows, but *how* it allows it is essential to future attempts at reforming the law to better protect the interests of nonhuman animals in law. This thesis lays new groundwork for thinking about and understanding the complex problem of lawful animal cruelty in Australia.

Through technical legal analysis and a critical assessment of the provisions of animal welfare legislation, regulations and Codes of Practice, I identify six ways in which Australian law permits cruelty towards nonhuman animals: (1) through the legal classification of nonhuman animals as legal property, (2) through inadequate legal provisions which prohibit only ‘unnecessary’ cruelty, and which give force to Codes of Practice that permit cruel acts, (3) through the commodification of nonhuman animals which characterises them as having only exchange value in the capitalist marketplace, (4) through the use of definitions, legal fictions and express exclusions to declare inaction with respect to some forms of cruelty, (5) through the propagation of the myth that animal welfare laws are protecting nonhuman animals from cruelty, and (6) through an implicit reliance on other laws which prohibit the public from observing the lawful cruelty that occurs against nonhuman animals in private industry.

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DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

In addition, I certify that no part of this work will, in the future, be used in a submission in my name for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint award of this degree.

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Signed:

Date: 14 June 2018

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CHAPTER 1: INTRODUCTION

I. THESIS

‘Someone who does not see a pane of glass does not know that he does not see it. Someone who, being placed differently does see it, does not know the other does not see it’.¹

Australian animal welfare laws and Codes of Practice are facilitating cruelty towards nonhuman animals. In this thesis, I demonstrate that the laws we have in place to *protect* nonhuman animals from harm are, in many instances, doing the precise opposite. I contend that the law is facilitating cruelty towards nonhuman animals at various levels. Cruelty is permitted not only by the explicit words of the law, but it is also legitimated by the unspoken premises upon which the law is built. I perform a close, critical reading of the provisions of the law to reveal this.

To illustrate that Australian animal welfare laws and Codes of Practice are harming (instead of protecting) nonhuman animals, I not only investigate the practical operation of these laws, but also critically evaluate the implications of the premises and preconditions on which they are based. It is these less obvious features of the law that guide its construction, give it context, and sustain its application. Yet, many of these features remain unspoken, unidentified or even actively concealed.² A close consideration of these underlying conditions is fundamental to my task of illuminating precisely what Australian animal welfare law is doing with respect to nonhuman animals, and how and why it is doing it.

A. *Defining Key Terms: ‘Cruelty’ and ‘Nonhuman Animal’*

The concept of ‘cruelty’ that this thesis relies upon is taken from the *Macquarie Dictionary*: to be cruel to a nonhuman animal is to be ‘disposed to inflict suffering; indifferent to, or taking pleasure in, the pain or distress of another; hard-hearted; pitiless’.³

¹ Simone Weil as quoted in Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 2011) 39.

² Peter Burdon defines critique as an ‘attempt to evaluate critically the premises, the preconditions and the implications of something that may not be obvious or reveal itself in everyday self-description’: Peter Burdon, ‘A Constructive Critique’ in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar Publishing, 2016) 205.

³ Susan Butler (ed) *Macquarie Dictionary* (online ed, at 21 November 2017) ‘Cruelty’.

The primary way in which I use the term ‘cruelty’ in this thesis relates to an *indifference* towards nonhuman animal suffering.

My use of the term ‘nonhuman animal’ is intended to interrupt the binary opposition that exists in our everyday language between ‘human’ and ‘animal’. As Mary Midgley explains, the term ‘animal’ is most commonly used as a point of contrast against the human.⁴ This is so even despite the fact that humans *are* animals. In everyday usage, the term ‘animal’ ‘stands for the inhuman, the anti-human’,⁵ and therefore plays an important role in ‘forming our communal self-image – our notion of the kind of being that we ourselves are’.⁶ In seeking to define who we are, we typically contrast ourselves with nonhuman animals, and in doing so provide a false account of our nature.

My use of the term ‘nonhuman animal’ throughout this thesis therefore serves two functions. First, it serves as a reminder of the biological fact that humans *are* animals, and therefore that human interests are not *prima facie* more important than nonhuman interests, simply because of the human/nonhuman divide. Second, and more importantly, it serves to indicate how important language is in conveying meaning. The use of the term ‘animal’, to mean *nonhuman* animal, serves to legitimate an ‘us versus them’ mentality, in which humans are viewed not only as *separate* from nonhuman animals, but also as more important than them. This type of thinking is routinely relied upon to justify some of the worst cruelties towards nonhuman animals. Whilst it is not within the scope of this thesis to consider the divide between human and nonhuman animals, my usage of the term ‘nonhuman animal’ throughout this thesis interrupts the binary opposition between ‘us’ (humans) and ‘them’ (nonhumans). I use the terms ‘who’ and ‘he/she’ to refer to nonhuman animals throughout this thesis for the same reasons. Nonhuman animals are sentient creatures who should be recognised as *individuals* that possess morally relevant interests. Given that our language conveys how we value them, they should not be described as ‘that’ or ‘it’ since such terms are typically reserved for objects.

For practical purposes, there are some instances throughout this thesis where the term ‘animal’ is used synonymously with the term ‘nonhuman animal’. Peter Singer, who uses

⁴ Mary Midgley, *The Myths We Live By* (Taylor and Francis, 2003) 135.

⁵ Ibid 136.

⁶ Ibid 135.

the term ‘nonhuman animal’ throughout his book *Animal Liberation*, describes the challenge of language thus:

The English language...reflects the prejudices of its users. So authors who wish to challenge these prejudices are in a well-known type of bind: either they use the language that reinforces the prejudices they wish to challenge, or else they fail to communicate with their audience.⁷

My use of both terms throughout this thesis therefore reflects my desire to communicate clearly with the reader, and to interrupt the powerful linguistic binary between ‘humans’ and ‘animals’.

B. *Underlying Premises of the Thesis*

The central argument contained in this thesis challenges the notion that Australian animal welfare laws are meeting their stated objective of prohibiting cruelty towards nonhuman animals, and reveals that there is an ambivalence regarding their true objective. In making this argument, I accept and rely upon the premises that nonhuman animals feel pain, and can suffer in numerous, complex ways. The existence of animal ‘welfare’ legislation in Australia is indicative of a general acceptance of the fact that nonhuman animals have the capacity to suffer, since the purported purpose of these laws is to minimize their suffering. Scientific literature also supports the contention that most nonhuman animals are sentient.⁸ Though some literature critiques this position,⁹ in this thesis I accept the proposition that

⁷ See: Peter Singer, *Animal Liberation* (2nd ed, Pimlico, 1990) xiv.

⁸ For some scientific perspectives on this, see: Donald Broom, 'The Scientific Assessment of Animal Welfare' (1988) 20 *Applied Animal Behaviour Science* 5, Donald Broom, 'Cognitive Ability and Sentience: Which Aquatic Animals Should Be Protected?' (2007) 75 *Diseases of Aquatic Organisms* 99, Jennifer Mather and Roland Anderson, 'Ethics and Invertebrates: A Cephalopod Perspective' (2007) 75(2) *Diseases of Aquatic Organisms* 119. Note that this scientific position marks a departure from historical views about nonhuman animals as mere ‘automatons’, a view which is typically associated with Rene Descartes. For a critical assessment of Descartes position, see: John Cottingham, 'A Brute to the Brutes? : Descartes' Treatment of Animals' (1978) 53 *Philosophy* 551. See also Ian House, 'Harrison on Animal Pain' (1991) 66 *Philosophy* 376.

⁹ For some critical perspectives see Peter Harrison, 'Do Animals Feel Pain?' (1991) 66(255) *Philosophy* 25 and Marian Dawkins, 'Through Animal Eyes: What Behaviour Tells Us' (2006) 100 *Applied Animal Behaviour Science* 4.

nonhuman animals are sentient. Moreover, I adopt the view that sentient nonhuman animals have morally relevant interests that should be protected by law.¹⁰

Whilst I acknowledge the existence of debates with respect to the sentience of some nonhuman animals (oysters are one example),¹¹ those debates do not constitute a challenge to the arguments contained in this thesis, because this thesis is not concerned with such cases. Rather, it is concerned with instances in Australian animal welfare laws *do* fail to protect nonhuman animals that we *know* are sentient. It is a natural response to any attempt to expand moral or legal protections for any group of beings or entities to ask where we should draw the line. In asking such questions, cases often emerge, which do not appear to fit neatly within our existing categories of thought. These cases are difficult to respond to, because they are generally surrounded by numerous other questions that require our consideration before we can know how to deal with them. For example: can oysters suffer? If so, what is their suffering like? Is their suffering restricted to feelings of physical pain, or can they suffer in more complex ways too?

In this thesis, I contend that Australian animal welfare laws are facilitating cruelty towards nonhuman animals. I point to numerous examples that illustrate precisely how and why this is the case. The existence of cases which require our further consideration, do not provide a compelling reason to refuse to inspect and examine the examples where the law is most clearly failing to protect a sentient nonhuman animal. On the contrary, the existence of these cases should be viewed as an imperative to continue to build our analysis of Australian animal welfare laws, and to continue to broaden our understanding of the nonhuman animal world. Only by doing this can we continue to expand and adapt our thinking so as to be able to better accommodate the cases that challenge our existing categories of thought.

¹⁰This is a common starting point for works of this type: Gary Francione, 'Animal Welfare and the Moral Value of Nonhuman Animals' (2010) 6(1) *Law, Culture and Humanities* 24, 24. For additional philosophical perspectives see Mark Rowlands, *Animals Like Us* (Verso, 2002) pp3-25, Steven Wise, *Rattling the Cage* (Cambridge Press, 2000)119-162, Jeremy Bentham, *Principles of Morals and Legislation* (Oxford Clarendon Press, 1823) 311; Singer, Above n 7, 1-23.

¹¹ There is a lack of scientific clarity surrounding the sentience of oysters. Peter Singer contends such 'doubts about a capacity for pain are considerable...But while one cannot with any confidence say that these creatures do feel pain, so one can equally have little confidence in saying that they do not feel pain'. Since it is easy to avoid treating them cruelly, '[t]hey should receive the benefit of the doubt'. See Singer, above n 7, 174.

II. BACKGROUND TO THE INVESTIGATION

A. The Legislative Framework

Each state and territory of Australia has animal welfare legislation that purports to exist to protect nonhuman animals from cruelty. Though the content of each statute in each jurisdiction varies, the key provisions in each create criminal offences that appear to explicitly prohibit cruelty towards nonhuman animals. For example, in New South Wales, the *Prevention of Cruelty to Animals Act 1979* (NSW) provides: ‘[a] person shall not commit an act of cruelty upon an animal’.¹² Some acts also purport to directly *promote welfare*. In South Australia, a 2008 legislative title amendment from the *Prevention of Cruelty to Animals Act 1985* (SA) to the *Animal Welfare Act 1985* (SA) was symbolic of this desire for the law to be seen to be doing more for nonhuman animals than simply prohibit their cruel treatment.¹³ The South Australian legislative subtitle now reads that it is: ‘[a]n Act for the promotion of animal welfare...’.¹⁴ In Victoria, the legislation also states that its purpose is not only to prohibit cruelty towards nonhuman animals, but to encourage their considerate treatment, and additionally ‘improve community awareness about the prevention of cruelty to animals’.¹⁵ Similarly, in the Northern Territory, the *Animal Welfare Act* explicitly creates a positive duty of care for those in charge of a nonhuman animal. It is an offence under this Act to breach this duty through an unreasonable failure to provide an animal with the ‘minimum level of care’ outlined in the Act.¹⁶ Australian animal welfare legislation of this kind is thus not only concerned with telling people what they *must not* do to animals, but also telling them what they *must do* to meet their welfare needs.

The provisions which ostensibly prohibit cruelty towards nonhuman animals in each Australian jurisdiction offer a great deal of information as to what constitutes cruelty. For example, in Queensland, the *Animal Care and Protection Act 2001* states that ‘[a] person

¹² *Prevention of Cruelty to Animals Act 1979* (NSW) s5(1).

¹³ *Prevention of Cruelty to Animals (Animal Welfare) Amendment Act 2008* (SA).

¹⁴ *Animal Welfare Act 1985* (SA).

¹⁵ *Prevention of Cruelty to Animals Act 1986* (Vic) ss1(a),(b),(c).

¹⁶ *Animal Welfare Act* (NT) s8.

must not be cruel to an animal'.¹⁷ The same Act also states that cruelty includes (among other things) causing an animal pain that is 'unjustifiable, unnecessary, or unreasonable' in the circumstances.¹⁸ Further, a person is considered to be cruel to a nonhuman animal where they: abuse it, terrify it, torment it, worry it, overdrive, override or overwork it, 'transport it in a way that is inappropriate for the animal's welfare', kill it 'in a way that is inhumane', or 'overcrowd or overload' it 'unjustifiably, unnecessarily or unreasonably'.¹⁹ The Queensland legislation thus proscribes a wide range of activities that may result in cruelty to a nonhuman animal. In addition to these types of general anti-cruelty provisions, legislation in some states of Australia also prohibits very specific acts of cruelty towards nonhuman animals which I address in chapter four.

At first instance, these broad, sweeping legislative provisions appear to provide nonhuman animals protection from a wide range of harms. They purport not only to prohibit overt acts of cruelty, but they also dictate what must be done to ensure nonhuman animal welfare is not compromised. On their face, these laws appear to amount to vast and strong protections for nonhuman animals in Australia. Yet, as I reveal throughout this thesis, these laws do not prohibit all forms of cruelty towards all nonhuman animals. On the contrary: they explicitly facilitate cruelty towards them.

B. *Lawful Cruelty*

It is beyond the scope of this thesis to provide an account of *every* way in which nonhuman animals in Australia experience lawful cruelty. However, I offer some powerful, representative examples which demonstrate the types of cruelty that are positively permitted by Australian animal welfare legislation and Codes of Practice. Whilst these examples merely scratch the surface of lawful cruelty towards nonhuman animals in Australia, they demonstrate the sharp contrast between what the law *says* it is doing, and what it is *actually* doing that inspired the writing of this thesis. In each of the following examples, the very same laws which purport to prohibit cruelty towards nonhuman animals, actively permit their cruel mistreatment.

¹⁷ *Animal Care and Protection Act 2001* (Qld) s18.

¹⁸ *Ibid* s18(2)(a).

¹⁹ *Ibid* s18(2)(b)-(h).

Hens who are kept for their egg production may lawfully be confined to cages so small they cannot even stretch their wings.²⁰ They may have their beaks removed with a hot blade to prevent them from pecking at others with whom they share a cage.²¹ Selectively bred ‘meat’ chickens grow at abnormally fast rates. In 1960, their maximum daily weight gain was 22 grams. By the end of the 1990s, that had almost tripled to 65 grams.²² The result of this lawful, intensive selective breeding which has manufactured an unnatural growth rate,²³ is that meat chickens now routinely experience poor bone quality, resulting in a ‘high incidence’ of painful leg problems, including bone deformities and fractures.²⁴ Sows (female pigs) may lawfully be confined to crates so small they cannot even turn around.²⁵ Piglets may be castrated, have their tails cut short, and have their eye teeth removed without anaesthetic.²⁶ Cattle under the age of 6 months may have their horns removed without anaesthetic or pain relief.²⁷ Calves born to female cows milked for dairy products may be taken away from their mother following birth so that her milk may be harvested for human consumption.²⁸ Her calf may lawfully be slaughtered because he is considered a ‘by-product’.²⁹ Nonhuman animals killed for meat may have their throats cut whilst fully conscious to serve religious preferences.³⁰ Greyhounds and horses used in racing may be bred and then killed if they are deemed to be too slow on the race track.³¹ Monkeys may be confined to laboratories and exposed to cruel experiments for the purposes of scientific research.³² The orphaned joeys of kangaroos killed in Australia for

²⁰ For cages constructed post January 2001, the minimum legal stocking density for Australian laying hens is 550cm² per bird, for cages containing three or more birds of 2.4kgs or less. The surface area of a piece of A4 paper is 623.6cm². See: *Model Code of Practice for the Welfare of Animals: Domestic Poultry (4th Edition)*, Appendix 1.

²¹ *Ibid* s13.2.

²² Colin Whitehead et al, 'Skeletal Problems Associated with Selection for Increased Production' in W Muir and S Aggrey (eds), *Poultry Genetics, Breeding, and Biotechnology* (CABI Publishing, 2003) 29.

²³ *Ibid* : The modern ‘broiler’ is now ‘18 genetic standard deviations from its origin in terms of growth capacity’.

²⁴ M. Y. Shim et al, 'The Effects of Growth Rate on Leg Morphology and Tibia Breaking Strength, Mineral Density, Mineral Content, and Bone Ash in Broilers' (2012) 91(8) *Poultry Science* 1790.

²⁵ For example: *Model Code for the Welfare of Animals: Pigs (3rd Edition)*, appendix 3.

²⁶ *Ibid* ss 5.6.6, 5.6.8, 5.6.11.

²⁷ For example: *Model Code of Practice for the Welfare of Animals: Cattle* s5.8.

²⁸ *Ibid* s5.11.

²⁹ *Ibid*.

³⁰ *Australian Standard for the Hygienic Production of Meat for Human Consumption* s7.12.

³¹ No code of practice exists but the killing of nonhuman animals is not unlawful per se. Section 85 *Animal Welfare Act 2002* (WA) provides explicitly that the ‘death of animal not sufficient to prove cruelty’.

³² For example see *Australian Code for the Care and Use of Animals for Scientific Purposes* (2013) s2.7.4(v)(b).

commercial purposes may be ‘euthanized’ by a ‘blow to the head...delivered with force sufficient to crush the skull and destroy the brain’.³³ Cattle may be ‘roped’, wrested, ridden and tormented in rodeos for entertainment.³⁴

The examples above, whilst providing only an illustrative list of the types of animal cruelty that Australian animal welfare laws positively allow, prompt the question that is at the core of this thesis: how can Australian animal welfare laws, which purport most explicitly to protect nonhuman animals from cruelty, simultaneously permit it?

III. APPROACH TO THE INVESTIGATION

A. Scope of Thesis

In seeking to explain how the law facilitates such cruelty, there are five limitations placed on the scope of this thesis that require articulation. First, this thesis is limited to a critique of laws that operate within the Australian jurisdiction. This restriction serves several purposes. It serves to illustrate how Australia, a country that typically prides itself on having a rigorous animal protection framework (a point which I explore in chapter six), still fundamentally fails to protect nonhuman animals from cruelty. My focus on the laws of a single country also enables sustained investigation into the detailed provisions of Australian animal welfare laws that has not taken place in existing literature.

Whilst my focus in this thesis is on the laws of Australia, international sources from legal systems that govern animals in a similar manner (such as the United States) assist my critique. Academic inquiry into the laws that govern and regulate nonhuman animals has only emerged in Australia, as a discrete discipline, within the last decade. The first Australian scholarly animal law issues book was published in 2009,³⁵ and the first Australian animal law textbook was published in 2010.³⁶ Given that there is such a small collection of Australian resources on animal law matters, international sources are pivotal

³³*National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes* s5.1.

³⁴ *Animal Welfare Act 1985 (SA)* s34.

³⁵ Steven White and Peter Sankoff (eds), *Animal Law in Australasia* (The Federation Press, 2009).

³⁶ Deborah Cao, *Animal Law in Australia and New Zealand* (Thomson Reuters, 2010).

to my inquiry as they support and inform my local focus. In chapter three for example, I detail some American case law in which there has been an attempt to extend legal ‘personhood’ to nonhuman animals. Such test cases have not yet been tried in Australia, and it is thus informative to observe how these cases have run in other countries.

Second, the laws that form the primary focus of this thesis are limited to state and territory based animal welfare statutes, regulations and accompanying Codes of Practice in Australia. I do not extend my analysis to Australian federal laws that touch on the welfare of nonhuman animals (such as the federal laws that govern the live export of nonhuman animals). I restrict myself to state-based legislation primarily because these are the documents that expressly purport to protect animal welfare. It is also within these Acts, Regulations and Codes that I suggest the law simultaneously prohibits and approves cruelty. In chapter eight, I critique examples of ‘ag-gag’ legislation that stifle the work of animal activists engaging in civil disobedience. Whilst these statutes do not neatly fit within the category of Australian animal welfare laws, they complement and facilitate these laws in important ways. Specifically, the enforcement of Australian animal welfare laws implicitly rely upon unlawful acts of trespass. Thus, an exploration of the relationship between Australian animal welfare legislation and other laws which prohibit trespass as civil disobedience on behalf of nonhuman animals is essential to a critical assessment of precisely how Australian animal welfare laws continue to permit cruelty towards nonhuman animals.

Third, this thesis is restricted in scope to identifying the ways in which Australian law fails to protect nonhuman animals from cruelty. I am thus concerned only with identifying problems for nonhuman animals within the existing Australian liberal legal system. Law reform proposals to generate change for nonhuman animals mark an important area for future research (some of which I point to in my concluding chapter). It is my hope that the arguments contained within this thesis may lay some important groundwork for thinking about what legal reforms may be needed to better protect nonhuman animals from cruelty in Australia. However, I do not articulate what those reforms may look like in this thesis.

Fourth, this thesis is restricted predominantly to an assessment of animal welfare matters and laws as they relate to *domestic* nonhuman animals. My usage of the term ‘domestic’ mirrors that used in Australian animal welfare legislation, and refers to any species of nonhuman animal that is kept in a tame state (or which is being tamed), and which is under

human care and control.³⁷ Domestic nonhuman animals can be contrasted with those that are living in a wild state. I focus on domestic nonhuman animals in this thesis because they are exposed to the greatest number of lawful cruelties, but are also ironically the subject of the greatest number of legal protections. Considerations of wild animal welfare matters and wild animal welfare regulations present a potential future research direction, but do not form part of my considerations within this thesis.³⁸

Fifth, this thesis is restricted in scope to providing an animal welfare perspective, rather than that of human welfare or interests. This thesis is concerned with identifying instances in which the law permits cruelty towards nonhuman animals, whilst simultaneously purporting to protect them from harm. It is acknowledged that the arguments contained within this thesis confront many powerful, vested human interests in continuing to be cruel to nonhuman animals. Humans are cruel to nonhuman animals for many reasons: because it is cheaper than being kind, because it satisfies a particular religious teaching or because we are more powerful than they are.³⁹ Further, we are crueller to some species than we are to others. We typically adore our pets, and loathe other creatures that we find frightening, disgusting or annoying. In providing an animal welfare perspective, this thesis confronts the many deeply held ideas that human beings have about how we ought to treat nonhuman animals. I critique the laws that legitimate many of the practices that routinely harm nonhuman animals and have been historically viewed as acceptable (and even ‘necessary’). However, I do not critique the many important arguments in *favour* of continuing to use nonhuman animals for human benefit, even where such use involves cruelty. Perhaps the most widely accepted usage of nonhuman animals is in research settings to generate medical advances for humans. Jeremy Garrett summarises the crux of the moral question in research settings in the following way:

Supposing that it were uniquely necessary for obtaining genuine medical or scientific benefit, is it morally permissible to use animals in research that is (1) harmful, (2) nontherapeutic, and (3) non-consensual that that would be judged unethical if done with

³⁷ For example: *Prevention of Cruelty to Animals Act 1979* (NSW) s4.

³⁸ For a detailed overview of the regulation of wild animal welfare in Australia, see Cao, above n 36, 225-259.

³⁹ Steven Wise, *Unlocking the Cage* (Persues Press, 2002) 9.

any nonconsenting human subjects or if the same acts were done in a nonresearch setting?⁴⁰

Many people definitively answer ‘yes’ to this question. Their exact reasons may be varied, but are generally framed in terms of the greater importance of human needs.⁴¹ Many humans will give preference to human interests over nonhuman interests in this context, simply because human interests are deemed to be more significant. Peter Singer calls this view ‘speciesism’, because he reasons that (like other forms of discrimination such as racism and sexism) it is premised on giving preference to the moral interests of one species (namely humans), over others (namely nonhumans), purely based on species membership.⁴² For Singer, species membership is not a morally relevant characteristic that justifies such discrimination. Yet, for many human beings it is.⁴³

This thesis does not consider wider debates about when (if at all) the use of nonhuman animals to serve human purposes is morally justified.⁴⁴ Although this thesis is implicitly critical of cruelty towards nonhuman animals, the goal of my inquiry within these pages is restricted to a more focused and perhaps more modest task. I am concerned, first and foremost, with making a basic case for clarity and honesty within Australian law by examining it against its own stated premise. At present, Australian animal welfare laws condone cruelty towards nonhuman animals, despite the fact they explicitly purport to protect them. It is this internal contradiction in Australian law, and not the human use of nonhuman animals in principle, that this thesis exposes and condemns.

B. *Method of Analysis*

My method in this thesis is shaped by the juxtaposition between what the law *says* it is doing, and what it is *actually* doing. My approach is to unpack and evaluate the provisions of Australian animal welfare law and Codes of Practice to understand precisely which mechanisms are operating to permit cruelty towards nonhuman animals. This approach is

⁴⁰ Jeremy Garrett, *The Ethics of Animal Research: Exploring the Controversy* (MIT Press, 2014) 6.

⁴¹ Cao, above n 36, 259.

⁴² Singer, above n 7, 9.

⁴³ Peter Singer, *Animal Liberation* (2nd ed, Pimlico, 1990).

⁴⁴ These debates mirror conversations being had within abolitionist movements more generally. See for example Brayden Goyette, ‘5 Things About Slavery You Probably Didn’t Learn in Social Studies: A Short Guide to ‘the Half Has Never Been Told’’, *The Huffington Post* (Online), 24 October 2014, <http://www.huffingtonpost.com.au/entry/the-half-has-never-been-told_n_6036840>.

informed by critical legal studies. Critical legal studies, in the broad sense in which I employ the term here,⁴⁵ refers to a vast array of critical scholarship that includes, for example feminist legal theory, critical race theory and queer legal theory.⁴⁶ These approaches share in common a concern with vulnerable groups, and thus inform my discussions in this thesis surrounding nonhuman animals. Moreover, as Robert Cryer, Tamara Hervey and Bal Sokhi-Bulley suggest, a critical approach ‘really wants to know *how* things work and why, not simply how we are told they are supposed to work’.⁴⁷ The critical approach I adopt in this thesis reads the law as it relates to the vulnerable group of nonhuman animals within the context in which the law is both constructed and applied.

To answer the question of how the law facilitates cruelty to nonhuman animals the method of analysis I use in this thesis is necessarily mixed. It is mixed because the law permits cruelty in various ways and on various levels. It is contained not only within the explicit provisions of Australian animal welfare law, but it is also inherent within the values that, despite remaining unarticulated, construct and sustain its operation. In revealing precisely what the law allows, I use traditional methods of doctrinal legal analysis. For example, in chapter four, I perform a close reading of the provisions of Australian animal welfare law, to identify the ways in which the provisions, which purport to prohibit cruelty to nonhuman animals, actually enable it. I examine defences to a charge of animal cruelty, and I consider the operation of supplementary legislative instruments, such as regulations and codes of practice. I consider how they are given legal force, and what forms of cruelty they allow. I also draw on existing Australian case law to substantiate my analysis of legislative terms such as ‘necessary’ and ‘reasonable’. In chapter seven I apply the traditional legal principle of ‘fair labelling’ to animal welfare law to demonstrate that Australian animal welfare legislation uses the term ‘cruelty’ in a misleading manner, and in doing so positively misinforms the public.

In identifying and critiquing the values that underpin and sustain these legal provisions, I perform a more critical analysis of the provisions of Australian animal welfare law. I look

⁴⁵ ‘Critical legal studies’ also describes a distinct movement that originated in the United States of America: Margaret Davies, *Asking the Law Question* (3rd ed, Lawbook Co, 2008) 186-212.

⁴⁶ *Ibid* 183.

⁴⁷ Robert Cryer, Tamara Hervey and Bal Sokhi-Bulley, *Research Methodologies in EU and International Law* (Hart Publishing, 2011) 60.

beneath the surface level of the law, to identify the presumptions that underpin and shape it. I do this not only by looking at Hansard but also by evaluating the implications of the law. By looking at what the law achieves, it is possible to ask questions about who the law is serving, and why it is serving them. The critical approach I draw on throughout this thesis draws upon other disciplines. For example, in chapter four, I draw on psychology to inform my discussion about what values are represented in the law, and why. In chapter five, I draw on feminist thinking to reveal the way in which the language used in the law contains prejudices that are routinely unarticulated yet serve to convey meanings and values with powerful implications for the welfare of nonhuman animals.

The cross-disciplinary approach that I adopt in parts of this thesis adds richness and depth to the more traditional legal analysis offered in the other parts of this thesis. This approach enables the consideration of questions about not only what cruelty the law permits, but also what values it reflects and how it reflects them in permitting that cruelty. A mere surface analysis of the legal provisions would fail to identify the powerful nature of the forces that construct and sustain the law. Cormac Cullinan's words are pertinent:

Constitutions, laws and the judgments that interpret them also express and reflect our idea of what law is and ought to be, and what societies believe in and aspire to. This is the tricky bit, because it is far less visible. If one imagines the legal and political system as a painting hanging on a wall, then our idea of law and society would be like the frame of the painting. Usually when we look at the painting we don't see the frame or the wall on which it hangs. Yet they are vital. The frame marks the boundary of our vision and understanding of society. When we look at the painting or society we don't think about, let alone question, whether the painting should be bigger or smaller, or whether it should be hanging on that wall or painted on it. When we look at our governance systems, the limits of our vision and the questions that we consider are defined by the frame.⁴⁸

⁴⁸ Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (2nd ed, Green Books, 2011) 57.

IV. STRUCTURE OF THESIS

This thesis is structured to reveal six ways in which Australian law is facilitating the cruelty towards nonhuman animals. Following this introduction and the literature review (chapter two), each substantive chapter focuses on one of these six ways.

Chapter Three: Legal Persons, Legal Things and Somewhere In-Between

In chapter three, I reveal that the legal characterisation of nonhuman animals as legal property facilitates cruelty towards them. It does so because it classes them as legal ‘things’. They are the ‘object’ of a private property relationship with humans. This legal characterisation facilitates cruelty towards nonhuman animals because it restricts the extent to which their interests may be protected by law (I show this in chapter four). Moreover, I suggest that a lack of clarity surrounding what the legal person is, and how it operates, means that key commentators on the legal status of nonhuman animal unwittingly rely upon a construction of the legal person as being tied to the *human*. The result is that commentators in animal law who argue for the alleviation of nonhuman animals from the status of property unwittingly rely upon a conception of the person that cannot extend to nonhuman animals.

I first explain the difference between legal ‘persons’ and legal ‘things’ to explain the legal status of nonhuman animals. My argument is that strictly speaking, only legal persons count in law. Legal ‘things’ cannot. Nonhuman animals therefore provide a *sui generis* case. They are property, but the law also attempts to protect their interests. This is a privilege normally reserved for legal persons. I then provide a critical overview of the concept of the legal ‘person’, with a view to explaining *who* can be a legal person. My argument is that even though there are several competing conceptions of the legal ‘person’, they are all shaped by human interests. By critically analysing the work of key theorists on the legal status of nonhuman animals, Gary Francione and Steven Wise, I argue that the category of legal personhood in animal law literature remains tightly bound to *humanness*, with the result that nonhuman animals are consistently disqualified from its reach. The result is that nonhuman animals are not only excluded from the legal category of persons, but that the way the category of the person itself is defined – even by those who advocate that animals should be included within it – necessitates their exclusion.

Chapter Four: Australian Animal Welfare Laws

In chapter four I argue that the key provisions of existing animal welfare law explicitly permit cruelty towards nonhuman animals. Having established in chapter three that nonhuman animals are legal *property*, and that the category of the person is constructed so as excluded nonhuman animals, here I illustrate how their property status results in inadequate legal protections for their welfare. Although Australian animal welfare laws purport to provide nonhuman animals with legal protections from nonhuman animals, those protections are consistently undermined to serve human interests. This is made possible by their legal characterisation as ‘things’ that may be legitimately used for human purposes.

To establish my argument in this chapter, I first outline the key animal welfare provisions in Australian law. I then identify two legal mechanisms by which the meaningful content of these provisions is eroded. The first is the use of ‘qualifying’ terms that limit the ambit of cruelty prohibitions. These words, such as ‘reasonable’ and ‘necessary’, accompany anti-cruelty provisions with the problematic result that cruelty towards nonhuman animals is prohibited by law in *principle*, but only where it is not seen as a human ‘necessity’. The law therefore reflects the view that there exist acts of ‘necessary’ or ‘reasonable’ cruelty towards nonhuman animals.⁴⁹ Further, the test of what constitutes ‘necessity’ or ‘reasonableness’ is one that consistently favours human interests. Thus, cruelty towards nonhuman animals is explicitly permitted by law, where that cruelty is seen to serve a legitimate human interest.

The second legal mechanism that I identify that undermines the law’s general prohibition on animal cruelty is the operation of Codes of Practice. Codes of practice dictate *separate legal standards* for industries that use nonhuman animals for human purposes. I argue that these Codes, which supplement Australian animal welfare provisions, operate to effectively exempt the *most vulnerable* nonhuman animals from the protective reach of Australian animal welfare provisions. I develop this theme further in chapter seven, where I suggest that a myth of animal protection is sustained by Codes which operate in tandem with animal welfare legislation to erode much of its meaningful content.

⁴⁹ Steven White, 'Legislating for Animal Welfare: Making the Interests of Animals Count' (2003) 28(6) *Alternative Law Journal* 277, 279.

Chapter Five : The Commodification of Nonhuman Animals

Having explained that Australian animal welfare laws prohibit ‘unnecessary’ or ‘unreasonable’ cruelty, in chapter five I turn to consider how the interests of nonhuman animals are reflected in law. The prohibition of ‘unnecessary suffering’ seeks to balance nonhuman animal interests against human interests. Yet, in this chapter I argue that in many instances, nonhuman animals are constructed in law as mere objects that have no interests at all. The result is that cruelty towards them becomes most readily justified with respect to human interests.

To sustain my argument, I demonstrate that some nonhuman animals are positively *commodified* by law, with the result that they are constructed as ‘things’ that have no morally relevant interests. Using Karl Marx’s concept of commodity fetishism, I suggest that commodities in capitalist society have value attributed to them at the point of exchange. The value of a commodity is therefore perceived as being synonymous with the price for which it can be exchanged at market. The commodification of nonhuman animals therefore has the troubling effect of equating their value with the price which can be obtained from the use or sale of their bodies. As commodities, the interests of nonhuman animals do not count. The sentient creature is made ‘absent’. Having established how the commodification of nonhuman animals facilitates cruelty toward them, I then explain how they are commodified by Codes of Practice.

Chapter Six: The Policy of Inaction

In this chapter, I shift my focus. Instead of looking at where the law actively prohibits cruelty, I look at where it is *silent* with respect to it. My contention is that Australian animal welfare laws ‘declare inaction’ with respect to some of the worst types of cruelty. Animal protection statutes therefore contain specific provisions which reflect a deliberate, intentional decision by lawmakers to ignore certain types of cruelty inflicted upon certain species of nonhuman animals. I argue that such instances do not constitute a ‘gap’ in the law, but rather that the law is actively complicit in permitting such cruelty. The law is thus complicit in the infliction of suffering of some nonhuman animals, because it fails to prohibit types of conduct that constitute cruelty towards them.

To establish my argument, I explain first how the law is always ‘active’, even where it fails to prohibit cruel conduct. I then identify three legal mechanisms operating within

Australian animal welfare legislation that reflect declared inaction towards specific types of cruelty. First, I show that the consciously inadequate definition of ‘animal’ excludes many sentient creatures from the protective provisions of Australian animal welfare law. Second, I explain how legal fictions operate to deem acts of cruelty to be ‘non-cruelty’. Third, I demonstrate that express exclusions work to exempt a wide range of ‘elective husbandry procedures’ from the reach of animal welfare law. In each instance, Australian animal welfare law explicitly states that certain types of cruelty are exempted from the protective reach of Australian animal welfare legislation. In doing so, it is complicit in that cruelty.

Chapter Seven: The Myth of Animal Protection

Having argued from several perspectives that Australian animal welfare laws consistently fail in meeting their stated objective, in this chapter I theorize how these laws generate and sustain a ‘myth’ of animal protection, while permitting cruelty to nonhuman animals. I argue that this myth facilitates cruelty to nonhuman animals by legitimating the status quo. It communicates to the public that nonhuman animals *are* being protected from cruelty. Moreover, it serves to legitimate cruel conduct by approving it within the context of a statute that ostensibly exists for the purposes of animal protection.

To make my argument in this chapter, I first explain how the myth of animal protection facilitates cruelty to animals. Then, I identify three ways in which this myth is generated and sustained by animal welfare legislation. First, I examine the physical compartmentalisation of the provisions which approve cruelty from those that prohibit it. My suggestion is that as it stands alone, animal welfare legislation falsely appears to prohibit cruelty. At the same time, Codes of Practice operate at a different level to erode these protections for many species. Second, I assess what animal welfare legislation and Codes of Practice communicate to the public, and *how* they communicate it. I argue that they communicate unclearly and misleadingly, with the result that they communicate a false message about what the law allows. Third, I turn to consider the enforcement mechanisms contained with Australian animal welfare statutes. Focusing specifically on the role of the RSPCA in enforcing animal welfare provisions, I argue that it is given inadequate powers and therefore must necessarily rely upon animal activists who unlawfully trespass to gather evidence of animal cruelty. Moreover, the RSPCA is chronically underfunded and has conflicts of interest. The result is not only that Australian

animal welfare legislation is poorly enforced, but it is set up to *necessitate* poor enforcement. Absent the mechanisms necessary for adequate enforcement, the notion that Australian animal welfare laws protect nonhuman animals remains a myth.

Chapter Eight: Keeping Cruelty Invisible: Laws that Punish Civil Disobedience

In the final chapter of this thesis, I examine legislation that seeks to stifle or deter unlawful acts of activism on behalf of nonhuman animals. Having established in chapter seven that the enforcement of Australian animal welfare laws implicitly rely upon unlawful acts of trespass, here I suggest that other legislation has the potential to silence and deter these activists. Such silencing not only precludes the enforcement of Australian animal welfare legislation, but also facilitates cruelty by keeping it invisible and by preventing public discourse on animal welfare matters. Cruelty that is kept ‘out of sight’ is cruelty that is kept ‘out of mind’.

To establish my argument, I first explain how the act of trespass is justified when it is necessary to expose cruelty towards nonhuman animals. Even though trespass invades an individual’s interest in privacy, I argue that that interest may be legitimately infringed in the name of the greater good. Moreover, I argue that trespass constitutes an act of civil disobedience which is morally justified in a democratic society. I then turn to explain how acts of unlawful activism have generated change for nonhuman animals by stimulating the types of public debate that are essential to law reform, and by facilitating the enforcement of animal welfare legislation. Finally, I examine three examples of ‘ag-gag’⁵⁰ legislation that may operate to stifle activists who trespass to expose cruelty: *The Surveillance Devices Act 2016* (SA), *The Biosecurity Act 2015* (NSW) and the proposed *Criminal Code (Animal Welfare) Amendment Bill 2015* (Cth). These laws may be used to punish and deter the acts of activism that are essential not only to enforcing Australian animal welfare laws, but to reforming them.

⁵⁰ The term ‘ag-gag’ is used to describe laws which criminalise the act of making audio or visual recordings of the activities which occur on farms, without the consent of the owner. They are laws that ‘gag’ whistleblowers who seek to expose cruelty in agricultural industries.

V. CONCLUSION

My six substantive chapters reveal six ways in which Australian animal welfare laws are harming nonhuman animals instead of protecting them. Having identified these mechanisms by which the law *facilitates* instead of *prohibits* cruelty, I then turn to consider some future research questions that result from the arguments contained herein. It is my hope that the arguments in this thesis will provide a platform for thinking about law reform directions, and how nonhuman animals may be better protected by Australian law.

In the literature review that follows, I provide a brief overview of existing literature that is critical of Australian animal welfare law which serves to highlight the unique contribution that is offered by this thesis.

**CHAPTER 2 : THE INTELLECTUAL CONTEXT: LITERATURE REVIEW AND
THE UNIQUE CONTRIBUTION OF THIS THESIS**

I. THE INTELLECTUAL CONTEXT

This chapter provides a summary of existing literature within the academic discipline of animal law. This summary does two things. First, it provides context for the argument and analysis performed within this thesis. Second, it demonstrates both how and why the arguments contained in this thesis either build on, or depart from thinking within existing animal law literature.

The term ‘animal law’ refers to growing area of academic inquiry, which focuses on the legal regulation of the relationship between human and nonhuman animals. In 2007, there were 90 animal law courses available for study across nine different countries. 74 of those were in the United States of America.¹ In Australia, Animal law was only offered as an area of study in Australian Universities for the first time in 2005, as a Postgraduate elective at the University of New South Wales. Fourteen universities in Australia have since offered, or continue to offer animal law as an area of elective legal study. Whilst philosophical discourse regarding the rights of nonhuman animals has existed for decades,² legal discourse on the topic (particularly in the Australian context) is relatively new. As such, there is considerable scope to contribute to legal discourse regarding how Australian law treats nonhuman animals.

Animal law issues arise in a wide range of legal disciplines. For example, the principles of administrative law are relevant to animals in the context of council determinations to seize and/or destroy dangerous dogs.³ Similarly, constitutional principles indirectly implicate nonhuman animals in the context of challenges to the federal live animal export scheme where the constitution provides federal powers to make laws with respect to trade and

¹ Peter Sankoff, 'A Subject in Search of Scholarship' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (The Federation Press, 2009) 389.

² For key writings on the moral status of nonhuman animals see for example : Peter Singer, *Animal Liberation* (2nd ed, Pimlico, 1990), Mary Midgley, 'Is a Dolphin a Person?' in Peter Singer (ed), *Defense of Animals* (Blackwell, 1985) 52, Cass Sunstein, 'Standing for Animals (with Notes on Animal Rights)' (2000) 47 *UCLA Law Review* 1333, Cass Sunstein and Martha Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press,2004), Tom Regan, *The Case for Animal Rights* (2nd ed, University of California Press, 2004).

³ Deborah Cao, *Animal Law in Australia and New Zealand* (Thomson Reuters, 2010) 98.

commerce that involve nonhuman animals.⁴ Family law implicates nonhuman animals where there are disputes over pet ownership and custody.⁵ In addition, International law is relevant where Australia has signed international treaties pertaining to animals and their welfare, which may also inform and guide local Australian law making.⁶ All of these disciplines constitute part of the focus of animal law. Animal law is also necessarily concerned with broader jurisprudential issues, such as the legal construction of nonhuman animals as ‘property’, how legal standing operates to exclude or enable nonhuman animals to be represented in Court, issues regarding the enforcement of law and the funding of animal law enforcement agencies such as the RSPCA, and the effect of political pressures on proposed statutory reform.

The study of animal law is also interdisciplinary in nature. This is because animal law, much like all areas of law, ‘involves the study of power relationships’.⁷ Philosophical and political perspectives are key to understanding how these relationships are created and sustained. Further, since animal law is connected to the goal of strengthening the legal mechanisms that seek to protect nonhuman animals from harm, the study of animal law necessarily involves analysis of the political and philosophical context in which our law is constructed. Though animal law is interdisciplinary in nature, this thesis seeks to contribute only to legal conversations. The breadth of philosophical materials that exist on the moral standing of nonhuman animals, thus does not form part of the focus of this literature review.⁸

The existing literature in animal law tends to share a concern for the lack of genuine protections provided to nonhuman animals by law. Graeme McEwan suggests Australia’s state-based welfare laws provide merely a bandaid solution for animal welfare, ‘when radical surgery is required’.⁹ Elizabeth Ellis has described nonhuman animals as being ‘objectified’

⁴ For example, in the case of *Department of Regional Government and Local Department v Emmanuel Exports Pty Ltd Et Al* (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008) it was held that the *Animal Welfare Act 2002* (WA) was operationally inconsistent with the Federal live export laws, pursuant to section 109 of the Commonwealth Constitution.

⁵ Tony Bogdanoski, ‘Towards an Animal-Friendly Family Law: Recognising the Welfare of Family Law’s Forgotten Family Members’ (2010) 19 *Griffith Law Review* 197.

⁶ For example, Australia is signatory to the *International Convention for the Regulation of Whaling*, Opened for Signature 2nd December 1946, [1948] ATS 18 (Entered into Force 10 November 1948).

⁷ Sankoff, above n 1, 397.

⁸ For example Singer, above n 2; Tom Regan, *The Case for Animal Rights* (2nd ed, University of California Press, 2004); Mary Midgley, *Animals and Why They Matter: A Journey around the Species Barrier* (Penguin Books, 1983).

⁹ Graeme McEwan, ‘Strategic Litigation and Law Reform’ (2011) 7 *Journal of Animal Law* 91, 102.

both in and by law,¹⁰ and Deborah Cao remarks that ‘the bulk of animal cruelty in Australia is institutionalised and not actionable in law’.¹¹ Further, former Australian democrat senator Andrew Bartlett contends Australia’s animal law system is marked by ‘weaknesses and omissions’.¹² Key texts in the field of animal law can therefore be said to do one of two things. Some identify the weakness of the existing framework and make a case for animal welfare law reform. Others campaign for the complete abolition of the existing legal paradigm, to create a space for completely re-thinking how nonhuman animals are treated by law. This thesis commences the different task of explaining and describing precisely *how* nonhuman animals are treated cruelly by law. I explain this distinction further below.

This review of animal welfare literature is divided into three key themes: (1) The legal status of nonhuman animals, (2) Failing Welfare Laws and Codes of Cruelty (3) Practical Issues in Animal Law. Though I make this division for the purposes of clarity, these themes are all interconnected and thus literature that covers one of these themes almost always touches upon others. In the final section of this chapter, I explain the unique contribution of this thesis to the discipline of animal law.

II. LEGAL STATUS OF NONHUMAN ANIMALS

The legal status of nonhuman animals is a key focus of many animal law texts because it is precisely the legal status of nonhuman animals as objects that characterises their treatment in law. It is a starting point that I share, as I discuss their legal status in the first substantive chapter (chapter three). Existing commentaries on the legal status of nonhuman animals are generally concerned with the way in which the characterisation of nonhuman animals as property affects their welfare. Leading commentators on the legal status of nonhuman animals, Gary Francione and Steven Wise, contend that nonhuman animals are classified as legal ‘things’. Because of this legal status, both Francione and Wise contend that nonhuman animals can be used, exploited and disposed of at the whim of their human owner with

¹⁰ Elizabeth Ellis, ‘Collaborative Advocacy: Framing the Interests of Animals as a Social Justice Concern’ in Steven White and Peter Sankoff (eds), *Animal Law in Australasia* (The Federation Press, 2009) 354, 357.

¹¹ Cao, above n 3, 204.

¹² Andrew Bartlett, ‘Animal Welfare in a Federal System: A Federal Politician’s Perspective’ in Steven White and Peter Sankoff (eds), *Animal Law in Australasia* (The Federation Press, 2009) 376, 377.

minimal legal restrictions.¹³ Though both Wise and Francione write in the American context, their thinking is applicable to Australia and other jurisdictions where nonhuman animals are defined as property. In Australia, animal welfare provisions purport to temper the rights of human owners in how they may treat their nonhuman animal property. However, as Wise and Francione contend, there exists a great power imbalance that is generated by the classification of nonhuman animal as property, which has a great effect on how their interests are reflected in law. Nonhuman animals are protected only insofar as that protection does not impinge greatly on the human interest and property right to treat their nonhuman animal (property) however they please.¹⁴ This problematic nature of the characterisations of nonhuman animals as ‘property’ has been well established by the arguments of Wise and Francione that I describe in the following section.

Animal law literature to date has provided less attention to critically evaluating the existing legal categories of the ‘person’ and ‘property’ in law. In chapter three of my thesis, I offer a critical explanation of these concepts to reveal that nonhuman animals are not only excluded from the category of the ‘person’, but the very construction of the ‘person’ by lawyers, commentators and jurists necessitates their exclusion. My argument is that the ‘person’ in law is reserved for either human beings, or for entities who, by virtue of being legal persons, can better serve human interests. Wise and Francione, who passionately campaign for the inclusion of nonhuman animals in the category of the legal person, are not attuned to this problem. Thus, though I am sympathetic to the motivation behind their arguments, they unwittingly compound the problem faced by nonhuman animals. In demanding that nonhuman animals be included within the category of the legal person, they appeal to the ‘humanness’ of nonhuman animals. Nonhuman animals, they reason, are like humans in important ways – and should therefore be afforded the same legal characterisation as human persons. The problem with this argument, is that it affirms a problematic conception of the legal person that consistently excludes nonhuman animals from its reach. For as long as the legal person is constructed to reflect *humanness*, it remains a category that necessarily

¹³ Gary Francione, *Animals, Property and the Law* (Temple University Press, 1995) 3-6, Steven Wise, *Rattling the Cage* (Cambridge Press, 2000) 1-7.

¹⁴More generally see Paul Babeie, 'Choices That Matter: Three Propositions on the Individual, Private Property, and Anthropogenic Climate Change' (2011) 22 *Colorado Journal of International Environmental Law and Policy* 323.

excludes nonhuman animals. In the sections that follow, I offer a brief overview of Francione and Wise's key writings on the topic (and return to them again in chapter three).

In *Animals, Property, and the Law*, Gary Francione argues for a complete re-thinking of the legal treatment of nonhuman animals. At the centre of Francione's argument is his view that the legal characterisation of nonhuman animals as legal 'things' casts them as the objects of a property relationship, such that they can be legitimately used and exploited by their human owners.¹⁵ Francione suggests that the role of existing animal welfare law is to *regulate* and *legitimate* animal cruelty, rather than *eradicate* it.¹⁶ Francione defines a welfarist legal system as one which reflects the moral view that 'there is *no* animal interest that cannot be overridden if the consequences of the overriding are sufficiently "beneficial" to human beings'.¹⁷ A welfarist system is thus concerned with *balancing* human and nonhuman animal interests to reach a 'compromise' position in which nonhuman animals are protected from some forms of cruelty, but in which humans may also still legitimately use and exploit them.

According to Francione, the compromise approach taken by welfare laws is necessarily underpinned by the assumption that the interests of nonhuman animals can always theoretically be sacrificed, provided a legitimate human reason exists.¹⁸ I consider what constitutes a 'legitimate' human interest in the fourth chapter. According to Francione, the view that nonhuman animals may be legitimately used for human purposes is inconsistent with his view that sentient nonhuman animals should have legal rights.¹⁹ I expand on this argument in chapter three. For Francione, the welfarist system is problematic because it does not inherently reject the use of nonhuman animals for human gain. Rather, by regulating the mistreatment of nonhuman animals for human purposes, it legitimates and facilitates cruelty towards them.²⁰

According to Francione, if animals were legal persons, and could possess legal rights, they would enjoy legal protection from harm, *irrespective* of any human benefits that may be lost

¹⁵ Francione, above n 13, 102.

¹⁶ Gary Francione, *Animals, Property and the Law* (Temple University Press, 1995) 5.

¹⁷ *Ibid* 6.

¹⁸ *Ibid* 102.

¹⁹ Sentience is where Francione 'draws the line' in deciding what nonhuman animals should be given rights.

See: Gary Francione, *Animal Rights: The Abolitionist Approach* <

<http://www.abolitionistapproach.com/faqs/#.WKe8s3dh1Z0> > at 17 February 2017.

²⁰ Francione, above n 13, 6.

as a result. Francione contends that this is the purpose of a legal right: ‘it stands as a barrier of sorts between the rightholder and everyone else’.²¹ Francione demands nonhuman animals should be attributed ‘respect based rights’ – that is, rights that are attributed to nonhuman animals in recognition of their fundamental moral value, rather than their utility.²² The first step, he reasons, in granting nonhuman animals these respect-based rights, is to abolish their property status. As legal ‘things’, Francione contends the interests of nonhuman animals can only ever be protected insofar as their protection does not impinge upon the legal rights of their owners to use them as they see fit. Thus, until nonhuman animals are removed from property status, they will remain objects who can be used for instrumental goals that fulfil a certain human need, desire or whim.²³ I return to Francione’s argument in chapter three of this thesis.

Steven Wise makes a similar argument for regarding some nonhuman animals as legal persons in his books *Rattling the Cage*, and *Unlocking the Cage*. Wise claims there exists a ‘thick and impenetrable legal wall’ which has separated humans from nonhuman animals in law.²⁴ This wall, he suggests, has protected the interests of the human species – no matter how trivial. Simultaneously, the wall has cast the entire nonhuman animal kingdom to the side of ‘legal refuse’, where their lives and basic freedoms, are ‘intentionally ignored and often maliciously trampled and routinely abused’.²⁵ Wise uses scientific information to illustrate the complex capacities of nonhuman animals, which are in many instances analogous to those possessed by humans. He suggests that by analogy to the human case, the legal classification of nonhuman animals as ‘property’ is arbitrary, given that we attribute legal rights to humans who possess more limited capacities than some nonhuman animal species.²⁶ I critique this assertion in chapter three, and suggest that Wise fails to identify the problem he faces if he insists on human measures of value. Human measures of value, I argue, explicitly exclude the nonhuman.

In *Rattling the Cage*, Wise argues for the legal personhood of two specific species: Chimpanzees and Bonobos. He does so not only because they are routinely used in cruel

²¹ Gary Francione, *Animals, Property and the Law* (Temple University Press, 1995)107.

²² Ibid107-110.

²³ Ibid102.

²⁴ Wise, above n 13, 4.

²⁵ Ibid 4.

²⁶ Steven Wise, *Rattling the Cage* (Cambridge Press, 2000) 245.

ways for human purposes, but also because scientific evidence reveals that they possess capabilities similar to humans. Wise contends that Chimpanzees and Bonobos are profoundly like human beings in morally relevant ways, and that they are therefore entitled to the legal personhood that we grant to human beings. If we grant legal personhood to humans who lack certain mental capacities, such as infants, or those suffering from a profound intellectual disability, on what basis ought we refuse the personhood of nonhuman animals? To fail to do so, Wise contends, amounts to arbitrary discrimination based on species membership.²⁷ As Peter Singer puts it, it is ‘speciesist’.²⁸ In making his argument, Wise can be seen to invoke the principle of equality: ‘the essence of equality under law is that individuals with similar cognitive capacities should be treated alike regardless of their species’.²⁹

In *Unlocking the Cage*, Wise conducts an analysis of scientific information about a range of nonhuman animal species, to show which nonhuman animals can meet the criteria for legal personhood, and *why*. Wise adopts two principles to conduct his analysis: the principles of liberty and equality. Equality, he writes, requires that ‘likes be treated alike’.³⁰ Liberty, according to Wise, is a right that attaches to one’s autonomy, and that ‘entitles one to be treated in a certain way because of facts about how one is made’.³¹ For Wise, an assessment of scientific facts about nonhuman animals, read in conjunction with these two principles, (which he contends are the ‘first principles of Western law’),³² compels us to invite other species into the category of legal persons, requiring the attribution of certain legal rights to them.

Though I am most sympathetic to Wise’s argument, I also contend that he overstates the simplicity of the task before him. My argument in chapter three is that the category of the legal ‘person’ is not the empty slot that Wise seems to think it is. Both Wise and Francione offer compelling arguments in favour of granting legal rights to nonhuman animals, but are limited by a lack of precision in explaining precisely what the category of the legal person is and how it operates. By adding more clarity to the concept of the legal ‘person’, I offer a

²⁷ Richard Posner, ‘Animal Rights (Reviewing Steven M Wise, *Rattling the Cage: Toward Legal Rights for Animals*)’ (2000) 110 *The Yale Law Journal* 527, 528

²⁸ Singer, above n 2, 9.

²⁹ Richard Posner, ‘Animal Rights (Reviewing Steven M Wise, *Rattling the Cage: Toward Legal Rights for Animals*)’ (2000) 110 *The Yale Law Journal* 527, 531.

³⁰ Steven Wise, *Unlocking the Cage* (Persues Press, 2002)29.

³¹ *Ibid* 29.

³² *Ibid* 29.

more critical starting point for conversations about the legal status of nonhuman animals than that which has been offered in existing literature. My hope is that this revised starting point may generate new ideas with respect to how the law should classify nonhuman animals which may see nonhuman animals removed from the status of property.

Other thinkers have thought differently about how we might provide nonhuman animals legal rights, without inviting nonhuman animals into the category of legal personhood. Whilst I offer a brief overview of David Favre's approach in the following paragraphs, I do not return to his writing throughout this thesis. This is because Favre's work is concerned predominantly with *solving* the legal problem that nonhuman animals face. As I stated in the introduction to this thesis, my task in this thesis is concerned not with identifying solutions to lawful animal cruelty, but with clarifying, explaining and reconceptualising the problem in the first place. Favre is scathing of perspectives that demand the immediate abolition of the property status of nonhuman animals as Francione does. He polemically envisions the potentially chaotic consequences of such a move: 15,000,000 chickens released from cages and shooed into the wild; 1,000,000 dogs fleeing their homes following a court finding that they could not lawfully be held against their will; animals being left property in wills - leaving a large percentage of the wealth tied up in 'animal trusts'; and pets taking ownership of homes through the concept of 'adverse possession'.³³ Favre contends that to abolish the property paradigm as it relates to nonhuman animals would lead to the elimination of domesticated animals entirely – something that he contends would be 'wrong in and of itself'.³⁴

Favre instead promotes an incremental approach to law reform, contending that movements motivated by 'only the purest philosophical position[s]' are politically unrealistic and therefore practically impossible.³⁵ Favre conceptualises a new property paradigm: equitable self-ownership. He summarises it as follows: 'unless a human has affirmatively asserted lawful dominion and control so as to obtain title to a living entity, then a living entity will be

³³ David Favre, 'A New Property Status for Animals: Equitable Self-Ownership' in Martha Nussbaum and Cass Sunstein (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 234, 236.

³⁴ David Favre, 'Integrating Animal Interests into Our Legal System' (2004) 10(87) *Animal Law* 87, 91.

³⁵ Favre, above n 33, 236.

considered to have self-ownership'.³⁶ When a human does take title over a nonhuman animal as property, Favre envisions a severance of the legal and equitable components of property ownership. The human owner takes only the *legal* title, leaving the *equitable* title in the possession of the nonhuman animal themselves.³⁷ Favre likens this legal framework to that of parent and child: the parent is the primary person responsible for the child, but must act in the interests of the child. Thus, in the human-animal context, Favre contends the human would enjoy exclusive possession of the nonhuman animal, but would be bound by certain terms in how that animal is treated.

According to Favre, equitable self-ownership would provide nonhuman animals not with legally enforceable rights (which he contends they already have), but with the ability to act in law through a guardian. Nonhuman animals will, he suggests, become 'juristic persons'.³⁸ Under this model, Favre suggests human guardians could initiate legal action on behalf of their animals where their rights have been unlawfully impinged upon, without relying upon action by the State. Further, a remedy would be made available which is capable of directly benefiting the animal that has been harmed, instead of the animal's human owner. In the Australian context, Tony Bogdanoski contends that family law practice provides an opportunity for Favre's theory of self-ownership to be applied in practice.³⁹ Bogdanoski points specifically to the context of custody disputes over pets, as one area of law in which the property paradigm is already being challenged, and in which the law is giving weight to the interests of a nonhuman animal.

In other writing, Favre proposes the introduction of a tort law, which can be used by a guardian on behalf of a nonhuman animal against humans. This tort, he suggests, would be available as a cause of action where a nonhuman animal has had their fundamental interests interfered with, and such interference was not for the purposes of the assertion of a 'more

³⁶ Ibid 237.

³⁷ It is an existing principle of property law that property ownership can be split into two distinct titles: legal and equitable. Legal title generally represents the legal ownership of the property, whilst equitable title provides a holder with the right to use, enjoy and benefit from the property. The distinction is useful in the context of trusts, in which the trustee holds the legal title to the trust, while the beneficiary to the trust holds the equitable title.

³⁸ Favre, above n 33, 244.

³⁹ Tony Bogdanoski, 'A Companion Animal's Worth: The Only 'Family Member' Still Regarded as Legal Property' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, The Federation Press, 2013) 84.

important, human interest'.⁴⁰ Whilst Favre's suggestion for a new tort law arguably does not establish standards much greater than existing anti-cruelty standards, he contends this tort law would bring nonhuman animals into focus in law: the obligation would be owed to them personally (not their owners), and not to the State under criminal law, as is currently the case.⁴¹ As such, nonhuman animals (via a human representative) could take action for wrongs committed against them.

III. FAILING WELFARE LAWS AND CODES OF CRUELTY

Another focus of scholarship in the discipline of animal law is on the failings of animal welfare laws. Peter Sankoff is an important contributor to this area. In *Animal Law in Australasia* Sankoff critiques the animal welfare legal paradigm. He begins by noting that prosecuting a person under Australian animal welfare law involves establishing two things. First, it must be proved that a person inflicted pain or suffering on a nonhuman animal. This is a factual question, which can generally be answered with respect to expert veterinary evidence. Second, it must be proved that the pain or suffering that was inflicted can be deemed 'unreasonable', or 'unnecessary' in the circumstances.⁴² This is a question of proportionality, and involves a determination of whether the harm inflicted upon a nonhuman animal is acceptable given the potential benefits it has provided to humans.

Sankoff examines this proportionality test and argues that it is effective only in addressing clear-cut cases of intentional animal cruelty, for no reason other than sadistic enjoyment.⁴³ Steven White describes the test as reflecting a surreptitious acceptance that cruelty can indeed be *necessary*.⁴⁴ Though the balancing act may purport to be a neutral test of proportionality in which the interests of humans are weighed against the interests of nonhumans, the practical application of the test reveals a strong bias towards the interests of humans.⁴⁵ Thus,

⁴⁰ Favre, above n 34, 96.

⁴¹ Ibid 96.

⁴² Peter Sankoff, 'The Welfare Paradigm: Making the World a Better Place for Animals?' in Peter Sankoff and Steven White (eds), *Animal Law in Australia* (The Federation Press, 2009) 7, 14.

⁴³ Ibid 15.

⁴⁴ Steven White, 'Legislating for Animal Welfare: Making the Interests of Animals Count' (2003) 28(6) *Alternative Law Journal* 277, 279.

⁴⁵ Sankoff, above n 42, 21.

[i]nstead of a neutral balance, whereby human need is balanced against animal suffering, we are presented with a balance tilted heavily from the outset in favour of justification of harm. In effect, human need weighs more than animal suffering, in that it is valued in a much more significant way.⁴⁶

The result is that many cases of severe animal suffering are accepted because they provide some comparatively minor human gain. As Michael Fox describes it, the law serves to ‘negate animals’ basic interests and keep them in permanent servitude to human desire’.⁴⁷ ‘Necessity’ therefore becomes largely synonymous with ‘reasonable desire’.⁴⁸ Sankoff points to the example of battery hens, who are deprived of any quality of life, and suffer long-term health consequences due to their mistreatment. The law does not classify their mistreatment as criminal, because the suffering of those chickens provides humans with the benefit of cheap eggs. Commenting on the same example, Cao argues that the law proclaims to protect chickens from cruelty, whilst having the effect of entrenching their pain and suffering as ‘acceptable’ in law.⁴⁹

In determining whether human needs or desires should be given preference in the welfare calculus, Sankoff points to two other questions that need to be answered: whether the purpose of the harm is legitimate, and whether the harm is inflicted is reasonable. Sankoff suggests that the ‘legitimate purpose’ test turns on a consideration of human needs and desires. I return to this point in chapter four, where I link the concept of ‘reasonableness’ and ‘necessity’ to empirical research by Dan Kahan, to demonstrate that human interests are always paramount in determining when cruelty is justified.

Despite the fact that human interests predominate in the calculus of ‘necessary’ cruelty, in chapter four I also explain that the prohibition on unnecessary cruelty performs very limited protective work, and that its legal function has been overstated in animal law literature. In chapter six, I also offer a new perspective on Australian animal welfare laws, and argue that they fail to protect nonhuman animals not only in virtue of what they *prohibit*, but also in

⁴⁶ Ibid.

⁴⁷ Michael Fox, ‘Animal Law in Australasia: A New Dialogue, Animal Law in Australia and New Zealand (Book Reviews)’ (2011) 36(1) *Alternative Law Journal* 72, 73.

⁴⁸ Sankoff, above n 42, 22.

⁴⁹ Cao, above n 3, 212.

virtue of what *they don't prohibit*. As part of this discussion I also explain how Australian animal welfares declare 'inaction' with respect to some of the worst forms of cruelty. Such an argument has not been made in existing literature. My argument is not only that Australian animal welfare laws are 'inadequate' or contain 'gaps', but that they also contain a very deliberate and conscious 'declaration of inaction' with respect to some egregious forms of cruelty.

Sankoff has also written on several discrete animal law issues. In *The Animal Rights Debate and the Expansion of Public Discourse*, Sankoff suggests that public discourse is essential to encouraging democratic law reform in animal welfare law, and that law should therefore be structured so as to promote 'vibrant and ongoing discourse'.⁵⁰ Law that is vague, or law whose application rests on a number of unspoken premises, does little to promote guidance for meaningful debate.⁵¹ Sankoff criticizes Canadian animal welfare law on this basis, arguing that it consists primarily of only two provisions buried within the *Criminal Code*. These provisions give little content to the term 'cruelty', and thus operate based on a 'simple binary equation': an act is either 'right' or 'wrong'. Yet, as Sankoff illustrates, the law is not this black and white. Rather, it is 'almost entirely gray – albeit a shade of gray that is rarely discussed in public'.⁵² He argues that '[b]y creating a standard that notionally governs the treatment of all animals the law operates a mile wide and an inch deep with an approach so vague that it fails to provide any guidance for meaningful public debate'.⁵³ In Chapter seven, I make a similar case in the context of Australian animal welfare laws, and argue that they fail to accurately communicate their standards to the Australian public. I conceptualise Australian animal welfare laws as generating a 'myth' of animal protection, with the result that cruelty is made *invisible*.

A. Critique of Australian Codes of Practice

Graeme McEwan observes that Australian animal welfare Codes of Practice are riddled with problems. Firstly, they purport to be constructed by an 'Animal Welfare Committee', yet the

⁵⁰ Peter Sankoff, 'The Animal Rights Debate and the Expansion of Public Discourse: Is It Possible for the Law Protecting Animals to Simultaneously Fail and Succeed?' (2012) 18(2) *Animal Law* 281, 320.

⁵¹ *Ibid* 298.

⁵² Peter Sankoff, 'The Failure to Enforce Criminal Law: Does It Impede the Development of Social Discourse on Important Policy Issues?' (2013) 46(1) *House of Riron* 105, 122.

⁵³ *Ibid* 46.

committee membership reveals that the group has no representative on the topic of animal welfare.⁵⁴ Steven White and Arjna Dale have also assessed the process by which Codes of Practice are developed, to reveal that the process itself lacks integrity and is unduly influenced by industry.⁵⁵

Further, the Codes purport to be a 'set of guidelines', detailing 'minimum standards', whilst also claiming to assist people in understanding what is expected of them to meet the standards of care outlined in state-based welfare legislation. Yet, under these Codes, we see the facilitation of cruel factory farming methods,⁵⁶ through provisions that purport to exist for the purposes of animal welfare.⁵⁷ Codes adopt vague terminology that legitimate virtually any practice that is considered necessary within industry for the purposes of animal husbandry.⁵⁸

Deborah Cao echoes McEwan's concerns, noting that welfare codes authorize 'accepted animal husbandry practice', and thus permit acts that would be unlawful if they were to be inflicted upon a nonhuman animal who was not within the relevant industry.⁵⁹ It is in this way that we see the cosmetic tail docking of dogs (even performed by a trained vet under anesthesia) outlawed, while the cutting of piglets tails without anesthetic remains acceptable and lawful practice. Katrina Sharman also points to the 'corporatization of animal production',⁶⁰ which has given rise to the prioritisation of business interests over nonhuman animal welfare. In many instances, this means that routine industry practices are automatically permitted by law, regardless of how cruel they are. I discuss Codes of Practice throughout this thesis, and address them in particular detail in chapter four. In addition, I explain and analyse the significant of the current transition away from state based Codes of Practice, towards national Standards and Guidelines. Whilst the adoption of consistent

⁵⁴ Graeme McEwan, *Animal Law: Principles and Frontiers* (Barister's Animal Welfare Panel, 2011) 17.

⁵⁵ Arnja Dale and Steven White, 'Codifying Animal Welfare Standards: Foundations for Better Animal Protections or Merely a Facade?' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, The Federation Press, 2013) 151

⁵⁶ A factory farm is a farm in which industrial procedures are adopted (for example, battery accommodation, mechanical feeding etc.): Susan Butler (ed) *Macquarie Dictionary* (online ed, at 27 November 2017) 'factory farming'.

⁵⁷ Katrina Sharman, 'Farm Animals and Welfare Law: An Unhappy Union' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, The Federation Press, 2013) 61, 77.

⁵⁸ *Ibid* 76.

⁵⁹ Cao, above n 3, 208.

⁶⁰ Sharman, above n 57, 63.

Standards and Guidelines across all Australian jurisdictions offers greater uniformity than state-based Codes of Practice, I will argue that their development is unduly influenced by those who have a positive interest in the continuation of cruel practices, with the result that in many instances, they operate to permit cruelty in the same way that Codes of Practice do. Throughout this thesis I offer a more critical assessment of both Codes of Practice and Standards and Guidelines than that which has been offered in existing animal law literature. In chapter five, I conceptualise Codes of Practice and Standards and Guidelines as *commodifying* nonhuman animals. In chapter seven, I explain how they facilitate a myth of animal protection.

IV. PRACTICAL ISSUES IN ANIMAL LAW

There are several other practical issues in Animal Law which receive particular attention in the current literature. They are legal standing, poor enforcement of welfare laws, and lenient judicial sentencing. I outline each in turn.

A. Animals and Legal Standing

The legal status of nonhuman animals has been given a great deal of attention in the literature. This is because how a ‘thing’ is characterized by law has grave implications for how they are treated and what protections they are accorded. In brief, only a legal person has the capacity to act in law. Legal things do not. Since nonhuman animals are characterized as legal things, enforcing the laws which purport to protect their interests is difficult. Cass Sunstein suggests that absent adequate mechanisms to enforce existing laws, ‘they are worth little more than the paper on which they are written’.⁶¹ Favre made a similar point, stating that his guardianship model would offer nonhuman animals greater opportunities to enforce their legal rights.⁶²

Sunstein identifies three major impediments to enforcement of animal welfare law in the United States context that are relevant also to the Australian jurisdiction. Firstly, enforcement

⁶¹ Cass Sunstein, ‘Can Animals Sue?’ in Martha Nussbaum and Cass Sunstein (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 251, 252.

⁶² Favre, above n 33, 244.

of animal welfare laws can only occur through public prosecution. It is therefore, only possible to prosecute animal welfare law where the state initiates the action.⁶³ Secondly, duties to animals only tend to exist where an identifiable ownership relationship exists. Sunstein therefore reasons that humans do not have duties towards nonhuman animals that are not within one's care or under one's control. There is no duty of mandatory reporting for the observation of cruelty towards nonhuman animals (or human beings in most circumstances for that matter). I discuss this point in chapter eight, in the context of legislation that seeks to stifle acts of activism on behalf of nonhuman animals. Thirdly, legal protections for nonhuman animals explicitly exempt a great deal of nonhuman animals from their reach. Animals used for human purposes, such as food or research, therefore do not receive the protection of law.⁶⁴

Graeme McEwan makes a similar observation in the Australian context, noting that Codes of Practice effectively exempt millions of nonhuman animals from the reach of animal welfare laws, making enforcement of laws prohibiting cruelty against them practically impossible. Due to weak laws and chronic underfunding, McEwan also highlights the importance of 'strategic litigation', which seeks to advance the interests of nonhuman animals using legal avenues other than those provided by welfare laws.⁶⁵ The use of consumer law to mandate fair labeling of nonhuman animal food products provides an example of this. I return to this discussion in chapter seven.

B. Enforcement

Enforcement of animal welfare laws in Australia is on a state-by-state basis. There exists no national body responsible for enforcing welfare laws.⁶⁶ For the most part, the responsibility for the enforcement of Animal Welfare laws is predominately with the Royal Society for the Prevention of Cruelty to Animals ('RSPCA') in each state.⁶⁷ White argues that 'the

⁶³ In Australia, the RSPCA also has the ability to prosecute animal welfare cases.

⁶⁴ Sunstein, above n 61, 253.

⁶⁵ McEwan, above n 9, 91.

⁶⁶ Cao, above n 3, 212.

⁶⁷ The RSPCA Australia is a community based charity that is a Federation of eight independent state and Territory RSPCA member bodies.

effectiveness of animal welfare legislation is critically dependent on enforcement'.⁶⁸ Yet, the powers of RSPCA animal welfare inspectors are extremely limited.⁶⁹ Not only do they lack legal power, but they are also chronically underfunded and charged with the responsibility of policing and enforcing animal welfare laws across Australia (with the exception of the Northern Territory).⁷⁰ Although the police and some government departments have the power to enforce welfare legislation, the RSPCA remains the primary actor. I discuss the role of the RSPCA as law enforcers in detail in chapter seven. In the New Zealand context, Peter Sankoff notes that enforcement in the area of animal welfare law is marked also by other struggles: animals ('the victims') cannot speak or testify, those who enforce animal welfare laws are generally involved in battles on numerous fronts, and, 'without a shift in consciousness, it is difficult to imagine crimes against animals ever being one of law enforcement's priorities, no matter how high Parliament sets the penalty for crimes'.⁷¹

As a result of these factors, animal cruelty is rarely prosecuted. In 2010, Cao provided that *Brayshaw v Liosatos*⁷² was the only farm-animal related prosecution to take place in the Australian Capital Territory in recent years.⁷³ Due to funding limitations, only those cases which involve clear-cut egregious cruelty proceed to prosecution. In chapter seven, I also extend these critiques on the enforcement of Australian animal welfare laws to suggest that it is not only *inadequate*, but that Australian animal welfare laws *necessitate* its inadequacy.

C. Sentencing

Sentencing is another area of concern in existing animal law literature. Katrina Sharman details the leniency given to those who are convicted of cruelty to nonhuman animals.⁷⁴ One example occurred in 2001 when a man appeared before Ryde Court and pleaded guilty to

⁶⁸ Steven White, 'Legislating for Animal Welfare: Making the Interests of Animals Count' (2003) 28(6) *Alternative Law Journal* 277, 280.

⁶⁹ Cao, above n 3, 221-230.

⁷⁰ *Ibid.*

⁷¹ Peter Sankoff, 'Five Years of the "New" Animal Welfare Regime: Lessons Learned from New Zealand's Decision to Modernize Its Animal Welfare Legislation' (2005) 11(7) *Animal Law* 7, 25.

⁷² [2001] ACTSC 2. The Brayshaw brothers were convicted of offences under ss89(2)(a) and (d) of the *Animal Welfare Act 1992* (ACT) in relation to 170 head of cattle, for failure to provide appropriate and adequate food/water/shelter or exercise, and for neglecting the animals so as to cause them pain.

⁷³ Cao, above n 3, 215.

⁷⁴ Katrina Sharman, 'Sentencing under Our Anticruelty Statutes: Why Our Leniency Will Come Back to Bite Us' (2002) 13(3) *Current Issues in Criminal Justice* 333

putting his sister's kitten in a freezer for up to 40 minutes, attempting to set the kitten's whiskers alight, spraying it with an aerosol and throwing steak knives at it before killing it by stoning. Under the applicable New South Wales *Prevention of Cruelty to Animals Act 1979*, this man faced a maximum penalty of \$11,000 or two years' imprisonment. Yet, he was released on a good behavior bond. Sharman contends that lenient sentencing in cases of animal cruelty are the status quo, citing the fact that between 1996 and 2000, only 3% of those who were convicted of animal cruelty were imprisoned.⁷⁵

Jed Goodfellow contrasts two approaches to regulation of animal welfare which he claims are both used in the Australian animal law context which help explain the inadequate sentencing that Sharman is concerned with. Namely, a deterrence approach and a compliance approach.⁷⁶ In general, a deterrence-oriented approach to regulation punishes those who fail to adhere to a legal rule. Such an approach also aims to deter an unwanted behavior by threat of punishment for non-compliance. Goodfellow contends this is the approach adopted by animal welfare legislation, which criminalizes cruelty towards nonhuman animals and is applied in a 'top-down' manner.⁷⁷ A compliance approach, in contrast, facilitates cooperation, through the provision of advice and education. This approach is evident in the application of Codes of Practice and regulations that govern the treatment of nonhuman animals in industry. As such, industry effectively polices itself, and the approach to non-compliance is generally dialogic in nature.⁷⁸ According to Goodfellow, such an approach seeks to *manage* animal mistreatment, rather than eradicate it – and it thus represents an unacceptable failure in animal welfare regulation.⁷⁹ I do not return to consider sentencing issues in further detail in this thesis.

⁷⁵ Ibid, 333.

⁷⁶ Jed Goodfellow, 'Animal Welfare Law Enforcement: To Punish or Pursuade?' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, The Federation Press, 2013) 183.

⁷⁷ Ibid 189.

⁷⁸ Ibid 196.

⁷⁹ Ibid 206.

V. THE UNIQUE CONTRIBUTION OFFERED BY THIS THESIS

Whilst this thesis is informed and influenced greatly by the aforementioned literature, I offer a unique approach to analysing Australian animal welfare law. I conceptualise the problem of lawful animal cruelty as one that is inadequately understood, and thus difficult to solve. My unique contribution to the problem of lawful animal cruelty in Australia is thus to identify the multiple and complex ways in which Australian nonhuman animals are treated cruelly. Rather than simply identifying the problematic results of the law's inadequate animal welfare provisions, this thesis offers a new, sustained and detailed analysis of *how* and *why* these provisions enable cruelty. The approach I adopt is therefore concerned not with solving the problem of lawful animal cruelty, but with identifying and articulating what the problem is in the first place. Put another way, I explain the role of animal welfare laws in creating and perpetuating this problem.

The sustained analysis of Australian animal welfare legislation offered in this thesis is the first of its kind. My aim is to reveal the complex and multifaceted ways that our law not only fails to *prohibit* cruelty – but *facilitates* cruelty. My hope is that the unique contribution offered by this thesis will generate new and different future research questions that may build towards meaningful law reform options to better protect nonhuman animals in law. By establishing precisely what the legal problem is for nonhuman animals, I lay new groundwork for theorizing different ways for thinking about and solving the problem in future research.

This thesis also builds upon existing literature with a cross-disciplinary approach that examines and applies knowledge from other disciplines to gain a deeper and more critical understanding of precisely how the law is failing to protect nonhuman animals. I also offer a novel application of existing legal principles to the area of Australian animal welfare law. In chapter seven for example, I consider the traditional criminal law principle of 'fair labelling', and apply it to Australian animal welfare legislation. In chapter six, I identify the operation of 'legal fictions' within Australian animal welfare legislation, which has not been done before. In chapter five, I also theorize Codes of Practice as *commodifying* nonhuman animals. Though I draw on existing literature to sustain my arguments in this chapter, my application of these theories to Australian Codes of Practice is new. In chapter eight, I also expand upon existing literature which seeks to define civil disobedience in the context of trespass on behalf of animal activists.

**CHAPTER 3: LEGAL PERSONS, LEGAL THINGS AND SOMETHING IN
BETWEEN**

I. INTRODUCTION

‘Legally, persons count, things don’t’.¹

‘[P]ersonhood is the legal bulwark that protects everybody, every personality, against human tyranny’.²

A common starting point for discussions around the law’s failure to protect nonhuman animals from harm is the legal status of nonhuman animals as property.³ I share this starting point, because the legal status of nonhuman animals is central to wider discussions in this thesis about how Australian animal welfare legislation and Codes of Practice facilitates cruelty. It is the legal characterisation of nonhuman animals as legal property that fundamentally shapes the protections they are provided with by Australian animal welfare legislation. An assessment of the legal status of nonhuman animals is thus fundamental to considering how and why Australian animal welfare laws allow nonhuman animals to be treated cruelly. We will see this clearly in chapter four, where I analyse the anti-cruelty provisions of Australian animal welfare legislation to reveal that they are shaped by the view that nonhuman animals are ‘property’, and are thus nonhuman animals are only entitled to protections insofar as those protections do not too greatly impinge upon the interests of a human property owner.

The legal status of nonhuman animals as property is central to their cruel treatment by law because as property, nonhuman animals are classified as objects.⁴ Though they receive some important legal protections for their interests, these protections are limited in scope by the owner/property relationship, in which the property interests of humans are almost always given precedence over the interests of nonhuman animals. It is for this reason that Steven Wise says that ‘[u]ntil, and unless, a nonhuman animal attains legal personhood, she will not

¹ Steven Wise, *Unlocking the Cage* (Persues Press, 2002) 21.

² Steven Wise, 'Animal Rights, One Step at a Time' in Cass Sunstein and Martha Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 19, 25.

³ For example, note the centrality of discussion on legal status of nonhuman animals in: Gary Francione, 'Animals - Property or Persons?' in Cass Sunstein and Martha Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 108, Gary Francione, *Animals, Property and the Law* (Temple University Press, 1995), Steven Wise, *Rattling the Cage* (Cambridge Press, 2000), Deborah Cao, *Animal Law in Australia* (2nd ed, Thomson Reuters, 2015) 69-102.

⁴ Francione, *Animals Property and the Law*, above n 3, 3-6; Wise above n 3, 1-7.

count'.⁵ Gary Francione makes a similar claim, surmising that '[a]nimals are *things* that we own that have only extrinsic or conditional value as means to our ends....as far as the law is concerned...animals are nothing more than commodities'.⁶

In this chapter, I offer a definition of the terms 'property' and 'persons' to reveal precisely how the property status of nonhuman animals facilitates cruelty against them. This discussion takes place within the confines of the liberal, positivist law tradition, and thus does not extend to consider competing conceptions of personhood or property that challenge existing legal paradigms.⁷ Wise and Francione, who are considered key thinkers on the legal status of nonhuman animals,⁸ do not provide such a definition and I contend that this has problematic implications for their work. Thus, an elucidation of the central concepts of 'property' and 'person' is central to my critique of Wise and Francione, and also forms the foundation for the remainder of my discussions in this thesis. Moreover, I make a unique contribution to discourse surrounding the legal status of nonhuman animals by suggesting not only that they suffer cruelty as legal 'property', but that the key thinkers who seek to alleviate them from this category implicitly affirm a definition of the legal 'person' that necessarily excludes nonhuman animals from its reach.

Drawing on the work of Ngaire Naffine, I suggest that the construct of the legal person can be broadly conceptualised in two different ways. First, on the Legalist view, personhood is viewed as legal 'fiction'. It is an 'empty slot' that bears no resemblance to human life. On this view, anything may be a person: it theoretically excludes nobody. Alternatively, on the Realist view, the person is conceptualised as reflecting some important aspect of *human* life. Though this view may take various forms, all statements of the realist view agree on one point: it is by virtue only of your *humanness* that you may be a person. The Legalist view of the person is typically relied upon as grounds to extend the construct of the person to nonhuman animals. It is thought to offer promise to nonhuman animals, because one need not

⁵ Wise, above n 2, 25.

⁶ Gary Francione, 'Reflections on Animals, Property and the Law and Rain without Thunder' 70(9) *Law and Contemporary Problems* 9, 9.

⁷ For an summary of different approaches to critiquing law, see Margaret Davies, 'Legal Theory and Law Reform' (2003) 28(4) *Alternative Law Journal* 168. See also Wendy Brown, 'Suffering Rights as Paradoxes' (2000) 7(2) *Constellations* 230; Wesley Smith, *Rat Is a Pig Is a Dog Is a Boy: The Human Cost of the Animal Rights Movement* (Encounter Books, 2010) 231-249.

⁸ See for example; Lee Hall, 'Introduction to Animal Rights: Your Child or the Dog? (Book Review)' (2000) 34(1) *Suffolk University Law Review* 83, 83; Wesley Smith, *Rat Is a Pig Is a Dog Is a Boy: The Human Cost of the Animal Rights Movement* (Encounter Books, 2010) 61.

be human to use it. Corporations are one example of a nonhuman entity that has been personified in law on this view. My suggestion in this chapter however, is that the Legalist view is consistently conflated with the Realist view – such that measures of human value are referred to in order to establish an argument for entry into the legal fiction of the person. I suggest that both Wise and Francione also conflate these views, and thus implicitly affirm the Realist conception of the person which systematically excludes nonhuman animals from its reach.

II. THE PERSON / PROPERTY DIVIDE

Even though our Earth is home to a vast continuum of living and non-living matter, Anglo-Australian law has constructed a division between two fundamental legal categories: ‘persons and things’.⁹ This distinction is fundamental to the operation of law, so much so, that Ngaire Naffine suggests that ‘these are the two major concepts employed by law to classify the world’.¹⁰ Yet, the two concepts are notoriously difficult to define. And, in many instances, it is possible to point to examples where the distinction between legal things and legal persons is complicated and blurred. Naffine, for example, points to the case of corporations – which simultaneously have both property and personhood status. They are akin to legal property when they are bought and sold, and they are akin to legal persons when they enforce their legal rights in the court.¹¹ It is also common to observe legal theorists conflating several conceptions of the legal person, with the result that they are ‘talking at cross purposes but may not be aware of this fact’.¹² The lack of certainty that exists around the definitions of legal personhood and legal property is problematic, given that this binary is so fundamental to the characterisation of nonhuman animals in law and shapes the type of protections that they are afforded.

⁹ Wise, above n 1, 21.

¹⁰ Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009) 48.

¹¹ *Ibid.*

¹² Ngaire Naffine, 'Legal Persons as Abstractions: The Extrapolation of Persons from the Male Case' in Visa Kurki and Tomasz Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer, 2017) 119, 15.

The legal characterisation of nonhuman animals is an important illustration of just how nuanced the definitions of legal ‘persons’ and legal ‘things’ can be. Naffine suggests that the two categories are not necessarily mutually exclusive, but rather ‘there can be a blending of the two concepts of personality and property; and a continuum may even be observed, from one to the other’.¹³ At common law, domestic (as opposed to wild) nonhuman animals in Australia are legally classified as property.¹⁴ The existence of pet shops and the Australian live export trade are illustrative of this fact – since they are evidence of the legal classification of nonhuman animals as merely a ‘tradable asset’.¹⁵ As a result of this classification, humans that own nonhuman animals are endowed with the power associated with the liberal trifecta of ownership. In the absence of regulation, property rights entitle a human owner to exclusively possess, use and dispose of nonhuman animals ‘property’.¹⁶

With respect to the ownership of nonhuman animals, human property rights are qualified to some extent by Australian animal welfare legislation. Animal welfare legislation recognises that nonhuman animals *are* capable of possessing interests – and, further, it requires that we take those interests into account. Interestingly, this is a characteristic normally reserved for those who enjoy legal personhood. Thus, whilst nonhuman animals are property that is legally owned by human owners – they are also protected by law in some important ways.

A. What is Legal Personhood?

In everyday language, the word ‘person’ refers *exclusively* to a human being. The Macquarie Dictionary expresses this common view – suggesting that a human ‘person’ can be ‘distinguished from an animal or thing’.¹⁷ In law however, the term ‘person’ can attract a very different meaning with profoundly different implications. A legal person is not *necessarily* a human being (although in Anglo-English world, all human beings are *now* legal

¹³ Naffine, above n 10, 47.

¹⁴ Halsbury's Laws of Australia, (LexisNexis, 2007) [20]-[50]. See also *Saltoon v Lake* [1978] 1 NSWLR 52, which involved the use of four racehorses as security for a mortgage agreement.

¹⁵ Ariel Simon, 'Cows as Chairs: Questioning Categorical Legal Distinctions in a Non-Categorical World' in Fier Cushman and Matthew Kamen Marc Hauser (ed), *People, Property, or Pets?* (Purdue University Press, 2006) 5.

¹⁶ Margaret Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 *The Columbia Law Review* 1667, 1667.

¹⁷ Susan Butler (ed) *Macquarie Dictionary* (online ed, at 21 November 2017) ‘Person’; Jane Nosworthy, 'The Koko Dilemma: A Challenge to Legal Personality' (1998) 2 *Southern Cross University Law Review* 1, 2.

persons).¹⁸ Deriving originally from the Latin *persona* – traditionally meaning the mask worn by an actor in a play – personhood in Australian law pertains to the creation of a particular legal identity with legal rights and obligations.¹⁹ Legal personality can thus be understood not as a way of describing one’s characteristics, but as a vehicle for attributing legal rights and duties to certain entities.

The exact content of the rights and duties that are attributed to different legal personalities varies.²⁰ As a result, no one criterion may be described as either necessary or sufficient to establish legal personhood. Richard Tur notes that in many cases, the rights and obligations of one legal personality may mirror those of another. Conversely Tur notes, ‘it is conceivable that two entities, both of which are legal persons, might have no rights or duties in common at all’.²¹ For example, whilst corporations are legal persons – they do not enjoy all the same rights of human persons. Christopher Stone humorously observes in the American context, that although corporations are persons, ‘they cannot plead the Fifth Amendment’.²²

This point is of great significance in the context of nonhuman animals, since thinkers such as Richard Epstein misleadingly argue that we cannot grant legal rights to nonhuman animals because it would not make sense to enable them to vote or enter contracts.²³ In making this argument, Epstein assimilates legal personhood with *human* personhood. Of course, as the case of the corporation clearly illustrates, legal persons may bear different legal rights and duties to other legal persons. It is merely the capacity to bear any legal rights *at all* that is unique to legal persons. As such, if we were to grant legal rights to nonhuman animals, it would not necessarily follow that they would share identical legal rights to those enjoyed by human persons.

¹⁸ Slavery is a pertinent example of humans being classed as legal ‘property’. Slavery was made unlawful by the *Slave Trade Act 1824 (5 George IV, ch113)*, which has since been repealed and incorporated into the *Australian Criminal Law Code 1995 (Cth) div. 270, 271*.

¹⁹ Nosworthy, above n 17, 3.

²⁰ Following Naffine and Davies, I use legal ‘persons’ and legal ‘personalities’ interchangeably.

²¹ Richard Tur, ‘The “Person” in Law’ in Arthur Peacocke and Grant Gillett (eds), *Persons and Personality: A Contemporary Inquiry* (Basil Blackwell, 1987) 121, 122.

²² Christopher Stone, ‘Should Trees Have Standing? : Towards Legal Rights for Natural Objects’ (1972) 45(2) *Southern California Law Review* 450, 457.

²³ Richard Epstein, ‘Animals as Objects, or Subjects, of Rights’ in Cass Sunstein and Martha Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 143.

Although legal persons may enjoy different legal rights and responsibilities, one thing that they have in common is the ability to enforce their legal rights.²⁴ The ability to enforce a right is fundamental to what it means to have that right in the first place. For this reason, Jeremy Bentham describes rights as ‘fruits of the law, and of the law alone’.²⁵ Christopher Stone similarly argues ‘an entity cannot be said to hold a legal right unless and until *some public authoritative body* is prepared to give *some amount of review* to actions that are colourably inconsistent with that “right”’.²⁶ Cass Sunstein contends that ‘the foundation for a legal right is an enforceable claim’.²⁷ Legal rights thus stand in stark contrast to the other varieties of norms that govern human behaviour, such as religious and moral norms. Legal norms are the only ones can be enforced by law.

Wesley Hohfeld went further in describing what it means to have a right, suggesting that a right was characterised by a legal advantage and a corresponding legal disadvantage.²⁸ He reasoned that the legal advantage could not exist without the relevant legal disadvantage. Thus, Hohfeld suggested that the holder of a legal right possesses a legally enforceable claim over somebody else who has the reciprocal duty to respect that claim. Hohfeld explains: ‘if X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty towards X to stay off the place’.²⁹ Thus, Hohfeld’s analysis confirms that a legal person has the potential for a legally enforceable claim against any other legal person who intrudes upon their rights through the failure to fulfil the corresponding legal duty.

The ability of a legal person to *enforce* their legal rights gives them a special kind of ‘visibility’ in law.³⁰ They are said to be visible because the law acknowledges their rights, and provides an avenue for those rights to be enforced. In other words, the law ‘sees’ them and protects them. Thus, legal persons have the ability to protect the rights which are legally

²⁴ Note that in some instances legal persons may rely upon a Guardian to enforce their legal rights on their behalf.

²⁵ Quoted in Tom Regan, *The Case for Animal Rights* (2nd ed, University of California Press, 2004) 268.

²⁶ Stone, above n 22, 458 (emphasis in original).

²⁷ See also Cass Sunstein, ‘Standing for Animals (with Notes on Animal Rights)’ (2000) 47 *UCLA Law Review* 1333, 1363.

²⁸ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (Yale University Press, 1919) 38.

²⁹ *Ibid.*

³⁰ Ngaire Naffine and Margaret Davies, *Are Persons Property? Legal Debates About Property and Personality* (Ashgate Publishing Ltd, 2001)

recognised.³¹ They have legal standing to seek a Court hearing where their legal rights have been unlawfully interfered with, and further, such interference is acknowledged through the provision of legal remedies such as damages.³²

B. *What is a Legal Thing?*

Legal persons stand in stark contrast to legal things in virtue of the legally visible rights and duties that they hold. Generally, while legal persons have legal rights and duties, legal things do not. However, regulations can operate to provide some protections for certain types of legal property in certain circumstances. These protections however remain bound by a characterisation of property that deems it a ‘tradable asset – one that can be bartered, used, and abused as an owner sees fit’.³³ Thus, where regulation attempts to protect property, it generally does so against the background view that legal property is something that an owner possesses rights *over and in relation to another person*, and not something that possesses legal rights *in and of itself*. It is for this reason that property rights are best described in relational terms:

The word ‘property’ is often used to refer to something that belongs to another. But...in the law, ‘property’ does not refer to a thing; it is a description of a legal relationship with that thing. It refers to a degree of power that is recognized in law as power permissibly exercised over that thing.³⁴

Radin’s conception of a ‘triad’ of rights associated with property ownership³⁵ has also been described as a ‘bundle of rights’.³⁶ The rights are said to exist in a ‘bundle’ because they can be separated from each other without fundamentally disturbing the property relationship. The metaphor is thus that each right is like a stick in the bundle – one can maintain a hold over the

³¹ This may be either at their own behest or in some cases a guardian may act on the behalf of somebody else.

³² Stone, above n 22, 458-459.

³³ Ariel Simon, 'Cows as Chairs: Questioning Categorical Legal Distinctions in a Non-Categorical World' in Marc Hauser (ed), *People, Property, or Pets?* (Purdue University Press, 2006) 5.

³⁴ *Yanner v Eaton* (1999) 166 ALR 258, 264 (Gleeson CJ, Gaudron, Kirby, Hayne JJ).

³⁵ Margaret Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 *The Columbia Law Review* 1667.

³⁶ For a critical overview of the history of this phrase, see: Daniel Klein & John Robinson, 'Property: A Bundle of Rights? Prologue to the Property Symposium' (2011) 8(3) *Econ Journal Watch* 193. Stephen Munzer has also articulated a more complex set of property relations: Stephen Munzer, 'Property and Disagreement' in James Penner and Henry Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, 2013) 289.

bundle but still lend out or dispose of individual sticks. Thus, while the bundle of property rights may include the right to exclusive possession, the right to destroy or dispose of property, the right to enjoy and control property, in some instances, one of those sticks may be given up without disrupting ownership. For example, where a real property owner decides to lease their property– they may lend out the stick for the right to exclusive possession and enjoyment of the land – whilst still maintaining legal ownership over the land.

Legal property thus exists predominantly at the whim of the legal owner who is entitled to deal with that property as he or she sees fit (though some legal restrictions will always apply). For this reason, Margaret Davies and Naffine contend that the categories of legal person and legal thing are often thought to be mutually exclusive: ‘that which is a person cannot be property; that which is property is stripped of personality’.³⁷ Legal things are ‘invisible’ in the eyes of the law because they do not have rights or interests that are legally recognised or protected.

It is not strictly true however, to say that that humans have *unqualified* rights over all kinds of property. The argument for unqualified rights is usually traced to William Blackstone’s commentaries, where he wrote that the ‘right of property’ was the source of mankind’s ‘despotic dominion which one man claims and exercises over things of the world, in total exclusion of the right of any other individual in the universe’.³⁸ Blackstone’s position was not absolute, but reflected the language of dominion and the view that the world was a divine grant from God that is usually associated with the Christian tradition.

However, a variety of laws operate to protect human property interests, which effectively qualify ownership rights. For example, council by-laws can place restrictions on how one can deal with their real property. Such restrictions may govern the positioning of fences, the colours of roofs and the position of windows, for example. We are also, for example, legally forbidden to use our property in such a way as to harm others or interfere with their legal rights. Thus, a property owner does not have an *unqualified* right to treat their house and land however they please. The rationale behind laws that qualify property rights is not to protect the property *in and of itself*. Rather they are designed to protect a human interest, such as the

³⁷ Naffine and Davies, above n 30, 51.

³⁸ William Blackstone, 'The Rights of Things' in *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1796* (The University of Chicago Press, 1979) 2, 2.

interest in maintaining one's property value, and the right to enjoy their own surrounding homes without undue interference. Laws that appear to limit the use of property in some way are therefore not generally directed at protecting some interest supposedly possessed *by* that property. It is for this reason that I contend nonhuman animals present a *sui generis* case. The law seems to attempt to balance *their* interests against human ownership rights. As Catharine MacKinnon characterises it from a feminist perspective, nonhuman animals are 'more than things, less than people'.³⁹ The same holds true in how the law characterises them. I explore the 'balancing act' between human and nonhuman interests in detail in chapter four.

C. Status of Wild Nonhuman Animals

As noted in the introductory chapter, it is necessary to note that 'wild' nonhuman animals are dealt with differently in law than 'domestic' nonhuman animals. In part, this is because wild nonhuman animals are not wholly owned in the same way as other nonhuman animals. The legal status of nonhuman animals is shaped by the question of whether they are possessed or controlled by a human owner.⁴⁰ For this reason, Justice Brennan of the High Court of Australia affirmed that wild nonhuman animals are not the property of humans 'in their wild state'.⁴¹ This position reflects the triad of property rights articulated by Radin, one of which is the right to exclusive possession over one's property.⁴²

Importantly though, when nonhuman animals are removed from the wild and taken under human control, they do become the property of humans. Thus, a hunter who lawfully kills a wild animal takes absolute ownership over that nonhuman animal.⁴³ Further, a person who captures or otherwise lawfully confines a wild nonhuman animal is entitled to 'qualified' property rights.⁴⁴ Those property rights remain contingent on whether the nonhuman animal is living in a captive or wild state. In terms of their legislative protections, wild nonhuman animals are not expressly excluded from animal welfare statutes except where they are

³⁹ Catharine MacKinnon, 'Of Mice and Men: A Feminist Fragment on Animal Rights' in Cass Sunstein and Martha Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 263, 263.

⁴⁰ *Young v Hitchens* (1844) 6 QB 606; *Pierson v Post* (1805) 3 Cai. R. 175; 1805 N.Y.

⁴¹ *Walden v Hensler* (1987) 163 CLR 561, 556.

⁴² Margaret Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 *The Columbia Law Review* 1667.

⁴³ *Pierson v Post* (1805) 3 Cai. R. 175; 1805 N.Y.; Cao, above n 3, 228.

⁴⁴ Cao, above n 3; 79-82; *Pierson v Post* (1805) 3 Cai. R. 175; 1805 N.Y., 229.

governed by a Code of Practice.⁴⁵ Consequently, key anti-cruelty provisions generally apply to wild nonhuman animals. As I have already explained, the further discussions in this thesis apply only to domestic nonhuman animals, except where otherwise expressly indicated.

III. WHO CAN BE A LEGAL PERSON?

So far, I have suggested that legal persons are legal actors that possess legal rights and duties. Legal things, by contrast do not have rights and duties. However, I have not yet said anything about the most controversial element of legal personhood, and that is *who* can be a legal person? The answer to this question is necessarily determined by philosophical, political and economic considerations. As I have stated, through the creation of legal rights and duties, law ‘personifies’, and therefore provides the basis upon which we some can act and relate in law.⁴⁶ Those who are not granted such rights, are simultaneously ‘unpersoned’, and are categorically ‘disabled at law’.⁴⁷ Determinations surrounding *who* can be a person are important given that legal personhood carries with it the ability to possess legal rights. Mary Midgley states that the question of who is a person is ‘actually a very complex one, much more like ‘who is important?’ than ‘who has got two legs?’.⁴⁸

Given the complexity of the question, the definition of a legal person is one that is surrounded by much debate. Naffine suggests that not only are there several competing accounts of who can be a legal person, but that there is a tendency by jurists to draw on different views at different times. Sometimes, the legal person is constructed as a formal legal device. It is possible to see this in its application to corporations. In this application, we can see the legal fiction of the person. You need not be a living, breathing entity to be a legal person. And yet, at other times, the legal person is equated with human persons. Debates around the legality of abortion provide an example of this, where the question of when a rights bearing person begins to exist is answered through a determination of when human life

⁴⁵ For example: *National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes*.

⁴⁶ Ngaire Naffine, 'Review Essay: Liberating the Legal Person' (2009) 26(1) *Canadian Journal of Law and Society* 193, 193.

⁴⁷ *Ibid.*

⁴⁸ Mary Midgley, 'Is a Dolphin a Person?' in David Midgley (ed), *The Essential Mary Midgley* (Routledge, 2005) 132, 135.

can officially be said to begin.⁴⁹ Naffine describes the conflation of these views in the following way:

[L]awyers are alert to the fact that the legal person is a construct and a fiction; but they also have a tendency to anthropomorphize the legal person and endow him with the characteristics of the rational human agent...Formally, they recognize the array of legal persons, and their attributed natures, especially when that person is a corporation, but then they frequently collapse these distinctions into the concept of the standard, paradigmatic human person.⁵⁰

A central question we must ask in determining *how* the legal person operates therefore requires us to articulate precisely what the law does when it personifies. Is it ‘trying to match or capture the nature of quality of life...or is it engaged in a quite distinct legal pursuit, coining its own basis conceptual unit – the person – for its own legal purpose’?⁵¹

A. *Competing Conceptions of the Legal Person*

In answering this question, Naffine outlines two conceptions of *who* can be a legal person: the (1) Legalist view, and the Realist view (which she divides further into two variants). I now describe each of these views in turn. Following this description, I use Naffine’s analysis as a basis to critique the writings of Wise and Francione, to reveal that they rely upon a blend of these conceptions, and so implicitly affirm a conception of the legal person that is linked to the *human*.

1. *The Legalist View*

According to the Legalist position, the legal person is a legal fiction, and nothing more. Legal personhood is a legal tool created to serve a legal purpose. It is not, therefore, an attempt to mirror the human person. As Naffine suggests, ‘[l]egal persons, in this view, are therefore only virtual persons: they exist in virtue of law, only in law, they are fully legal *constructions*, and there is *no* legal requirement that they bear any resemblance to natural

⁴⁹ For more see Ngaire Naffine, 'Legal Personality and the Natural World: On the Persistence of the Human Measure of Value' (2012) 3(0) *Journal of Human Rights and the Environment* 68.

⁵⁰ Naffine, above n 46, 199.

⁵¹ *Ibid* 193.

fleshy human beings'.⁵² Legal persons on this view need not bear any particular characteristics or traits, 'he has no substantive nature'.⁵³ Alexander Nekam articulates a similar view, stating

[e]verything...can become a subject – a potential carrier – of rights, whether a plant or an animal, a human being or an imagined spirit...[t]here is nothing in the notion of the subject of rights which in itself would, necessarily, connected it with the human personality.⁵⁴

Legal personhood on this view is a legal *fiction*. Lon Fuller describes a fiction as an intentional 'false idea' that lacks 'a physical counterpart'.⁵⁵ The legal fiction of the person is a device for confronting new problems,⁵⁶ and a means of classifying the external world.⁵⁷ A Legalistic account of law's persons is therefore instrumental, because the use of the fiction can depend entirely on the outcome one is trying to achieve, rather than focusing on the characteristics of the entity being considered.⁵⁸ Entities may thus become legal persons because the law deems them so. As Midgley explains, the law 'can, if it chooses, create persons; it is not merely a recorder of their presence'.⁵⁹ The Legalist view may offer promise to nonhuman animals, since on this view, 'whatever law finds convenient to include in its community of persons' can *theoretically* be so included.⁶⁰ We need not establish, as Wise and Francione attempt to do, that nonhuman animals share fundamental human qualities that mandate they be included in the category of legal persons.

The Legalist account of the legal person however may not be as neutral as it appears to be. Richard Tur has described the Legalist conception of personhood as an 'empty slot' that may theoretically be occupied by any entity that is capable of fitting in it.⁶¹ Tur therefore suggests that legal personhood can be possessed by *any* entity to whom we wish to ascribe legal rights or duties. As Naffine contends, on this view, the slot 'does not have any particular contour

⁵² Ibid 198.

⁵³ Ngaire Naffine, 'Who Are Law's Persons? From Chesire Cats to Responsible Subjects' (2003) 66(3) *Modern Law Review* 346, 351.

⁵⁴ Alexander Nekam, *The Personality Conception of the Legal Entity* (Harvard University Press, 1938) 26.

⁵⁵ Lon Fuller, 'Legal Fictions' (1931) 25 *Illinois Law Review* 877, 885.

⁵⁶ Ibid 888.

⁵⁷ Ibid 885.

⁵⁸ Naffine, above n 46, 202.

⁵⁹ Midgley, above n 48, 134.

⁶⁰ Naffine, above n 53, 351.

⁶¹ Richard Tur, 'The "Person" in Law' in Peacocke and Gillett (eds), *Persons and Personality: A Contemporary Inquiry* (Basil Blackwell, 1987) 121.

and so can...fit anyone'.⁶² On this view, the 'empty slot' of legal personhood, could theoretically include nonhuman animals. A nonhuman animal need not prove it has any particular characteristics to be included as a person.

However, the personhood 'slot' should not be viewed as a 'one size fits all' legal category. Rather, the slot must be viewed in connection to its intended purpose: to serve human needs and interests. Nekam encapsulates this view when he says that 'everything...that the community chooses' may be a holder of rights, and that similarly, 'nothing, if the community does not choose to regard it so, will become a subject of rights'.⁶³ To this end, human interests *necessarily* and *always* shape the legal personhood 'slot', and limit the ways in which personhood may be extended to other entities to serve particular human purposes. The inclusion of nonhuman animals within the category of 'persons' could interrupt the human use (and cruel treatment) of nonhuman animals that is thought to serve certain human interests. As legal persons, nonhuman animals could theoretically possess legal rights that could prevent humans from using them the ways that they currently do. To this end, the incorporation of nonhuman animals within the category of persons may seem contrary to human interests. As such, nonhuman animals are consistently excluded from the personhood slot.

The personification of the corporation provides a prime example of the way in which the category of the person can serve human interests. The corporation is an example of the operation of the fiction of legal personhood, because it is a nonhuman entity that has been personified in law. The grant of personhood enables a corporation to act in law. In the American context for example, it has an 'independent legal existence which permits it to act in many significant ways, such as entering into contracts, suing those who have wronged it, and even exercising its free speech rights in political referenda'.⁶⁴ The personification of the corporation however, did not seek to reflect some inherent value in the corporate form. Rather, it served to further human economic interests. As Fox describes it, the personification of the corporation was 'crucial to corporate expansion', and the resultant capitalist

⁶² Naffine, above n 10, 56.

⁶³ Nekam, above n 54, 26.

⁶⁴ Jeffrey Nesteruk, 'Persons, Property, and the Corporation: A Proposal for a New Paradigm' (1990) 39 *DePaul Law Review* 543, 544 (Note, this is in the context of American where there exists a constitutional right to free speech).

economy.⁶⁵ The move to include corporations within the legal ‘slot’ of personhood has thus served human interests and sustained an economic system manufactured by humans to serve humans.⁶⁶ Given the centrality of human interests in determining whether an entity should be granted legal personhood, personification is an inherently political decision. Naffine contends:

The legal demography of persons depends on the sort of world that the influential who manipulate the levers of power wish to create and how they wish to position themselves. If they want a world in which other animals and natural objects have directly enforceable and defensible interests, then they will extend rights to them. They will not insist on a human middleman to demonstrate a human interest first.⁶⁷

2. *The Realist View*

According to the Realist view, a legal person can be objectively discovered because they possess certain characteristics that make them a ‘person’.⁶⁸ These objective conditions may vary depending on the particular Realist account of personhood that one subscribes to, which further turn on one’s beliefs about *who matters*. Naffine articulates two variations of the Realist account.

One Realist account of the law of persons holds that it is human life that is to be the ultimate measure of legal personhood. On this view, legal personhood and human persons are effectively synonymous.⁶⁹ It is therefore membership of the human species *homo sapiens* that is thought to be enough to generate legal personality. It does not matter on this view, what capacities one has, because ‘intelligence is not the issue; being human is’.⁷⁰ On this view, nonhuman animals cannot be legal persons, regardless of their capacities. The fact that they are not human beings is enough to reject them from the class of legal persons.

⁶⁵ Dennis Fox, 'The Law Says Corporations Are Persons but Psychology Knows Better' (1996) 14 *Behavioural Sciences and the Law* 339, 344.

⁶⁶ Some commentators also suggest that describing corporations as ‘persons’ has facilitated the attribution of human qualities to the corporate form, even though it is used in the Legalist sense: Sanford Schane, 'The Corporation Is a Person: The Language of a Legal Fiction' (1987) 61 *Tulane Law Review* 563; Dennis Fox, 'The Law Says Corporations Are Persons but Psychology Knows Better' (1996) 14 *Behavioural Sciences and the Law* 339.

⁶⁷ Naffine, above n 49, 82.

⁶⁸ Naffine, above n 53, 349.

⁶⁹ *Ibid* 358.

⁷⁰ *Ibid* 361.

An alternative Realist account rests on the view that only certain *types* of human life matter. The paradigmatic case of law's person on this view, tends to be the rational, autonomous actor.⁷¹ Arguments about who should count as a legal person on this view thus turn on discussions about the possession of certain capacities and characteristics in comparison to the paradigmatic case. This view therefore proceeds on the basis that only those who possess the named characteristics can be considered legally competent, and therefore can be classed as legal persons. Therefore, the irrational, or the dependent – even if they are *human* - may still be refused entry into the class of legal persons. On this view, nonhuman animals are also unlikely to be granted legal personhood, because they will be unlikely to measure up to the paradigmatic case of law's persons: the rational, autonomous, *human* actor.

IV. MAKING ANIMALS PERSONS AND CONFLATING CONCEPTIONS OF THE LEGAL PERSON

Thus far, I have made two key suggestions. First, that the category of the legal person is a method for ascribing rights that may be enforced in law. Second, that the category of the legal person may be conceptualised in two competing ways. On the Legalist view, the legal person is a fiction that bears no resemblance to human persons. According the Legalist account, any entity may theoretically be a legal person. I have suggested however, that the grant of personhood remains fundamentally tied to human interests, and thus a grant of personhood will only take place where it serves human interests for such a grant to be made. On the Realist view, by contrast, legal personhood reflects objectively discoverable facts about human beings. On this view, only those who possess these objectively discoverable conditions may qualify for legal personhood.

Steven Wise and Gary Francione make strong arguments for the inclusion of nonhuman animals within the category of legal person. Such a move is necessary, they contend, to ensure that nonhuman animals are not treated cruelly by law. Francione contends for example, that '[t]o label something property, is, for all intents and purposes, to conclude that the entity so labelled possesses no interests that merit protection and that the entity is solely a

⁷¹ Ibid.

means to the end determined by the property owner'.⁷² For Francione, the legal characterisation of nonhuman animals as property is therefore problematic, since it prevents nonhuman animals from possessing legal rights that can be legally enforced to protect their interests. Wise makes a similar claim, arguing that the property status of nonhuman animals means that '[t]heir most basic and fundamental interests – their pains, their lives, their freedoms – are intentionally ignored, often maliciously trampled, and routinely abused'.⁷³ For Wise, like Francione, a grant of legal personhood is a 'legal shield that protects against human tyranny; without it, one is helpless'.⁷⁴

In arguing for the inclusion of nonhuman animals within the category of legal persons, Francione and Wise dedicate little time to explaining precisely *who* the legal 'person' is, and how nonhuman animals may be included within the category. As I suggest in the final section of this chapter, a failure to clearly explain the construct of the legal 'person' is problematic for both authors, because they rely upon a blend of conceptions – both Legalist and Realist. In blending these conceptions of the legal person, Wise and Francione invoke an anthropocentric construction of the legal 'person' which, through its construction, *excludes* nonhuman animals.

A. Gary Francione's Approach

Gary Francione seeks to abolish the property status of nonhuman animals in law.⁷⁵ In making this claim, Francione calls for the introduction of a vegan lifestyle as the moral 'baseline',⁷⁶ which he contends must follow logically from the complete abolition and rejection of all industries in which nonhuman animals are routinely exploited and used for human benefit.⁷⁷ Francione argues that the property status of nonhuman animals is detrimental to them, because it prevents them from obtaining basic rights that protect their interests. As such, he contends their property status must be abolished and replaced with the status of legal personhood, such that their interests may be protected in law in the same way as human

⁷² Francione, *Animals, Property and the Law*, above n 3, 253.

⁷³ Wise, above n 3, 4.

⁷⁴ Wise, above n 1, 21.

⁷⁵ Cao, above n 3, 88.

⁷⁶ Gary Francione, 'Animal Welfare and the Moral Value of Nonhuman Animals' (2010) 6(1) *Law, Culture and Humanities* 24, 36.

⁷⁷ *Ibid.*

interests. Such a move, he suggests, would endow nonhuman animals with basic legal rights, such as ‘protection against torture, battery and even confinement’.⁷⁸

Francione’s argument for the extension of personhood to nonhuman animals is based on an application of what he calls the ‘the principle of equal consideration’.⁷⁹ That is, ‘the moral rule that we treat similar cases similarly – and ask whether there is a good reason to accord the right not to be treated as property to nonhumans as well’.⁸⁰ For Francione, no such ‘rational justification’ exists, and thus he argues we must extend legal personhood to nonhuman animals. Francione argues that no such justification exists because nonhuman animals are sentient, and thus capable of possessing interests of equal moral weight to those of human beings. The sentience of nonhuman animals mandates their immediate inclusion within our ‘moral community’.⁸¹ According to Francione, there is no rational reason why the sentience of a nonhuman animal should be less morally relevant than the sentience of a human being. To draw such an artificial divide, he reasons, is ‘speciesist’,⁸² a form of arbitrary discrimination based only on species membership.⁸³ Importantly, for Francione, inclusion within the moral community mandates the grant of what he contends is the most basic right: the right ‘not to be treated as the property of others’.⁸⁴

Francione thus contends that we must abolish the property status of nonhuman animals. He argues that improvements to animal welfare that maintain the property status of nonhuman animals, amount merely to the *regulation of exploitation*. This approach, which Australian law currently adopts, and which he labels the ‘humane treatment’ approach, is concerned only with improving the welfare of nonhuman animals that humans use and exploit. It is not *ever* concerned with eradicating the use and exploitation of nonhuman animals altogether. According to Francione, even where we are more generous towards nonhuman animals in our interest balancing calculations (which I detail in chapter four), nonhuman animal interests will be unavoidably devalued because they are legally classified as human property.

⁷⁸ Cao, above n 3, 87.

⁷⁹ Francione, above n 46, 35.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Francione, above n 6, 57.

⁸³ Peter Singer, *Animal Liberation* (2nd ed, Pimlico, 1990) 9.

⁸⁴ Gary Francione, *The Six Principles of the Abolitionist Approach to Animal Rights* <
<http://www.abolitionistapproach.com/about/the-six-principles-of-the-abolitionist-approach-to-animal-rights/#.V7JsZ8f9IBw> > .

Francione therefore reasons that the ‘humane treatment’ approach does not ‘establish any rights for animals or impose any duties on humans that are directed ultimately to the well-being of the animal’.⁸⁵ He goes further, suggesting that the property status of nonhuman animals

stops us from perceiving animal interests as similar to ours in the first instance and subordinates animal interests to human interests even when human and animal interests are recognized as similar because the property status of animals is always a good reason to refuse them similar treatment.⁸⁶

For Francione, animal welfare legislation exists to regulate, and thus *legitimate* the animal exploitation that he demands we abolish. Controversially, he likens it to the case of human slavery:⁸⁷ ‘It may have been better to beat slaves three rather than five times a week, but this better treatment would not have removed slaves from the category of things’.⁸⁸

B. *Steven Wise and Nonhuman Animal ‘Persons’*

Like Francione, Wise contends that certain nonhuman animals should be granted legal personhood. Wise puts forward his case with relation to specific animals only. As I explained in chapter two, the key principles that guide Wise’s argument are ‘liberty and equality’,⁸⁹ and that ‘like be treated alike’.⁹⁰ Further, Wise suggests ‘liberty entitles one to be treated a certain way because of how one is made...liberty rights turn on a being’s qualities and because a certain degree of autonomy will suffice to entitle one to rights’.⁹¹

Wise’s argument however, requires that a certain level of autonomy, ‘not just the ability to suffer’ be the basis for establishing legal rights for nonhuman animals.⁹² Wise suggests it is this practical autonomy that is *legally* required for nonhuman animals to be granted legal personhood. Indeed, he concedes that if he were ‘[c]hief Justice of the universe’, sentience would be a necessary condition for legal personhood and the associated legal rights

⁸⁵ Francione, *Animals, Property and the Law*, above n 3, 4.

⁸⁶ Gary Francione, ‘Taking Sentience Seriously’ (2006) 1(1) *Journal of Animal Law and Ethics* 1, 17.

⁸⁷ For a critical perspective on why such comparisons may be problematic, see Carol Adams, *The Sexual Politics of Meat* (Tenth Anniversary ed, Continuum, 2006) 53-55.

⁸⁸ Francione, *Animals –Property or Persons?*, above n 3, 131.

⁸⁹ Wise, above n 1, 29

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.* 33.

personhood carries.⁹³ The capacity to suffer however, he contends, has been proven to be largely ‘irrelevant’ to judicial considerations regarding who should be entitled to legal rights.⁹⁴ Wise therefore appears to adopt a tactical approach, which gives weight to both sentience *and* practical autonomy, in the hope it will be more legally persuasive.⁹⁵

Commenting on this approach, Wise notes ‘[t]he more exactly the behaviour of any nonhuman resembles ours and the taxonomically closer she is, the more confident we can be’ in attributing certain characteristics to that nonhuman animal.⁹⁶ He also refers to an ‘autonomy value’ which he suggests can act as a measure of the extent to which a nonhuman animal possesses the characteristics he deems necessary for legal personhood and legal rights.⁹⁷ He ascribes autonomy values (between 0.00 and 1.00) to reflect the extent to which a particular species displays behaviour that resembles human behaviour. The closer a nonhuman animal is to a human being, the higher their autonomy value.

In *Unlocking the Cage*, Wise sets out four possible categories which beings can be placed into, based on their autonomy values. Category one animals, which Wise attributes an autonomy value between 0.90 and 1.00, are those that are clear examples of creatures who possess the characteristics required for legal rights. Wise places his human son Christopher (1.00), Koko the gorilla (0.95), Chantek the orang-utan (0.93), and Atlantic bottle nosed dolphins, Ake and Phoenix (0.90) in this category. The second category comprises nonhuman animals in possession of an autonomy value between 0.51 to 0.89. Wise places Alex the African grey parrot (0.78), Echo the African elephant (0.75), Marbury the dog (0.68), and the average honeybee (0.59) into this category.

Category two animals, Wise reasons, may vary greatly in terms of their capacities and capabilities.⁹⁸ In response to this variation, Wise contends that an ‘intermediate’ application of the precautionary principle should see all nonhuman animals within this category whom score higher than 0.70 be granted legal rights.⁹⁹ Those animals within the category who fall below this cut-off, should be granted ‘proportional’ rights that accord with the degree to

⁹³ Ibid 34.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid 36.

⁹⁷ Ibid 36.

⁹⁸ Ibid 43.

⁹⁹ Ibid.

which one has practical autonomy.¹⁰⁰ He writes: ‘if you have it, you acquire rights in full; if you don’t, the degree to which you *approach* autonomy might make you eligible to receive some proportion of liberty rights’.¹⁰¹ Wise contends this proportional approach to granting rights is one that Judges already participate in. He provides the example of a severely mentally disabled human, whom he reasons ‘might have a claim to bodily integrity but lack the power to waive it, thus being unable to consent to a risky medical procedure or the withdrawal of life-saving medical treatment’.¹⁰²

Category three animals are those which are given an autonomy value of 0.50, whilst category four animals receive a rating of 0.50 or below. Nonhuman animals that fall into these categories, according to Wise, ‘may not be entitled to basic liberty rights, simply because we don’t value their brand of intelligence, their style of learning, their sense of self’.¹⁰³ In other words, they fail to ‘measure up...to human standards’, unlike those in Category one, and some in category two.¹⁰⁴

To determine how to classify each nonhuman animal species, Wise considers scientific knowledge surrounding several species of animal, to place each of them into one of these categories. To do this, Wise notes that he will ‘act the judge, review the evidence, and make [his] own judgments about whether practical autonomy exists, how strong a scientific argument has been made, and how valid the data are’.¹⁰⁵ To make a determination, Wise adopts the precautionary principle in the face of uncertainties, thereby granting rights to nonhuman animals of a certain autonomy value (namely, 0.70 or higher), even where the evidence may not clearly support the contention that they possess all the necessary characteristics to make them worthy of such rights.¹⁰⁶

He notes that in some instances, judges and legislators may opt to provide rights to a being who is ‘completely nonautonomous’.¹⁰⁷ Such an application of rights is, according to Wise,

¹⁰⁰ Ibid 44.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid 47.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid 43.

¹⁰⁷ Ibid 237.

‘arbitrary’.¹⁰⁸ He refers for example to the case of human beings who clearly lack practical autonomy due to, for example, being born into a permanent vegetative state, but who still possess legal rights.¹⁰⁹ Wise writes that such a person ‘is neither conscious nor sentient...cannot think or feel...is so utterly devoid of any higher brain functions...[and] has no mind’.¹¹⁰ Yet, this person possesses the legal right to bodily integrity, even though a guardian must exercise that right on their behalf. He goes further, and suggests that humans in this position are protected from the suggestion that they be eaten, or used in terminal medical research, in a way that nonhuman animals are not.¹¹¹

In making this argument, Wise compares the case of a human in a vegetative state who is granted legal rights, to a nonhuman animal who is stripped of legal rights, even though they might possess complex cognitive capacities. For Wise, the grant of rights to a human in such a state merely strengthens his argument that category one and some category two nonhuman animals must be granted legal rights. Indeed, he suggests that it would be arbitrary for a judge to grant legal rights to a human in a vegetative state yet deny them to an orang-utan, without violating the principle of equality.¹¹² He states: ‘only a radical speciesist could accept a baby girl who lacks consciousness, sentience, even a brain, as having legal rights just because she’s human, yet thinkingest, talkingest, feelingest apes have no rights at all, just because they’re not human’.¹¹³

C. Wise’s and Francione’s Blended Conceptions of the Legal Person

Both Wise and Francione contend that nonhuman animals should be granted legal rights, and thus made into legal persons. A central premise of their arguments is that nonhuman animal interests cannot adequately be protected by law unless they take the form of legal rights of the type associated with legal personhood. As I illustrate in chapter four, the property status of nonhuman animals does have problematic implications for their welfare that arguably cannot be remedied by welfare reforms alone.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid 238.

¹¹² Ibid.

¹¹³ Ibid.

However, neither Wise nor Francione explain precisely how they understand the construct of the legal person. As such, their arguments tend to blend competing conceptions of the legal person. The result is that they attempt to detach the Realist conception of the person from its human mooring. They insist that we include nonhuman animals in the category of legal persons using a legal category that has consistently *excluded* them.

Consider first Francione's argument. Francione demands that since nonhuman animals share the capacity for sentience with humans, they must be entitled to the same types of legal rights as humans. In similar terms, Wise argues that nonhuman animals whose sentience and autonomy measures up to the human standard should be granted legal personhood. Both arguments implicitly insist upon the Realist view of the legal person, that is, that *humanness*, or more specifically, human *attributes*, are what counts in thinking about the legal person. Wise and Francione insist upon equality, and suggest that nonhuman animals who share these attributes (sentience in Francione's case, and sentience and autonomy in Wise's) must, as a matter of consistency, be granted legal personhood. In making these arguments, Wise and Francione are seemingly attempting to perform an impossible task. They are seeking to remove the 'human' from the Realist account.

Yet, as we have seen, the Realist account of the legal person is inherently tied to the *human*. As Naffine provides, 'there is no real disagreement about the pre-eminence of the human and of the human measure of the legal person'.¹¹⁴ Naffine offers Australian case law examples to illustrate her point. One of those cases is *Cattanach v Melchior*¹¹⁵ which was heard in the High Court of Australia. The plaintiff in that case fell pregnant following surgical sterilisation, and alleged that the doctor who performed the sterilisation procedure had negligently failed to inform her of the possibility of falling pregnant. The question before the court was whether the plaintiff could receive damages from the doctor in recognition of the 'harm' caused by the doctor's negligence. In the course of its judgment, the court affirmed what Naffine describes as the 'blessing of all human life and the centrality of human value in legal thought'. Naffine points to the assertions Gleeson CJ:¹¹⁶

¹¹⁴ Naffine, above n 49, 79.

¹¹⁵ Ibid; *Cattanach v Melchior* (2003) 215 CLR 1.

¹¹⁶ Naffine, above n 49, 80.

[t]he common law has always attached a fundamental value to human life; a value originally based upon religious ideas which, in a secular society, no longer command universal assent. Blackstone, in his commentaries, referred to human life as ‘the immediate gift of God, a right inherent by nature in every individual’.¹¹⁷

The insistence upon the centrality of human value has also been evidenced by case law in the United States of America. There, the Nonhuman Rights Project (‘NHRP’), run by Steven Wise, has directly asked the courts to extend legal personhood to chimpanzees, through writ of habeas corpus, which provides a means to challenging a person’s detainment or imprisonment. Though the NHRP operates within the American legal context, the decisions made by the American courts are illustrative of a continued deference to the Realist account of ‘personhood’ by lawyers and jurists. One case of interest actioned by the NHRP pertained to Tommy, a chimpanzee who was found living isolated and caged in a shed on a used trailer lot in New York city. Tommy appeared in films and was allegedly beaten during ‘training’.¹¹⁸ After Tommy’s original owner died, ownership of Tommy passed to the Lavery family, who provided Tommy with living arrangements that, whilst, though lawful, were deemed unacceptable by the NHRP.

In response to Tommy’s isolated confinement, the NHRP in 2013 filed a petition for a common law writ of habeas corpus in the New York State Supreme Court, demanding recognition that Tommy was a legal person who had a right to bodily integrity. The NHRP petition sought for Tommy to be released immediately and transferred to an appropriate sanctuary for the remainder of his life. In the memorandum of legal precedent accompanying their petition, the NHRP stated that ‘legal person has never been a synonym for human being’.¹¹⁹ Rather, they reasoned it is a category that ‘determines who counts, who lives, who dies, who is enslaved, and who is free’.¹²⁰ Here, they seemingly invoke the Legalist view. The NHRP then argued that Tommy’s classification as a legal ‘thing’ served only the ‘sole,

¹¹⁷ *Cattanach v Melchior* (2003) 215 CLR 1, 10.

¹¹⁸ Chris Churchill, 'Advocate: Rights or Not, Caged Chimp Deserves Better', *Times Union* (Online), 7 December 2013, <<http://www.timesunion.com/local/article/Advocate-Rights-or-not-caged-chimp-deserves-5044847.php>>.

¹¹⁹ Petitioners' Memorandum of Law in Support of Order to Show Cause and Writ of Habeas Corpus and Order Granting the Immediate Release of Tommy, *Nonhuman Rights Project Inc, on Behalf of Tommy v Patrick Lavery and Ors* [2014] Available Here: <<https://www.Nonhumanrights.Org/Content/Uploads/Memorandum-of-Law-Tommy-Case.Pdf>> 40.

¹²⁰ *Ibid* 2.

illegitimate, and odious purpose of enslaving him' for human benefit.¹²¹ Slavery, they argued, is something that the courts of New York have 'openly loathed' for more than a century and a half.¹²² This implication that nonhuman animals may aptly be described as 'slaves' (a term reserved to describe a specific type of oppression experienced by humans), begins to call upon the Realist account of the person. If we reject human slavery, the argument goes, we should also reject nonhuman (chimpanzee) slavery, because chimpanzees bare many of the characteristics of legal *human* persons.

The NHRP offered the court a vast array of expert evidence pertaining to the extent to which humans and chimpanzees share physical attributes fundamental to claims of liberty and autonomy. For example, they pointed to the fact that chimpanzees and humans share 'almost 99% of their DNA', and have brains that are 'similar'.¹²³ Further, the NHRP suggested chimpanzees have the capacity for learning, sophisticated communications, humour, autonomous behaviour based upon choice (as opposed to instinct), and the possession of self-awareness.¹²⁴

The argument put forward by the NHRP therefore, was that since chimpanzees share fundamental attributes with human beings, it was a matter of *equality*, that chimpanzees be entitled to be viewed as legal persons, just as human beings have been. The NHRP acknowledged that while being member of the species *homo sapiens* is now recognised as a sufficient condition for legal personhood, it is not the *only* sufficient condition, indicated by the extension of legal personhood to other nonhuman entities such as corporations. In making this argument, the NHRP reverted back to invoke the Legalist conception of person.

During the first hearing in the Fulton County Supreme Court, during an order to show cause, Justice Josphe M. Side illustrated the extent to which *humanness* is consistently intertwined with the construct of the legal person. The NHRP's petition was made under Article 70 of the New York Civil Practice Law and Rules and states under Article 70, rule 7002, that a petition may be made by a 'person illegally imprisoned or otherwise restrained in his liberty within the state...'.¹²⁵ The centrality of human measures of value was evidenced at the outset, as the

¹²¹ Ibid 3.

¹²² Ibid.

¹²³ Ibid 8-9

¹²⁴ Ibid 8-9

¹²⁵ *New York Civil Practice Law and Rules* s7002.

Judge explicitly conflated the legal ‘person’ directly with a ‘human being’, asking the NHRP whether they were asking the Supreme Court to ‘enlarge the definition of human-being under Article 70 to include an animal, a chimpanzee’.¹²⁶

Later in the case, asking the NHRP whether any precedent existed for extending legal personhood to nonhuman animals, the Judge again conflated the two, asking : ‘[i]n what type of case has a nonhuman been held as a human-being?’.¹²⁷ When the NHRP attempted to develop their argument, drawing analogies between the gradual inclusions of some groups of human beings (such as black slaves) within the category of legal persons, they were met with strong resistance from the court: ‘the Court will reject that argument, the argument that cases involving human-beings who were slaves in the 1800s as synonymous with a chimpanzee. I reject it’.¹²⁸ No substantive reasons for such a rejection were given.

In making his final determination, the Judge simply stated, without reason:

Your impassioned representations to the court are quite impressive. The court will not entertain the application, will not recognize a chimpanzee *as a human* or as a person as a person [sic] who can seek a writ of habeas corpus under Article 70... You make a very strong argument. However, I do not agree with the argument only insofar as Article 70 applies to chimpanzees’.¹²⁹

The NHRP filed a notice of appeal in January 2014. The appellate brief filed stated that the court had erred in making the ruling that Tommy was not entitled to seek a common law writ of habeas corpus. Specifically, the NHRP reasoned that the court committed a legal error in failing to determine whether Tommy was a ‘person’ under the common law of habeas corpus. The common law of habeas corpus, they suggested, should have been read with a view to interpreting the term ‘person’ as it was used in Article 70 of the New York Civil Practice Law and Rules under which the original action commenced. Further, the NHRP argued that

¹²⁶ Transcript of Proceedings, *Petitioners v Patrick C Lavery* (Fulton County Supreme Court, New York, Index No 02051, Sise J, 3 December 2013) 8.

¹²⁷ Ibid 10.

¹²⁸ Ibid 12.

¹²⁹ Ibid 26 (emphasis added).

the New York Civil Practice Law and Rules contain only instructions of *procedure* and not of substantive law.¹³⁰

In May 2014, the NHRP sought a preliminary injunction against the Lavery family to prevent them from moving Tommy from New York State, pending their final appeal. The Third Judicial Department granted the NHRP's motion for the injunction. At the hearing, and to obtain the injunction, the NHRP had to demonstrate that they were likely to succeed in the appeal. The decision of the Third Judicial Department again re-iterated the centrality of human value in the construct of the legal person, though somewhat less explicitly than the first Judge had. The Third Judicial Department's decision was that Tommy was not a legal person, because:

[U]nlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities, or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights...that have been afforded to human beings.¹³¹

Though the NHRP appealed this decision on the basis that it constituted an error of law (with the judgment still pending), the fascinating part of this particular Judgement is found in a footnote in the decision which states: 'nothing in this decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings or otherwise'.¹³² Such a disclaimer was considered necessary by virtue of the fact that *all* human beings, some of whom are incapable of bearing legal duties (for example children, or the severely disabled) are still afforded the rights associated with legal personhood. They are legal persons not because they bear legal rights and duties, but because they are *humans*. In an amicus curiae submitted to the Court, Laurence Tribe of Harvard University stated that but for that disclaimer, the conception of 'personhood' relied upon to make the decision, 'would appear on its face to exclude third-trimester fetuses, children, and comatose adults (among other

¹³⁰ Brief for Petitioners- Appellants, *Nonhuman Rights Project Inc on Behalf of Tommy v Patrick C Lavery and Ors*, [2014] Available Here: <<https://www.Nonhumanrights.Org/Content/Uploads/8.-Appellate-Brief-Filed-with-Court-Tommys-Appeal1.Pdf>> 33.

¹³¹ *The Nonhuman Rights Project Inc. On Behalf of Tommy v Patrick C Lavery* (2014) 518336 Third Judicial Dept. Available Here: <<https://www.Nonhumanrights.Org/Content/Uploads/Appellate-Decision-in-Tommy-Case-12-4-14.Pdf>> 6.

¹³² *Ibid* 5.

entities whose rights as persons the law protects)’ – a view that the Judge inherently rejects.¹³³

It is thus clear that there exists a continued insistence upon measures of *human* value in determining precisely *who* or *what* can be a legal person. The Legalist account of personhood provides that *anything*, at least in theory, can be a legal person. On this view, the legal personhood is a legal fiction: a mere legal device. It bears no necessary connection to reality, nor does it try to capture any facts about human life in its application. It is a purely legal tool used to serve a purely legal purpose. The potential promise provided by the Legalist conception of the legal person is that one need not prove membership to a certain species, or the existence of certain capacities, to be accorded with legal personhood. It is on this basis that ‘lifeless’ entities such as corporations and ships have been granted legal personhood.

In utilising the Realist account of personhood, both Francione and Wise implicitly insist that legal person should mirror human values and attributes. For Francione, the legal person is necessarily sentient. For Wise, the legal person has both autonomy and sentience. Yet case law illustrates the Realist account is more than this: it is fundamentally human. Wise and Francione thus attempt to dismantle the paradigmatic person that is central to the Realist account, as they attempt to strip it of its human element. Wise and Francione thus seek to expand the Realist construct of the legal person to nonhuman animals, even though it is a construct that has consistently enabled their exclusion. To do so without acknowledging the extent to which this category is fundamentally tied to the *human*, Wise and Francione risk legitimating the construction of a category that is not an empty vessel but instead is marked by its application to human persons. Put another way, Wise and Francione seek to include nonhuman animals by reference to science that proves how ‘human’ they are in morally important ways. But in making this argument both writers implicitly legitimate the *humanness* of this construct.

In attempting to dismantle the paradigmatic person that is central to the Realist account of legal personhood, my contention is that Wise and Francione understate the difficulty of their task. This is well illustrated by an example in Wise’s writing. Wise argues that the attribution

¹³³ Lawrence Tribe, ‘in Support of Motion for Leave to Appeal’, Submission in *Nonhuman Rights Project Inc on Behalf of Tommy v Patrick C Lavery*, Index Number 518336, 8 May 2015
<<https://www.nonhumanrights.org/content/uploads/Tribe-Amicus-Curiae-Letter-Brief-FINAL.pdf>> 2.

of legal rights to human persons who lack autonomy, only *strengthens* his own argument that nonhumans who possess autonomy must logically be granted the same rights.¹³⁴ He refers to the case of Joseph Saikewicz, a ‘sixty-seven year old man with an IQ of ten’, and Beth, ‘a ten-month-old girl born into a permanent vegetative state’.¹³⁵ According to Wise, the attribution of legal rights to both Joseph and Beth, human beings who *lack* autonomy, strengthens his argument that we must grant legal rights to nonhuman animals who possess autonomy. To fail to do so, Wise argues, would be utterly arbitrary, and therefore violates the basic notion of equality.¹³⁶

Arguably however, the precise opposite is true. Wise rightly observes that the law grants rights to human persons simply *because they are human*. Wise even refers to the existence of a law in Louisiana (USA) that ‘designates a fertilized *in vitro* ovum a legal person before it is implanted in the womb’.¹³⁷ It seems clear that it is therefore *humanness*, and not autonomy, that matters in designating human persons as legal persons. Yet, Wise supposes that this same fact supports his argument that nonhuman animals should similarly be granted rights, because they are equally (if not more) autonomous than the human persons that we grant personhood to. The *human* element is something that Wise seemingly brushes aside. Yet, as we have seen, it is precisely the human element that remains central to the paradigmatic case of law’s person on the Realist view. Beth and Joseph are legal persons not because they bare certain attributes, but because they are *human*. The distinction between *human* and *nonhuman* is paramount and cannot be so easily pushed aside.

Cora Diamond suggests that there are culturally embedded views about the relationship between humans and nonhuman animals that have become key facts in our understanding of animals and humans. Talking about the animals that humans eat, she writes: ‘we [humans] are around the table and they [animals] are on it. The difference between human beings and animals is not to be discovered by studies....the difference is...a central concept for human life’.¹³⁸ Wise and Francione appear to ignore the fundamental importance of this divide. The law does not fail to include nonhuman animals within the category of persons because it fails

¹³⁴ Wise, above n 1, 238.

¹³⁵ Ibid 237.

¹³⁶ Ibid 238.

¹³⁷ Ibid 237.

¹³⁸ Cora Diamond, 'Eating Meat and Eating People' (1978) 53(206) *Philosophy* 465, 470.

to appreciate their sentience or their capabilities (as they assume it does). There has long been little scientific doubt that nonhuman animals feel a wealth of emotions that are, in many instances, not dissimilar to the emotions felt by human beings. Wise and Francione establish this convincingly. We are left in little doubt that some nonhuman animals may possess greater mental capabilities than many humans do in the first years of their life. Yet, we offer an undisputed grant of personhood to human persons, whilst simultaneously refusing the same to nonhuman animals. The issue is something that Wise and Francione do not appreciate: the problem is not that the law is yet to appreciate scientific truths about nonhuman animals. The problem is that nonhuman animals are precisely that: *nonhuman*.

V. CONCLUSION

In this chapter, I have suggested that the legal characterisation of nonhuman animals as legal property is central to the way in which the law treats them cruelly. Characterised as legal property, I have suggested that nonhuman animals are viewed as legitimate objects of human property rights. As property, the interests of nonhuman animals do not count in law. In understanding precisely how nonhuman animals are excluded from ‘counting’ in law, I explained two competing conceptions of the legal ‘person’. The purpose of examining these competing conceptions was to reveal an important point. Namely, that nonhuman animals are not only excluded from the category of the legal person, but the category is constructed so as to necessitate their exclusion. I considered the argument of two key thinkers on the legal status of nonhuman animals, Gary Francione and Steven Wise. A critical assessment of their premises reveals that they share a tendency to recapitulate the human-centric nature of the construct of the legal person. In doing so, they unwittingly legitimate a construction of the person as something which remains tightly bound to the *human*. As long as the person remains tightly bound to the human, nonhuman animals will not, and cannot count in law. My critique of Wise and Francione in this chapter offers a unique contribution to discourse on the legal status of nonhuman animals. Though I am sympathetic to their desire to remove nonhuman animals from the legal status of ‘property’, I have suggested that their arguments implicitly affirm a human-centric concept of the legal ‘person’. As such, Wise and Francione, unwittingly recapitulate the essence of the problem. Nonhuman animals are ‘property’ because they are not (human) *persons*.

In the following chapter, I reveal in more detail precisely how the legal characterisation of nonhuman animals as legal property facilitates their cruel treatment. My suggestion is that that the provisions of Australian animal welfare law are bound tightly to protecting human property interests. The result is that laws which purport to prohibit cruelty to nonhuman animals are strictly limited in scope. Cruelty is prohibited only insofar as that prohibition does not prevent humans from using nonhuman animals to serve their own interests.

CHAPTER 4: AUSTRALIAN ANIMAL 'WELFARE' LAWS

I. INTRODUCTION

‘The law may prevent ‘cruelty’ but it does so by stripping away the meaning of this word through its acceptance that human privilege to use animals to our ends takes priority over suffering, and that human needs like efficiency, higher economic productivity, and more desirable aesthetics and even entertainment count as legitimate ends’.¹

In the previous chapter, I explained that nonhuman animals in Australia are legally classified as property. I argued that their property status facilitates cruelty towards them, because it legitimates the human use of nonhuman animals to serve human purposes, even where such usage inflicts cruelty upon them. However, as I explained in chapter one, animal welfare legislation exists in each state and territory of Australia and to restrict the ways in which humans use nonhuman animals to serve their own interests. These statutes claim to prohibit cruelty and promote nonhuman animal welfare. In Queensland for example, the *Animal Care and Protection Act 2001* (Qld) subtitle reads ‘an Act to promote the responsible care and use of animals and to protect animals from cruelty...’.²

Australian animal welfare legislation purports to meet these statutory objectives through the creation of offences to prohibit conduct that is cruel to a nonhuman animal or otherwise compromises their welfare. For example, in Victoria, section 9 of the *Prevention of Cruelty to Animals Act 1986* (Vic) details the offence of cruelty towards a nonhuman animal, and criminalises conduct that, for example, ‘wounds, mutilates, tortures, overrides, overdrives, overworks, abuses, beats, worries, torments, or terrifies’ a nonhuman animal.³ In South Australia, section 13(2) of the *Animal Welfare Act 1875* (SA) provides that ‘[a] person who ill-treats an animal is guilty of an offence’. The Act then goes on to provide a lengthy description of what constitutes such ‘ill-treatment’, including neglecting an animal, or intentionally, unreasonably or recklessly causing harm to an animal.⁴

Although animal welfare legislation may appear to provide vast protections for nonhuman animals, I demonstrate in this chapter that these laws consistently fail in meeting their stated

¹ Peter Sankoff, ‘The Welfare Paradigm: Making the World a Better Place for Animals?’ in Sankoff and White (eds), *Animal Law in Australia* (The Federation Press, 2009) 7, 33.

² *Animal Care and Protection Act 2001* (Qld) (legislative subtitle).

³ *Prevention of Cruelty to Animals Act 1986* (Vic) s9(1)(a).

⁴ *Animal Welfare Act 1875* (SA) s13(3).

objective. I make this claim on the basis that nonhuman animals in Australia still suffer greatly and *lawfully* in human hands, despite the seemingly strong legal protections they are offered by animal welfare legislation. For example, an estimated 500 million animals bred and raised for human consumption in Australia annually are lawfully confined to ‘factory farm’ conditions, where they are unable to exercise, socialise, nurture their young or explore nature.⁵ My contention in this chapter is that the cruelty experienced by nonhuman animals such as those confined to factory farms occurs not only despite animal welfare legislation, but precisely *because* of it. My argument is that animal welfare legislation, which purports to protect nonhuman animals from cruelty, permits their mistreatment.

This chapter is divided into three parts. In the first part, I detail the key protective provisions contained in Australian animal welfare statutes. These provisions purport to protect nonhuman animals from cruelty and to promote their welfare. They also outlaw specific offences against nonhuman animals. In the second part, I explain the first mechanism by which I argue these protections are consistently undermined for some species of nonhuman animal kept in certain contexts. I argue that the use of qualifying language such as ‘necessary’ and ‘reasonable’ qualify and limit the general protections that the law offers to nonhuman animals. My argument is that the law does not protect nonhuman animals from cruelty *per se*, but only from ‘unreasonable’ or ‘unnecessary’ cruelty. Given that nonhuman animals are characterised as legal property, these qualifying terms legitimate cruelty that serves human ownership interests. In the third part, I explain the role of Codes of Practice and Standards and Guidelines, which supplement Australian animal welfare legislation. Codes of Practice and Standards and Guidelines dictate the legal standards that govern the treatment of nonhuman animals in industries that have a positive interest in treating nonhuman animals cruelly because such cruelty serves an economic purpose. The result is that those nonhuman animals that are the most vulnerable to experiencing cruelty by human hand, are systematically exempted from the general protections offered by Australian animal welfare legislation. In the fourth part, I use the case study of factory farmed pigs in Australia to demonstrate the failings of Australian animal welfare legislation in protecting pigs from cruelty.

⁵ Animals Australia, *Frequently Asked Questions About Factory Farming The Facts* < <http://www.makeitpossible.com/facts/frequently-asked-questions.php#faq10> > at 2 September 2014 .

II. AUSTRALIA'S ANIMAL WELFARE LEGISLATIVE FRAMEWORK

The Australian animal welfare legislative framework is vast and varied.⁶ As I explained in chapter two, the treatment of nonhuman animals is dealt with by numerous branches of law. In general however, the Australian constitution makes no provision for the federal Government of Australia to legislate with respect to animal welfare, except where the power can derive indirectly from other heads of power.⁷ For example, federal legislation covers animal welfare matters in the live animal export trade, created under the federal government's power to legislate with respect to trade and commerce.⁸ As a result, the regulation of animal welfare in Australia is not addressed by a uniform legislative framework, but rather is addressed individually by each state and territory of Australia.⁹ In addition, local councils are responsible for the creation of by-laws relating to the management of companion animals, such as dogs and cats.¹⁰

In 2005 the Australian Animal Welfare Strategy ('AAWS') was developed by the Australian Government to create more consistency across Australia with respect to animal welfare standards.¹¹ The AAWS was originally governed by the Australian Animal Welfare Advisory Committee (AusAWAC), which was comprised of representatives of industry, researchers, veterinarians and animal welfare advocates. The AusAWAC was charged with the task of providing advice to Government on animal welfare policy. Government funding for the AAWS was withdrawn in the 2014-15 federal budget, to allegedly secure a saving of 3.3 million dollars over three years.¹² The AusAWAC was also disbanded, with responsibility for

⁶ 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* 348.

⁷ *Commonwealth of Australia Constitution Act 1901* (Cth) s51.

⁸ For example: *Australian Meat and Livestock Industry Act 1997* (Cth), *Export Control Act 1982* (Cth).

⁹ *Animal Welfare Act 1985* (SA), *Animal Welfare Act 1993* (Tas), *Animal Welfare Act 2002* (WA), *Animal Welfare Act* (NT), *Prevention of Cruelty to Animals Act 1986* (Vic), *Animal Welfare Act 1992* (ACT), *Prevention of Cruelty to Animals Act 1979* (NSW), *The Animal Care and Protection Act 2001* (Qld).

¹⁰ In South Australia for example, such by-laws are passed under the *Dog and Cat Management Act 1995* (SA) and the *Local Government Act 1999* (SA).

¹¹ Deborah Cao, *Animal Law in Australia* (2nd ed, Thomson Reuters, 2015) 111-114.

¹² Rob Dossor, *Cessation of Animal Welfare Assistance in Destination Countries and Australian Animal Welfare Strategy* (2014) Parliament of Australia < http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201415/Animal > .

the AAWS being taken up by the Department of Agriculture.¹³ I return to the AAWS later in this chapter.

A. *The Legal Definition of 'Animal'*

Before examining the legislative provisions that purport to protect nonhuman animals from cruelty, it is necessary to explain how the law defines the term 'animal'. The legal definition of 'animal' is important because it sets the scope of animal welfare legislation. Only those who are included within the legal definition of the 'animal' are entitled to protections provided by animal welfare laws. This is a point which I return to in more detail chapter six, where I argue that the legal definition of the term 'animal' is inadequate because it fails to include nonhuman animal species that are capable of suffering.

State based statutory frameworks for protecting nonhuman animals from harm do not share a common definition of the term 'animal'. As a result, each state and territory of Australia separately defines 'animal' for the purposes of defining the scope of animal welfare legislation in their respective jurisdictions. In Victoria, the definition of 'animal' even changes throughout the *Prevention of Cruelty to Animals Act 1986* (Vic), such that certain provisions apply only to certain 'animals'.¹⁴

Though there is no unified definition of 'animal', it is possible to find commonalities between the various definitions of 'animal' across Australia. In all states and territories of Australia – human beings are also explicitly excluded from the definition of 'animal'.¹⁵ Live members of a vertebrate species are included under all animal welfare acts, including amphibians, reptiles, birds, and mammals.¹⁶ Insects by contrast, are excluded in all states and territories. Fish are included in Queensland, the Australian Capital Territory, Tasmania, Victoria and

¹³ Ibid.

¹⁴ *Prevention of Cruelty to Animals Act 1986* (Vic) ss3, 25.

¹⁵ *Prevention of Cruelty to Animals Act 1979* (NSW) s4, *Animal Welfare Act 1992* (ACT) s2(a)(iv), *Animal Welfare Act 1985* (SA) s3, *Animal Welfare Act* (NT) s4, *Animal Welfare Act 2002* (WA) s5, *Animal Welfare Act 1993* (Tas) s3, *Animal Care and Protection Act 2001* (Qld) s11(a), *Prevention of Cruelty to Animals Act 1986* (Vic) s3(3)(a)(ii).

¹⁶ *Prevention of Cruelty to Animals Act 1979* (NSW) s4, *Animal Welfare Act 1992* (ACT) s2, *Animal Welfare Act 1985* (SA) s3, *Animal Welfare Act* (NT) s4, *Animal Welfare Act 2002* (WA) s5, *Animal Welfare Act 1993* (Tas) s3, *Animal Care and Protection Act 2001* (Qld) s11, *Prevention of Cruelty to Animals Act 1986* (Vic) s3(3).

New South Wales.¹⁷ In the Northern Territory, fish are only included if they are kept under human control, either in captivity or if they are otherwise dependent on humans for food.¹⁸ Fish are expressly excluded in South Australian and Western Australia.¹⁹

The Australian Capital Territory, New South Wales, Victoria and Queensland also include crustaceans in the statutory definition of ‘animal’, but Victoria is the only jurisdiction among these that does not limit the definition to include only crustaceans being confined and used for human consumption.²⁰ The Australian Capital Territory, Victoria and Queensland are the only parts of Australia which extend animal welfare laws to live cephalopods (such as octopus, cuttlefish and squid), though Victoria only includes them for the purposes of provisions pertaining to scientific research on nonhuman animals.²¹ Cephalopods in all other states and territories do not receive any protections for their welfare – despite scientific indications they are capable of suffering.²²

In addition, Queensland and Victoria are the only states in which some classes of mammals are included in utero. In Victoria, mammals that have reached over half their gestation period are considered ‘animals’ for the purposes of the *Prevention of Cruelty to Animals Act 1986* (Vic).²³ In Queensland, mammals, reptiles and avian young are included where they are in the last half of gestation or development.²⁴ The spawn of fish are expressly excluded by the Queensland Act.²⁵ I return to the legal definition of the ‘animal’ in chapter six.

B. Key Animal Welfare Provisions

Having briefly explained which nonhuman animals are defined as ‘animals’ in Australian animal welfare legislation, I now describe the key provisions in each state. Whilst the content

¹⁷ *Animal Welfare Act 1992* (ACT) s2, *Animal Care and Protection Act 2001* (Qld) s11(1)(a), *Animal Welfare Act 1993* (Tas) s3, *Prevention of Cruelty to Animals Act 1979* (NSW) s4(1)(a)(iii).

¹⁸ *Animal Welfare Act* (NT), s4(b)

¹⁹ *Animal Welfare Act 1985* (SA) s3(b), *Animal Welfare Act 2002* (WA) s5(1)(b).

²⁰ *Animal Care and Protection Act 2001* (Qld)s11(1)(d), *Prevention of Cruelty to Animals Act 1979* (NSW) s4(1)(b), *Prevention of Cruelty to Animals Act 1986* (Vic) s3(b), *Animal Welfare Act 1992* (ACT) s2.

²¹ *Animal Welfare Act 2002* (WA) s11(1)(d), *Animal Welfare Act 1992* (ACT) s2, *Prevention of Cruelty to Animals Act 1986* (Vic) s25(c).

²² See for example: Jennifer Mather and Roland Anderson, 'Ethics and Invertebrates: A Cephalopod Perspective' (2007) 75(2) *Diseases of Aquatic Organisms* 119.

²³ *Prevention of Cruelty to Animals Act 1986* (Vic)s3(a)(ii)

²⁴ *Animal Care and Protection Act 2001* (Qld) s 11(b)(i), (ii).

²⁵ *Ibid* s11(3)(a).

of the provisions varies across each Australian state and territory, each share some important sections that are similar in terms of their purported effect. I divide these provisions into three themes: anti-cruelty provisions, animal welfare provisions, and specific offences against nonhuman animals.

1. *Anti-Cruelty Provisions*

Animal welfare legislation in each jurisdiction contains provisions which purport to prohibit cruelty towards nonhuman animals. These provisions apply to the conduct of any person, regardless of whether they are the owner of a nonhuman animal, and prohibit certain forms of conduct. For example, in South Australia, it is an offence to ‘ill-treat’ an animal.²⁶ This is a broad offence that covers a wide variety of human conduct that may cause a nonhuman animal to suffer unnecessarily. The ill-treatment offence covers both intentional acts, as well as reckless and negligent acts that unnecessarily cause an animal harm.²⁷ The South Australian Act defines ‘harm’ broadly, to include any form of damage, pain, suffering or distress (including unconsciousness), whether arising from injury, disease or any other condition.²⁸

The South Australian *Animal Welfare Act 1985* (SA) also contains an aggravated offence provision, which applies where a person ill-treats a nonhuman animal, and that ill-treatment caused death or serious harm to the animal, *and* the person intended to cause, or was reckless about causing the death or serious harm.²⁹ Each jurisdiction except Queensland and Western Australia contains a similar aggravated offence provision.³⁰

In New South Wales, under section 5 of the *Prevention of Cruelty to Animals Act 1979* (NSW) it is also an offence to be cruel to a nonhuman animal. In New South Wales however, the definition of what constitutes ‘cruelty’ is given more detail than it is in South Australia. A person commits an act of cruelty upon a nonhuman animal in New South Wales if they cause that nonhuman animal to be

²⁶ *Animal Welfare Act 1985* (SA) s13.

²⁷ *Ibid* s13(3)(a).

²⁸ *Ibid* s4.

²⁹ *Ibid* s13(1).

³⁰ *Animal Welfare Act 1992* (ACT) s7A; *Prevention of Cruelty to Animals Act 1979* (NSW) s6; *Animal Welfare Act* (NT) s10; *Animal Welfare Act 1993* (Tas) s9; *Prevention of Cruelty to Animals Act 1986* (Vic) s10.

s4(2)(a) unreasonably, unnecessarily or unjustifiably beaten, kicked, killed, wounded, pinioned,³¹ mutilated, maimed, abused, tormented, tortured, terrified or infuriated,

s4(2)(b) over-loaded, over-worked, over-driven, over-ridden or over-used,

s4(2)(c) exposed to excessive heat or excessive cold, or

s4(2)(d) inflicted with pain.

The Victorian *Prevention of Cruelty to Animals Act 1986* (Vic), the Western Australian *Animal Welfare Act 2002* (WA), the Queensland *Animal Care and Protection Act 2001* (Qld) and the Tasmanian *Animal Welfare Act 1993* (Tas) contain very similar provisions.³² New South Wales is distinctive in that the *Crimes Act 1900* (NSW) also contains offences that address serious acts of animal cruelty. Under those provisions, it is an offence to: ‘torture, beat or commit a serious act of cruelty on an animal with the intention of inflicting severe pain; and kill, seriously injure, or cause prolonged suffering to an animal’.³³ The New South Wales *Prevention of Cruelty to Animals Act 1979* (NSW) contains an additional obligation that is not present in animal welfare legislation in other jurisdictions, whereby it is an offence of animal cruelty to *authorize* the commission of cruelty upon a nonhuman animal.³⁴

In the Australian Capital Territory, the *Animal Welfare Act 1992* (ACT) similarly creates an offence where a person commits an act of cruelty on an animal.³⁵ In addition to the anti-cruelty provision, section 8 of the *Animal Welfare Act 1992* (ACT) also provides that it is an offence to cause pain to an animal. ‘Pain’ is defined in the Act to include suffering and distress.³⁶ The *Animal Welfare Act 1992* (ACT) is the only animal welfare statute in Australia to include detailed rules pertaining to the keeping of some nonhuman animals raised for food, namely chickens kept for egg production and pigs kept for commercial purposes.³⁷ In all other states and territories, such laws are largely contained in the subordinate regulations and

³¹ An exception to ‘pinioning’ a bird exists where the pinioning is performed in accordance with the regulations made under the Act: *Prevention of Cruelty to Animals Act 1979* (NSW) s2A.

³² *Prevention of Cruelty to Animals Act 1986* (Vic) s9(1)(a), (b); *Animal Welfare Act 2002* (WA) s19(1)(e); *Animal Welfare Act 1993* (Tas) s8(2); *Animal Care and Protection Act 2001* (Qld) s18.

³³ *Crimes Act 1900* (NSW) s530(1).

³⁴ *Prevention of Cruelty to Animals Act 1979* (NSW), s5(2).

³⁵ *Animal Welfare Act 1992* (ACT) s7.

³⁶ *Ibid* s2.

³⁷ *Ibid* ss 9A, 9B.

Codes of Practice which I discuss in part three of this chapter. The Australian Capital Territory is also the only jurisdiction in which the de-beaking of fowl, the confinement of hens to battery cages and the confinement of sows to stalls is outlawed.³⁸ Whilst an important symbolic gesture, this prohibition has little practical effect since the Australian Capital Territory does not house any factory farms where such cruelty would normally be practiced.

The Northern Territory *Animal Welfare Act* (NT) is somewhat different to other jurisdictions in terms of the wording used to prohibit cruelty. The *Animal Welfare Act* (NT) states that a person commits an offence of cruelty to an animal if they fail to meet the minimum level of care, *and* intended to cause the animal harm.³⁹ The Northern Territory is the only jurisdiction in which an allegation of cruelty must be substantiated by proof an *intent* to cause harm. Though this may seem to establish a higher threshold for the establishment of guilt than the anti-cruelty provisions in other jurisdictions, this Northern Territory cruelty offence is analogous to the aggravated charges that exist in other Australian jurisdictions. An offence similar to the strict liability cruelty offences that exist in most jurisdictions is instead established under section 7 of the *Animal Welfare Act* (NT), as the ‘minimum level of care’ required for a nonhuman animal. Any person who fails to meet that level of care, breaches the duty of care established in section 8. An aggravated charge in the Northern Territory legislation is established when a person has been intentionally cruel to a nonhuman animal, and in doing so, have caused the death of, or serious harm⁴⁰ to that animal.⁴¹

Section 7 of the Northern Territory act, which deals with breaching one’s duty of care to an animal provides that the minimum level of care required for an animal is that it:

- (a) has appropriate and sufficient food and water; and
- (b) has appropriate accommodation and living conditions; and
- (c) is appropriately treated for disease, injury or suffering; and

³⁸ Ibid ss9A, 9B, 9C. The de-beaking of fowl is a surgical procedure performed on young chicks, typically without anaesthetic. The tip of a the beak is removed using a hot blade. The procedure is said to minimize the incidence of injury when chickens fight in cramped factory farming conditions.

³⁹ *Animal Welfare Act* (NT) s9.

⁴⁰ ‘Serious harm’ is defined in section 10(2) of the *Animal Welfare Act* (NT).

⁴¹ *Animal Welfare Act* (NT) s10.

- (d) is allowed appropriate exercise; and
- (e) is handled only in ways that are appropriate; and
- (f) is confined or restrained only in ways that are appropriate; and
- (g) is worked, ridden or otherwise used only in ways that are appropriate; and
- (h) is not abandoned; and
- (i) is not used in an organized animal fight.

The term ‘appropriate’ is defined to mean suitable for ‘ensur[ing] the welfare, health and safety of the animal, having regard to all relevant circumstances, including the animal’s species and the environment in which it is kept or lives’.⁴² In addition, something is considered not appropriate for an animal if it causes that animal unnecessary suffering.⁴³

In Tasmania, the *Animal Welfare Act 1993* (Tas) establishes that humans in charge of an animal have a legally enforceable duty of care to it, in a similar manner to the *Animal Welfare Act* (NT).⁴⁴

2. *Animal Welfare Provisions*

In addition to the anti-cruelty provisions just described, animal welfare legislation in each Australian jurisdiction also contains what I am labelling ‘animal welfare’ provisions. These provisions differ from anti-cruelty provisions in two ways. First, they generally only apply to a person who is the owner of a nonhuman animal, or who otherwise has a nonhuman animal within their custody and control. Second, that they establish a *positive duty*. They dictate things that a person *must do* to protect a nonhuman animal’s welfare. Thus, rather than prohibit certain forms of conduct, as anti-cruelty provisions do, animal welfare provisions require those in charge of a nonhuman animal to do certain things to protect the interests of nonhuman animals.

⁴² Ibid s7(2).

⁴³ Ibid s7(3)(a).

⁴⁴ *Animal Welfare Act 1993* (Tas) s6. In the case of *Joyce v Visser* [2001] TASSC 116 at [4] the Court held that care or charge of an animal is an element of an offence against this section.

For example, in South Australia, according to section 13(3) of the *Animal Welfare Act 1985* (SA), a person who owns a nonhuman animal, commits an ill-treatment offence if they fail to provide that nonhuman animal with ‘appropriate and adequate’ food, water, shelter or exercise.⁴⁵ An ‘owner’ in South Australia is defined as any person who has a nonhuman animal in their custody or control,⁴⁶ and would therefore include persons who are caring for a nonhuman animal in any capacity, even if they are not the registered owner. The obligation that a person with custody and control over a nonhuman animal provide it with adequate and appropriate food, water, exercise and shelter is common across every animal welfare statute in Australia.⁴⁷ The New South Wales Act expressly excludes ‘stock’ animals in the context of reasonable access to exercise, where that animal is usually kept in captivity by means of a cage.⁴⁸ I address this provision later in this chapter, and in chapter six.

Each statute also requires that a person in charge of a nonhuman animal take reasonable steps to mitigate harm caused by disease or injury.⁴⁹ In New South Wales a person also has a positive duty to provide a nonhuman animal under their control animal with appropriate supervision and care so as to prevent the commission of an act of cruelty. A person who fails in this regard may commit an animal cruelty offence.⁵⁰

3. *Specific Offences Against Nonhuman Animals*

In addition to anti-cruelty and animal welfare provisions, animal welfare legislation in each state and territory of Australia also contains provisions which detail specific offences against nonhuman animals. Although these prohibited activities may already be unlawful under the general anti-cruelty provisions, the explicit prohibition of certain types of conduct towards nonhuman animals provides certainty. In some cases different penalties also apply. While

⁴⁵ *Animal Welfare Act 1985* (SA) s13(3).

⁴⁶ *Ibid* s3.

⁴⁷ *Animal Welfare Act 1992* (ACT) s8, *Prevention of Cruelty to Animals Act 1979* (NSW), s8, *Prevention of Cruelty to Animals Act 1986* (Vic) s9(1)(f), *Animal Welfare Act 2002* (WA) s19(3)(h), *Animal Care and Protection Act 2001* (Qld) s17(3)(a)(i),(ii), *Animal Welfare Act* (NT) s7(1)(a), (b), *Animal Welfare Act 1993* (Tas) s8(2)(e).

⁴⁸ *Prevention of Cruelty to Animals Act 1979* (NSW) s9(1).

⁴⁹ *Animal Welfare Act 1985* (SA) s13(3)(b)(i), (iv); *Prevention of Cruelty to Animals Act 1986* (Vic) s9(1)(i); *Animal Care and Protection Act 2001* (Qld) s17(3)(a)(iv); *Animal Welfare Act* (NT) s7(1)(c); *Animal Welfare Act 1993* (Tas) s8(2)(g); *Prevention of Cruelty to Animals Act 1979* (NSW) s5(3)(b); *Animal Welfare Act 2002* (WA) s19(3)(h); *Animal Welfare Act 1992* (ACT) s8(2)(b).

⁵⁰ *Prevention of Cruelty to Animals Act 1979* (NSW), s5(3).

there is significant variety between jurisdictions with respect to the explicit prohibition of specific offences, some commonalities do exist. For example, abandoning an animal is an offence in each state and territory of Australia.⁵¹ Most jurisdictions also explicitly prohibit animal fights,⁵² the performance of surgical procedures on nonhuman animals by non-veterinarians,⁵³ the use of electric devices (except where allowed by regulations)⁵⁴ and the riding or working of unfit nonhuman animals.⁵⁵

Two noteworthy differences between jurisdictions are that rodeos are permitted in all states and territories of Australia, except the Australian Capital Territory,⁵⁶ and that steeplechase (jumps racing) is unlawful only in New South Wales,⁵⁷ though it is no longer practiced anywhere except Victoria and South Australia.⁵⁸

III. FAILING LEGAL PROTECTIONS

The key provisions of Australian animal welfare legislation that I have just detailed may appear to provide vast protections to nonhuman animals. They purport to prohibit cruelty, and to place a positive duty on those in control of nonhuman animals to ensure the basic welfare needs are met. Yet, nonhuman animals in Australia continue to suffer *lawful* cruelty. As I have already stated, some nonhuman animals are excluded from the definition of ‘animal’

⁵¹ *Prevention of Cruelty to Animals Act 1986* (Vic) s9(1)(h); *Animal Welfare Act 2002* (WA) s19(3)(h); *Animal Welfare Act 1992* (ACT) s8(2)(c); *Prevention of Cruelty to Animals Act 1979* (NSW) s11; *Animal Welfare Act* (NT) s7(1)(h); *Animal Care and Protection Act 2001* (Qld) s19; *Animal Welfare Act 1993* (Tas) s8(2)(f); *Animal Welfare Act 1985* (SA) s13(3)(b)(iii).

⁵² *Animal Welfare Act 1992* (ACT) s17; *Prevention of Cruelty to Animals Act 1979* (NSW) s18; *Prevention of Cruelty to Animals Act 1986* (Vic) s13; *Animal Welfare Act 1985* (SA) s14(5)(a); *Animal Care and Protection Act 2001* (Qld) ss20, 21, 22; *Animal Welfare Act 2002* (WA) s32; *Animal Welfare Act* (NT) s7(1)(i)

⁵³ *Animal Welfare Act 1992* (ACT) s19; *Prevention of Cruelty to Animals Act 1979* (NSW) s12; *Prevention of Cruelty to Animals Act 1986* (Vic) s9(1)(l); *Animal Welfare Act 1985* (SA) s13(3)(i); *Animal Care and Protection Act 2001* (Qld) ss23-27; *Animal Welfare Act 2002* (WA) s19(3)(j).

⁵⁴ *Animal Welfare Act 1992* (ACT) s13; *Prevention of Cruelty to Animals Act 1979* (NSW) s16; *Animal Welfare Act 1985* (SA) s15; *Animal Welfare Act 1993* (Tas) s8(2)(i); *Animal Welfare Act* (NT) s19.

⁵⁵ *Animal Welfare Act 1992* (ACT) s16; *Prevention of Cruelty to Animals Act 1979* (NSW) s7; *Prevention of Cruelty to Animals Act 1986* (Vic) s9(1)(e); *Animal Care and Protection Act 2001* (Qld) s18(2)(f)(ii) *Animal Welfare Act 1993* (Tas) s8(2)(d); *Animal Welfare Act 2002* (WA) s19(3)(c)(i); *Animal Welfare Act* (NT) s7(1)(g)

⁵⁶ *Animal Welfare Act 1992* (ACT) s18.

⁵⁷ *Prevention of Cruelty to Animals Act 1979* (NSW) s21C

⁵⁸ The Law Society of South Australia, Submission in Relation to the *Animal Welfare (Jumps Racing) Amendment Bill 2011*, 2011.

and are thus offered no legal protections from cruelty. I return to this point in chapter six. In what follows however, I demonstrate that even those nonhuman animals who *are* included within the definition of an ‘animal’, and thus *are* included within the scope of the anti-cruelty and welfare provisions, are still systematically excluded from the law’s protective reach by two other less obvious mechanisms.

First, the prohibition on cruelty is always qualified by words such as ‘legitimate’, ‘necessary’ and ‘reasonable’, with the result that many forms of cruelty are in fact facilitated, and not prohibited, by law. Second, regulations and Codes of Practice operate in each Australian jurisdiction to dictate separate standards for the treatment of nonhuman animals kept for particular human purposes. These regulations and Codes exempt some of the worst forms of cruelty towards nonhuman animals from the protective reach of Australian animal welfare laws. For the purposes of the inquiry in this thesis, I restrict my analysis to Codes of Practice, because they provide the most overt examples of lawful, permitted cruelty. I now describe each of these mechanisms in turn.

A. *Qualifying Words and ‘Necessary’ Cruelty*

The key provisions of Australian animal welfare legislation are much more limited in scope than they seem at first sight. Each statute contains qualifying words that limit the scope of the general prohibition on cruelty provisions. Critiques on the inadequacy of Australian animal welfare legislation have focused on these terms, because they implicitly *legitimate* certain forms of cruelty, providing it can be ‘justified’ in some way.⁵⁹ For example, the South Australian prohibition on ill-treating a nonhuman animal provides that: ‘A person who ill-treats an animal is guilty of an offence’.⁶⁰ That same act also *qualifies* this general prohibition, defining ill-treatment as causing ‘*unnecessary harm*’, causing ‘*unnecessary pain*’, or failing to take ‘*reasonable steps*’ to mitigate harm suffered by a nonhuman animal.

⁵⁹ Cao, above n 11, 213-216; Katrina Sharman, ‘Farm Animals and Welfare Law: An Unhappy Union’ in White and Sankoff (eds), *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, The Federation Press, 2013) 61, 78; Peter Sankoff, ‘The Protection Paradigm: Making the World a Better Place for Animals?’ in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (The Federation Press, 2013) 1, 13-20; Steven White, ‘Exploring Different Philosophical Approaches to Animal Protection Law’ in *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, The Federation Press, 2013) 31, 49-51. In the American context see Gary Francione, *Animals, Property and the Law* (Temple University Press, 1995) 17-32; Steven Wise, *Rattling the Cage* (Cambridge Press, 2000) 259-260.

⁶⁰ *Animal Welfare Act 1985* (SA) s13(2).

Ill-treatment, therefore, is *only* prohibited by the South Australian *Animal Welfare Act 1985* (SA) insofar as it constitutes *unnecessary* or *unreasonable* ill-treatment of a nonhuman animal.

Animal welfare legislation in each jurisdiction contains similar qualifications. In the Northern Territory, a person is cruel to a nonhuman animal where they cause it ‘*unnecessary* suffering’.⁶¹ In Tasmania, a person must not do any act that is likely to cause ‘*unreasonable* and *unjustifiable* pain or suffering’ to a nonhuman animal.⁶² Whilst purporting to meet the objective of prohibiting cruelty to nonhuman animals, Australian animal welfare legislation only prohibits cruelty of a very specific type: cruelty that is *unnecessary*, *unjustifiable* or *unreasonable*. In other words, the only cruelty that is prohibited is that which cannot be justified by the person inflicting it.⁶³

It is possible to imagine contexts in which these provisions, despite their limitations, could operate to protect the welfare of nonhuman animals. For example, the infliction of pain to administer a lifesaving vaccination would seem to be a ‘justifiable’ or ‘reasonable’ infliction of pain upon on a nonhuman animal. Here, the infliction of a comparatively minor harm upon a nonhuman animal could be deemed *necessary* to protect their future welfare, and preventing them from experiencing future pain and suffering. To this extent, the qualified anti-cruelty prohibition seems reasonable.

However, qualifying terms can also facilitate cruelty towards nonhuman animals that is not justified with respect to their own interests. The qualifying words operate to facilitate cruelty that can be judged ‘necessary’ or ‘reasonable’ because it serves *human* interests to inflict it. This is particularly so where the infliction of cruelty serves the economic needs of an industry that uses nonhuman animals for human benefit. The factory farming of nonhuman animals is a pertinent example. As I demonstrate in chapter five, the test for what constitutes ‘necessary’ suffering is may be applied differently to different species, with the result that some species are treated more cruelly than others. As Peter Sankoff explains, ‘[h]arm is not absolute, but

⁶¹ *Animal Welfare Act* (NT) s3(a).

⁶² *Animal Welfare Act 1993* (Tas) s8(1).

⁶³ Katrina Sharman, ‘Farm Animals and Welfare Law: An Unhappy Union’ in Sankoff, White and Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, The Federation Press, 2013) 61, 78.

relative'.⁶⁴ To explain how 'necessary' or 'reasonable' cruelty is defined in law, I now detail some judicial commentary surrounding the terms.

1. *Judicial Commentary on 'Necessary' Suffering*

There exists little case law to explain precisely what constitutes 'necessary' suffering in the context of animal welfare provisions. This is so even despite the fact that animal welfare laws have existed globally for almost 200 years.⁶⁵ Sankoff attributes this lack of case law to two things: the 'alarmingly inadequate' enforcement of animal welfare laws, meaning that there are few cases appearing before the courts (which I address in chapter eight),⁶⁶ and the fact that even fewer cases go to trial or are appealed, with the result that 'very little case law is generated to assist in future interpretation of the statute'.⁶⁷ Annabel Markham has also described the analysis of animal welfare case law as 'no easy task', since prosecutions in Australia typically take place in Magistrate and District courts, the decisions of which are unreported.⁶⁸ As I contend later in this part and in chapter six, the prohibition on 'unnecessary' cruelty also performs very limited protective work because the majority of cruelty is positively permitted by law that is therefore never exposed to the general anti-cruelty provisions. As such, minimal case law is generated to give meaning to the terms.

In addition to the lack of case law which explains precisely what 'necessary' cruelty is, the term is also notoriously difficult to define. In the English case of *Ford v Wiley*⁶⁹ which I discuss further below, Lord Chief Justice Coleridge explained that it is easier to define the concept of necessary suffering 'from the negative'.⁷⁰ That is, it is simpler to explain what necessary cruelty *is not*, than it is to articulate precisely what it *is*. This makes sense when viewed in light of the role that qualifying terms play in Australian legislation. The very purpose of using such terms is to provide scope for judicial interpretation of what constitutes lawful or unlawful conduct through inspection of the facts of each case.⁷¹ What is 'necessary'

⁶⁴ Sankoff, above n 59, 15.

⁶⁵ Ibid 13; Cao, above n 11, 214.

⁶⁶ Sankoff, above n 59, 13.

⁶⁷ Ibid 14.

⁶⁸ Annabel Markham, 'Animal Cruelty Sentencing in Australia and New Zealand' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (The Federation Press, 2009) 289, 293.

⁶⁹ *Ford v Wiley* (1889) 23 QB 203.

⁷⁰ Ibid 209.

⁷¹ Sankoff, above n 59, 15.

in one context may not be ‘necessary’ in another. The benefit of the use of such terminology in law is that it enables the creation of highly flexible provisions that can be applied to different factual scenarios in different ways. However, absent any statutory guidance, such terminology also offers little guidance on precisely how these terms should be interpreted by the judiciary in each case.⁷²

Two cases that have offered some guidance on what constitutes ‘necessary’ or ‘reasonable’ cruelty in the context of animal welfare laws are the English case of *Ford v Wiley*,⁷³ and the Canadian case of *R v Menard*.⁷⁴ Although these are not Australian cases, they contain important judicial commentary on the concept of ‘necessary’ nonhuman animal suffering which took place in the context of applying similar provisions to those contained in Australian animal welfare statutes. The judicial commentary may therefore be persuasive in Australian cases if a court is required to interpret these terms.⁷⁵ *Ford v Wiley* has also been considered and applied directly in the Australian context.⁷⁶

In the case of *Ford v Wiley*, the defendant used a saw to remove the horns of his cattle, and was charged with an animal cruelty offence.⁷⁷ The question before the court was whether the cruelty committed was ‘necessary’.⁷⁸ The defendant justified his actions on the basis of economic and practical necessity. He reasoned that by dehorning the cattle, he would obtain a better price for them, because he could keep more cattle in his available space, and they would be less likely to cause injury and damage to one another.⁷⁹ In determining whether the cruelty was justified on these grounds, the court developed a two-limbed proportionality test, to balance the pain and suffering of the cattle, against the defendant’s intended purpose of achieving economic benefits:

The legality of a painful operation must be governed by the necessity for it, and even where a desirable and legitimate object is sought to be attained, the magnitude of the operation and the

⁷² Ibid 15.

⁷³ *Ford v Wiley* (1889) 23 QB 203.

⁷⁴ *R v Menard* (1978) 43 Ccc (2d) 458 (Que CA).

⁷⁵ Sankoff, above n 59, 14.

⁷⁶ For example *Wilson v Royal Society for the Prevention of Cruelty to Animals (SA) Inc* [2016] SASC 107.

⁷⁷ The charges were laid under s2 of the *Cruelty to Animals Act 1949* (12&13 Vict. c. 92).

⁷⁸ Dehorning is now a routine part of cattle husbandry, and is lawful in every state of Australia provided applicable Codes of Practice and Regulations are complied with.

⁷⁹ Meg Lamb, ‘*Ford v Wiley* Proportionality Analysis of the Castration of Domestic Livestock for Meat Production’ (2015) 11 *Australian Animal Protection Law Journal* 20, 21.

pain caused thereby must not so far outbalance the importance of the end as to make it clear to any reasonable person that it is preferable the object should be abandoned rather than that disproportionate suffering should be inflicted.⁸⁰

The court therefore established that cruelty can only be considered ‘necessary’ where it was inflicted in pursuit of a legitimate end, *and* where the means used to pursue that end were reasonably proportionate to the object being sought. In this case, the court found that the act of dehorning the cattle, which was not routinely practiced at the time, was *not* a legitimate object. Lord Coleridge stated:

No owner is compelled by any necessity to turn his horned into his dishorned or artificially-polled cattle...If he wishes for polled cattle he can buy naturally-polled animals, though it may be at a small extra price. If, however, to avoid that outlay, he prefers to buy horned cattle, and to enhance their value...by mutilating them at the expense to the poor animals of excruciating torture, how can this be said to be either necessary or reasonable?⁸¹

Lord Coleridge therefore concluded that even though having polled cattle may be more convenient for the defendant, the fact that other farmers through England had not widely adopted the practice was ‘abundant proof that dishorning is not necessary’.⁸² In the same case, Hawkins J reasoned that the law must place limitations on the purposes for which humans use nonhuman animals. Not all uses of nonhuman animals to serve human interests should be deemed ‘necessary’ simply because they secure a human benefit. He stated:

If the law were that any man or body of men could in his or their own interest, or for his or their pecuniary benefit, cause torture and suffering to animals without legitimate reasons, and could, when charged with cruelty, excuse himself or themselves upon the ground that he or they honestly believed the law justified them, though in fact it did not, it is not difficult to see the limits to which such a principle might not be pushed, and the creatures it is man’s duty to protect from abuse, would oftentimes be suffering victims of gross ignorance and cupidity...Constant familiarity with unnecessary torture to and abuse of dumb animals cannot fail by degrees to brutalize and harden all who are concerned in or witness the miseries

⁸⁰ Ibid 22.

⁸¹ *Ford v Wiley* (1889) 23 QB 203, 221.

⁸² Ibid 221-222.

of the sufferers, a consequence to be scrupulously avoided in the best interests of civilised society.⁸³

The defendant in *Ford v Wiley* was found guilty of animal cruelty.⁸⁴ It is interesting to note however, that the act of dehorning cattle without anaesthesia or pain relief is both routine and lawful practice in Australia. It is explicitly permitted by Codes of Practice that operate in each Australian jurisdiction.⁸⁵

In the Canadian case of *R v Menard*, the defendant captured and killed stray dogs and cats by poisoning them with carbon monoxide. The question before the court was whether the cruelty he inflicted upon them in the course of such actions could be considered ‘necessary’. In answering this question, Lamer JA adopted a utilitarian approach in which to ‘balance’ the negative effects of inflicting cruelty against the perceived positive ones:

It is sometimes necessary to make an animal suffer for its own good or...to save a human life. Certain experiments, alas, inevitably very painful for the animal, prove necessary to discover or test remedies which will save a great number of human lives. [The legislation] does not prohibit these incidents, but at the same time, condemns the person who, for example, will leave a dog or horse without water and without food for a few days, through carelessness or negligence or for reasons of profit or again in order to avoid the costs of a temporary board and lodging, notwithstanding that these animals would suffer much less than certain animals used as guinea pigs. Everything is therefore according to the circumstances, the quantification of suffering being only one of the factors in the appreciation of what is, in the final analysis, necessary’.⁸⁶

The test adopted by Lamer JA reveals some important points. First, there does not appear to be any threshold for what may constitute necessary suffering. Even cruelty that is ‘very painful’ may be considered reasonable, if it is inflicted in pursuit of a reasonable object, and in a proportionate manner.⁸⁷ To this extent, the reasoning provided in this case draws a similar conclusion to the Judges in *Ford v Wiley*: any cruelty can be ‘necessary’, and

⁸³ Ibid 225.

⁸⁴ Ibid.

⁸⁵ See for example: *Australian Animal Welfare Standards and Guidelines: Cattle* (2016) Part 6.

⁸⁶ Quoted in Sankoff, above n 59, 15.

⁸⁷ Ibid 15-16.

therefore lawful, as long as it is inflicted for a legitimate purpose, and by reasonable means.⁸⁸ I now consider in more detail what may constitute a ‘legitimate purpose’ and ‘reasonable means’ with continued reference to the judicial commentary contained in both *Ford v Wiley* and *R v Menard*, and with additional reference to some Australian case law.

B. *Legitimacy of Purpose and Reasonableness of Means*

In considering what may constitute a ‘legitimate purpose’ or ‘reasonable means’ by which to inflict cruelty upon a nonhuman animal, it is necessary to first examine the context in which this assessment takes place. Such an examination is integral to an attempt to understand the concepts of ‘reasonable’ or ‘necessary’ cruelty, since the terms are highly subjective and vary according to the context in which they are used.

In chapter three, I explained that nonhuman animals are legally classified as property, and so may be treated cruelly to serve human ends. Humans therefore occupy a privileged position with respect to nonhuman animals, such that legally they have a right to use them as their property to serve their own interests. According to Sankoff, this means that ‘the starting point is not a presumption that harm is generally wrong, and must be justified, but that it is humanity’s privilege to inflict it’.⁸⁹ The very fact that animal welfare legislation prohibits ‘unnecessary’ cruelty reflects a general acceptance of the infliction of cruelty towards nonhuman animals, so long as it takes place within certain confines. In the case of *R v Menard*, Lamer JA stated that there exists a ‘hierarchy’, in which ‘the animal is inferior to man’.⁹⁰ This, he contends is the context in which animal welfare provisions which prohibit only ‘unnecessary’ cruelty operate:

[I]t will often be in the interests of man to kill and mutilate wild or domestic animals, to subjugate them and, to this end, to tame them with all the painful consequences this may entail for them...This is why, in setting standards for the behaviour of men towards animals, we have taken into account our privileged position in nature and have been obliged to take into account at the outset the purpose sought.⁹¹

⁸⁸ Ibid 17-20.

⁸⁹ Ibid 16.

⁹⁰ *R v Menard* (1978) 43 Ccc (2d) 458 (Que CA), 464.

⁹¹ Ibid.

The fact that humans occupy a ‘privileged’ position with respect to nonhuman animals is an important consideration in the context of determining what may constitute a ‘legitimate purpose’ in inflicting cruelty towards nonhuman animals. The starting point created by the hierarchy is that the interests of humans are already substantially favored at the outset. So much so, that Francione suggests ‘[a]s far as the law is concerned, it is as if we were resolving a conflict between a person and a lamp...the winner of the dispute is predetermined by the way in which the conflict is conceptualized in the first place’.⁹² Though Francione perhaps overstates the extent of the bias towards human interests, he demonstrates that the interests of nonhuman animals are attributed far less weight than human interests, with the result some of the worst forms of animal cruelty are explicitly permitted by law, even where the human interest that it serves is comparatively trivial.

1. *Confirmation Bias in Law*

In addition to the fact that humans occupy a privileged position with respect to nonhuman animals in virtue of the owner/property relationship, decisions about what constitutes ‘reasonable’ or ‘necessary’ suffering are never deliberations that take place in a neutral setting. Rather, they are influenced and informed by human values and interests. Friedrich Nietzsche made this point when he wrote:

Let us be on guard against the dangerous old conceptual fiction that posited a ‘pure, will-less, painless, timeless knowing subject’, let us guard against the snares of such contradictory concepts as ‘pure reason’, ‘absolute spirituality’, ‘knowledge in itself’: these always demand that we should think of an eye that is completely unthinkable, an eye turned in no particular direction, in which the active and interpreting forces, through which alone seeing becomes seeing *something*, are supposed to be lacking; these always demand of the eye an absurdity and a nonsense. There is *only* a perspective seeing, *only* a perspective ‘knowing’...⁹³

Nietzsche’s point is that the ‘seeing’ and ‘knowing’ always take place from a point of view. The process of human thinking, reasoning, and judging, is always shaped by existing commitments to particular values and ideals, even when we may seek to be impartial.

⁹² Gary Francione, *Animals, Property and the Law* (Temple University Press, 1995) 24.

⁹³ Friedrich Nietzsche, ‘What Is the Meaning of Ascetic Ideals?’ in Walter Kauffman (ed), *On the Genealogy of Morals* (Vintage Books, 1989) 119 (emphasis in original).

Margaret Davies makes a similar point, stating that ‘a whole mess of laws – social, political, sexual, intellectual (etc) conventions, laws of thought, laws of language, the imperatives of place and nature, and other influence’ influence our thinking and judgements.⁹⁴ Moreover, they do so not only to the extent that they influence the decisions that we reach, but also in the way that we perceive problems and approach their solutions in the first place.⁹⁵

Dan Kahan’s research also demonstrates that the process of human reasoning is *always* influenced by our existing motivations - be they silent, or otherwise.⁹⁶ Kahan’s research is particularly interesting because it rests on empirical studies that illustrate the phenomenon which he describes as ‘motivated cognition’. Motivated cognition refers to the unconscious way in which we process information and reach conclusions to achieve a result that legitimates our existing values. Kahan demonstrates that human interests ‘motivate’ thinking by directing and shaping perceptions. He writes, ‘motivated reasoning refers to the tendency of people to conform assessments of information to some goal or end extrinsic to accuracy’.⁹⁷ Motivated cognition can operate even in the presence of facts, such that ‘ideological conflicts’ can occur even in the face of empirical evidence.⁹⁸ He contends

Political polarization on empirical issues...occurs not only despite the lack of any logical connection between the contending beliefs and the opposing values of those who espouse them. It also persists despite apparent scientific consensus on the answers to many of these disputed questions.⁹⁹

Kahan’s findings are important in the context of this discussion about what may constitute a ‘legitimate purpose’ to inflict cruelty upon a nonhuman animal. Humans have a positive interest in treating nonhuman animals cruelly for various reasons. Perhaps the most significant in the Australian context is economic. For as long as there is a financial imperative to treat nonhuman animals cruelly, this motivation will continue to shape the way in which we perceive what constitutes ‘necessary’ cruelty, either directly or indirectly.

⁹⁴ Margaret Davies, *Asking the Law Question* (4th ed, Thomson Reuters, 2017) 499.

⁹⁵ *Ibid* 499.

⁹⁶ Dan Kahan, 'Ideology, Motivated Reasoning, and Cognitive Reflection' (2013) 8(4) *Judgment and Decision Making* 407

⁹⁷ *Ibid* 408.

⁹⁸ *Ibid* 407.

⁹⁹ *Ibid*.

2. What is a Legitimate Purpose?

Having explained the context in which the ‘necessary’ cruelty test takes place, I now examine judicial commentary concerning what constitutes a ‘legitimate’ purpose. Given the lack of case law in this area, it is possible to identify only a few minor points which frame the issue in the negative. For example, it was explicitly noted by Lamer JA in *R v Menard*, that cruelty that is inflicted due to sheer laziness or negligence is not likely to be deemed cruelty that is inflicted for a legitimate purpose.¹⁰⁰

Cruelty that is inflicted to express anger or hatred is also unlikely to be deemed cruelty inflicted for a legitimate purpose. In the South Australian case of *RSPCA v Bond*,¹⁰¹ the defendant was convicted of ill-treating an animal under s13(1) of the *Animal Welfare Act 1985* (SA) for repeatedly stabbing his girlfriend’s dog, causing its death. The ill-treatment took place following an argument that the defendant had with his girlfriend. The stabbing was motivated by rage. Foley J described the defendant as having ‘lost it, bl[own] a fuse’.¹⁰² The defendant was convicted of aggravated cruelty. On appeal, Duggan J described the defendant’s stabbing of the ‘in in a fit of anger... motivated by spite’¹⁰³ as constituting a ‘serious breach’ of the *Animal Welfare Act 1985* (SA).¹⁰⁴

3. What is a Reasonable Means?

The second limb of the proportionality test established in *Ford v Wiley* requires cruelty that has been inflicted for a legitimate purpose also be achieved using means that were reasonable and proportionate to the object sought. As Sankoff argues, ‘[o]ne may have a perfectly legitimate purpose but exercise it in a completely inappropriate way’.¹⁰⁵ Though this limb of the proportionality test may provide nonhuman animals with some protections from harm, it is important to recall the predominance of human interests in determining what constitutes a reasonable means. The requirement that one pursue their legitimate object via a reasonable means does not, for example, require a person to exhaust *all* alternative preferable measures

¹⁰⁰ *R v Menard* (1978) 43 Ccc (2d) 458 (Que CA) 464.

¹⁰¹ *RSPCA v Bond* (Unreported, Magistrates Court of South Australia, Foley J, 20 December 2010).

¹⁰² *Ibid* [14].

¹⁰³ *Bond v Royal Society for the Prevention of Cruelty to Animals* (2011) SASC 19 [24] (Duggan J).

¹⁰⁴ *Ibid*.

¹⁰⁵ Sankoff, above n 59, 19.

prior to advancing with their chosen means. Rather, it requires only that a person do that which can be reasonably expected of them.

This point was reiterated in the Australian case of *Brayshaw v Liosatos*,¹⁰⁶ in which Higgins J commented on section 8(2) of the Animal Welfare Act 1992 (ACT), which deals with failures to provide animals with adequate food and neglecting animals to cause pain. He said the section is not about ‘ensur[ing] that animals are kept in prime condition’, but rather is about simply preventing unnecessary suffering, and only insofar as ‘their owners or custodians are aware of the need and have reasonable means available to them to do so.’¹⁰⁷ The test of ‘reasonableness’ does therefore not mandate that one do *everything* possible to achieve their legitimate purpose without the infliction of any cruelty or suffering.

If a person is faced with several means by which to fulfil a legitimate object, and they elect to utilise a cruel means in preference to a less cruel means, the reason for that choice may render their selection ‘unreasonable’. This point is evidenced by the case *Department of Regional Government and Local Department v Emmanuel Exports Pty Ltd et al*,¹⁰⁸ which was a prosecution for animal cruelty against the defendant who transported and confined live export sheep in a manner that allegedly caused those sheep ‘unnecessary harm’.¹⁰⁹ The defendant loaded a shipment of 103,232 sheep for export in November 2003, with cruelty charges pertaining only to 13,163 of those sheep. Namely, those that were classified as A class wethers and Muscat wethers.¹¹⁰ The charges were restricted to these breeds of sheep because they were at higher risk of experiencing harm due to inanition or salmonellosis due to their breed, when transported in that manner at that particular time of year.¹¹¹

In considering whether the harm suffered by these sheep was ‘unnecessary’, Magistrate Crawford applied the test in *Ford v Wiley*,¹¹² stating that ‘the beneficial or useful ends sought to be attained must be reasonably proportionate to the extent of suffering caused, and in no

¹⁰⁶ [2001] ACTSC 2.

¹⁰⁷ *Brayshaw v Liosatos* [2001] ACTSC 2 at [159] (Higgins J).

¹⁰⁸ *Department of Regional Government and Local Department v Emmanuel Exports Pty Ltd Et Al* (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008).

¹⁰⁹ For a discussion of this case, see Cao, above n 11, 215-216.

¹¹⁰ *Department of Regional Government and Local Department v Emmanuel Exports Pty Ltd Et Al* (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008) [3].

¹¹¹ *Ibid* [40]-[75].

¹¹² *Ford v Wiley* (1889) 23 QB 203. *Department of Regional Government and Local Department v Emmanuel Exports Pty Ltd Et Al* (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008) [97].

case can substantial suffering be inflicted, unless necessity for its infliction can reasonably be said to exist'.¹¹³ Her Honour found that the harm caused to the sheep was unnecessary, because the *only* justification for exporting these particular sheep at this specific time of year was financial. Magistrate Crawford stated that there was 'no evidence that failure to supply sheep in that category would jeopardize the whole shipment'.¹¹⁴ As such, the defendant was not justified in shipping these sheep at a time of year when it was known that such actions would likely result in a high degree of suffering. Her Honour reasoned that the commercial gain of exporting the animals had to be 'balanced against the likelihood of pain, injury or death to relevant sheep shipped in the second half of the year'.¹¹⁵ On this basis, Magistrate Crawford was satisfied that the harm the sheep experienced was unnecessary.¹¹⁶ Although the elements of the cruelty offence were established, the applicable provision of the *Animal Welfare Act 2002 (WA)* was deemed operationally inconsistent with the Federal live export licensing provisions, which had authorized the defendant's export.¹¹⁷ As a result, the accused were acquitted.

Despite the fact that this case demonstrates that a chosen means for inflicting cruelty may be unreasonable where the choice to utilise that means is motivated purely by financial imperatives, it is important to note that the 'reasonable means' test can only yield limited results for nonhuman animals. It is implicit within Magistrate Crawford's judgment that if the whole shipment would have been compromised by failing to export those particular breeds at that particular time of year, the cruelty may not have been 'unnecessary'. The test of 'reasonable means' therefore does not provide scope to critique, for example, the live export of nonhuman animals in principle. It provides only a basis upon which to examine the *means* by which the object is sought. If the purpose of the cruelty inflicted is deemed 'legitimate', then the test of 'reasonable means' can only serve to regulate, but not *prohibit* the infliction of cruelty to serve that purpose.

Moreover, what constitutes a 'reasonable means' may vary with respect to different species of nonhuman animal. In chapter five, I explain how what may be considered a reasonable

¹¹³ *Department of Regional Government and Local Department v Emmanuel Exports Pty Ltd Et Al* (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008) [98].

¹¹⁴ *Ibid* [94].

¹¹⁵ *Ibid* [99].

¹¹⁶ *Ibid* [99].

¹¹⁷ *Ibid* [199].

way of treating one species of nonhuman animal may not be considered reasonable with respect to another. Magistrate Musk made this explicit observation in the case of *Department of Local Government and Regional Development v Gregory Keith Dawson*, noting: ‘if you put your pet dog on a truck and shipped [it] to the Middle East some people would say that would be very unkind and a cruel thing to do. But with sheep it’s all acceptable isn’t it?’¹¹⁸ This again reflects the extent to which human needs predominate in the context of determining what constitutes ‘reasonable’ or ‘necessary’ cruelty to inflict upon a nonhuman animal.

C. *The Limited Operation of the Prohibition on ‘Unnecessary’ Cruelty*

The cases I have just described have illustrated how the prohibition on ‘unnecessary’ cruelty can have a protective effect in some contexts. Despite this, animal law scholars have paid great attention to describing the inadequacies of the concept of ‘necessary’ suffering for the extent to which it fails to protect nonhuman animals,¹¹⁹ because the prohibition on ‘unnecessary’ suffering actually performs very limited protective work for most species. This is not only because the protection itself is inadequate, but because it simply does not apply in the context of some of the worst cruelties towards nonhuman animals. Where cruelty is positively permitted by Codes of Practice or regulations, that cruelty is effectively exempted from any protections that may be offered by the prohibition on unnecessary cruelty. Thus, any limited protective function that the prohibition on ‘unnecessary’ cruelty *could* perform, is effectively rendered unattainable due to the troubling relationship between the operation of animal welfare legislation, regulations and Codes of Practice.

It is thus important to be clear about *how* and *why* the prohibition on unnecessary cruelty fails to protect some nonhuman animals. Deborah Cao, for example, contends that qualifying words and the notion of ‘necessary’ cruelty ‘fails to protect countless farm animals from harm each year’.¹²⁰ *Voicelless: The Animal Protection Institute*, also claim that qualifying

¹¹⁸ *Department of Local Government and Regional Development v Gregory Keith Dawson* (Unreported, Fremantle Magistrates Court, Magistrate Musk, 22 July, 2008) [60], [64].

¹¹⁹ Cao, above n 11, 213-216; Katrina Sharman, ‘Farm Animals and Welfare Law: An Unhappy Union’ in White and Sankoff (eds), *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, The Federation Press, 2013) 61, 78; Sankoff, above n 59, 13-20; White, above n 59, 49-51. In the American context see Gary Francione, *Animals, Property and the Law* (Temple University Press, 1995) 17-32; Steven Wise, *Rattling the Cage* (Cambridge Press, 2000) 259-260.

¹²⁰ Cao, above n 11, 214.

terms may serve to permit cruelty if the Court was asked to ‘consider whether it is justifiable to castrate a pig without anaesthetic for pig meat production’.¹²¹ Cao and other commentators are correct to describe the routine and lawful cruelty that occurs against farm animals in Australia. They are also correct to highlight the inadequacy of legislative provisions that implicitly legitimate cruelty while purporting to have the opposite effect. However, I contend that we must be clear that qualifying terms such as ‘necessary’ or ‘reasonable’ are not *singularly* responsible for making cruelty lawful, because in many instances cruelty is positively permitted by law with the result that it is effectively exempted from the reach of these legislative prohibitions. While *Voiceless* may be correct that the castration of a piglet without anaesthetic would be deemed ‘necessary’ or ‘reasonable’ in the context of a legal challenge against the practice, as long as this practice is explicitly permitted by Codes of Practice and Regulations, it can *never* be exposed to such a challenge. As a result, the prohibition on ‘unnecessary’ cruelty simply cannot perform any protective function.

Codes and Regulations specifically allow cruelty such that it is exempted from the prohibition on cruelty that is ‘unreasonable’ or ‘unnecessary’. The explicit exemption of cruel practices from the reach of anti-cruelty provisions reflects the fact that these practices *are in fact unnecessarily cruel*. If they were not *unnecessarily cruel*, there would be no reason to specifically exempt them from the operation of animal welfare legislation. For example, in the case of *Department of Regional Government and Local Department v Emmanuel Exports Pty Ltd et al* (discussed above),¹²² the Perth Magistrates Court held that that cruelty towards sheep was ‘unnecessary’ if it was inflicted solely for economic advantage.¹²³ If the principles articulated in this case were applied in the context of the castration of piglets without anaesthetic, the practice could be deemed ‘unnecessary’ and therefore ‘unlawful’ because the withholding of anaesthetic serves only a financial incentive. The specific approval of this practice within Codes and Regulations therefore ensures that this practice cannot be subjected to the test of ‘necessary’ cruelty.

¹²¹ Emmanuel Giuffre and Sarah Margo, *The Animal Law Toolkit* (2nd ed, Voiceless: The Animal Protection Institute, 2015) 12.

¹²² *Department of Regional Government and Local Department v Emmanuel Exports Pty Ltd Et Al* (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008).

¹²³ Cao, above n 11, 215-216 .

Thus, although the prohibition on ‘unnecessary’ cruelty remains troubling and inadequate, the *explicit permitting* of some of the worst cruelties is the main reason why general anti-cruelty provisions routinely fail to protect nonhuman animals from cruelty. Codes of Practice, which I discuss below, permit the confinement of hens to battery cages,¹²⁴ the castration of male piglets without anaesthetic,¹²⁵ and the killing of a calf of less than 24 hours old by blunt trauma to the head.¹²⁶ These practices are lawful because they are expressly permitted in sufficient detail to exclude them from the reach of the prohibition on ‘unnecessary’ cruelty. For as long as the law explicitly permits such practices, the general prohibition on ‘unnecessary’ cruelty is rendered inapplicable, and will only operate to protect nonhuman animals whose mistreatment *exceeds* that which is positively permitted by law. I develop this theme in chapter six, where I demonstrate that animal welfare legislation is *active* in facilitating cruelty towards nonhuman animals. My contention is that some types of cruelty receive detailed and focused attention in law to ensure that they are actively permitted, and are thus never exposed to the prohibition on ‘unnecessary’ suffering which may perform limited protective work.

IV. AUSTRALIAN CODES OF PRACTICE AND STANDARDS AND GUIDELINES

In addition to the results of qualifying words in Australian animal welfare legislation, each animal welfare statute (except Tasmania’s) also contains a provision that gives some form of legal force to Codes of Practice, or Standards and Guidelines.¹²⁷ Codes of Practice emerged in the 1970s in Australia to dictate in detail what constituted acceptable standards for farmers.¹²⁸ The impetus for their introduction was changing community attitudes regarding how we ought to treat nonhuman animals, and in particular those raised and killed for food

¹²⁴ *Model Code of Practice for the Welfare of Animals: Domestic Poultry (4th Edition)* Appendix 1.

¹²⁵ *Model Code for the Welfare of Animals: Pigs (3rd Edition)* 5.6.5.

¹²⁶ *Australian Animal Welfare Standards and Guidelines: Cattle* (2016) standard 11.5.

¹²⁷ See for example: *Animal Welfare Act 1985* (SA) s43; *Animal Welfare Act 1992* (ACT) s20; *Animal Welfare Act* (NT) s79; *Animal Care and Protection Act 2001* (Qld) ss38, 40; *Prevention of Cruelty to Animals Act 1979* (NSW) s34A; *Prevention of Cruelty to Animals Act 1986* (Vic) s6, *Animal Welfare Act 2002* (WA) s25.

¹²⁸ Arnja Dale, ‘Animal Welfare Codes and Regulations: The Devil in Disguise?’ in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (The Federation Press, 2009) 174, 175; Dale and White, above n 55, 152.

and fibre.¹²⁹ There was also an important economic incentive for the introduction of Codes of Practice. Farming practices in Europe were increasingly being governed by ‘tougher’ animal welfare standards, with the result that the Australian export market was at risk unless Australian farmers could demonstrate a commitment to similar, higher animal welfare standards.¹³⁰ Codes of Practice were seen as a desirable response to these mounting social and economic pressures because they could provide certainty surrounding what constituted cruelty towards nonhuman animals specifically within the farming context.¹³¹ Codes were seen as a means by which farmers, deemed to be ‘specialists’ in farm animal welfare, could determine what constituted proper care for their own animals.¹³² Codes of Practice were also deemed to be desirable because they could be more easily modernised than animal welfare legislation, since they could be exposed to more frequent reviews.¹³³

Despite the purported benefits of Codes of Practice, a 2005 review commissioned by the Australian Government Department of Agriculture, Fisheries and Forestry of the Model Codes of Practice (entitled the ‘Neumann Report’) stated that Government representatives who were responsible for approving Model Codes of Practice lacked ‘expertise in animal welfare’, with the result that many Codes of Practice which purported to protect animal welfare were in fact approved ‘with minimum scrutiny’ applied from an animal welfare perspective.¹³⁴ Codes of Practice have become an integral part of animal welfare regulation in Australia, as they now dictate the acceptable animal welfare standards in most contexts in which nonhuman animals are exposed to cruelty, including where they are killed as pests, used in scientific research or kept for meat, egg, dairy, fibre, companionship and entertainment.¹³⁵ However, there remains a substantial question regarding whether Codes of Practice actually do facilitate better animal welfare standards, or whether they simply operate

¹²⁹ Dale and White, above n 55, 152; Elizabeth Ellis, 'Making Sausages and Law: The Failure of Animal Welfare Law to Protect Both Animals and Fundamental Tenets of Australia's Legal System' (2010) 4 *Australian Animal Protection Law Journal* 6, 14. In the New Zealand context see Peter Sankoff, 'Five Years of the "New" Animal Welfare Regime: Lessons Learned from New Zealand's Decision to Modernize Its Animal Welfare Legislation' (2005) 11(7) *Animal Law* 7.

¹³⁰ Dale and White, above n 55, 152.

¹³¹ *Ibid.* 153.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Geoff Neumann & Associates, *Review of the Australian Model Codes of Practice for the Welfare of Animals* (2005) 8.

¹³⁵ Dale and White, above n 55, 153.

to legitimate cruel animal husbandry practices that are beneficial to industry.¹³⁶ As I discuss further below, whilst the transition from Codes of Practice to national Standards and Guidelines may serve to offer greater consistency across all Australian jurisdictions than that currently offered by Codes of Practice, the standards themselves continue to permit cruelty.

A. Conflicts of Interest in the Development of Model Codes and National Standards and Guidelines

Typically, the content of a Code of Practice in any particular jurisdiction is based on a Model Code of Practice that was developed by the Australian Government Primary Industry Ministerial Council (PIMC).¹³⁷ The PIMC was responsible for the development of twenty two Model Codes of Practice pertaining to animal welfare,¹³⁸ prior to the introduction of the AAWS, which began the process of ‘updating’ and replacing the Model Codes with ‘Standards and Guidelines’, following the recommendations contained within the Neumann report.¹³⁹ The Standards and Guidelines were intended to achieve more national consistency in terms of animal welfare standards, and the way in which those standards are implemented across each jurisdiction. At the time of writing, only three sets of Standards and Guidelines have been developed which dictate legally enforceable welfare standards. These operate in the context of cattle farming, sheep farming, and the transport of livestock.

The process for development of the Model Codes by the PIMC was marked by a substantial conflict of interest. The PIMC comprised the ‘Australian national, state and territory and New Zealand ministers responsible for agriculture, food, fibre, forestry, fisheries and aquaculture industries and production’.¹⁴⁰ Model Code development also involved The Animal Welfare Working Group (AWWG) which comprised ‘representatives from the Commonwealth

¹³⁶ Siobhan O'Sullivan and Dinesh Wadiwel, *We Have Animal Welfare Laws but They Don't Stop the Suffering* (2014) < <http://theconversation.com/we-have-animal-welfare-laws-but-they-dont-stop-the-suffering-30703> > at 28 August 2014 .

¹³⁷ Dale and White, above n 55, 153. Two notable exceptions are the *Australian Code for the Care and Use of Animals for Scientific Purposes* (2013) *Australian Code for the Care and Use of Animals for Scientific Purposes* (2013) which was developed by the National Health and Medical Research Council, and the *Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption* which was developed by the Australia New Zealand Food Regulation Ministerial Council, and includes some references to animal welfare.

¹³⁸ Dale and White, above n 55, 154.

¹³⁹ Geoff Neumann & Associates, above n 134, ix.

¹⁴⁰ Animal Health Australia, *Animal Health in Australia* (2009) < <http://www.animalhealthaustralia.com.au/wp-content/uploads/2015/12/AHIA-2008.pdf> > 6.

Department of Agriculture, Fisheries and Forestry (DAFF) and its State and Territory counterparts, together with representatives of CSIRO, Animal Health Australia, and the Vertebrate Pest Committee'.¹⁴¹ The AAWG developed the Codes and reported to the Animal Health Committee, which was part of the Primary Industries Health Committee, all 'sitting under the PIMC umbrella'.¹⁴²

Given that the stated aim of the PIMC was to 'develop and promote sustainable, innovative and profitable industries in these commodities',¹⁴³ and given the heavy influence of industry representatives in the Model Code development process, there exists a perceived conflict of interest between the PIMC's primary aim to generate and support profitable nonhuman animal industries, and their role in developing Model Codes of Practice that dictate acceptable animal welfare standards.¹⁴⁴ The conflict of interest is so substantial that Arnja Dale and Steven White have said 'it is almost exclusively those who have a stake in profiting from animals who continue to draw the line on what is necessary or unnecessary in the treatment of animals'.¹⁴⁵ In an opinion piece for *The Age*, barrister and animal law scholar Graeme McEwan similarly described the Model Codes as keeping 'the fox...in charge of the chickens'.¹⁴⁶

While animal welfare representatives were involved in aspects of the Model Code Development process, they were 'comparatively few in number'.¹⁴⁷ According to Elizabeth Ellis, the extent of the conflict is well evidenced by the fact that PIMC systematically failed to outlaw the 'ritual' slaughter of sheep in approved Australian abattoirs where they are not stunned prior to sticking (neck cutting).¹⁴⁸ This is so even despite two comprehensive reviews

¹⁴¹ Dale and White, above n 55, 166.

¹⁴² Ibid 166.

¹⁴³ Animal Health Australia, *Animal Health in Australia* (2009) <<http://www.animalhealthaustralia.com.au/wp-content/uploads/2015/12/AHIA-2008.pdf>> 6.

¹⁴⁴ Alex Bruce, *Animal Law in Australia: An Integrated Approach* (LexisNexis Butterworths, 2012) 84; Ellis, above n 129, 13.

¹⁴⁵ Dale and White, above n 55, 167.

¹⁴⁶ Graeme McEwan, 'The Fox Is in Charge of the Chickens', *The Age* (Online), 30 March 2007, <<http://www.theage.com.au/news/opinion/the-fox-is-in-charge-of-the-chickens/2007/03/29/1174761660068.html?page=fullpage#contentSwap1>>.

¹⁴⁷ Dale and White, above n 55, 166.

¹⁴⁸ Ellis, above n 129, 15.

undertaken on the practice, both of which indicate that the practice is contrary to animal welfare.¹⁴⁹

Jed Goodfellow's research has also demonstrated that in many contexts the conflict of interest that manifests during Code development is not only perceived, but is actually real.¹⁵⁰ According to Goodfellow, Departments of Agriculture suffer from 'regulatory capture', which describes 'the process in which a regulatory agency acts in the interests of the industry it is charged with regulating in a way that is inconsistent with the public interest the regulation is designed to serve'.¹⁵¹ Goodfellow's contention therefore is that the Departments of Agriculture tasked with administering animal welfare legislation are also simultaneously required to prioritize a competing responsibility to facilitate growth in the agricultural sector. Whilst he contends that the existence of competing responsibilities does not prima facie indicate regulatory capture,¹⁵² a problem emerges when 'one objective is unduly prioritized over another', with the result that the department's actions favour the industry they regulate in a way that is inconsistent with the public interest that they are intended to serve.¹⁵³

The conflict of interest inherent in the development of Model Codes of Practice has also resulted in a failure to properly incorporate scientific evidence pertaining to animal welfare. The Neumann report noted that there was no consistent method for implementing scientific literature in Codes of Practice:

In Australia, although there is now widespread support for sound welfare science to be used to underpin Codes, there is no agreed process to manage this or to report on current science or international developments. Thus until recently the availability of welfare science information

¹⁴⁹ David Adams and Allan Sheriden, *Specifying the Risks to Animal Welfare Associated with Livestock Slaughter without Induced Insensibility* (Animal Welfare Working Group of the Animal Health Committee, Primary Industries Standing Committee of Australia, 2008); Paul Hemsworth et al, *A Scientific Comment on the Welfare of Sheep Slaughtered without Stunning* (Animal Welfare Science Centre (Australia) and Animal Welfare Science and Bioethics Centre (New Zealand), 2009).

¹⁵⁰ Jed Goodfellow, 'Regulatory Capture and the Welfare of Farm Animals in Australia' in Deborah Cao and Steven White (eds), *Animal Law and Welfare - International Perspectives* (Springer, 2016) 195; Jed Goodfellow, *Animal Welfare Regulation in the Australian Agricultural Sector: A Legitimacy Maximising Analysis* (Phd Thesis, Macquarie University, 2015).

¹⁵¹ Goodfellow, *Regulatory Capture*, above n 150, 197.

¹⁵² *Ibid.* 208.

¹⁵³ *Ibid.*

and its role in Code development has been largely left to the initiative of the person nominated to lead the development or review process.¹⁵⁴

As a result, it appears that scientific literature has been insufficiently incorporated in some Model Codes. For example, the *Model Code of Welfare for Animals – Domestic Poultry 2002* states: ‘[i]t is noted that there are particular behaviours such as perching, the ability to fully stretch and to lay in a nest that are currently not possible in certain (caged) poultry housing systems. These issues will remain the subject of debate and review’. It is unclear what further ‘review’ or ‘debate’ may entail in that context, or what remaining evidence is needed to indicate that the confinement of hens to cages that severely restricts their natural movement is contrary to their welfare.

The development of Standards and Guidelines has been similarly compromised by conflicts of interest in the development process. For example, the above mentioned poultry code review is funded by ‘all [state] Governments, the Australian Chicken Meat Federation Inc, the Australian Egg Corporation Limited, the Australian Duck Meat Association Inc, and the Australian Turkey Federation Inc’.¹⁵⁵ At the time of writing, there has been no independent comprehensive scientific review initiated as part of the standard and guidelines development process. This is despite the fact that a key recommendation contained within the 2005 Neumann report was that ‘[a]n independent Animal Welfare Science Review be carried out as the first step in developing an Australian Standards for Animal Welfare and be appropriately funded’¹⁵⁶. In the absence of such review, the RSPCA undertook their own comprehensive scientific review, demonstrating clearly that battery cages are contrary to animal welfare.¹⁵⁷ The RSPCA has also reportedly raised concerns that the Code review process has been ‘heavily influenced’ by industrial producers, with the scientific integrity of the process being called into question by scientists.¹⁵⁸ The Victorian Government similarly undertook its own independent scientific review to inform its position with respect to battery

¹⁵⁴ Geoff Neumann and Associates, above n 134, 8.

¹⁵⁵ Australian Animal Welfare Standards and Guidelines, *Poultry* (2017) <<http://www.animalwelfarestandards.net.au/poultry/>>

¹⁵⁶ Geoff Neumann and Associates, above n 134, 53.

¹⁵⁷ RSPCA Australia, *The Welfare of Layer Hens in Cage and Cage-Free Housing Systems* (Royal Society for the Prevention of Cruelty to Animals, 2016) 2, 31.

¹⁵⁸ Esther Han, 'RSPCA Threatens to Quit Poultry Standards Advisory Group, as Integrity of Process Is Questioned', *The Sydney Morning Herald* (Online), 15 February 2017, <<http://www.theherald.com.au/story/4468730/rspca-threatens-to-quit-poultry-standards-advisory-group-as-integrity-of-process-is-questioned/?cs=12>>.

cages and the proposed draft standards, which also indicates that battery cages are contrary to animal welfare.¹⁵⁹

Moreover, in December 2017, documents obtained under Freedom of Information laws revealed acts of alleged ‘collusion’ by the New South Wales Department of Primary Industry, who is responsible for drafting the proposed poultry Standards and Guidelines.¹⁶⁰ The documents showed that the Department had participated in a number of ‘secret meetings’ between department and industry representatives before the standards-writing process had commenced. Specifically, Stephen Atkinson, who occupies the role of ‘independent chair’ of the group charged with advising the development of the new standards, met with egg farmers prior to his election into the role. During this meeting, Atkinson reportedly assured the egg industry that the ‘banning of cages would not be the remit of the official stakeholder meetings’.¹⁶¹ Troublingly, none of these meetings were disclosed to animal welfare stakeholders involved in the review process.¹⁶² At the time of writing, the proposed standards permit the continued use of the battery cage.¹⁶³

Conflict of interest in the development of national Standards and Guidelines is also presupposed by the appointment of Animal Health Australia to oversee the drafting of these documents. Animal Health Australia are a not-for-profit public company established by the Australian Government under the Australian Animal Welfare Strategy in 2005. Although the AAWS has been disbanded, Animal Health Australia continues to oversee the development of these standards and guidelines. The membership of Animal Health Australia comprises only state government agriculture departments and industry representatives. Further, an analysis of the drafting process by White and Dale reveals that the process of developing these standards and guidelines is dominated by industry voices at the expense of animal welfare.¹⁶⁴ The process includes three stages: development, public consultation and revision. During the development stage, Animal Health Australia establishes a writing group of 4-8 members, ‘including appropriate industry representation’, who prepare the draft standards

¹⁵⁹ C.J Nicol et al, *Farmed Bird Welfare Science Review* (Victorian Department of Economic Development, Jobs, Transport and Resources 2017) 59-60.

¹⁶⁰ Australian Broadcasting Corporation, ‘Allegations of Backroom Deals to Keep Battery Hen Eggs on the Market’, 7.30, 21 December 2017 (Ellen Fanning).

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Proposed Draft Australian Animal Welfare Standards and Guidelines for Poultry SB1.1-1.9.*

¹⁶⁴ Dale and White, above n 55, 164.

and guidelines.¹⁶⁵ These are then considered by a reference group that also comprises government and industry representatives, as well as animal welfare representatives such as the RSPCA and Animals Australia. Once the reference group approves the direction of the draft, the writing group prepares a copy for consideration by a larger reference group prior to public consultation. Following the review and implementation of public feedback, the full final draft is prepared by the writing group prior to approval by the reference group.¹⁶⁶

According to Ellis, the standards and guidelines development process with respect to ‘bobby calf’ welfare ‘provides little ground for optimism’ for the integrity of the process overall.¹⁶⁷ Bobby calves are the ‘unwanted by-product of the dairy industry, with about 700,000 calves slaughtered commercially each year’.¹⁶⁸ They are typically transported to slaughter at 5 days of age, meaning that their welfare is at heightened risk. This is exacerbated by the fact that they are unweaned and separated from their mothers. One particularly controversial aspect of bobby calf welfare is allowable ‘time off feed’, which dictates how long feed may be withheld from bobby calves during transport and prior to slaughter.

A proposed amendment to the Land Transport Standards sought the introduction of a revised standard which would give permission for bobby calves between 5 – 30 days old travelling without their mothers be withheld feed for up to 30 hours. The process for assessing the proposed amendment included a scientific review and the preparation of a Regulatory Impact Statement for consideration by the PIMC. The Regulatory Impact Statement supported a maximum allowable time off feed of 30 hours.¹⁶⁹ This finding was supported by a science-based review undertaken with respect to bobby calf welfare and the allowable time off feed. This review was funded by the Australian dairy industry,¹⁷⁰ was not published in full, and

¹⁶⁵ Australian Animal Welfare Strategy, *Development of Australian Standards and Guidelines for the Welfare of Livestock - Business Plan* (2009) < <http://www.animalwelfarestandards.net.au/files/2011/01/Animal-Welfare-Standards-and-Guidelines-Development-Business-Plan.pdf> > 9.

¹⁶⁶ Ibid.

¹⁶⁷ Elizabeth Ellis, 'Bobby Calves: An Example of the Standards Development Process' (2011) 5 *Australian Animal Protection Law Journal* 89, 90.

¹⁶⁸ Ibid.

¹⁶⁹ Animal Health Australia, *Australian Animal Welfare Standards and Guidelines - Land Transport of Livestock: Proposed Amendment to the Land Transport of Livestock Standards (Sb4.5) Bobby Calves Time Off Feed Standard* (Animal Health Australia, 2011).

¹⁷⁰ Andrew Fisher et al, 'Determining a Suitable Time Off Feed of Bobby Calf Transport under Australian Conditions' (2010) *Dairy Australia Project no TIG. 124* .

was not subjected to peer review.¹⁷¹ Animals Australia commissioned an independent scientific review of the study, which advised ‘serious methodological and interpretation flaws’, and that the recommended 30 hours off feed for bobby calves was not good animal welfare practice.¹⁷² At the time of writing, the proposed ‘time off feed’ amendment has not been incorporated into the *Land Transport Standards*, although Animal Health Australia reports an industry-wide agreement to implement the standard of 30 hours off feed for bobby calves.¹⁷³

B. How Are Codes of Practice and Standards and Guidelines Enforced?

Codes of Practice are created and adopted under the animal welfare legislation and regulations in varying ways in each Australian state and territory.¹⁷⁴ The extent to which individual Codes of Practice are implemented varies between Australian jurisdictions, and there is a lack of uniformity across Australia with respect to both the content and enforceability of animal welfare Codes.¹⁷⁵ The enforceability of Codes of Practice not only varies between jurisdictions, but can also vary within any single state or territory. Thus, some jurisdictions may mandate compliance with some Codes of Practice, but not others. Further, they may mandate compliance only with certain provisions within any given Code. The difficulty in ascertaining precisely which parts of any given Code of Practice are enforceable (if any), has led Alex Bruce to describe them as ‘shadowy instruments’.¹⁷⁶ Their operation is particularly ‘shadowy’ when a Code of Practice dictates only voluntary guidelines for animal

¹⁷¹ A summary was published only: Dairy Australia, *Determining a Suitable Time Off Feed for Bobby Calf Transport under Australian Conditions* < <http://www.animalwelfarestandards.net.au/files/2011/05/Fisher-report-a-summary.pdf> > .

¹⁷² Animals Australia, Submission to Animal Health Australia, *Bobby Calf Time of Feed Regulatory Impact Statement*, February 2011, 10.

¹⁷³ Animal Health Australia, *Bobby Calf Time-Off-Feed Standard: Further Review Likely in 2014* (2012) < <https://www.animalhealthaustralia.com.au/news/bobby-calf-time-off-feed-standard-further-review-likely-in-2014/> > .

¹⁷⁴ *Animal Welfare Act 1992* (ACT) s20(1) (with the exception of provisions relating to the prohibition on factory farming of pigs and battery hens), *Animal Care and Protection Act 2001* (Qld) s40, *Animal Welfare Act 1985* (SA) s43, *Prevention of Cruelty to Animals Act 1986* (Vic) s6, *Animal Welfare Act 2002* (WA), *Animal Welfare Act* (NT) s79; . In NSW, there are a variety of legislated defences: *Prevention of Cruelty to Animals Act 1979* (NSW) s24 which correspond to the types of acts that are authorized by Codes of Practice. In Tasmania, *Animal Welfare Act 1993* (Tas) s40(1)(h) provides that an ‘animal welfare advisory group’ established under the Act may make a recommendation to the Minister regarding the development of an animal welfare standard or guideline.

¹⁷⁵ Dale and White, above n 55, 154; Geoff Neumann and Associate, above n 134, 9.

¹⁷⁶ Bruce, above n 144, 217.

welfare at the same time as it purports to dictate the minimum standards that should be met to ensure animal welfare.

The complexity of ascertaining the legal status afforded to a given Code of Practice is well evidenced by reference to the Queensland jurisdiction. The Queensland *Animal Care and Protection Act 2011* (Qld) provides in s15(1) that '[a] regulation may require a person to comply with the whole or a stated part of a code of practice'. The implication of this section appears to be that the regulations can require mandatory compliance with animal welfare Codes of Practice. Schedules 1, 2 and 3 of the *Animal Care and Protection Regulations 2002* (Qld) performs this task. Under regulation 2, '[a] person must comply with the code of practice' contained within the provisions of schedules 1-3. These schedules contain provisions that pertaining to the welfare of domestic fowl, pigs, and livestock during transport. However, regulation 3(2) of the *Animal Care and Protection Regulations 2002* (Qld) also provides that a person *may* comply with a Code of Practice that is mentioned in schedule 4. Schedule 4 lists 15 Codes of Practice pertaining to animal welfare, compliance with which is therefore only voluntary. Non-compliance with Codes of Practice listed in Schedule 4 in Queensland is therefore not an offence under the *Animal Care and Protection Act 2011* (Qld).¹⁷⁷ The legal status of Code of Practice in the Queensland jurisdiction thus varies, with compliance with some Codes of Practice being mandatory, and others being only voluntary. By contrast, in South Australia for example, compliance with all Codes of Practice adopted under the *Animal Welfare Regulations 2012* (SA) is mandatory.¹⁷⁸

Even where a Code of Practice dictates a 'mandatory' standard, their 'shadowy' character remains. Codes of Practice are marked by a distinction between two different types of instruction: those that dictate what a person *must* do to ensure animal welfare, and those that dictate only what they *should* do. The *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishment*, for example, is mandatory in South Australia, with a penalty attached to non-compliance.¹⁷⁹ However, many of the provisions contained within the Code dictate only 'should' requirements. For example, part 2.6.1.4 provides that '[a]nimals *should* not enter the knocking box unless they are to be stunned immediately'.

¹⁷⁷ Alex Bruce, *Animal Law in Australia: An Integrated Approach* (LexisNexis Butterworths, 2012) 218.

¹⁷⁸ See for example *Animal Welfare Regulations 2012* (SA) s5.

¹⁷⁹ *Ibid* s5(1).

Similarly, part 2.6.3.3 provides: '[t]he practice of hoisting pigs and calves after electrical stunning and before sticking is not recommended as it may extend the time between these operations and allow return of consciousness. Animals *should* be stuck before hoisting'. Given that these provisions are worded only as a 'should' requirements or 'recommended' practice, compliance with them is not mandatory.

The distinction between what 'should' be done, as opposed to what 'must' be done to ensure animal welfare was raised as a point of concern in the Neumann Report, because the distinction confuses what constitutes a mandatory standard versus a suggested practice.¹⁸⁰ The new Australian Standards and Guidelines for animal welfare (discussed further below) address this concern by drawing a clear distinction between 'standards' which articulate mandatory requirements and 'guidelines' which constitute only recommended practice. From an animal welfare perspective, it remains unclear why the distinction should remain at all, since the guidelines will supposedly constitute 'recommended practices to achieve desirable livestock welfare outcomes', with the implication that non-compliance may yield a negative animal welfare outcome.¹⁸¹

Adding to the complexities surrounding the legal status of Codes of Practice is the fact that compliance with a Code of Practice provides a defence to an allegation of animal cruelty under animal welfare legislation in some jurisdictions. For example, in the Australian Capital Territory, compliance with a Code of Practice is a defence to most allegations of animal cruelty.¹⁸² The same type of defence exists in South Australia,¹⁸³ Victoria,¹⁸⁴ Queensland,¹⁸⁵ the Northern Territory,¹⁸⁶ and Western Australia.¹⁸⁷ In New South Wales no specific defence exists for compliance with a Code of Practice. However, evidence of either compliance or non-compliance with a Code of Practice 'is admissible in evidence in proceedings' pertaining to an allegation of cruelty under the Act.¹⁸⁸ The legal status of Codes of Practice in Tasmania is particularly unclear with no statutory provision detailing the legal status of Codes of

¹⁸⁰ Geoff Neumann and Associates, above n 134, 11.

¹⁸¹ Australian Animal Welfare Standards and Guidelines, *About* (2017) <
<http://www.animalwelfarestandards.net.au/about-2/>> .

¹⁸² *Animal Welfare Act 1992* (ACT) s20(1).

¹⁸³ *Animal Welfare Act 1985* (SA) s43.

¹⁸⁴ *Prevention of Cruelty to Animals Act 1986* (Vic) s6(1)(c).

¹⁸⁵ *Animal Care and Protection Act 2001* (Qld) s40.

¹⁸⁶ *Animal Welfare Act* (NT) s79(1)(a).

¹⁸⁷ *Animal Welfare Act 2002* (WA) s25.

¹⁸⁸ *Prevention of Cruelty to Animals Act 1979* (NSW) s34A(3).

Practice.¹⁸⁹ However, the Tasmanian Government department describes Codes of Practice as ‘advisory documents’, such that they may have similar legal force to Codes of Practice in New South Wales, where compliance or non-compliance may substantiate an allegation of animal cruelty under the Act.¹⁹⁰ As I explain in Chapter six, although compliance with a Code is not a defence in New South Wales, section 24 of the New South Wales *Prevention of Cruelty to Animals Act* makes specific provisions to exempt certain cruel practices from the reach of anti-cruelty provisions.

The transition to Standards and Guidelines partially remedies the lack of clarity and uniformity currently offered by Codes of Practice. Given that each Australian jurisdiction has agreed to implement the new national Standards and Guidelines as they are endorsed, this should result in greater consistency across Australia in terms of the animal welfare standards required to be met by various industries that which is currently provided by state-based Codes. Whilst each Australian jurisdiction appears to be moving towards implementing existing Standards and Guidelines, uptake has been slow in some instances. For example, the *Australian Animal Welfare Standards and Guidelines: Land Transport of Livestock* were released in 2012, but have not yet been implemented in Western Australia or the Australian Capital Territory. The Standards and Guidelines are also being implemented in different ways in each jurisdiction. In many instances, they are being adopted by act of regulation, much in the same way as Codes of Practice. In other contexts, it appears some jurisdictions will implement the enforceable components of the Standards and Guidelines by way of amendment to animal welfare legislation. For example, according to Animal Health Australia, the state of Victoria intends to implement the Standards and Guidelines relating to both sheep and cattle by way of a proposed new Animal Welfare Act.¹⁹¹

Standards and Guidelines also draw a more clear distinction between mandatory, enforceable requirements and recommended, voluntary ones than Codes of Practice do. Mandatory ‘standards’ are accompanied by the term ‘must’, and are intended to be legally enforceable. By contrast, the ‘guidelines’ constitute only ‘recommended practice’, and are therefore

¹⁸⁹ Dale and White, above n 55, 157.

¹⁹⁰ Parks Tasmanian Government Department of Primary Industries, Water and Environment, *Animal Welfare Guidelines* < <http://dpiwve.tas.gov.au/biosecurity-tasmania/animal-biosecurity/animal-welfare/legislation-standards-guidelines/animal-welfare-standards-guidelines/animal-welfare-guidelines> > .

¹⁹¹ Animal Health Australia, *Sheep*, (13 March 2018) Australian Animal Welfare Standards and Guidelines < <http://www.animalwelfarestandards.net.au/sheep/>>.

suggested to ‘achieve desirable livestock welfare outcomes’. Whilst the Standards and Guidelines therefore offer greater clarity regarding what constitutes an enforceable legal obligation than Codes of Practice, the fact that practices which are said to promote welfare remain only ‘voluntary’ is troubling. In the state of Western Australia, proposed amendments to the *Animal Welfare Act 2002* (WA) may see these ‘voluntary’ requirements prescribed by act of regulation, with the result that whilst they cannot be directly enforced, they may guide a Court in considering whether a cruelty offence has taken place.¹⁹²

Thus, while the transition to Standards and Guidelines may offer greater uniformity across Australia, and clarify which standards are legally enforceable, the transition has only just commenced with the result that many Codes of Practice continue to operate with negative animal welfare outcomes. Moreover, as the above discussion has suggested, much like the development of Model Codes, the Standards and Guidelines development process has also been unduly influenced by industry representatives. As a result, the Standards and Guidelines continue to permit cruelty to nonhuman animals where that cruelty serves a human interest.

V. CASE STUDY: FACTORY FARMED PIGS IN NEW SOUTH WALES

Conflicts of interest and inadequate attention to animal welfare science has led to the development of Codes of Practice that permit cruelty towards nonhuman animals. The inadequacies of Codes of Practice, and the animal welfare legislation that give them legal force is powerfully illustrated by a consideration of an individual animal in Australia whose treatment is governed by a Code. Pigs that are bred in factory farms are a revealing case study since they are among the most lawfully mistreated nonhuman animals in Australia. A brief consideration of the life of a factory farmed pig in Australia is revealing of the extent to which Australian animal welfare legislation fails to meet its purported purpose of protecting nonhuman animals from harm. For the purposes of this example, I consider the New South Wales Jurisdiction. The applicable law is the *Prevention of Cruelty to Animals Act 1979* (NSW) (‘NSW Act’), the *Prevention of Cruelty to Animals Regulation 2012* (NSW) (‘NSW regulations’) and the *Animal Welfare Code of Practice – Commercial Pig Production 2009*

¹⁹² See *Animal Welfare Amendment Bill 2017* (WA); Explanatory Memorandum, *Animal Welfare Amendment Bill 2017* (WA) 1.

(NSW) ('NSW code'). I focus on the New South Wales jurisdiction because the *Prevention of Cruelty to Animals Act 1979* (NSW) contains an interesting provision with respect to the confinement of 'stock' animals that is unique to the New South Wales jurisdiction, which explicitly demonstrates the way in which human interests dominate the provisions of animal welfare protections.

Pigs are mammals that are included under the definition of 'animal' in the NSW Act. The Act prohibits cruelty to animals in section 5(1), which reads: 'A person shall not commit an act of cruelty upon an animal'. This provision explicitly purports to prohibit cruel acts towards pigs in New South Wales. This s5(1) general prohibition on cruelty is accompanied also by some specific provisions which articulate the legal requirements for the keeping of nonhuman animals in certain contexts. For example, section 9(1) of the Act provides that '[a] person in charge of an animal which is confined shall not fail to provide the animal with adequate exercise'. Yet, these protective provisions are consistently undermined by other provisions in the NSW Act, the Regulations and the Code.

Factory farmed pigs in New South Wales do not benefit from this provision against confinement without exercise. Section 9(1A) of the Act expressly excludes them in two ways, stating first that the rules 'does not apply to a person in charge of an animal if the animal is a stock animal other than a horse', and further stating that it does not apply to any nonhuman animals that is 'an animal of a species which is usually kept in captivity by means of a cage'.¹⁹³ Given that the Act defines a 'stock animal' as 'an animal which belongs to the class of animals comprising cattle, horses, sheep, goats, deer, pigs, poultry and any other species prescribed for the purposes of this definition' factory farmed pigs are excluded from the protection against confinement without exercise.¹⁹⁴ Further, since factory farmed pigs are routinely confined without exercise; they may also be excluded on the basis that they are so routinely confined. The puzzling effect of provisions 9(1) and 9(1A) is that those nonhuman animals who would most benefit from a prohibition on confinement are expressly excluded from its protective reach. As Siobhan O'Sullivan explains, 'the exercise provision only

¹⁹³ *Prevention of Cruelty to Animals Act 1979* (NSW) s9(1A)(b).

¹⁹⁴ *Ibid* s4.

protects those animals who are not vulnerable to exercise deficiency and does not protect those who are'.¹⁹⁵

Breeding sows in New South Wales typically and lawfully live for significant portions of their lives confined to a 'sow stall'. Legal requirements contained in the Code for these stalls dictate a minimum space requirement of floor space 0.6 metres wide and 2.2 metres long.¹⁹⁶ A sow in such conditions must be able to stand or lie down without 'being obstructed by fixtures or fittings', and must be able to lay or stand 'without simultaneously touching opposite ends or sides of the stall'.¹⁹⁷ However, she need not be provided enough space to be able to turn around. From July 2017, a producer in NSW may lawfully keep a sow in these conditions for up to 6 weeks in any gestation period, unless special circumstances apply.¹⁹⁸ For these six weeks of her pregnancy, she may lawfully be confined to a stall where she must live, sleep, defecate and drink and eat.



1 : A sow in a sow stall at Walseys Piggery, Pinkerston Plains, South Australia.¹⁹⁹

Just prior to giving birth, sows are typically moved to alternative cages called 'farrowing crates'. In these crates, sows birth their litter of piglets. The crates often consist of two

¹⁹⁵ Siobhan O'Sullivan, 'Advocating for Animals Equally from within a Liberal Paradigm' (2007) 16 *Environmental Politics* 1, 6.

¹⁹⁶ *Animal Welfare Code of Practice - Commercial Pig Production 2009* (NSW) s16(2)(a)

¹⁹⁷ *Ibid* ss16(3)(c)(i), (iii).

¹⁹⁸ *Ibid* s19(1)-(3). Special circumstances include the provision of medical treatment or the provision of an individual nutrition regime to 'restore health and body condition to the sow'.

¹⁹⁹ Australian pig farming: the inside story, *Walseys Piggery* < <http://www.aussiepigs.com/piggeries/walseys> >

sections – one which tightly confines the mother pig, and a second adjacent section which the piglets can access due to their small size. The purpose of the division between these sections is to enable the piglets to nurse from the sow, whilst simultaneously preventing the sow from accessing her young. The Code dictates that the floor space of a farrowing crate with adjacent ‘creep’ area for her piglets should provide an area of 3.2 square metres.²⁰⁰ Of this 3.2 square metres, the sow must only be provided a floor space of 0.5 metres wide by 2 metres length, some of which may be occupied by a ‘rear anti crush rail, appropriately placed’, to prevent her from squashing her own piglets.²⁰¹ When lactating, the sow must be able to ‘lie and extend her limbs freely and position herself so that both sides of her udder are accessible to her piglets’.²⁰² A sow may be kept in these conditions for 6 weeks in any one reproductive cycle, except in ‘emergency or exceptional circumstances’, including where she may be required to foster one additional litter of piglets following her own weaning.²⁰³



2 : A sow in a typical Farrowing Crate - Finiss Piggery, South Australia.²⁰⁴

²⁰⁰ *Animal Welfare Code of Practice - Commercial Pig Production 2009* (NSW) s16(2)(c)(i)

²⁰¹ *Ibid* s16(2)(c)(ii).

²⁰² *Ibid* s16(3)(d)(ii).

²⁰³ *Ibid* ss18(1), (2).

²⁰⁴ Australian pig farming: the inside story, *Finnis Park Piggery* < <http://www.aussiepigs.com/piggeries/finnis-park> > .

By confining sows confined to stalls, producers can not only house more pigs, but they can also minimize the amount of time and effort involved in tending to the welfare needs of each pig. They also claim that the use of sow stalls was necessary to protect pigs from fighting with each other.²⁰⁵ Interestingly, the Australian pork industry committed to a voluntary phase out of sow stalls (but not farrowing crates) by 2017, opting to provide sows with ‘freedom of movement’ during pregnancy. At the time of writing, there is no evidence that producers have honoured this commitment.

It has been argued that farrowing crates are necessary for preventing piglets from crush injuries. In a study by G Cronin and G Amerongen however, a total of 16 sows were monitored over a period of 8 months.²⁰⁶ Some sows were kept in standard farrowing crates, and some were kept in ‘modified’ crates in which they had access to straw, and were provided with a hessian ‘roof’ to mimic the shelter they would normally seek in the wild. The experiment found that none of the sixty five piglets that were live-born into the modified crate environment died before weaning. By comparison, 7 of the 66 piglets born into the standard crate died prior to weaning. Four piglets were savaged to death by the sow, 2 were crushed by the sow and 1 fell ill. In addition, the experimenters observed that human intervention saved several other piglets in the standard crate, and that the observed level of piglet mortality in that instance was thus ‘conservative’.²⁰⁷

The NSW Act also purports to provide nonhuman animals other protections from harm. For example, section 12 prohibits certain painful procedures from being performed on a nonhuman animal, including the cropping of a dog’s ears, the removal of a cat’s claws, or the hot iron branding of an animal’s face, unless the performed by a veterinary practitioner.²⁰⁸ Pigs however, are not afforded protection from similarly painful procedures. Section 8 of the NSW Code provides that ‘elective husbandry procedures’ may be carried out on a pig by a suitably qualified person. Such procedures include: castration or vasectomy, docking a pig’s tail, clipping a pig’s needle teeth, inserting a nose ring to a pig’s nose, applying identification marks to a pig’s ear by notching, or attaching clips or tags, measuring a pig’s back fat,

²⁰⁵ Australian Pork Limited, *Housing* < <http://australianpork.com.au/industry-focus/animal-welfare/housing/> > .

²⁰⁶ G.M. Cronin and G Van Amerongen, 'The Effects of Modifying the Farrowing Environment on Sow Behaviour and Survival and Growth of Piglets' (1991) 30 *Applied Animal Behaviour Science* 287.

²⁰⁷ Ibid 296.

²⁰⁸ *Prevention of Cruelty to Animals Act 1979* (NSW) ss12(1)(b), (d), (g) and s12(2)(b)(ii), (iii), (iv).

diagnosis of pregnancy and tusk trimming.²⁰⁹ The Code does not require the provision of anaesthetic or pain relief for the performance of painful surgical procedures.

The Code is silent as to the method by which such ‘elective husbandry procedures’ must be performed (I return to this point in chapter six). As such, these procedures are effectively unregulated but are positively permitted by law even though they are cruel. Teeth cutting for example, is routinely performed on piglets, despite the fact that such a procedure is known to cause both acute and chronic pain.²¹⁰ Piglets also commonly have their tails cut short without pain relief, and have their ears notched for identification purposes.²¹¹ Male piglets are also routinely castrated without anaesthetic or pain relief.

The Code also provides authority for the ‘humane destruction’ of pigs, so long as it is performed by a ‘suitably qualified person’, or a person under the supervision of somebody ‘suitably qualified’.²¹² The New South Wales Code is silent with respect to the methods by which ‘humane destruction’ may be performed. However, the *Model Code of Practice for the Welfare of Animals: Pigs*, which is intended to provide ‘detailed minimum standards for assisting people in understanding the standard of care required to meet their obligations under the laws that operate’ in their own jurisdiction provides suitable methods may include: carbon dioxide induced respiratory arrest, anaesthetic overdose, gunshot, penetrative captive bolt followed by bleeding out, or blunt trauma to the head followed by bleeding.²¹³ I return to this discussion in chapter 7, where I explain why the method of carbon dioxide induced arrest is actually cruel, even though it is purportedly ‘humane’.

This brief overview of the lawful cruelties inflicted upon pigs serves to illustrate the key contention I make in this thesis. Namely, the very same laws that purport to protect nonhuman animals not only fail to do so, but explicitly permit their cruel mistreatment.

²⁰⁹ *Animal Welfare Code of Practice - Commercial Pig Production 2009* (NSW) s8(3)(a)-(h).

²¹⁰ M Sutherland, 'Welfare Implications of Invasive Piglet Husbandry Procedures, Methods of Alleviation and Alternatives: A Review' (2015) 63(1) *New Zealand Veterinary Journal* 52.

²¹¹ Standard 5.6.8 *Model Code of Practice for the Welfare of Pigs 2008*.

²¹² *Animal Welfare Code of Practice - Commercial Pig Production 2009* (NSW) s9.

²¹³ *Model Code for the Welfare of Animals: Pigs (3rd Edition)*, Appendix 5.

VI. CONCLUSION

In this chapter, I have suggested that although Australian animal welfare legislation purport to offer broad protections to nonhuman animals, those protections are consistently undermined by qualifying words and Codes of Practice and Standards and Guidelines which serve human interests. The general prohibition on cruelty contained within animal welfare legislation are qualified by terms such as ‘reasonable’ and ‘necessary’ that enable cruelty to occur where it serves a human interest. The starting point for making an assessment as to what constitutes ‘necessary’ or ‘reasonable’ suffering, is the view that suffering is, *prima facie*, acceptable if it serves a human interest. Further, I have argued that Codes of Practice and Standards and Guidelines dictate separate standards to govern the treatment of nonhuman animals in industries. These Codes of Practice and Standards and Guidelines are developed by those who have a positive interest in sustaining the profits of industries that are routinely cruel to nonhuman animals. As a result, they tend to permit cruelty rather than prohibit it. As the case study of factory farmed pigs illustrated, those nonhuman animals that are the most vulnerable to being mistreated are effectively exempted from the reach of animal welfare statutes with the result that the protections provided therein do not extend to them.

In the next chapter, I re-visit the concept of ‘necessary’ suffering to demonstrate how what constitutes ‘necessity’ with respect to one species may not constitute ‘necessity’ with respect to another. I demonstrate that Australian animal welfare legislation and Codes of Practice positively commodify nonhuman animals, with the result that cruelty is readily justified toward them.

CHAPTER 5 : THE COMMODIFICATION OF NONHUMAN ANIMALS

I. INTRODUCTION

‘...animals are not just raised for food; they are raised as food’.¹

In the previous chapter, I argued that the provisions of Australian animal welfare legislation are facilitating cruelty towards nonhuman animals in two ways. First, they only prohibit cruelty that is ‘unreasonable’ or ‘unnecessary’. The use of such qualifying terms legitimates forms of cruelty where it can somehow be ‘justified’ with respect to human interests. I also demonstrated that Codes of Practice and Standards and Guidelines facilitate some of the worst forms of cruelty towards nonhuman animals. They do so by exempting some of the most vulnerable species of nonhuman animals, and some of the cruellest practices towards them, from the protective reach of Australian animal welfare legislation.

In this chapter, I say something more about the concept of ‘necessary’ cruelty to illustrate that other legal mechanisms operate in conjunction with it to permit cruelty towards nonhuman animals. The concept of ‘necessary’ cruelty seeks to balance the interests of nonhuman animals against the interests of humans. My focus in this chapter is how nonhuman animal interests are constructed by the very same laws that purport to protect them. We saw in the third and fourth chapters that the interests of nonhuman animals are generally afforded less weight than the interests of humans. In this chapter, I argue that at times, sentient nonhuman animals are constructed not only as having interests of *less* importance, but that sometimes they are constructed as if they have *no interests at all*. Such a construction, facilitates cruelty towards them by making their interests invisible. Cruelty is ‘necessary’ or ‘reasonable’, because the interests of the nonhuman animal concerned simply do not count.

This chapter is divided into two parts. First, I argue that nonhuman animals are commodified by law, and that the commodification of nonhuman animals facilitates cruelty towards them. Using Karl Marx’s concept of commodity fetishism, I argue that nonhuman animals who are commodified are constructed as having only exchange value. The value of a commodified nonhuman animal is thus deemed to be synonymous with the price that can be obtained for them or their bodies when they are sold for human use and consumption. Conceptualised as

¹ David Cassuto, 'Meat Animals, Humane Standards and Other Legal Fictions' (2014) 10(2) *Law, Culture and Humanities* 225, 236.

having only exchange value, nonhuman animals as sentient creatures possessing morally relevant interests become what Carol Adams describes as ‘absent referents’ because their interests disappear from our consideration. As such, they simply do not count.

In the second part of this chapter, I detail specific examples from within Australian Codes of Practice and Standards and Guidelines which facilitate the commodification of nonhuman animals. Specifically, I consider provisions which operate predominantly to maximise the profits of producers at the expense of animal welfare, and where Codes of Practice use language that directly conflates nonhuman animals with the product that humans seek to obtain from them. Hens become ‘layers’ or ‘broilers’ and cows become ‘dairy cows’. In these and other instances, I demonstrate that the commodification of nonhuman animals facilitates their cruel mistreatment.

II. THE PROBLEM WITH BEING A COMMODITY

So far in this thesis I have demonstrated that Australian animal welfare legislation prohibits only ‘unnecessary’ or ‘unreasonable’ cruelty towards nonhuman animals. This prohibition seeks to strike a balance between the property rights that humans are endowed with over nonhuman animals, and the fact that nonhuman animals are sentient creatures that possess interests of their own. The result is that animal welfare legislation does not prohibit cruelty towards nonhuman animals *per se*, but only prohibits forms of cruelty that are unreasonable or serve an illegitimate human end. Cruelty, I have argued, is therefore *prima facie* lawful, provided it can be justified with respect to human interests.

The prohibition on ‘unnecessary’ or ‘unreasonable’ cruelty performs limited protective work for nonhuman animals because they are classified as legal property.² As legal property, their interests are ‘regarded as of lesser import’ than the legal rights of human to *use* their property to serve their own purposes.³ Human property rights, and the interests of nonhuman animals, are ‘two very different entities’, and when the law seeks to balance those entities, human property rights and interests typically prevail.⁴ This is true even where ‘a relatively trivial

² Gary Francione, *Animals, Property and the Law* (Temple University Press, 1995) 19.

³ *Ibid* 22.

⁴ *Ibid*.

human interest is balanced against an animal's most fundamental interest in not experiencing pain or death'.⁵ In chapter four, I provided the example of pigs, who are routinely confined to sow stalls and farrowing crates, despite the fact that such conditions are contrary to their basic welfare needs. The problem for these pigs, is that the Codes of Practice which effectively dictate what constitutes 'unnecessary' or 'unreasonable' suffering, result from an 'unbalanced balancing act' that yields 'lopsided results', because their interests are *prima facie* less important than human interest in confining them.⁶

A. *The Commodification of Nonhuman Animals*

In addition to the fact that nonhuman animals are legal property, and thus have interests that are *prima facie* less important than human interests, some nonhuman animals are also positively *commodified* by law. As the Macquarie dictionary defines it, a commodity is 'a thing that is of use or advantage'; 'an article of trade or commerce'.⁷ In the context of capitalist society, Karl Marx also defines commodities as objects that are ascribed value based not their intrinsic properties, but on the rate at which they may be exchanged for other commodities in the marketplace.⁸ When nonhuman animals are commodified, they are therefore made synonymous with the 'thing that is of use or advantage' to humans, which is typically attained through the breeding, use or slaughter of their bodies. Commodified nonhuman animals are not conceptualised as having interests that are simply less important than human interests. Rather, they are conceptualised as essentially having *no interests at all*. Pigs are commodified when their bodies are slaughtered and sold as 'pork'. Racehorses are commodified when they are raced for money and then slaughtered and turn into dog food because they were not fast enough to win a race. Birds are commodified when they are confined to cages and sold in pet shops. In each instance, a sentient nonhuman animal is ascribed value only insofar as their bodies can be exchanged for money or other commodities within the capitalist marketplace. In each context, the interests of the nonhuman animals that were raised, kept and slaughtered to produce a product or serve human purposes do not count.

⁵ Ibid 18-19.

⁶ Ibid 24.

⁷ Susan Butler (ed) *Macquarie Dictionary* (online ed, at 21 November 2017) 'Commodity'.

⁸ Ian Fraser and Lawrence Wilde, *The Marx Dictionary* (Bloomsbury Academic, 2012) 5.

Marx describes commodities as becoming ‘fetishized’ in the capitalist marketplace, by which he means that they are ascribed value only in relation to the extent to which they can be exchanged for money or other commodities. Tim Dant explains that a ‘fetish is created through the veneration or worship of an object that is attributed some power or capacity, independently of its manifestation of that capacity’.⁹ In the context of nonhuman animal products, the fetish emerges where the exchange value of their bodies appears to be their true or only value. In other words, the ‘value’ of a pig only emerges at the time of exchange once its body has been turned into ‘pork’. Pork producers ‘don’t know and can’t know what the value of their commodity is until they take it to the market and successfully exchange it’.¹⁰ When a pig is conceptualised merely as ‘pork’, it is perceived as having value only insofar as its body can be exchanged for money or other commodities in the marketplace. A pig that does not sell, or which cannot be sold as ‘pork’, would be deemed to have no value at all.¹¹ It is in this way that the pig becomes a ‘fetishized’ commodity. Its value is attributed to it at the time of exchange in the capitalist marketplace, but is perceived as being something inherent to the pig itself.¹²

For Marx, the fetishism of commodities conceals the *true* value of a commodity, which he contends is to be found in the social relations and human labour that went into its production.¹³ Marx’s primary concern was that commodity fetishism in the capitalist marketplace disguised ‘real social relations through the exchange of things’.¹⁴ Put simply, he was concerned with the way in which the exchange of commodities appears in the capitalist marketplace to be an exchange between things, when it is an exchange between persons.

In the context of the commodification of nonhuman animals, it is possible to extend Marx’s analysis to consider the experience of the nonhuman animal itself. Just as Marx argues that commodity fetishism conceals the social relations and human labour value of a commodity, so too does it conceal the context in which a nonhuman animal is bred, raised, kept and slaughtered for human use or consumption. When a consumer walks into the supermarket to

⁹ Tim Dant, 'Fetishism and the Social Value of Objects' (1996) 44(3) *The Sociological Review* 495, 499.

¹⁰ David Harvey, *A Companion to Marx's Capital* (Verso, 2010) 39.

¹¹ Ibid 42.

¹² Karl Marx, *Marx's Capital* (Student ed, Electric Book Company, first published 1867, 2000 ed).

¹³ Ibid 37. This is known as Marx’s ‘labour theory of value’. For commentary and critique on this idea, see Ian Steedman (ed), *The Value Controversy* (New Left Books, 1981); Ronald Meek, *Studies in the Labour Theory of Value* (2nd ed, Lawrence and Wishart, 1973); Dant, above n 9, 500.

¹⁴ Harvey, above n 10, 41.

purchase meat, for example, they see only the ‘price’ on the shelf. This price is perceived as being the meat’s value, and is therefore implicitly the same value that is attributed to the animal itself. In exchanging money for meat, a consumer does not see the nonhuman animal that was raised and killed to produce the product, nor do they learn about the conditions in which it lived and died.¹⁵ These realities do not present themselves to the consumer in the supermarket aisle, nor are they reflected in the price ‘value’ that is attributed to the commodity. It is in this way that commodity fetishism ‘drains products of their original meaning, which derives from the circumstances of production’,¹⁶ with the result that animal suffering is made invisible to consumers. Meat, as a fetishized commodity, does not reveal the ‘radical disjuncture between the violent material conditions of production and the sanitized, seductive physical conditions of consumption’, even though such disjuncture is integral to the way in which the meat is produced and sold.¹⁷ Chris Otter contends that meat is one of the most

magic and beguiling of commodities – one that just *appears*, bearing almost no trace of its brutal origin. That rows of wrapped, severed cubes of flesh, perhaps adorned with labels decorated with carton pigs or cows, are *just there* in the shop, next to smiling children and sweet old men, is one of the strangest normal things in our world.¹⁸

Each time a nonhuman animal is commodified - when pigs become ‘pork’, cows become ‘beef’, chickens become ‘layers’ – their value is perceived as synonymous with the price which can be attained for their bodies at the time of sale.

B. *Commodification Facilitates Cruelty*

Thus far, I have argued that when nonhuman animals are commodified, they are conceptualised as having *only* exchange value such that their morally relevant interests are rendered invisible. It is for this reason that David Cassuto contends that exchange value is the opposite of ‘inherent value’.¹⁹ Whilst it is not within the scope of this thesis to consider

¹⁵ Bettina Heinz and Ronald Lee, 'Getting Down to the Meat: The Symbolic Construction of Meat Consumption' (1998) 49(1) *Communication Studies* 86.

¹⁶ *Ibid* 87.

¹⁷ Chris Otter, 'Civilising Slaughter: The Development of the British Public Abattoir 1850-1910' in Paula Young Lee (ed), *Meat, Modernity and the Slaughterhouse* (University Press of New England, 2008) 89, 106.

¹⁸ *Ibid* 106.

¹⁹ Cassuto, above n 1, 69.

whether nonhuman animals have ‘inherent value’, the central point that Cassuto makes is that the interests of nonhuman animals who have only an exchange value are invisible because they are defined solely by their ‘transactional worth in a market economy’.²⁰ The concept of the ‘absent referent’ is a powerful way of explaining precisely how commodification makes nonhuman animal interests invisible.

1. *How Commodified Animals Become ‘Absent’*

According to Carol Adams, the absent referent is ‘anything whose original meaning is undercut as it is absorbed into a different hierarchy of meaning’.²¹ Nonhuman animals are made absent when they are commodified, because with their interests these sentient creatures are absorbed by their commodification which endows them only with exchange value. As absent referents, nonhuman animals are simultaneously both ‘there and not there’.²² They are literally there when they are confined to battery stalls, or slaughtered and sold as ‘meat’. Yet they are simultaneously ‘not there’, in that their interests do not count, and their lives are deemed meaningful only insofar as their bodies can be used as objects of exchange in the marketplace. They are absent because we fail to accord them their own existence.²³ The commodified pigs becomes ‘pork’. The commodified cow becomes ‘beef’. The commodified hen becomes a ‘layer’. In each case, the sentient nonhuman animals are made absent.

One of the ways in which Adams’ contends nonhuman animals can be made absent is through language. It is through language that Adam contends ‘meat’s true meaning is cast out’.²⁴ Language can ‘distance us further from animals by naming them as objects, as “its”’.²⁵ The application of such a ‘generic’ term to nonhuman animals ‘erases the living, breathing nature of the animals and reifies their object status’.²⁶ Characterised by language as commodities, or as ‘its’, nonhuman animals don’t have interests that matter *less* than human interests, rather they are deemed to have *no interests at all*.

²⁰ Ibid 69.

²¹ Carol Adams, *The Sexual Politics of Meat* (Tenth Anniversary ed, Continuum, 2006) 53.

²² Ibid.

²³ Ibid.

²⁴ Ibid 74.

²⁵ Ibid 75.

²⁶ Ibid.

The critique of language has been an important tool used in feminist thinking to reveal that language not only describes things but also brings them into being.²⁷ As Judith Butler has stated in the context of gender, language not only ‘report[s] a pre-linguistic experience, but constructs that experience as well as the limits of its analysis’.²⁸ In the context of the oppression of women by men, Sarah Hoagland argues that when language which reflects *only* a male perspective is used to describe women, that language not only operates in a descriptive fashion, it also operates in a normative way to dictate not only what women *are* like, but what women *should* be like, as it is perceived from a predominantly male perspective.²⁹ Such language therefore operates to legitimate the oppression of women, since it operates to define women according only to the male perspective of what women should be like.

American linguist, philosopher and feminist Julia Penelope has argued that language not only facilitates continued sexism, but is capable also of ‘prescribing passivity’ towards it.³⁰ Penelope’s point is that the continued acceptance of language that contains harmful values facilitates the continuation of those harms. In the context of women, the continued usage and acceptance of language that contains gender bias not only sustains the existence of that bias, but also neutralises that bias. She provides the example of language that is seemingly neutral, like the word ‘surgeon’, that is typically assumed to refer to a *male* occupation. This is evidenced, she suggests, by the fact that people typically refer also to ‘female surgeons’ as a point of contrast to the ‘standard’ definition.³¹ The use of the term ‘surgeon’ in contrast to the phrase ‘female surgeon’, operates to sustain the standard view that surgeons are necessarily *male*, unless it is explicitly stated otherwise. It is for this reason that Penelope contends that dismantling language, by ‘removing biased gender reference from our vocabulary’ can be a powerful means of interrupting continued sexism.³² Language, she contends, is capable of

²⁷ Julia Penelope, 'Prescribed Passivity: The Language of Sexism' (1988) *A Feminist Ethic for Social Research (Nebraska Sociological Feminist Collective)* 119; Iris Marion Young, 'Five Faces of Oppression' (1988) 19(4) *The philosophical forum* 270; Sarah Lucia Hoagland, 'Lesbian Ethics' (1988) 11(6) *Women's Studies International Forum* 531; Carol Adams, *The Pornography of Meat* (Continuum 2003).

²⁸ Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) 40(4) *Theatre Journal* 519, 531.

²⁹ Hoagland, above n 27, 539.

³⁰ Penelope, above n 27.

³¹ *Ibid* 120.

³² *Ibid* 138.

‘forc[ing] upon us an awareness of the deeply ingrained sexism that usage [of such language] reflects’.³³

Just as feminists have argued that language depicts the female identity as being synonymous with one single male perspective on how women *should* be, it is possible to see also how language constructs the identity of sentient nonhuman animals and defines them as commodities. Even changes in syntax, which alter the arrangement of words within a sentence, can vastly affect the meaning of a sentence, and can impart values that harm others – both human and nonhuman. To illustrate this point, I turn first to Penelope’s illustration of how the identity of women who have been domestically abused can be consumed by language that describes them as ‘battered’. I then turn to consider how a similar process takes place in the context of nonhuman animals who, by language, simply become ‘meat’. Consider now how language operates to dictate meaning about a person, namely Mary, in the following series of sentences and terms:³⁴

‘Mary was beaten by John’

‘Mary was beaten’

‘Mary is a battered woman’

‘Battered woman’

‘Battered’

The first sentence, that is, ‘John beat Mary’ – positions John as the agent of an action that caused harm to Mary. In this case, Mary is the object of the sentence and she has something done *to her*. In the second sentence, ‘Mary was beaten by John’, Mary has become the focus: John’s role as the perpetrator of violence upon Mary is less central than it was in the first instance. By the time the sentence transitions to ‘Mary was beaten’ – John, the perpetrator of the violence, has entirely disappeared from the scenario. And, with his disappearance, the beating has become a temporary characteristic of Mary herself – as opposed to something that was done *to* Mary, *by* John. By the end of the sequence, Mary has been labelled a ‘battered’

³³ Ibid 138.

³⁴ Attributed to Julia Penelope, quoted in In Sarah Lucia Hoagland, 'Lesbian Ethics' (1988) 11(6) *Women's Studies International Forum* 531.

woman. Mary now possesses a certain characteristic (in this case, ‘batteredness’) that now classifies her as a certain *kind* of woman. As such, Hoagland concludes, ‘something *men do to women* has become instead something that is part of *women’s nature*’.³⁵ Ultimately, when there are enough ‘battered women’, we lose sight of Mary completely, and she is simply absorbed anonymously into the category of ‘battered women’. At this point, Mary becomes the absent referent. She is simultaneously ‘there and not there’.³⁶

Moreover, the person who is responsible for having been violent towards Mary, has disappeared from our contemplation entirely.³⁷ Sarah Hoagland contends that we can see this type of language shift occur in numerous practical contexts. She contends that statements such as ‘one-half to two-thirds of women who live with a man will be beaten’ are commonplace.³⁸ These statements routinely appear in preference to the alternative statement: ‘one-half to two-thirds of all men who live with a woman will beat her’.³⁹ The juxtaposition between the two demonstrates that the way in which we use language can dramatically alter the message and meanings that we convey.

Adams has used a similar sequence in the context of nonhuman animals to illustrate how, through language, they are commodified:

‘Someone kills animals so that I can eat their corpses as meat’

‘animals are killed to be eaten as meat’

‘animals are meat’

‘meat animals’

‘meat’⁴⁰

Whilst the original statement casts animals as creatures that have something done *to them* by humans, it is possible to see that by the final statement, nonhuman animals have been commodified and are conceptualised as mere carriers of flesh: the ‘meat’ becomes ‘part of

³⁵ Ibid 541.

³⁶ Adams, above n 21, 53.

³⁷ Hoagland, above n 27, 540.

³⁸ Ibid 541.

³⁹ Ibid.

⁴⁰ Carol Adams, 'Ecofeminism and the Eating of Animals' (1991) 6(1) *Hypatia* 125, 137.

animals' nature'.⁴¹ The sentient animal has disappeared entirely from contemplation. Moreover, the human role in *creating* meat has also disappeared.⁴² Just as Mary was defined by the term 'battered', nonhuman animals are defined by language that commodifies them or simply turns them into 'meat'. In each case, important meaning is lost through language, and as a result, both Mary and nonhuman animals become absent referents.

Making nonhuman animals absent facilitates cruelty towards them by keeping their interests invisible. As Adams explains, '[t]he function of the absent referent is to keep our "meat" separated from any idea that she or he was once an animal, to keep the "moo" or "cluck" or "baa" away from the meat, to keep *something* from being seen as having been *someone*'.⁴³ If, as Adams suggests, language ensures that 'animals are ontologized as carriers of meat',⁴⁴ then the role of the human actor in producing that meat is necessarily eliminated from our consideration. This is evident when we 'no longer talk about baby animals but about veal or lamb'.⁴⁵ It makes 'meat' an essential part of their being, much like 'batteredness' can become an essential part of Mary through language. Such language equates living, sentient nonhuman animals with the fetishized product that we hope to obtain from the use, slaughter, or butchering of their bodies.

Examples abound in the supermarket aisles – where we see bodies that have been butchered re-conceptualised as 'whole'. Consumers order a 'whole chicken' when in fact, they are receiving a dismembered body, 'whose feathers, feet and head are missing'.⁴⁶ The term 'whole' when applied to a slaughtered, dismembered animal, conceals the process by which meat came to be on the supermarket shelf, and re-defines an animal's dismembered body as being 'whole' – as if to imply it sits there on the shelf in a natural state. It is also possible to find examples of such language in law. Troublingly, they can be found in the very same Codes of Practice that purport to exist for the protection of nonhuman animal interests.

⁴¹ Ibid 137.

⁴² Carol Adams, 'The Social Construction of Edible Bodies and Humans as Predators' in Kerry S Walters and Lisa Portmess (eds), *Ethical Vegetarianism: From Pythagoras to Peter Singer* (State University of New York Press, 1999) 247, 250.

⁴³ Adams, above n 21, 14.

⁴⁴ Adams, above n 40, 136.

⁴⁵ Adams, above n 21, 53.

⁴⁶ Ibid 78.

III. 'TREATING MEAT HUMANELY':⁴⁷ LEGAL LANGUAGE THAT COMMODIFIES NONHUMAN ANIMALS

Thus far, I have argued that language that commodifies nonhuman animals facilitates cruelty towards them by making them absent referents. Conceptualised as mere 'objects' or even as 'pre-food', the interests of commodified nonhuman animals disappear from our consideration. The result is that 'we do not see our meat eating as contact with animals because it has been renamed as contact with food'.⁴⁸ Such renaming facilitates cruelty towards nonhuman animals as it 'blinds' us to the 'independent consciousness of the creature and chang[es] our sentiments' towards them.⁴⁹ Pigs and cows have morally relevant interests that can demand our consideration. Pork and beef do not.

A. *Where Law Maximises Exchange Value at the Cost of Animal Welfare*

Perhaps the most obvious way in which Australian animal welfare statutes, regulations and Codes of Practice facilitate the commodification of nonhuman animals is through the permitting of practices that operate to protect the human interest in maximising exchange value, at the cost of animal welfare. The example I provided in chapter four is pertinent: pigs may lawfully be confined because such confinement maximises their exchange value. Confinement enables a producer to produce more pigs, with less effort, at the lowest possible cost. Similar examples can be found with relation to all nonhuman animals who are intensively farmed in accordance with the law: 'broilers' confined to crowded indoor barns,⁵⁰ 'layers' confined to battery cages,⁵¹ and cattle confined to feedlots.⁵² In each case, the exchange value of these nonhuman animals is realised through the slaughter and the butchering of their bodies, or the use of their bodies as 'producers' (of eggs or milk). Moreover, their exchange value is maximised by keeping production costs to a minimum. Thus 'the economic incentive – which is, after all, what drives exchange value, lies with

⁴⁷ David Cassuto, 'Meat Animals, Humane Standards and Other Legal Fictions' (2014) 10(2) *Law, Culture and Humanities* 225, 231.

⁴⁸ Adams, above n 21, 77.

⁴⁹ Mary Midgley, *Animals and Why They Matter: A Journey around the Species Barrier* (Penguin Books, 1983) 80.

⁵⁰ *Model Code of Practice for the Welfare of Animals: Domestic Poultry (4th Edition)* 2.4

⁵¹ *Ibid* 2.3.

⁵² *Australian Animal Welfare Standards and Guidelines: Cattle* (2016) Part 10.

minimizing expense associated with the thing while maximizing its yield'.⁵³ In such settings, Codes of Practice operate not to prohibit cruelty towards nonhuman animals, but to permit systems that 'maximise the use of animal property' to maximise exchange value.⁵⁴ This position is maintained even though such use typically involves egregious cruelty.⁵⁵ It is for this reason that Gary Francione contends that the 'regulation of animal use does not...transcend that level of protection that facilitates the most economically efficient exploitation of the animal'.⁵⁶

There are also less obvious ways in which Codes of Practice facilitate the commodification of nonhuman animals. For example, it is lawful to dock the tail of a pig in South Australia.⁵⁷ By contrast, it is unlawful to dock the tail of a dog in any Australian jurisdiction, unless the procedure is performed by a veterinary surgeon for medical (non-cosmetic) reasons.⁵⁸ The docking of a pig's tail need not be performed under anaesthetic as there is no legal requirement that anaesthetic be provided, despite the fact that the procedure causes 'pain and distress'.⁵⁹ Moreover, the tail docking need not be performed by a veterinary surgeon, but may be performed by a 'suitably qualified person or by a person acting under the supervision (whether or not direct supervision) of a suitably qualified person'.⁶⁰ To understand how the provisions which permit the docking of a pig's tail facilitate the *commodification* of pigs, it is necessary to briefly examine the justification for the practice.

The tail docking of pigs is typically justified on the basis that it prevents pigs from biting the tails of other pigs. Tail biting between pigs not only results in pain and suffering for the pigs who are bitten, but also causes 'substantial loss to producers due to deteriorating body conditions in affected animals'.⁶¹ Docking the tails of pigs is a preventive action that is said to remove the possibility of tail biting, and thus prevent the negative consequences it entails.

⁵³ Cassuto above n 1, 70.

⁵⁴ Francione, above n 2, 5.

⁵⁵ Ibid 17-32.

⁵⁶ Ibid 5.

⁵⁷ *Animal Welfare Regulations 2012* (SA) ss30(1)(b), 30(4).

⁵⁸ Ibid s6(1)(a)(ii); RSPCA Australia, *Why Is the RSPCA Opposed to the Tail Docking of Dogs?* (2014) <http://kb.rspca.org.au/why-is-the-rspca-opposed-to-the-tail-docking-of-dogs_135.html> .

⁵⁹ Pierpaolo Di Giminiani et al, 'Docking Piglet Tails: How Much Does It Hurt and for How Long?' (2017) 182 *Physiology and Behaviour* 69, 69.

⁶⁰ *Animal Welfare Regulations 2012* (SA) s30(1)(b).

⁶¹ Eleonora Nannoni et al, 'Tail Docking in Pigs: A Review on Its Short and Long-Term Consequences and Effectiveness in Preventing Tail Biting' (2014) 13 *Italian Journal of Animal Science* 98, 98.

However, it is necessary to note that tail biting between pigs is an ‘abnormal behaviour’ that only becomes a problem when pigs are ‘situated in an inadequate environment...[that denies them] the freedom to express their normal explorative behaviour’.⁶² Provisions which permit tail docking therefore necessarily facilitate and legitimate other provisions which permit the intensive farming of pigs as mere commodities. Tail docking does not ‘resolve the underlying causes of tail biting’,⁶³ but merely removes the possibility of tail biting in intensive systems where pigs are denied their most basic interests. It is possible therefore to see how any claim that tail docking is a ‘necessary’ practice implicitly legitimates other cruel practices towards pigs, including the confinement of them in housing that fails to meet their most basic welfare needs.

Another example can be taken from the provisions which purport to ensure that the slaughter of nonhuman animals for human consumption is ‘humane’. The *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments* and the *Australian Standard for the Hygienic Production of Meat for Human Consumption* together require that livestock be ‘stunned effectively’, rendering them ‘unconscious and insensible to pain’ prior to and during slaughter.⁶⁴ Although I argue in chapter seven of this thesis that some of the recommended methods for ‘humane’ stunning are inherently cruel, for the purposes of this section it is sufficient to note that these provisions are intended to protect the most basic welfare interests of nonhuman animals to be rendered unconscious prior to slaughter. Given the purpose of these provisions, it is troubling that operators working under an ‘approved arrangement’ to provide animals that have been slaughtered according to religious requirements may have their throats cut *prior* to being stunned.⁶⁵ These nonhuman animals may therefore lawfully be stuck while fully conscious. Such provisions most clearly reflect the commodity status of these nonhuman animals. If it is the most basic and fundamental principle of so-called ‘humane’ slaughter that nonhuman animals be rendered insensible to pain before they are killed, those nonhuman animals who are killed in accordance with ritual slaughter standards are most clearly commodified. They have value *only* when they can be exchanged, and they can be exchanged only when they are killed according to religious

⁶² Ibid 104.

⁶³ Ibid.

⁶⁴ *Model Code of Practice for the Welfare of Animals : Livestock at Slaughtering Establishments* s.6.2.1; *Australian Standard for the Hygienic Production of Meat for Human Consumption* 7.10.

⁶⁵ *Australian Standard for the Hygienic Production of Meat for Human Consumption* 7.12.

requirements. As such, their most basic welfare interests are not reflected in law, and simply do not count.

B. *Where Law Conflates the Life and Death of Nonhuman Animals*

It is also possible to identify instances in which the language contained within Codes of Practice serves to commodify nonhuman animals and make them absent referents. In many cases, nonhuman animals become the absent referent when language conflates their living, sentient selves with the commodity or product that we seek to use them for. When this happens, the law facilitates a conceptual merging of nonhuman animal life and death as it conflates sentient, *living* nonhuman animals, with the product that humans intend to *create* from that nonhuman animal when it is killed. The legal language thus reflects the position that ‘living animals might best be [legally] classified as “pre-food”’,⁶⁶ or ‘food-in-waiting’.⁶⁷ Or, as David Cassuto suggests – the law ‘merges live animals and carcasses into one’.⁶⁸ The result is that the death of a nonhuman animal appears to be a natural phenomenon, when it is in fact inflicted upon them by human agents.

The *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments* is a pertinent example of this. ‘Livestock’, as the Macquarie Dictionary defines it – are creatures who are categorised according to the purpose for which they are kept by humans to serve human purposes: ‘*noun* the horses, cattle, sheep and other useful animals kept or bred on a farm or ranch’.⁶⁹ The use of the term ‘livestock’ in legislation that purports to protect their welfare therefore facilitates the concealment of their interests. They are referred to by law as existing to serve a specific human purpose. The fulfilment of those human purposes typically legitimates their cruel slaughter.

Another example of this comes from the *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments* where determinations about holding times, (that is – the amount of time which an animal should be rested in a pen prior to slaughter) – is made based on ‘carcass quality’. The applicable Code of Practice states: ‘[f]or carcass quality

⁶⁶ Cassuto, above n 47, 228.

⁶⁷ Lindsay Hamilton and Darren McCabe, 'It's Just a Job': Understanding Emotion Work, De-Animalization and the Compartmentalization of Animal Slaughter' (2016) 23(3) *Organization* 330, 331.

⁶⁸ Cassuto, above n 47, 227.

⁶⁹ Susan Butler (ed) *Macquarie Dictionary* (online ed, at 21 November 2017) ‘Livestock’.

purposes a minimum rest period of 2 hours between arrival and slaughter is desirable'.⁷⁰ Here I have identified a direct conflation between the life and death of nonhuman animals in law. The Code purports to contain rules which exist for the purposes of *promoting the welfare of living nonhuman animals*.⁷¹ It states that animals that are stressed or suffering from exhaustion, or animals that have been travelling for extended periods, should be rested for longer periods prior to being moved to the slaughter floor.⁷² This reflects the scientific understanding that the 'physical, psychological and physiological stress' experienced by nonhuman animals during transport can be alleviated by an adequate rest period upon arrival at the slaughterhouse,⁷³ and thus that resting nonhuman animals prior to slaughter has important animal welfare implications.

Yet, the very first rule regarding holding times in the applicable Code of Practice refers explicitly to the 'carcass' of the nonhuman animal. What is evident is thus that the reduction of stress is deemed important not for animal welfare reasons, but for the creation of a desirable meat product. It is in this sense that I suggest the life and death of these nonhuman animals is directly conflated. If human life and death were similarly conflated, it is evident how troubling it is: 'living people and dead people are fundamentally different; a corpse is not the same as a person'.⁷⁴ Yet, in this context, the Code that purports to protect nonhuman animals prior to slaughter also refers directly to their 'carcass'. Through such conflation, it becomes conceptually impossible to 'escape the animals' commodity status even as ethics demand[s] their decent treatment'.⁷⁵

Some species of nonhuman animal are also described in law with reference to the means by which humans choose to cook them. The term 'broiler birds', which is used throughout the *Model Code of Practice for the Welfare of Animals (Domestic Poultry)* is one such example. 'Broiler' chickens are also known as 'meat chickens'.⁷⁶ As the *Macquarie Dictionary* defines it, a 'broiler' is 'a young chicken, twelve to fourteen weeks old, that can be cooked by

⁷⁰ *The Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments* 2.5.4.1

⁷¹ See for example *Model Code of Practice for the Welfare of Animals : Livestock at Slaughtering Establishments* 1.1.

⁷² *Ibid* 2.5.4.1.

⁷³ See for example: Thays Mayra da Cunha Leme et al, 'Influence of Transportation Methods and Pre-Slaughter Rest Periods on Cortisol Levels in Lambs' (2012) 107 *Small Ruminant Research* 8, 8.

⁷⁴ Cassuto, above n 47, 236.

⁷⁵ *Ibid* 234.

⁷⁶ Australian Chicken Meat Federation Inc, *General Questions* < <http://www.chicken.org.au/page.php?id=150> > Question 7.

broiling'.⁷⁷ 'Broiler' chickens are thus described in terms that mirror the product that humans create by slaughtering them, *and* the method by which it is preferable to cook their butchered bodies. It is clear how the chicken itself becomes an absent referent. A cooking technique simply 'cannot have feelings and certainly cannot suffer' and so 'mistreatment cannot be a problem'.⁷⁸

Language that facilitates a conceptual blending of the life and death of a nonhuman animal makes the animal, as a sentient creature, an absent referent. They are defined by words that describe them as a product that has only exchange value: they are 'food', or 'carcasses'. To describe these nonhuman animals in these terms constitutes what Adams describes as a 'denial of beingness'⁷⁹ – since the language we use to describe them does not observe their sentience, but conflates them with their dead or productive bodies. They are denied their very essence:

Animals in name and body are made absent as animals for meat to exist. If animals are alive they cannot be meat. Thus a dead body replaces the live animal and animals become absent references. Without animals there would be no meat eating, yet they are absent from the act of eating because they have been transformed into food. Animals are made absent through language that renames dead bodies before consumers participate in eating them...The roast on the plate is disembodied from the pig who she or he once was.⁸⁰

Another way in which nonhuman animals become absent referents is where the product that nonhuman animals gain from them is referred to as if it is a naturally occurring quality of the nonhuman animal itself. In this context, the animal is conflated with the 'product' it is used to produce, such that the product itself appears to be a *part* of the animal in its natural state. Take for example hens which are routinely kept to provide humans with eggs. The Code of Practice which purports to protect their interests refers to them explicitly as 'layers',⁸¹ such that daily egg-laying appears to be a natural characteristic of the bird itself. In much the same way as Mary's identity is consumed when she becomes 'battered', so too is the identity of the

⁷⁷ Susan Butler (ed) *Macquarie Dictionary* (online ed, at 21 November 2017) 'Broiler'.

⁷⁸ C. C Croney and R. D Reynnells, 'The Ethics of Semantics: Do We Clarify or Obfuscate Reality to Influence Perceptions of Farm Animal Production?' (2008) 87 *Poultry Science* 387, 389.

⁷⁹ Adams, above n 40, 135.

⁸⁰ *Ibid* 136.

⁸¹ See for example *Model Code of Practice for the Welfare of Animals: Domestic Poultry (4th Edition)* Appendix 1.

bird who is consumed by the label 'layer'. In the creation of the label 'layer' the human agent in stimulating unnatural egg laying behaviours disappears, as does the process by which a 'layer hen' was *created* by humans, to serve human purposes. Siobhan O'Sullivan describes it thus:

It is a fallacy to believe that the battery hen is in some way a 'natural' phenomenon. The modern egg-laying hen is derived from the South-East Asian rainforest fowl that has a seasonal laying cycle that produces around seven eggs annually. Through cross-breeding, the annual egg production capacity of the laying hen was increased to around 120 eggs per annum. Industrial processes have extended that to almost an egg a day. The hens are hatched in purpose built breeding facilities. Once they are sexed, the males are killed and the females are transported to their permanent home, a factory farm. The sheds in which battery hens are housed use high-level artificial lighting for up to 16 hours a day, creating the illusion it is always spring. Antibiotics are used as a growth stimulant. When the hen's laying capacity drops, a technique termed "forced moulting" is used to re-stimulate production. During forced moulting hens are kept in darkness without food or water for up to three days. After their environment returns to its pre-forced moulting state, optimal egg production levels are recovered. Egg-laying birds are not commercially viable after 12-18 months. They are then slaughtered and their flesh is sold to processed food manufacturers. There is nothing natural about the egg production industry.⁸²

Yet, the application of the term 'layer' removes the human agent from the story of what is *done to chickens* - much like John disappears as the perpetrator of what is *done to Mary*. As such, a myriad of cruel practices are permitted towards 'layers' to maximise the exchange value of eggs. As I explain further in chapter five, hatcheries that breed 'layer' hens cull all male chicks that hatch. These male hatchlings are among the most overtly commodified nonhuman animals. They have no exchange value as 'layers' because they do not lay eggs. As such, their interests do not count, and they are therefore merely 'disposable'.⁸³

The precise same effect is achieved by usage of the term 'dairy cattle' in the *Australian Animals Welfare Standards and Guidelines for Cattle 2016*. The objective of the provisions on 'dairy management' is that 'dairy cattle are managed to minimise the risk to their

⁸² Siobhan O'Sullivan, 'Advocating for Animals Equally from within a Liberal Paradigm' (2007) 16 *Environmental Politics* 1, 8-9.

⁸³ *Model Code of Practice for the Welfare of Animals: Domestic Poultry (4th Edition)* 14.1

welfare'.⁸⁴ Yet, the term 'dairy' cattle indicates that those cows who are kept for the purposes of providing milk are positively commodified. They are cows with interests that require our protecting. They are providers of *dairy* products, and 'dairy' cattle are exposed to some of the most egregious forms of lawful cruelty. One of the most significant cruelties inflicted on 'dairy' herds is the forcible removal of a calf from its mother soon after birth. The removal is extremely distressing for both mother and calf,⁸⁵ but is deemed a virtual necessity in the commercial dairy industry. The calf must be removed from the mother so that the milk can be harvested in commercial quantities for human consumption. When a cow becomes a commodified 'dairy' cow, forms of cruelty towards her are more readily justified. The forcible removal of her calf is justified as not only 'reasonable', but as 'necessary', because she is valuable only insofar as she can produce dairy for human consumption. Her calf *must* be removed because she is a producer of dairy for human consumption. I return to talk about these calves in the section below.

All of these examples are reflections of what Adams describes as the process of 'false naming'.⁸⁶ In the American context, she contends through false naming 'we see ourselves as eating pork chops, hamburger, sirloins, and so on, rather than 43 pigs, 3 lambs, 11 cows, 4 'veal' calves, 2,555 chickens and turkeys and 861 fishes that the average American eats in a lifetime'.⁸⁷ It is through this process of false naming, and through the associated 'detachment, concealment, misrepresentation, and shifting [of] the blame', that it enables, that the 'structure of the absent referent [can] prevail'.⁸⁸ Moreover, for as long as Codes of Practice facilitate such false naming, the very same provisions which purport to *protect* nonhuman animals from harm, merely legitimate their commodification and are thus complicit in the denial of their most basic welfare interests.

⁸⁴ *Australian Animal Welfare Standards and Guidelines: Cattle* (2016) Part 9.

⁸⁵ Agnethe-Irén Sandem and Bjarne Braastad, 'Effects of Cow-Calf Separation on Visible Eye White and Behaviour in Dairy Cows - a Brief Report' (2005) 95(3) *Applied Animal Behaviour Science* 233; E Vasseur et al, 'A Survey of Dairy Calf Management Practices in Canada That Affect Animal Welfare' (2010) 93(3) *Journal of Dairy Science* 1307, 1131.

⁸⁶ Adams, above n 21, 78.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

C. *Where Nonhuman Animals become 'Wastage'*

Another way in which nonhuman animals become the absent referent in Australian law is where they are defined as mere 'wastage'. These nonhuman animals have their interests denied not because they have exchange value, but because they do *not*. Nonhuman animals who have no exchange value not only have no interests, but they also have *no value at all*.

So called 'bobby calves' are an important example of such animals, and are referred to as 'bobby calves' in both the *Australian Animal Welfare Standards and Guidelines: Land Transport of Livestock* and the *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments*. As I explained above, to sustain milk production, cattle kept for dairy production are impregnated annually. 'Bobby calves' are typically male calves born into the dairy industry who have 'no value as a dairy replacement'.⁸⁹ Approximately 450,000 bobby calves are slaughtered in Australia annually, because they are 'surplus to dairy industry requirements'.⁹⁰ Bobby calves, by definition, are the wastage of the dairy industry. The term 'bobby' refers explicitly to those calves that have no exchange value. After they are born and have stimulated (or re-stimulated) their mother's milk production, bobby calves simply serve no human purpose as dairy commodities. As a result, bobby calves are 'prone to being neglected and ill-treated'.⁹¹ One of the most troubling cruelties inflicted upon dairy calves is the forcible separation of them from their mothers (discussed above) as well as their lawful transport to slaughter at only a few days old, and the withholding of feed and water that I discussed in chapter four.⁹²

D. *Nonhuman Animals that are 'Pests'*

Animal welfare legislation and Codes of Practice also routinely refer to some species of nonhuman animal as 'pest animals'. Like those that are 'wastage', 'pests' have no exchange value. Moreover, they are typically seen to compromise the exchange value of other things. Thus, even though nonhuman animals such as rats are 'lively, intelligent and sociable creatures', their public image has been shaped by the notion that they are 'pests...competitors

⁸⁹ Neville Gregory, 'Cattle' in Neville Gregory and Temple Grandin (eds), *Animal Welfare and Meat Production* (2nd ed, CABI, 2007) 61, 73.

⁹⁰ RSPCA Australia, *What Happens to Bobby Calves?* < http://kb.rspca.org.au/what-happens-to-bobby-calves_87.html > .

⁹¹ Gregory, above n 89, 73.

⁹² See chapter 4, Pages 113-114. *Australian Animal Welfare Standards and Guidelines: Cattle* (2016) SB4.5.

with us...for access to stores of grain', and as 'carriers of disease'.⁹³ According to Mary Midgley, it has therefore become easy to view so-called pests 'as some kind of undeserving monster'.⁹⁴

It is not surprising then that 'pests' are routinely exempted from the reach of animal welfare legislation through various mechanisms. For example, in Queensland, 'pest' animals are specifically excluded from animal welfare legislation by way of section 42, which reads that where an act done by a person was done 'to control a feral animal or pest animal, including, for example, by killing it; and (b) the act does not involve the use of a prohibited trap or spur', it is an exemption to an offence if that act was done so as to cause the animal 'as little pain as is reasonable' so long as the act otherwise complies with controls prescribed under regulations.⁹⁵

In Victoria, under the *Prevention of Cruelty to Animals Regulations 2008* glue traps may be used with Ministerial approval by 'commercial pest controller operators', for the purposes of trapping rodents in accordance with Ministerial directions. The Victorian Government provides that 'consideration was given to a total ban' on the use of glue traps, on the basis that they are 'one of the most inhumane methods of rodent control'.⁹⁶ Specifically, a trapped animal experiences:

Enormous distress....even if the trapped animals are found after just a few hours and then humanely dispatched...rodents are likely to experience pain and distress through being trapped, the physical effects of the adhesive on functioning (e.g. suffocation), and trauma resulting from panic and attempts to escape, such as forceful hair removal, torn skin and broken limbs. After three-five hours animals have been reported as covered in their own faeces and urine. When boards are collected, animals are also often squealing; one pest controller even described them as 'screaming their heads off'. Some rodents even bit through their own limbs to escape.⁹⁷

⁹³ Mary Midgley, *The Myths We Live By* (Taylor and Francis, 2003) 147.

⁹⁴ Ibid 148.

⁹⁵ *Animal Care and Protection Act 2001* (Qld) s42(1), (2).

⁹⁶ Government of Victoria, *Glue Traps* < <http://agriculture.vic.gov.au/agriculture/animal-health-and-welfare/animal-welfare/humane-vertebrate-pest-control/glue-traps> > .

⁹⁷ Ibid; G Mason and K E Litten, 'The Humaneness of Rodent Pest Control' (2003) 12(1) *Animal Welfare* 1, 16.

Yet, the *Prevention of Cruelty to Animals Regulations 2008* allow a commercial pest controller to continue to use them. Interestingly, such provisions contradict a 2005 regulatory impact statement on a proposed total ban on the use and selling of glue traps. The statement found that any negative cost implications of the ban would be ‘outweighed by their expected benefits, especially to animal welfare’.⁹⁸

IV. CONCLUSION

In this chapter, I have argued that nonhuman animal interests not only matter *less* than human interests, but that sometimes the very laws which purport to *protect* their interests, serve to commodify them. As commodities, nonhuman animals are conceptualised as having *no interests at all*. This is a problem since Australian animal welfare laws prohibit only *unnecessary* or *unreasonable* cruelty. That prohibition seeks to balance the human interest in treating nonhuman animals cruelly against a nonhuman animal’s interest in being protected from it. When nonhuman animals are positively *commodified* by law, their interests do not count. Cruelty towards them therefore becomes more readily justified as necessary or ‘reasonable.’

In the chapter that follows, I shift my focus to look not at what the law says about the interests of nonhuman animals and the prohibition of cruelty towards them, but at what *it does not say*. My argument is that in many instances, Australian animal welfare legislation contains a declaration of ‘inaction’ with respect to some of the worst forms of cruelty towards nonhuman animals.

⁹⁸ Tim Harding & Associates, *Draft Prevention of Cruelty to Animals (Prohibition of Glue Trapping) Regulations 2005 : Regulatory Impact Statement* (State of Victoria, Department of Primary Industries, 2005) v.

CHAPTER 6 : THE POLICY OF INACTION¹

¹ Title taken from the quote, 'inaction is a policy': Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15(4) *Legal Studies Forum* 327, 334.

I. INTRODUCTION

‘not responding is a response – we are equally responsible for what we don’t do’.²

In the previous chapter, I argued that Australian Codes of Practice positively commodify some nonhuman animals. As *commodities*, nonhuman animals are conceptualised as having only an exchange value. In other words, they are valuable only insofar as their bodies can be used or sold for human benefit. The commodification of nonhuman animals makes them absent references, as their most basic welfare interests are made invisible. In the context of animal welfare laws which operate to prohibit only *unnecessary* or *unreasonable* cruelty, those nonhuman animals who are commodified are offered minimal welfare protections. They are defined by law not as creatures who have interests that are *less important* than human interests, rather they are defined as commodities who have *no interests at all*.

In this chapter, I shift my focus. I look not at what type of cruelty the law says are prohibited, but at what it *does not* say about certain forms of cruelty. Specifically, my focus in this chapter is where the law declares ‘inaction’ with respect to certain types of cruelty towards certain types of nonhuman animals. By ‘inaction’ I refer to instances in which the law is silent, or fails to provide an avenue for legal recourse with respect to harmful conduct. My argument in this chapter is that Australian animal welfare laws utilise inadequate definitions, legal fictions and express exclusions to declare inaction with respect to certain types of cruelty. Consequently, the law is silent with respect to some of the worst forms of cruelty towards nonhuman animals. Their suffering does not count.

This chapter is divided into two parts. In the first part, I argue that the law’s inaction is not a neutral stance. Rather, I argue that inaction is an *active* stance, which serves to *legitimate* the status quo, in which some types of cruelty towards some nonhuman animals is deemed acceptable and justifiable. In the second part, I identify three mechanisms by which I contend the law declares a policy of inaction with respect to some forms of cruelty. First, I critique limited and inadequate definitions of what constitutes an ‘animal’ in Australian animal welfare legislation. This definition explicitly exempts certain categories of sentient nonhuman animals from the law’s protective reach. It does so specifically to serve human

² Jonathan Safran Foer, *Eating Animals* (Back Bay Books, 2009) 226.

interests. If these nonhuman animals are not protected, humans have no legal obligation to take their suffering into account. Second, I explain the use of a legal fiction operating in the New South Wales jurisdiction. This fiction, I argue, deems that certain types of cruelty *are not cruelty at all* for legal purposes. It does so, I contend, knowing that this is a false claim. By deeming certain forms of cruelty to be ‘non-cruelty’ when they are in fact cruel, the law facilitates forms of cruelty that are economically advantageous to humans. Third, I identify the operation of an express exclusion from anti-cruelty provisions in Western Australia and the Australian Capital Territory where conduct can be described as accepted animal husbandry practice. This exclusion, I demonstrate, enables those who use nonhuman animals for human purposes to set their own standards as to what constitutes cruelty. As such, the nonhuman animals that are most vulnerable to experiencing cruelty are again exempted from the protective reach of Australian animal welfare legislation.

II. ‘INACTION IS A POLICY’³

The legal prohibition on animal cruelty is inadequate. Thus far in this thesis I have critiqued what the law says about cruelty towards nonhuman animals, and have demonstrated that the standards contained within animal welfare legislation are consistently undermined by qualifying words and Codes of Practice. Here, I critique the law’s silence, because the law is active not only when it *prohibits* cruelty towards nonhuman animals, but also when it *permits* it, or *fails to prohibit it*.⁴

Commentators on animal law issues have readily identified the fact that the law fails to protect nonhuman animals from cruelty. In some instances, these commentators state that there is a ‘gap’ in animal welfare legislation.⁵ However, the concept that there exists a legal ‘gap’ implies that the law on a certain matter is simply ‘missing’, or that the law merely has nothing to say on a subject. This claim overlooks the fact that the *law is never neutral*. Even when it is silent, the law reflects what Duncan Kennedy describes as a ‘conscious decision’ to

³ Kennedy, above n 1 334.

⁴ Ibid 333.

⁵ See for example, Steven White, 'Into the Void: International Law and the Protection of Animal Welfare' (2013) 4(4) *Global Policy* 391, 391; Brian Sherman, 'Animal Law: Peering over the Gap or Daring to Close It?' (2006) 31(4) *Alternative Law Journal* 226; Pamela Fransch, 'Gaps in Us Animal Welfare Law for Laboratory Animals: Perspectives from an Animal Law Attorney' (2016) 57(3) *ILAR Journal* 285.

facilitate a particular state of affairs.⁶ Where the law is silent, it does not have a ‘gap’ in the sense that it does not proscribe any standards. The law *always* conveys and reflects a point of view. When it is silent, the law is complicit in facilitating the status quo.

To reveal how the law is always active in either prohibiting or permitting certain types of conduct, Kennedy cites the example of building regulations, which he argues enable homeowners to develop their blocks even where that development hinders a neighbouring person’s enjoyment of their own land (for example, because it blocks light to their property). This legal *permission* to hinder the enjoyment of others, Kennedy argues, is not a neutral legal stance, but is a deliberate and conscious decision to ‘let builders have their way, and make victims buy them out if they care that much about their view’.⁷ Kennedy’s point is that the law, in failing to proscribe standards of behaviour, facilitates the status quo. Building regulations are not *neutral* with respect to whether a neighbour’s enjoyment of their land may be hindered by further developments. Rather, it is *complicit* in that hindering, because it creates and maintains a set of standards that facilitate the actions of those who have a positive interest in developing buildings that hinder others. According to Kennedy, ‘inaction is a policy’ and the law must always be seen to bear some responsibility for a social outcome, even where it appears to be silent on an issue.⁸ By being silent, the law is always responsible for an outcome insofar as it ‘could have made it otherwise’.⁹

The law is thus always performing an important political task. In the context of nonhuman animals, it reflects which nonhuman animals the law values, and to what extent it values them.¹⁰ As I explain in part two of this chapter, Australian animal welfare law is silent with respect to some of the worst forms of animal cruelty, such that the law necessarily becomes complicit in it. Fundamental to my argument in this chapter, is Kennedy’s argument that the law is always ‘active’, even when it is *failing* to do something.¹¹ For example, South Australian animal welfare legislation is silent with respect to fish welfare. By being silent, the law should not be deemed ‘neutral’ with respect to cruelty towards fish, but rather it should

⁶ Kennedy, above n 1, 333.

⁷ Ibid.

⁸ Ibid 334.

⁹ Ibid 334.

¹⁰ Ngaire Naffine, ‘Legal Persons as Abstractions: The Extrapolation of Persons from the Male Case’ in Kurki and Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer, 2017) 119, 15, 24.

¹¹ Kennedy, above n 1, 343.

be viewed as being necessarily complicit in their suffering. The law excludes fish because parliament has explicitly decided not to include them.¹² I return to this point in part two.

The fact that the law is complicit in maintaining the status quo has also been made by Frances Olsen in the context of what the law prohibits and permits with respect to family life.¹³ According to Olsen, the law has historically failed to articulate the criminal nature of abuses that had been deemed to be 'private' family matters. The law reflected the view that domestic abuse was not the law's jurisdiction, and that they should be dealt with privately and internally by the family. Olsen contends this legal position did not reflect 'neutrality' towards family life, but rather explicitly legitimated and facilitated conduct within the family home that has been harmful, particularly for women and children. Moreover, the law was engaged in positively defining the family in defining the relationship of marriage and enforcing the roles 'it decided each family member would fill'.¹⁴

The patriarchal construction of the family, which prioritizes the interests of men, has seen women and children exposed to acts of domestic violence that have been positively permitted by law. Although the law of assault in Australia has always applied to an assault upon *any* person, the patriarchal construction of the family has served to legitimate forms of abuse by a husband against his wife, with the result that domestic abuse was rarely prosecuted. Thus, while abuse was always a criminal act, domestic abuse was historically still deemed to be a 'private' matter, and was not seen as being criminal in nature.¹⁵

At common law in Australia, there also existed a legal presumption that a wife, in virtue of becoming married, consented to sex with her husband. A husband could therefore not be prosecuted for raping his wife, because at common law she was presumed to have consented to sex with him at the time she became married.¹⁶ The law in this instance was not 'neutral' with respect to the rape of a wife by her husband. Rather, it explicitly served to 'empower' a

¹² Ian Weldon, 'Why Doesn't Animal Protection Legislation Protect Animals? (and How It's Getting Worse)' (2008) 1 *Animal Protection Law Journal* 9, 9.

¹³ Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96(7) *Harvard Law Review* 1497.

¹⁴ *Ibid* 1522.

¹⁵ Heather Douglas, 'The Criminal Law's Response to Domestic Violence' (2008) 30 *Sydney Law Review* 439, 443.

¹⁶ Ngaire Naffine and Joshua Neoh, 'Fictions and Myths in *PGA v the Queen*' (2013) 38 *Australian Journal of Legal Philosophy* 32, 41.

husband in exerting physical dominance over his wife.¹⁷ The law there was complicit in the rape of a wife by her husband. The maintenance of a space deemed ‘private family matters’ in which the law does not intrude has therefore been central to the continuation of lawful violence within the family home. Indeed, the absence of laws to protect women within these spaces is precisely what has enabled those who have excessive power (in this case, men) to retain it.¹⁸ Furthermore, the implicit permitting of such violence by law can become self-legitimizing: ‘men in fact use the coercive power of the state to reinforce and consolidate their authority over wives and children’.¹⁹

As Olsen demonstrated in the context of the family, the law has historically empowered perpetrators of violence because it has failed to prohibit their conduct. The law was thus complicit in suffering of victims. As social and legal conceptions of marriage, family life and the status of women have changed, Australian law has changed to reflect a shift in conceptions of violence within the family home. In Australia, assaults that occur within the family home are now considered to be assaults of the worst kind. For example, section 5AA the South Australian *Criminal Law Consolidation Act 1935* (SA), lists offences against a spouse or former spouse, domestic partner or child as an ‘aggravated offence’, which carries a higher penalty than a non-aggravated offence of a similar kind. The inclusion of domestic assaults as aggravated offences marks a clear and intentional shift to no longer view assaults within the family home as private family matters. Such assaults are now not only criminal, but they are one of the most serious types of criminal wrongdoing. In 2009, South Australia also introduced the *Intervention Orders (Prevention of Abuse) Act 2009*, which states explicitly amongst its objects ‘to assist in preventing domestic and non-domestic abuse, and the exposure of children to the effects of domestic and non-domestic abuse’.²⁰ South Australia was also the first Australian state to abolish the common law presumption of a wife’s consent to sex with her husband.²¹ Whilst these laws do not have the effect of eradicating family violence, they are representative of an important shift in law away from practical complicity in family violence.

¹⁷ Olsen, above n 13, 1510.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s5(a).

²¹ *Criminal Law Consolidation Act Amendment Act 1976* (SA).

A. Language Use: The Law as 'Intervening'

Legal changes interrupt existing power structures in society. Thus, when the law in South Australia shifted to explicitly *prohibit* violence in the family home, it also interrupted a series of views about family relationships that had previously sustained such violence. According to Suzanne Hatty, such a legal shift towards prosecuting family violence that had historically been viewed as an acceptable use of a husband's force 'would seriously challenge the male prerogative of dominion over women in the private sphere. It would also conflict with the concept of the "chivalrous male" as constructed within discourses of masculinity'.²²

The extent to which the law can interrupt existing power structures and accepted norms of social behaviour is demonstrated by the language that is used to describe such interruptions. Olsen provides the example that if the law were to allow a child to seek damages against their parents for being confined to their room as punishment, it would largely be considered an unjustifiable 'intrusion' of the law into private family matters. Punishment and discipline, the argument goes, should be managed by the parent and not dictated by law. Yet, Olsen notes we also accept that if the same act of false imprisonment had been committed by a third party, who is not a part of the family structure, the act should be punishable by law.²³ Such punishment would not be intrusive or invasive, but rightful and necessary.

The family structure is therefore a source of very specific social and cultural values, which are often deemed to be untouchable by law. Interestingly, the notion that a family is the subject of intrusion by law, only exists where the law seeks to challenge the status quo about socially accepted family power dynamics. Where the law 'ratifies the preexisting social roles within the family' it is deemed to be 'neutral'.²⁴ The concept of 'interference' is thus not, as Olsen reminds us, 'a simple description of state action or inaction'.²⁵ Rather, it is a means of condemning the law where it seeks to change preconceived notions of what a family is, and how each person within the family should operate.

²² Suzanne Hatty, *Invisible Lives: Women, Dependence and the Law* (Paper presented at Women and the Law, Australian Institute of Criminology, Canberra, January 1993) 24.

²³ Olsen, above n 13, 1506.

²⁴ *Ibid* 1504.

²⁵ *Ibid* 1506.

The same is true in the context of nonhuman animals. In chapter eight of this thesis, I demonstrate how the idea that the law is ‘interfering’ operates in the animal welfare law context. There, I detail discussions surrounding the introduction of ag-gag laws, which are designed to stifle the work of animal advocates. Advocates who challenge the cruelty towards nonhuman animals are consistently described as ‘intruders’. So much so, that prominent Australian politic figure Katrina Hodgkinson has even described them as ‘terrorists’.²⁶

III. LEGAL MECHANISMS ENABLING SILENCE ON CRUELTY

In the first part of this chapter, I argued that the law’s silence can never be described as neutral. A legal policy of inaction is *active* in legitimating and facilitating the status quo. Thus, where the law does not operate to intervene to prohibit cruelty or violence, it is complicit in it. In this part, I detail three legal mechanisms through which the law reveals a deliberate policy of inaction with respect to certain forms of cruelty towards some nonhuman animals: through deliberately inadequate definitions, through the operation of legal fictions, and through express exclusions. The word *deliberate* is important here, because lawmakers explicitly declare a policy of inaction in Australian animal welfare legislation with respect to particular types of cruelty. The law therefore reflects a conscious and deliberate decision to remain complicit in the suffering of some sentient nonhuman animals.

A. *The Meaning of ‘Declared Inaction’*

Throughout this section, I describe the law as ‘declaring inaction’. This unusual use of terminology is intended to convey a very important point. To date, animal law scholars have focused on the way in which the proportionality test of ‘unnecessary’ cruelty legitimates

²⁶ ABC News, 'Animal Rights Activists 'Akin to Terrorists', Says NSW Minister Katrina Hodgkinson', *ABC News* (Online), 18 July 2013, <<http://www.abc.net.au/news/2013-07-18/animal-rights-activists-27terrorists272c-says-nsw-minister/4828556>>.

cruelty towards some of the most vulnerable nonhuman animals.²⁷ Their focus is not surprising. The very concept of ‘necessary’ cruelty is uncomfortable and unfamiliar. However, my contention in this section is that there is an (even more) troubling aspect of Australian animal welfare legislation that requires inspection. There are times where the law explicitly articulates a conscious decision by law makers to ignore certain types of cruelty. The presence of explicit words to this effect is the reason I describe the law as ‘declaring’ something. I do not conceptualise the law as containing a ‘gap’, rather I conceptualise it as positively articulating a position of intentional and deliberate inaction.

As I discussed in chapter four, the concept of ‘necessary’ suffering contains tacit acceptance of cruelty towards nonhuman animals in certain circumstances. The protective work of the prohibition against ‘unnecessary’ cruelty therefore legitimates cruelty towards some of the most vulnerable species of nonhuman animal. However, those nonhuman animals that are the subject of declared inaction fare even worse than those who are exposed to ‘necessary’ cruelty. Declared inaction represents an explicit and intentional decision by lawmakers to exclude some acts of cruelty from the reach of animal welfare legislation. Such a move is presumably deemed necessary on the basis that the exempted acts are in fact acts of *unnecessary* cruelty. The move to explicitly exclude them, therefore, reflects a conscious decision by Parliament to ignore some of the worst forms of cruelty towards nonhuman animals.

B. *Consciously Inadequate Definitions of ‘Animal’*

Law makes frequent use of definitions. They are an integral legal device because they articulate both the scope and purpose of legislation. Definitions do not only give a meaning to specific words used throughout legislation, but they may also be referred to in inferring the purpose of a statute as a whole. Under the South Australian *Acts Interpretation Act 1915* for

²⁷ Deborah Cao, *Animal Law in Australia* (2nd ed, Thomson Reuters, 2015) 213-216; Katrina Sharman, ‘Farm Animals and Welfare Law: An Unhappy Union’ in White and Sankoff (eds), *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, The Federation Press, 2013) 61, 78; Peter Sankoff, ‘The Protection Paradigm: Making the World a Better Place for Animals?’ in Sankoff, White and Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (The Federation Press, 2013) 1, 13-20; Steven White, ‘Exploring Different Philosophical Approaches to Animal Protection Law’ in *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, The Federation Press, 2013) 31, 49-51. In the American context see Gary Francione, *Animals, Property and the Law* (Temple University Press, 1995) 17-32; Steven Wise, *Rattling the Cage* (Cambridge Press, 2000) 259-260.

example, the definitions provisions form part of the Act.²⁸ Further, in interpreting a provision within a statute, ‘the construction that would promote the purpose or object of the Act (whether or not that purpose or objects is expressly stated in the Act) must be preferred to a construction that would not promote that purpose or object’.²⁹ Definitions in legislation therefore are not only important insofar as they give meaning to particular words. They are also important in that they inform the legislative intention and overall meaning and purpose of a statute.

In the context of Australian animal welfare legislation, the term ‘animal’ is defined separately in each jurisdiction, and does not accord with the common place meaning typically given to the term. The commonplace meaning ascribed to the term can be taken from the *Macquarie Dictionary*, to mean ‘any living organism characterised by the capacity for voluntary motion, sensation, and the ingestion of food such as plants and other animals, and which has a non-cellulose cell wall’.³⁰ A second definition is also provided: an ‘animal’ is ‘any animal other than a human’.³¹ On this definition, both vertebrate and invertebrate species are included, including fish and cephalopods.

As I explained in chapter four, the law defines the term ‘animal’ in a more limited way. My contention is that in some jurisdictions, this definition is inadequate because it fails to include species of nonhuman animal that should, by virtue of their capacity to suffer, be included within the legal meaning of the word. The commonplace meaning of the term ‘animal’ characterizes them by their ability to experience the sensations of pleasure and pain. The failure to include species of sentient nonhuman animals within the legal definition therefore represents an explicit declaration by Parliament that the law be *inactive* with respect to cruelty inflicted upon these species. To illustrate my point, it is necessary to revisit the definition of ‘animal’ that I considered in chapter four.

In Victoria, the term ‘animal’ is given two different meanings within the *Prevention of Cruelty to Animals Act 1986* (Vic). For the purposes of the anti-cruelty provisions, the legislation defines an ‘animal’ as a member of a *vertebrate species* which include

²⁸ *Acts Interpretation Act 1915* (SA) s22(1). Similar provisions exist in each jurisdiction.

²⁹ *Ibid* s19(a).

³⁰ Susan Butler (ed) *Macquarie Dictionary* (online ed, at 28 November 2017) ‘Animal’.

³¹ *Ibid*.

amphibians, birds, fish, mammals, (including those above the midpoint of gestation or incubation), reptiles or live adult decapod crustaceans (lobster, crab or crayfish). Invertebrate animal species (such as octopus, squid, insects, and molluscs) are explicitly excluded from this legal definition of the term ‘animal’. Part 3, section 25 of the legislation however, which regulates the performance of scientific procedures on nonhuman animals, provides a different definition. This definition is broader than that offered for the purposes of the anti-cruelty provision, and here includes cephalopods (octopus, squid, cuttlefish, nautilus).³² It does not extend to other nonhuman animals, such as insects and spiders.

In South Australia and Western Australia, ‘animal’ is defined so as to explicitly exclude fish.³³ A Bill was introduced in 2016 to amend the South Australian legal definition of ‘animal’ to include fish, however debate on the matter remains adjourned.³⁴ In New South Wales, a crustacean only counts as an ‘animal’ in law if it is being kept for specific purposes, namely ‘at a building or place (such as a restaurant) where food is prepared or offered for consumption by retail sale in the building or place’.³⁵ The provisions are similar in the Australian Capital Territory, where live crustaceans are included as ‘animals’ if they are ‘intended for human consumption’.³⁶ Pre-natal or pre-hatched mammals, reptiles or avian young are defined as ‘animals’ in both Queensland and Victoria, once they have reached the half-way point of gestation or incubation.³⁷

The law is used to define the term ‘animal’ in very specific and limiting ways: it includes only certain *types* of creatures – and sometimes it only includes them in contexts where they are being used for a human purpose. The legal meaning given to the term ‘animal’ serves the legal purpose of limiting the scope of animal welfare legislation. By dictating precisely which species count as an ‘animal’ for the purposes of animal welfare legislation, the definition serves to provide protections to some forms of nonhuman animals and to ensure they do not apply to others.

³² *Prevention of Cruelty to Animals Act 1986* (Vic) s25.

³³ *Animal Welfare Act 1985* (SA) s3, *Animal Welfare Act 2002* (WA) s5.

³⁴ *Animal Welfare (Miscellaneous) Amendment Bill 2016* (SA).

³⁵ *Prevention of Cruelty to Animals Act 1979* (NSW) s4(1)(b).

³⁶ *Animal Welfare Act 1992* (ACT) s2.

³⁷ *Prevention of Cruelty to Animals Act 1986* (Vic) s3(3)(a)(ii); *Animal Care and Protection Act 2001* (Qld) s11(b).

The fact that fish and cephalopods (and crustaceans in some jurisdictions)³⁸ are explicitly *excluded* from the definition of ‘animal’ is not a neutral ‘gap’ in the law. Rather, it is a conscious declaration by Parliament that cruelty towards those nonhuman animals does not count for the purposes of animal welfare legislation. It is possible also to see how this position facilitates the pursuit of human interests. For example, fish are increasingly being raised for human consumption in intensive farms (‘aquaculture’), where stressors to the fish are ‘unavoidable’.³⁹ Stressors that compromise fish welfare in aquaculture include handling, transport, food withdrawal prior to slaughter or transport, high stocking densities and slaughter methods that prioritize ‘product’ quality over animal welfare.⁴⁰ For as long as fish are not protected by animal welfare legislation, there is no requirement that aquaculture practices be tailored to improve fish welfare. This point also links with my discussion in chapter five. Fish are commodified, and are viewed as ‘products’ that may legitimately be treated cruelly to serve human interests. In this case, their commodity status is reflected in their express exclusion from the legal definition of ‘animal’.

Similarly, scientific evidence confirms that so-called ‘recreational fishing’, in which fish are caught and then released back into the water, ‘results in some level of injury and stress to an individual fish’.⁴¹ This evidence clearly confronts the ethics of a popular Australian pastime. When a hook penetrates the flesh of a fish, ‘there is no doubt...there will inevitably be some form of tissue damage or injury’.⁴² This injury not only causes acute pain, but may also impair a fish’s ability to engage in other normal behaviours such as foraging or avoiding predators.⁴³ Fish that are caught and released are also routinely subjected to stress of various kinds, some of which require ‘extended recovery periods’.⁴⁴

³⁸ Crustaceans are included as ‘animals’ when they are being kept and killed for human consumption under the *Prevention of Cruelty to Animals Act 1979* (NSW) s4; *Animal Welfare Act 1992* (ACT) s2 (Dictionary); *Animal Welfare Act* (NT) s4. Victoria is the only jurisdiction where they are included in contexts other than where they are being prepared for human consumption: *Prevention of Cruelty to Animals Act 1986* (Vic) s3(3).

³⁹ Paul Ashley, ‘Fish Welfare: Current Issues in Aquaculture’ (2007) 104 *Applied Animal Behaviour Science* 199, 206.

⁴⁰ *Ibid* 206.

⁴¹ *Ibid*.

⁴² Steven Cooke and Lynne Sneddon, ‘Animal Welfare Perspectives on Recreational Angling’ (2007) 104 *Applied Animal Behaviour Science* 176.

⁴³ *Ibid* 191.

⁴⁴ *Ibid*.

The exclusion of mammals and reptiles in utero in some jurisdictions is also important for two reasons. First, because scientific literature suggests that they have a capacity to suffer,⁴⁵ and second, because they may be exposed to suffering in industries that use nonhuman animals for human purposes.⁴⁶ For example, the foetuses of livestock are also killed when pregnant dams are slaughtered. In jurisdictions where nonhuman animals in utero are excluded from the definition of ‘animal’, there is no obligation for their welfare to be considered. Further, medical experiments often intentionally use pregnant nonhuman animals to explore the effect of new human medicines on a nonhuman foetus. Excluded from the definition of ‘animal’, these foetuses are not the subject of animal welfare provisions which may curtail the types of experiments that one may reasonably perform.

In other contexts, a foetus is intentionally killed to obtain a product. Fetal calf serum, for example, is obtained after the slaughter and bleeding of a pregnant cow at an abattoir. The uterus, containing the calf foetus is removed during the process of eviscerating the cow, and the foetus’ blood is collected via a needle inserted into the heart. The blood is deemed to be particularly valuable because it is free from micro-organisms and can therefore be used routinely for scientific purposes.⁴⁷ These calves have no welfare protections for their suffering, and the collection of valuable fetal calf serum is thus uninterrupted, with no legal requirement that their welfare be taken into consideration.

What these examples show is that legal definitions are a powerful legal device. Where the law does not intervene to prohibit the suffering of nonhuman animals, it implicitly permits it. Scientific literature confirms that fish, cephalopods and decapods are capable of suffering in

⁴⁵ MLH Campbell, DJ Mellor and P Sandoe, 'How Should the Welfare of Fetal and Neurologically Immature Postnatal Animals Be Protected?' (2014) 23 *Animal Welfare* 369.

⁴⁶ It is important to note that the purposes of this discussion in this thesis is to illustrate the role that the legal definition of ‘animal’ plays in setting the limits surrounding which species ‘count’ in law: those species that are included as ‘animals’ may be provided with limited welfare protections, and those who are excluded, are not. My intention is thus to show the power of the legal definition as a legal device in the context of animal welfare. A separate, important conversation is often had in the animal protection literature in relation to how arguments to protect the welfare or ‘rights’ of nonhuman animals may translate to the context of human abortion. For more on this, see: Cheryl Abbate ‘Adventures in Moral Consistency: How to Develop an Abortion Ethic through an Animal Rights Framework’ (2015) 18(1) *Ethical Theory and Moral Practice* 145.

⁴⁷ *Ibid.*

numerous and complex ways.⁴⁸ Similarly, nonhuman animals above the midpoint gestation also possess a capacity to suffer.⁴⁹ The continued exclusion of these nonhuman animal species from the protective reach of animal welfare legislation therefore serves not to reflect their intrinsic properties, but rather to facilitate the human interest in being cruel to these them. By failing to include them, the law is complicit in their suffering.

C. Legal Fictions

The legal fiction is another device that is employed within Australian animal welfare legislation to declare inaction with respect to certain forms of cruelty. I introduced the legal fiction chapter three in the context of legal personhood, and will say some more about it now. The legal fiction deems a ‘consciously false’ premise to be true to serve a legal purpose.⁵⁰ The legal fiction differs from a legal definition of the type discussed above, because the legal fiction involves a *deeming*. Whilst a definition may be described as inadequate or inaccurate with respect to the meaning normally attributed to the term, a legal definition does not generally deem something to be true, in the same way that a legal fiction does.

Though the legal fiction is intentionally based on false premises, it is also different from a lie or an erroneous conclusion.⁵¹ Legal fictions necessarily involve a *conscious* deeming by law of a *knowingly false* premise. The deeming therefore is ‘not intended to deceive’ since it does not entail any claim to reflect a truth in the external world.⁵² To therefore critique the fiction solely on the basis that it is ‘false’ misses the point. As Naffine and Neoh suggest, ‘falsehood is the essence of the fiction. It does not destroy the fiction: it is its very basis’.⁵³ As we saw in chapter three, a legal fiction, by virtue of the fact that it is a known falsehood, may offer greater legal and conceptual possibilities than other legal devices. The fiction of the legal

⁴⁸ Jennifer Mather and Roland Anderson, 'Ethics and Invertebrates: A Cephalopod Perspective' (2007) 75(2) *Diseases of Aquatic Organisms* 119, Donald Broom, 'Cognitive Ability and Sentience: Which Aquatic Animals Should Be Protected?' (2007) 75 *Diseases of Aquatic Organisms* 99; Stuart Barr et al, 'Nociception or Pain in a Decapod Crustacean?' (2008) 75(3) *Animal Behaviour* 745; Robert Elwood and Laura Adams, 'Electric Shock Causes Physiological Stress Responses in Shore Crabs, Consistent with Prediction of Pain' (2015) 11(11) *Biology Letters* 1.

⁴⁹ MLH Campbell, DJ Mellor and P Sandoe, 'How Should the Welfare of Fetal and Neurologically Immature Postnatal Animals Be Protected?' (2014) 23 *Animal Welfare* 369.

⁵⁰ Lon Fuller, 'Legal Fictions' (1930) 25(4) *Illinois Law Review* 363, 368; Naffine and Neoh, above n 16, 32.

⁵¹ Fuller, above n 49, 366-369.

⁵² *Ibid* 368.

⁵³ Naffine and Neoh do this in the context of the ‘rape in marriage’ immunity. See: Naffine and Neoh, above n 16, 41.

person, for example, creates theoretical scope to include a much broader range of entities within the construct of the ‘person’. The legal fiction enables us to call a corporation a ‘person’ in law. We do so knowing a corporation is *not actually* a person (i.e. a human being) but we treat them as if they are for legal purposes.

Legal fictions are thus employed to serve a legal purpose.⁵⁴ In the context of Australian animal welfare law, my argument is that legal fictions are operating to declare the law’s deliberate and conscious inaction with respect to certain types of cruelty. For the purposes of the following discussion, I have identified a legal fiction that I contend is operating in the *Prevention of Cruelty to Animals Act 1979* (NSW), that serves the purpose of declaring the inaction with respect to specific forms of cruelty towards nonhuman animals.

1. *Deeming ‘Non-Cruelty’*

The *Prevention of Cruelty to Animals Act 1979* (NSW) purports to have several purposes. At the outset, the title tells us it is concerned with preventing cruelty towards nonhuman animals. This object is explicitly re-iterated in section 3(a) of the Act, alongside the additional object of ‘promoting the welfare of animals by requiring a person in charge of an animal to provide care for the animal, and to treat the animal in a humane manner, and to ensure the welfare of the animal’.⁵⁵ The Act provides an expansive description of what may constitute cruelty for the purposes of the Act, with cruelty including

reference to any act or omission as a consequence of which the animal is unreasonably, unnecessarily or unjustifiably: beaten, kicked, killed, wounded, pinioned, mutilated, maimed, abused, tormented, tortured, terrified, or infuriated, over-loaded, over-worked, over-driven, over-ridden or over-used, exposed to excessive heat or excessive cold, or inflicted with pain.⁵⁶

In providing such an expansive definition of ‘cruelty’, the *Prevention of Cruelty to Animals Act 1979* (NSW) mirrors the everyday understanding of what may constitute cruelty toward a nonhuman animal. So much so, that it is difficult to think of any act of cruelty towards a nonhuman animal that is not included within the legal definition. My contention is that this is

⁵⁴ Ibid 39.

⁵⁵ *Prevention of Cruelty to Animals Act 1979* (NSW) s3(b).

⁵⁶ Ibid s4(2).

intentional. The law seeks to reflect the everyday understanding of what it means to be cruel to a nonhuman animal, because Australian society cares about preventing cruelty towards nonhuman animals. The result is that the *Prevention of Cruelty to Animals Act 1979* (NSW) provides *more* than just a legal definition of what constitutes ‘cruelty’ in a legal context. It goes one step further, and makes broader claims about the *type of people we are*: we are kind to nonhuman animals, we are concerned about their welfare, we do not inflict pain upon them, nor any other type of suffering without a legitimate reason. Read in conjunction with the objects of the Act, the legal definition of cruelty in New South Wales is making a truth claim about how we, as Australians, care about nonhuman animals.

The parliamentary debates surrounding the introduction of the *Prevention of Cruelty to Animals Bill* (NSW) support my contention. The Bill was met with almost unanimously positive feedback, and was described as ‘modern and enlightened’.⁵⁷ Minister Crabtree, who introduced the Bill, was praised for being an ‘animal lover’.⁵⁸ Minister Hatton extended thanks to ‘all members of the community...who are vigilant in the protection of animals against cruelty’.⁵⁹ During debate the bill was consistently described as representative of something fundamental about Australian values: it was about ‘compassion’ for nonhuman animals,⁶⁰ and about being ‘humanitarian’.⁶¹ The Bill was called a ‘safeguard for those creatures which are unable to fend for themselves’.⁶² It defended those who are ‘defenceless’.⁶³ Minister Barraclough claimed that Australians are recognised for ‘their love and protection of animals’,⁶⁴ and concluded his offering by claiming: ‘[w]e have only one creed- to speak for those who can’t’.⁶⁵ Despite opposing the ‘far-reaching provisions’ of the Bill that compromised routine farming practices, Minister MacDiarmid stated that ‘this

⁵⁷ New South Wales, *Parliamentary Debates*, House of Assembly, 13 November 1979, 2925 (Minister Crabtree).

⁵⁸ New South Wales, *Parliamentary Debates*, House of Assembly, 14 November 1979, 3004 (Minister Barraclough).

⁵⁹ New South Wales, *Parliamentary Debates*, House of Assembly, 7 November 1979, 2679 (Minister Hatton).

⁶⁰ New South Wales, *Parliamentary Debates*, House of Assembly, 14 November 1979, 3006 (Minister Barraclough).

⁶¹ *Ibid* 3002 (Minister Barraclough).

⁶² New South Wales, *Parliamentary Debates*, House of Assembly, 13 November 1979, 2933 (Minister Crabtree).

⁶³ New South Wales, *Parliamentary Debates*, House of Assembly, 7 November 1979, 2676 (Minister Crabtree).

⁶⁴ New South Wales, *Parliamentary Debates*, House of Assembly, 14 November 1979, 3006 (Minister Barraclough).

⁶⁵ *Ibid* 3007 (Minister Barraclough).

[animal welfare legislation] is an area which is apolitical'.⁶⁶ He therefore claimed that the prevention of cruelty to nonhuman animals was such a fundamental and uncontroversial aspect of human responsibility, that there ought to be no need for it to be perceived as 'a case of Opposition versus the Government'.⁶⁷

Several Ministers were also critical of people who perpetrated cruelty towards nonhuman animals. These perpetrators were described by Minister Crabtree as 'irresponsible and callous'.⁶⁸ He contended that the need to prevent cruelty to nonhuman animals was *so* obvious that it was 'disappointing' that legislation to protect nonhuman animals was even considered necessary in the modern age.⁶⁹ For Minister Crabtree, those who were cruel to nonhuman animals desecrated fundamental human values: they 'have no respect for life and feeling'.⁷⁰ He described cruelty towards 'defenceless' nonhuman animals as 'savage and incomprehensible...'.⁷¹ Those who are a cruel, he said, are 'inhumane...callous' people,⁷² best described as 'sadists'.⁷³ Minister MacDiarmid was similarly scathing, stating that those who engaged in cruelty to nonhuman animals were 'sick', and 'deserve the punishment that they receive'.⁷⁴

The Parliamentary debates surrounding the introduction of the *Prevention of Cruelty to Animals Bill 1979* (NSW) thus reveal that the prevention of 'cruelty' towards nonhuman animals is intended to reflect fundamental human values. So much so that those who inflict cruelty on nonhuman animals are deemed to exhibit values that conflict so greatly with humanity that they ought more reasonably be described as 'savages'.⁷⁵ The legal definition of 'cruelty' in the *Prevention of Cruelty to Animals Act 1979* (NSW) therefore does much more than define what constitutes 'cruelty' for legal purposes. It makes moral truth claims about

⁶⁶ New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1979, 3228 (Minister MacDiarmid)

⁶⁷ Ibid 3228 (Minister MacDiarmid)

⁶⁸ New South Wales, *Parliamentary Debates*, House of Assembly, 13 November 1979, 2924 (Minister Crabtree)

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid 2926 (Minister Crabtree).

⁷² New South Wales, *Parliamentary Debates*, House of Assembly, 7 November 1979, 2676, (Minister Crabtree).

⁷³ New South Wales, *Parliamentary Debates*, House of Assembly, 13 November 1979, 2926 (Minister Crabtree).

⁷⁴ New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1979, 3228 (Minister MacDiarmid).

⁷⁵ New South Wales, *Parliamentary Debates*, House of Assembly, 13 November 1979, 2926 (Minister Crabtree).

what it means to be kind, compassionate human beings, and what it means to love and care for nonhuman animals.

A legal fiction can therefore be identified when these general propositions are reversed by law. For example, section 24 of the *Prevention of Cruelty to Animals Act 1979* (NSW) reads:

In any proceedings for an offence against this Part or the regulations in respect of an animal, the person accused of the offence is not guilty of the offence if the person satisfies the court that the act or omission in respect of which the proceedings are being taken was done, authorized to be done or omitted to be done by that person:

Where, at the time when the offence is alleged to have been committed, the animal was:

- a. A stock animal – in the course of, and for the purpose of, ear-marking or ear-tagging the animal or branding, other than firing or hot iron branding the face of, the animal
- b. A pig of less than 2 months of age or a stock animal of less than 6 months of age which belongs to a class of animals comprising cattle, sheep or goats – in the course of, and for the purpose of, castrating the animal,
- c. A goat of less than 1 month of age or a stock animal of less than 12 months of age which belongs to the class of animal comprising cattle – in the course of, and for the purpose of, dehorning the animal,
- d. A sheep of less than 6 months of age – in the course of, and for the purpose of, tailing the animal, or
- e. A sheep of less than 12 months of age – in the course of, and for the purpose of, performing the Mules operation upon the animal,

In a manner than inflicted no unnecessary pain upon the animal.

These provisions operate as a legal fiction. To illustrate precisely how, I look exclusively at section 24(e). This provision operates as a fiction in two ways: it deems it to be ‘non-cruelty’ to perform a mules operation upon a sheep of less than 12 months of age, and it also makes a sheep of less than 12 months of age, in this particular context, a ‘non-animal’ for the purposes of this legislation. In doing so it engages in a positive legal deeming based on knowingly *false* premises: cruelty is deemed not be cruelty, and a sheep is deemed not to be an animal. Moreover, the very fact that the law *explicitly* says it is *not* cruelty towards an animal to perform such a procedure reveals that it in fact *is*. If it were not, there would be no need for provision 24(e) because the act of mulesing a sheep under the age of 12 months would not be prohibited by the general provisions of the Act which prohibit unnecessary cruelty.

2. What is Mulesing?

Mulesing is described in the scientific literature as a method of preventing flystrike, which occurs when the ‘larvae of the blowfly infest the skin and fleece of a sheep, resulting in both mechanical and chemical damage to the tissue and a substantial stress response in the animal’.⁷⁶ Flystrike typically occurs in the ano-genital region of sheep in the moist and dirty wool of the surrounding area.⁷⁷ It is typically fatal if left untreated.⁷⁸ Mulesing, as a method of preventing flystrike, is described as a ‘surgical procedure that involves cutting away the skin around the tail and perineum, with resulting scar tissue providing a bare surface that is resistance to flystrike’.⁷⁹ It is routinely performed without anaesthetic or pain relief, and ‘almost always’ in conjunction with other painful surgical procedures such as tail docking.⁸⁰

3. Why Mulesing is Cruel

Mulesing is cruel because it is performed in preference to less invasive measures for reasons of human convenience and economic efficiency. Whilst the need to reduce instances of flystrike is clear, the use of mulesing to achieve this end is unjustifiable. In chapter four, I demonstrated that even from a legal perspective, financial gain *alone* is not an adequate basis for justifying an act of cruelty towards a nonhuman animal as ‘necessary’.⁸¹ Alternative methods of preventing flystrike include the use of insecticides, or the practice of ‘crutching’ to remove excessive wool (but not skin) in the vulnerable region of the body. Such alternatives have been described as ‘labour intensive’ because they provide only temporary protection and require repeating on a recurrent basis.⁸² Mulesing, however, despite providing a more permanent solution, has known poor animal welfare outcomes. Not only does it cause acute pain at the time of the procedure, but studies have revealed lambs that have been

⁷⁶ Lauren Edwards et al, 'Acute Effects of Mulesing and Alternative Procedures to Mulesing on Lamb Behaviour' (2011) 133 *Applied Animal Behaviour Science* 169, 169.

⁷⁷ Ibid 169.

⁷⁸ Paul Hemsworth et al, 'Effects of Mulesing and Alternative Procedures to Mulesing on the Behaviours and Physiology of Lambs' (2009) *Applied Animal Behaviour Science* 20, 21.

⁷⁹ Edwards, above n 75, 170.

⁸⁰ Andrew Fisher, 'Addressing Pain Caused by Mulesing in Sheep' (2011) 135(3) *Applied Animal Behaviour Science* 232, 234.

⁸¹ See chapter 4, page 66 for a discussion of *Department of Regional Government and Local Department v Emmanuel Exports Pty Ltd Et Al* (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008).

⁸² Edwards, above n 75, 169-170.

mulesed can suffer for weeks following the procedure.⁸³ While topical analgesics are now available for use, their use is not mandated, and they do not provide analgesia during the operation itself, nor do they provide lasting effects that cover the period of ‘pain and discomfort that follows mulesing’.⁸⁴

Animal welfare organisations are vocal in their opposition to the practice of mulesing because of the cruelty it involves. The RSPCA has ‘called for a greater commitment from wool producers’ to find alternative strategies for preventing flystrike.⁸⁵ *People for the Ethical Treatment of Animals* (‘PETA’) contend that ‘better husbandry’ can alleviate the risk of flystrike without the need for mulesing.⁸⁶ New Zealand Primary Industries have now proposed new animal welfare regulations, which make it a criminal offence for anybody other than a veterinarian to mules a sheep.⁸⁷ During public consultation, the provisions received 75 submissions from the public, 92% of which supported the ban.⁸⁸ The New Zealand Veterinary Association policy on mulesing also describes it as an ‘unacceptable procedure’.⁸⁹ They do ‘not condone the use of the procedure in New Zealand in any circumstances...Merino farmers today have other practical options available to minimize the risk of flystrike’.⁹⁰

Following an international *PETA* campaign targeting the mulesing of sheep by Australian wool producers,⁹¹ several international apparel retailers, including H&M, Adidas and Hugo Boss pledged to stop purchasing Australian grown wool from mulesed sheep.⁹² In response, the Australian Wool Growers Association announced a commitment by Australian sheep and wool industry leaders to phase out the practice of mulesing by the year 2010, which they did

⁸³ Hemsworth, above n 77, 25.

⁸⁴ Fisher, above n 79, 232.

⁸⁵ Lisa Herbert and Harry Crawford, ‘RSPCA Calls for More Farmer Commitment for Mulesing Alternatives’, *ABC Rural* (Online), 28 August 2014, <<http://www.abc.net.au/news/rural/2014-08-28/mulesing-awi-update/5699710>>.

⁸⁶ People for the Ethical Treatment of Animals, *Mulesing by the Wool Industry* <<https://www.peta.org/issues/animals-used-for-clothing/wool-industry/mulesing/>> .

⁸⁷ Minister for Primary Industries (New Zealand), *Proposed Animal Welfare Regulations* (2016) <<https://www.mpi.govt.nz/document-vault/11905>> 100.

⁸⁸ Minister for Primary Industries (New Zealand), *Summary Report on Public Consultation* (2017) <<https://www.mpi.govt.nz/document-vault/18953>> 43.

⁸⁹ New Zealand Veterinary Association, *Mulesing* (2011) <<http://www.nzva.org.nz/?page=policymulesing>>

⁹⁰ *Ibid.*

⁹¹ People for the Ethical Treatment of Animals, *There's Nothing Like Australia's Cruelty* <<https://www.peta.org/features/theres-nothing-like-australias-cruelty/>> .

⁹² Joanne Sneddon, ‘How the Wool Industry Has Undercut Itself on Mulesing’, *The Conversation* (Online), 3 May 2011, <<https://theconversation.com/how-the-wool-industry-has-undercut-itself-on-mulesing-956>>.

not meet.⁹³ At the time of writing, mulesing is still commonplace in the Australian wool industry, although alternative permanent solutions such as selective breeding to develop sheep without the vulnerable skin folds continue to be pursued.⁹⁴

4. *Identifying the Legal Fiction*

Section 24(e) of the *Prevention of Cruelty to Animals Act 1979* (NSW) is operating as a legal fiction because it deems a known-to-be cruel act against a nonhuman animal to be ‘not-cruelty’ against a ‘non-animal’. It does so to serve a clear legal purpose. Namely, the exemption of the mulesing practice from the protective reach of the *Prevention of Cruelty to Animals Act 1979* (NSW).

It is necessary to be quite clear about what the law is doing here. The law is not simply saying that mulesing is ‘cruelty’ that we deem reasonable, or that we deem necessary – and therefore should be viewed as lawful. The law is positively deeming something that is known to be false to be true: an act of cruelty is deemed in law as *not an act of cruelty*, as the very same Act defines it. It thus invokes a legal fiction to exempt sheep exposed to the mules operation from the protective reach of the anti-cruelty provisions contained within the *Prevention of Cruelty to Animals Act 1979* (NSW).

D. *Express Exclusions*

The third legal mechanism that is utilised by Australian animal welfare legislation to declare ‘inaction’ with respect to certain forms of cruelty is the express exclusion. My focus in this chapter is the exclusion of ‘accepted animal husbandry procedures’ from the scope of anti-cruelty provisions in both Western Australia and the Australian Capital Territory.

The *Animal Welfare Act 2002* (WA) contains the provision:

a person must not be cruel to an animal’.⁹⁵ Section 23 however, provides a defence where the act was done ‘in accordance with generally accepted animal husbandry practice, other than a

⁹³ Ibid.

⁹⁴ Jared Owens, ‘Sheep Farmers Flocking Back to Mulesing’, *The Australian* (Online), 21 January 2013, <<http://www.theaustralian.com.au/news/health-science/sheep-farmers-flocking-back-to-mulesing/news-story/db41404d010a1b267102de949b79e9f8?sv=e2c545b93c3708ba0b0d2d72c720c504>>

⁹⁵ *Animal Welfare Act 2002* (WA) s19(1).

prescribed practice, that is used in (i) farming or grazing activities; (ii) the management of zoos, wildlife parks or similar establishments; (iii) the management of animal breeding establishments; or (iv) the training of animals’,

and is performed in a ‘humane manner’.⁹⁶ The Australian Capital Territory *Animal Welfare Act 1992* (ACT) contains an almost identical provision, though it applies more narrowly only to conduct that constitutes the carrying out of a medical or surgical procedure on a nonhuman animal by a person other than a veterinarian.⁹⁷

The term ‘accepted animal husbandry practice’ is not defined by either Act, and therefore seemingly excludes *any* practice that is accepted by the community of persons who engage in animal husbandry of a given type, as long as it does not constitute a prescribed practice.⁹⁸ This exclusion therefore represents a declaration of legal inaction with respect to any activity that is considered ‘normal’ or ‘routine’ by those who engage in a particular cruel practice.⁹⁹ The result is that it is *industry* which articulates what constitutes ‘cruelty’ in certain contexts, rather than animal welfare legislation that purports to prohibit it. According to Katrina Sharman, industry therefore dictates its own standards surrounding what constitutes the ‘cruel’ treatment of nonhuman animals.¹⁰⁰ This express exclusion offered to ‘accepted animal husbandry procedures’ therefore facilitates cruelty to nonhuman animals. These procedures are deemed legitimate purely because they are used routinely and widely by those within a certain industry that use nonhuman animals.¹⁰¹ So long as cruelty is considered ‘normal’ by those who practise it, the nonhuman animals who are exposed to such cruelty are removed from the protective reach of Australian animal welfare legislation. Ruth Harrison explains:

[i]f one person is unkind to an animal it is considered to be cruelty, but where a lot of people are unkind to animals, especially in the name of commerce, the cruelty is condoned and, once large sums of money are at stake, will be defended to the last by otherwise intelligent people.¹⁰²

⁹⁶ Ibid s23.

⁹⁷ *Animal Welfare Act 1992* (ACT) s19(2)(b).

⁹⁸ Ibid s19(3).

⁹⁹ Sharman, above n 27, 77.

¹⁰⁰ Katrina Sharman, ‘Farm Animals and Welfare Law: An Unhappy Union’ in Sankoff, White and Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (2nd ed, The Federation Press, 2013) 61-77.

¹⁰¹ Cao, above n 27, 216-217.

¹⁰² Ruth Harrison, ‘Cruelty and Legislation’ in Ruth Harrison (ed), *Animal Machines* (CABI, 2013) 175.

It is necessary to include this exclusion *only because* the conduct that it expressly excludes is in fact cruel.¹⁰³ The law is silent with respect to the suffering of these nonhuman animals, and is therefore complicit in it.

IV. CONCLUSION

In this chapter, I have argued that the law's inactivity with respect to certain forms of cruelty reveals a deliberate and conscious decision to be complicit in those types of cruelty. I have identified three legal mechanisms in Australian animal welfare legislation that are utilised to declare such inaction: inadequate legal definitions, legal fictions, and express exclusions. Each of these mechanisms operate to exclude nonhuman animals from the protective reach of Australian animal welfare legislation. Such exclusion does not constitute a 'gap' in the law, but rather reflects a policy of inaction towards some of the worst cruelties towards nonhuman animals. The law is thus complicit in the suffering of the nonhuman animals who endure this lawful cruelty.

In the following chapter, I describe another way in which Australian animal welfare law is facilitating cruelty towards nonhuman animals. Namely, by generating and sustaining and a myth of 'animal protection'. This myth facilitates cruelty by communicating to the Australian public that Australian animal welfare laws are doing something that they are not. I argue that this myth not only facilitates cruelty by concealing it, but also by legitimating it.

¹⁰³ Sharman, above n 27, 77.

CHAPTER 7 : THE MYTH OF ANIMAL PROTECTION

I. INTRODUCTION

‘Anti-animal cruelty statutes throughout the Western world are amazing in their capacity to appear to support one principle while containing clauses that actually generate a completely different outcome. They would be most poetically beautiful in their ability to defy logic were it not for the sad fact that these instruments have a big impact on the lives of billions of animals.’¹

In the previous chapter, I argued that Australian animal welfare legislation declares inaction with respect to some forms of cruelty. I identified three legal mechanisms through which such a declaration is made: statutory definitions, legal fictions and express exclusions. These mechanisms are explicitly used to carve out types of cruelty that are not protected by Australian animal welfare legislation. Australian animal welfare laws therefore contain an express declaration of ‘inaction’ with respect to some of the worst forms of cruelty towards nonhuman animals. Such inaction is an active stance, and the law is thus complicit in the cruelty that it fails to prohibit.

In this chapter, I describe another way in which Australian animal welfare law is facilitating cruelty towards nonhuman animals. Having demonstrated that Australian animal welfare legislation systematically fails to meet its objective of prohibiting cruelty towards nonhuman animals, here I contend that Australian animal welfare legislation generates a ‘myth’ of animal protection. I call it a myth for two reasons. First, because it holds out the promise of prohibiting cruelty towards nonhuman animals, and systematically fails to meet this promise. Second, because it is a powerful story that informs the significance that can be attached to the animal welfare legislation in Australia.² The myth of animal protection is a story that legitimates cruelty, by informing the way that we that perceive the laws that purport to prohibit it.

The myth of animal protection makes cruelty towards nonhuman animals *invisible*. The law communicates to the public that it prohibits cruelty towards nonhuman animals, and the

¹ Siobhan O'Sullivan, *Animals, Equality and Democracy* (Palgrave Macmillan, 2011) 36.

² Mary Midgley, *The Myths We Live By* (Taylor and Francis, 2003) 1.

public therefore may form the false believe that the law fulfils this stated purpose. In holding this false belief, the public remain unaware of the cruelty that Australian animal welfare laws permit. My suggestion is that if people do not know that nonhuman animals are suffering lawful cruelty, then they cannot oppose it. I develop this theme further in the following chapter, where I consider how Australian animal welfare laws and Codes of Practice interact with legislation that may stifle animal activists who seek to expose lawful cruelty to the Australian public.

This chapter is divided into four parts. In the first part, I explain how the myth of animal protection facilitates cruelty towards nonhuman animals. I distinguish my argument in this chapter and the next from other arguments that seek to make the mere visibility of cruelty towards nonhuman animals a *sufficient* condition for change. Instead, I suggest only that it is a *necessary* one. In the second part, I explain the first way in which the myth of animal protection is created and sustained by Australian animal welfare legislation and Codes of Practice. My argument is that animal welfare statutes and Codes of Practice serve two different functions, and that these functions are kept separate, and are addressed to different audiences. The result is that as it stands alone; animal welfare legislation falsely appears to provide strong protections for *all* nonhuman animals. Yet, Codes operate in tandem to erode the content of these protections for nonhuman animals that are kept and killed to serve human purposes. They do so discretely, as they contain provisions that are kept separate from general anti-cruelty provisions, and are addressed specifically to those who are engaged in cruelty towards nonhuman animals.

In the third part, I demonstrate a second way in which Australian animal welfare legislation and Codes of Practice generate a myth of animal protection. My argument in this part is that both animal welfare legislation and Codes of Practice fail to communicate fairly and honestly what they are doing. They appear to prohibit cruelty at the same time as they explicitly permit it. I argue that the meaning given to the term ‘cruelty’ in Australian animal welfare legislation is unclear and misleading, and Codes of Practice use ‘weasel words’ which deflect from the fact that they permit cruelty. In presenting a false image of what they allow, Australian animal welfare laws and Codes of Practice both sustain a myth of animal protection.

In the fourth part, I shift my focus and look at the enforcement mechanisms provided by Australian animal welfare legislation. My claim in this section is that even those provisions that *do* offer animals some form of protection from cruelty are not accompanied by adequate

enforcement mechanisms. I focus my discussion in this part on the role of the RSPCA in enforcing animal welfare legislation, and make three key claims regarding inadequate enforcement. First, that Animal welfare legislation provides the RSPCA with inadequate enforcement powers which not only result in poor enforcement of animal welfare laws, but serve to *necessitate* such poor enforcement. Second, that the RSPCA is an underfunded charity, meaning that they cannot respond to all reports of animal cruelty. Third, that there exists a significant question regarding whether the RSPCA is well placed to enforce Australian animal welfare legislation at all, since they possess conflicting interests. These three factors combined demonstrate that Australian animal welfare legislation generates a myth of animal protection, not only by providing a false image of animal protection, but also by providing insufficient mechanisms to enforce the inadequate protections they contain.

II. INVISIBILITY FACILITATES CRUELTY: THE PROBLEM WITH THE MYTH OF ANIMAL PROTECTION

The starting point for this chapter and the next is that making animal cruelty *invisible* facilitates that cruelty. Cruelty that is out of sight, is cruelty that is out of mind. It is necessary at the outset of this chapter to distinguish my argument from others that have been made previously. My claim is not that visibility *alone* is a sufficient condition for the abolition of cruelty towards nonhuman animals. Rather, my argument is that visibility and transparency are *necessary* to achieve change for nonhuman animals. Simply, if people do not know that nonhuman animals are suffering lawful cruelty, then they cannot object to it.

The relationship between visibility and change for nonhuman animals is more complex than has been suggested by some thinkers. Paul McCartney, for example, claimed that ‘if slaughterhouses had glass walls, everyone would be vegetarian’.³ In making this statement, McCartney drew a direct link between visibility and the abolition of cruelty towards nonhuman animals. He implies that the *visibility* of cruelty is a sufficient condition for alleviating it. If people *see* cruelty towards nonhuman animals, they will necessarily oppose it.

³ Paul McCartney in Siobhan O'Sullivan, *Animals, Equality and Democracy* (Palgrave Macmillan, 2011) 63
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Drawing such a direct link between ‘seeing’ and ‘knowing’ is inherent in our everyday language:

If we grasp an idea, we say ‘I see’...When we make sense of something, we may ‘observe’ it to be so. If someone ‘sheds light’ on a problem, they help to explain it. Should they persuade us to change our minds, we say we have come ‘to see’ the situation ‘in a different light’. Our language is peppered with metaphors linking vision with knowledge. Seeing it seems is knowing as well as believing.⁴

However, the relationship between what we see, what we know, and how we know it is much more complex. It is not sufficient that one merely *sees* cruelty towards a nonhuman animal for that person to oppose it. There is a step between ‘seeing’ and ‘opposing’. In some instances, human beings actually take *pleasure* in witnessing cruelty towards nonhuman animals. Rodeos are one obvious example, in which nonhuman animals (typically horses and cattle) are provoked into displaying ‘wild’ behaviours for the purposes of being captured and restrained by human participants. The method of provocation varies, but often involves the use of spurs and flank straps to inflict pain.⁵ Rodeos have been described by the RSPCA as ‘inherently inhumane’.⁶ Yet, they remain a lawful form of entertainment in all jurisdictions of Australia except the Australian Capital Territory.⁷

There are numerous reasons why a person who is witness to cruelty may not immediately oppose it. According to Peggy Larson, education may play an important role. In the context of rodeos, Larson contends ‘[i]t takes knowledge of livestock and awareness of the animal in the rodeo event to understand that these animals are being injured’.⁸ An observer who lacks this knowledge may therefore not perceive what they witness at a rodeo event as cruel.

Those who make a profit from the rodeo business may also deem the cruelty that is involved as justifiable.⁹ Cruelty towards nonhuman animals is more readily rationalised and justified by those who have a strong interest in continuing it. As I argued in chapter four, the prohibition on *unnecessary* cruelty in animal welfare legislation prohibits only those acts of

⁴ Ngaire Naffine, ‘Sight and Insight: Is There a Lawful Relation between What We See and What We Know?’ (1997) 12(1) *Canadian Journal of Law and Society* 263

⁵ Peggy Larson, ‘Rodeo Is Cruel Entertainment’ (1998) 16 *Pace Environmental Law Review* 115, 115.

⁶ *Ibid*, 115.

⁷ *Animal Welfare Act 1992* (ACT) s18.

⁸ Larson, above n 5, 115.

⁹ O’Sullivan, above n 1, 63.

cruelty that serve illegitimate human interests, or which serve legitimate human interests by unreasonable means.¹⁰ This prohibition thus reflects the view that it *is* possible to justify cruelty where a human interest is at stake. In chapter six, I also talked about the operation of a legal fiction that deems the overtly cruel practice of mulesing to be ‘non-cruelty’.¹¹ In that context, the deeming again legitimates a human economic interest mulesing, and in doing so justifies an act of egregious cruelty towards sheep.

Another reason why a person who witnesses cruelty may not contest it is that the observation of cruelty may not be their focus. If we are not focused on something, we may fail to see it, even if it is seemingly overtly visible. Christopher Chabris and Daniel Simons have called this phenomenon ‘inattentional blindness’.¹² Chabris and Simons developed the concept of inattentional blindness in conjunction with an experiment conducted at Harvard University, which asked participants to observe video footage of six people playing with a basketball. Three of the players in the video were dressed in white, and three were dressed in black. The participants were asked to count how many passes of the ball were made between players wearing white shirts. They were thus instructed to focus only on the white shirt players in the video footage. During the video, as two balls were passed around between the players, a man dressed in a gorilla costume passed directly through the game. He stopped in the centre of the video to thump his chest, and then moved off screen. The study revealed that a majority (66%) of participants did not notice the gorilla passing through the game. These people were so focused on observing the ball as it passed between the players dressed in white that they did not see a seemingly obvious gorilla passing right through the centre of the scene. To explain this phenomenon, Simons and Chabris concluded: ‘we perceive and remember only those objects and details that receive focused attention’.¹³ We are ‘inattentionally blind’ to that which we elect not to focus on. It is possible to see how this phenomenon may occur in the context of rodeos. A person who is focused on observing a stockperson’s ‘mastery’ of animals may focus their attention entirely on his skills and speed. They may remain inattentionally blind to the suffering of the animal, even though it is occurring before their very eyes.

¹⁰ Chapter 4, Page 93.

¹¹ Chapter 6, Page 159.

¹² Christopher Chabris and Daniel Simons, ‘Gorillas in Our Midst: Sustained Inattentional Blindness for Dynamic Events’ (1999) 28 *Perception* 1059.

¹³ *Ibid*, 1059.

In the context of an American slaughterhouse, Timothy Pachirat has also explored the concept of visibility. According to Pachirat, even though a slaughterhouse offers apparent conditions of *total* visibility of cruelty towards nonhuman animals, ‘isolation and sequestration are possible’.¹⁴ A portion of Pachirat’s study focuses on the Quality Control worker in the slaughterhouse. This worker has physical access to the entire slaughterhouse, and thus has visual access to the entire slaughter process. Yet, Pachirat contends, even the overt acts of cruelty that the Quality Control officer witnesses remain invisible if they offer no ‘visceral engagement’ with it.¹⁵ Unlike Simons and Chabris, Pachirat does not suggest that the cruelty is *literally* invisible to the Quality Control worker. Rather, he is concerned with the extent to which cruelty can be so overtly visible, but not perceived by the viewer as cruelty. In the slaughterhouse environment, Pachirat contends cruelty is normalised and bureaucratised, to the point that it no longer *appears* as cruelty. In such a context, ‘sight and concealment work together and quarantine is possible even under conditions of total visibility’.¹⁶ He details the operations of a Quality Control worker within a slaughterhouse to illustrate his point:

The QC [Quality Control worker] looks at workers but sees failures to sanitize knives. The QC looks at and listens to cattle, but sees statistics on slips, falls, and vocalizations – quantifiable data points within a technical procedure designed to facilitate rather than confront the work of killing...the QC becomes an exemplary instances of how experiential compartmentalization is produced even, and perhaps especially, under conditions of total visibility.¹⁷

Pachirat also talks about employees in the slaughterhouse who are directly confronted with the task of killing. These workers allow themselves to be overcome by a ‘hypnotic numbness’ to the work that they are doing.¹⁸ This numbness, he claims, is fundamental to their wellbeing. It allows them to lose track of time, and relieves the psychological discomfort inherent in their work.¹⁹ A refusal to viscerally engage with cruelty that places workers at such risk may therefore be self-protective. At the same time, it operates as a means of

¹⁴ Timothy Pachirat, *Every Twelve Seconds: Industrialised Slaughter and the Politics of Sight* (Yale University Press, 2011) 253.

¹⁵ *Ibid.*

¹⁶ *Ibid* 207.

¹⁷ *Ibid* 232.

¹⁸ *Ibid* 217.

¹⁹ *Ibid.*

distorting cruelty such that even the most overt instances of cruelty do not appear to the viewer to be cruel.

Whilst it is not within the scope of this chapter to further elucidate the complex relationship between visibility and invisibility, the above discussion serves to highlight the complexities of the relationship between *seeing* cruelty, and demanding change for nonhuman animals. With these complexities in mind, my argument in this chapter and the next is simply that invisibility facilitates cruelty towards nonhuman animals. It does so because it precludes the public from knowing how nonhuman animals are treated. And, as O’Sullivan puts it, ‘decisions cannot be made in the absence of information.’²⁰ I establish the link between information and change for nonhuman animals in chapter eight.

A. *How the Myth of Animal Protection Sustains Invisibility*

According to Tamie Bryant, myths are part of every society, and they are means by which societies ‘define and inspire themselves’.²¹ Myths then are not deliberate lies or falsehoods, but are ‘imaginative patterns, networks of powerful symbols that suggest particular ways of interpreting the world’.²² Myths play a powerful role in shaping our thinking and how we give meaning to things. Mary Midgley contends they are ‘an integral part of our thought-structure’, and play a crucial role in how we interpret the world around us.²³ Importantly then, they are more than ‘a surface dressing of isolated metaphors’ operating in the real world. Rather, myths govern precisely how ‘we imagine the world’.²⁴ They dictate how we access it, and determine ‘what we think important in it’.²⁵ They define ‘what we select for our attention among the welter of facts that constantly flood upon us’ in the world.²⁶ It is thus important to think critically about the ‘myths that we live by’, since it is in virtue of these myths that we ‘form our official, literal, thoughts and descriptions’ of the world around us.²⁷

Even though myths play a central role in shaping how we view the world around us, they should not be understood only as grand, overarching ideologies by which we live our lives.

²⁰ O’Sullivan, above n 1, 61.

²¹ Tamie Bryant, ‘Mythic Non-Violence’ 2(1) *Journal of Animal Law* 1, 1.

²² Midgley, above n 2, 1.

²³ *Ibid.* 2.

²⁴ *Ibid.* 1.

²⁵ *Ibid.*

²⁶ *Ibid.* 2.

²⁷ *Ibid.*

Myths also operate in the context of our ordinary, everyday interactions with the world. One such myth, and the myth that I am concerned with in this chapter, is the myth of animal protection. This myth holds not only that we are *actually*, protecting nonhuman animals from cruelty. It also sustains much bigger ideas about who we are as people, and the kinds of laws that we have in place to protect the nonhuman animals that we care for. In chapter six, I detailed some of the truth claims that I contend are made by the key provisions of animal welfare laws in New South Wales which purport to prohibit cruelty. I explained that those provisions are not merely a series of words confined to a statute to serve a legal purpose and to protect nonhuman animals, but that they are thought to reflect important truths about our very nature: our ‘compassion’, our ‘humanity’ and our concern for those nonhuman animals that are at our mercy.²⁸ The myth of animal protection therefore is a story that reflects a set of shared ideas not only about what we are doing to protect nonhuman animals, but how we are doing it, and who we are as people.

The problem with the myth of animal protection is that Australian animal welfare laws and Codes of Practice *simply do not* protect nonhuman animals from cruelty. Moreover, I have consistently argued they actively facilitate and permit some of worst cruelties towards them. The myth of animal protection is thus at odds with the reality of what we are really doing to nonhuman animals, and how we are doing it. We are failing to protect them from cruelty, and we are failing to live up to our own stated ideal of being compassionate people that are concerned for the welfare of those creatures vulnerable than us. The myth of animal protection however serves to facilitate and legitimate our cruel treatment of nonhuman animals. It does so in two ways.

First, the myth of animal protection makes it seem as though Australian animal welfare laws and Codes of Practice are doing something that they are not. In this sense, the myth conceals or diverts our attention away from the facts of the matter. Simply, we may not realise that our animal welfare laws are permitting cruelty, because they say that they prohibit it. The myth of animal protection therefore represents a ‘widespread misconception’ that Australian animal welfare laws are operating to protect *all* nonhuman animals from harm.²⁹ This misconception *facilitates* cruelty by precluding opportunities for the normative scrutiny of animal welfare

²⁸ Chapter 6, Page 161.

²⁹ Deborah Cao, *Animal Law in Australia* (2nd ed, Thomson Reuters, 2015)192.

practices. If people believe that Australian animal welfare laws are doing something that they are not, then they have no reason to oppose the cruelty that they permit. In the American context, Gary Francione presents the problem thus:

On the one hand, it appears clear that most people strongly condemn, on moral grounds, the mistreatment of animals. On the other hand, although our written laws ostensibly reflect this concern, the legal system in practice seems to be completely unresponsive to that moral sentiment and permits any use of animals, however abhorrent'.³⁰

Second, the myth facilitates and legitimates the view that lawful acts of cruelty are compatible with the notion that we are animal 'protectors'. In this sense, the myth operates as a story that tells us that we are compassionate people who take care of nonhuman animals, and that these qualities are reflected in law. The myth legitimates cruelty by shaping the way that we perceive the provisions which permit cruelty. As Wiseman and Smith define it, '[I]legitimation is the process by which social knowledge explains and justifies prevailing social reality'.³¹ The myth of animal protection therefore legitimates cruelty by explaining and justifying it according to the ideals that are upheld by the myth itself. In this sense, the myth of animal protection facilitates the view that cruelty is, *as a matter of fact*, synonymous with animal protection. In other words, cruelty *is not cruelty*, because it is 'animal protection'. This point connects directly with the point that I made in chapter six with respect to mulesing. Australian animal welfare laws reflect important human values surrounding how we treat nonhuman animals. Mulesing is not only deemed 'non-cruelty' when it is explicitly permitted by law, but it can also be perceived as non-cruelty when viewed in light of the myth of animal protection. The myth provides that Australian animal welfare laws reflect our compassion towards nonhuman animals, and our desire to protect them from cruelty. When the very same laws that ostensibly reflect these concerns also permit mulesing, they legitimate that cruelty by calling it non-cruelty. The law makes the act of mulesing compatible with animal protection law.

It is possible to find numerous examples of the myth of animal protection serving to justify and legitimate acts of cruelty. For example, the National Secretary of the Australian Meat

³⁰ Gary Francione, *Animals, Property and the Law* (Temple University Press, 1995)4.

³¹ Jon Wiseman and James Smith, 'Legitimizing Inequality' (2011) 70(4) *The American Journal of Economics and Sociology* 974.

Industry Employee's Union, Graham Smith, has described the slaughter of nonhuman animals in Australia as being humane, and safeguarded by regulations that are 'extremely strict...because people in Australia have a high expectation that the animals are going to be looked after'.³² With respect to the use of painful electric prodders to move cattle into the slaughterhouse, he replied, 'there are regulations to stop you hurting the animals with prodders'.³³ Yet, in reality, the new standards and guidelines merely require a person using a prodder to 'consider the welfare of cattle', and state that it must not be used on particular types of the body (e.g. the genitals and face) or on cattle who are unable to move away.³⁴ These regulations do not prohibit cruelty, nor do they prohibit a person hurting cattle with a prodder. They merely 'regulate' the cruelty – and in doing so, serve to legitimate it.

III. THE LAYERING OF LAWS

Having established how the myth of animal protection facilitates cruelty, I now turn to explain how this myth of generated, sustained and legitimated by Australian animal welfare laws, regulations and Codes of Practice. In this part, I consider the physical compartmentalisation of provisions that permit cruelty from those that prohibit it, to demonstrate how such separation sustains a false message about what animal welfare laws are doing.

At first glance, farm animals appear to be the subject of state-based animal welfare provisions. For example, the South Australian *Animal Welfare Act 1985* provides the simple and clear statement: 'A person who ill-treats an animal is guilty of an offence'.³⁵ An 'animal' is defined by the same Act as 'any member of any species of the sub-phylum *vertebrata*' except for a human being or a fish.³⁶ Vertebrate farm animals (such as cattle, poultry, pigs and sheep) thus are covered by this general provision. Yet, in practice, most of these animals consistently fall 'beyond the protective reach of the law'.³⁷ In chapter four, I explained how

³² Alyssa Braithwaite, 'How Cattle Are Slaughtered in Australia', *SBS News* (Online), 17 June 2016, <<http://www.sbs.com.au/news/article/2016/06/17/how-cattle-are-slaughtered-australia>>.

³³ *Ibid.*

³⁴ *Australian Animal Welfare Standards and Guidelines: Cattle* (2016) S5.4

³⁵ *Animal Welfare Act 1985* (SA) s13(2).

³⁶ *Ibid* ss3(a), (b).

³⁷ Cao, above n 29 213.

Codes of Practice, and the defences and exemptions that they provide for treating a nonhuman animal cruelly, consistently make lawful many acts of cruelty. Cao describes Codes of Practice as enshrining a ‘double standard in the legislation whereby farm animals are afforded substantially less protection than those animals that are not considered crucial to industrialised food production’.³⁸ This legal double standard has also been observed by the Fremantle Magistrates Court, in which Magistrate Musk observed:

A lot more is tolerated towards animals in business and industry than would otherwise be tolerated say towards a domestic pet. For example, it’s difficult to imagine any circumstances where the use of a cattle prod on a pet dog would ever be tolerated by anybody in society but it’s a different standard, with respect to industry and business...[and]...a lot more people find aspects of industry cruel but the politics of law doesn’t.³⁹

The way in which animal welfare is regulated in Australia serves to conceal this double standard, and therefore sustains the myth that Australian animal welfare laws are protecting farm animals. The provisions which permit cruelty are generally contained within regulations or Codes of Practice, which are physically separate from the provisions of Australian animal welfare legislation which purport to prohibit it. Moreover, the provisions of Australian animal welfare legislation that give legal force to Codes of Practice are typically far removed from the other provisions within the same statute which claim to protect nonhuman animals. In South Australia for example, a single provision contained within the *Animal Welfare Act 1985* (SA) provides: ‘[n]othing in this Act renders unlawful anything done in accordance with a prescribed code of practice relating to animals’.⁴⁰ Despite the egregious cruelty that is made lawful by the operation of this single provision, the provision itself sits discretely towards the end of the Act, under the ‘miscellaneous’ division. Thus, the key provisions of the South Australian animal welfare statute that *appear* to provide vast protections for *all* nonhuman animals, including farm animals, are physically isolated from the single powerful provision which permits forms of cruelty that comply with Codes of Practice. This physical compartmentalisation of the laws that prohibit cruelty and those that permit it serves to facilitate the myth that the key protective provisions of Australian animal welfare legislation

³⁸ Cao, above n 29, 216.

³⁹ *Department of Local Government and Regional Development v Gregory Keith Dawson* (Unreported, Fremantle Magistrates Court, Magistrate Musk, 22 July, 2008) at [60], in Cao, above n 37, 207.

⁴⁰ *Animal Welfare Act 1985* (SA) s43.

operate to protect all nonhuman animals from harm. Viewed in isolation, Australian animal welfare laws genuinely appear to prohibit cruelty towards all nonhuman animals.

In addition to the fact that Codes of Practice separately permit cruelty, they also only address those who work in the industries that are routinely cruel towards nonhuman animals and are therefore intended only to be read by that audience. The *Model Code of Practice for the Welfare of Animals: Pigs*, addresses ‘all people responsible for the welfare of pigs’.⁴¹ The *Model Code for the Welfare of Animals: Poultry*, is a guide ‘intended...for people involved in the care and management of poultry’.⁴² The *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments* is for ‘all people...involved in the management of animals of various species at slaughtering establishments (abattoirs, slaughter-houses and knackeries)’.⁴³ The fact that Codes are addressed only to specific persons working in specific industries reflects the reason that Codes were developed in the first instance. As I explained in chapter four,⁴⁴ Codes were originally developed so that industry could be governed by a separate, detailed set of standards. The Codes were intended to alleviate increasing public concern for the welfare of nonhuman animals, and to give those who were ‘specialists’ in their respective field the ability to dictate their own animal welfare standards.

Australian animal welfare statutes, by contrast, are addressed to the public. As I explained in chapter two, many of the obligations in Australian animal welfare legislation apply to *all* persons, regardless of whether they are the owner of a nonhuman animal. The duties that are contained with Australian animal welfare legislation are thus directed to all members of the Australian public, and not only a select few who deal with particular species in specific contexts. For example, the *Animal Care and Protection Act 2001* (Qld) provides ‘a person must not be cruel to an animal’.⁴⁵ In Tasmania, the prohibition on causing an animal ‘unreasonable or unjustifiable pain of suffering’ also applies broadly to ‘person[s]’.⁴⁶

⁴¹ *Model Code for the Welfare of Animals: Pigs* (3rd Edition) 1.1.

⁴² *Model Code of Practice for the Welfare of Animals: Domestic Poultry* (4th Edition) (Introduction).

⁴³ *Model Code of Practice for the Welfare of Animals : Livestock at Slaughtering Establishments* 1.1.

⁴⁴ Chapter 4, Page 107.

⁴⁵ *Animal Care and Protection Act 2001* (Qld) s18.

⁴⁶ *Animal Welfare Act 1993* (Tas) s8.

Animal welfare legislation also generally has a strong public face. State government websites typically direct the public to animal welfare statutes as a way of providing information on animal welfare. In South Australia, for example, the government webpage on animal welfare reads ‘[a]nimals in South Australia must be treated in accordance with the Animal Welfare Act 1985 and the Animal Welfare Regulations 2012’.⁴⁷ The webpage also provides that ‘anyone who ill-treats an animal is guilty of an offence’.⁴⁸ However, the webpage does not contain any reference to the operation of Codes of Practice. Yet, for those species who are kept and killed for human purposes, it is Codes of Practice, and *not* animal welfare legislation that primarily dictates how they may lawfully be treated, and therefore is the primary source of information for legal requirements pertaining to their welfare.

Although I have addressed the complexities of enforcing Codes of Practice,⁴⁹ they largely operate to give meaning to what constitutes ‘cruelty’ in any given case. While nonhuman animals that are governed by a Code are typically also contained within the definition of ‘animal’ in welfare statutes, they are also largely excluded from all the protections those statutes offer. Thus, the notion that ‘animal welfare’ in Australia is predominantly governed by animal welfare statute is misleading. Any suggestion that the protections within these statutes *protect* nonhuman animals is true *only insofar as they are nominally included* within the definition of the ‘animal’, and it is within this statute that Codes of Practice are given legal force.⁵⁰

The general provisions of animal welfare statutes will therefore generally only apply to an animal governed by a Code if they have been ill-treated *in excess* of what Codes already allow. Thus, the prohibition on ill-treating a nonhuman animal in South Australia does not prohibit the act of killing an intensively farmed rabbit by cervical dislocation (i.e. breaking the neck), because such a method is permitted by the applicable Code.⁵¹ The general statutory provision that prohibits ill-treatment may however apply where a person kills a rabbit using an alternative method that causes it to suffer over an extended period. It is possible to see

⁴⁷ Water and Natural Resources) Government of South Australia (Department of Environment, *Animal Welfare Legislation* < http://www.environment.sa.gov.au/managing-natural-resources/plants-and-animals/Animal_welfare/Animal_welfare_legislation >

⁴⁸ Ibid.

⁴⁹ Chapter 4, Page 114.

⁵⁰ *Animal Welfare Act 1985* (SA) s43.

⁵¹ Ibid s43; *Model Code of Practice for the Welfare of Animals: Intensive Husbandry of Rabbits* (1991) s9.

therefore how the applicable Code of Practice effectively operates to define ‘ill-treatment’ in this context.

Given that Codes of Practice play such a defining role in how nonhuman animals may lawfully be treated, it is troubling that it is generally only Australian animal welfare statutes that are presented as the ‘face’ of animal welfare in Australia. The South Australian Government website provides information on animal welfare with respect to the *Animal Welfare Act 1985* (SA). Yet, intensively farmed rabbits, as I have mentioned, are predominantly governed by different standards, namely the *Model Code of Practice for the Welfare of Animals: Intensive Husbandry of Rabbits*. Given that this is a prescribed Code of Practice in South Australia,⁵² the treatment of intensively farmed rabbits is exempted from the general anti-cruelty provisions by section 43 of the *Animal Welfare Act 1985* (SA), which I discussed above.⁵³ Under this *Model Code*, intensively farmed rabbits of 12 weeks age or older may be confined indoors in cages allowing them a floor space of 1800cm² for the duration of their lives.⁵⁴ This gives them a living space only slightly larger than the size of two A4 sheets of paper (each of surface area approximately 861cm²). The RSPCA maintains that such confinement is contrary to rabbit welfare, given that it ‘prevents them from moving freely and does not satisfy their behavioural, social and physiological needs’.⁵⁵ Thus, the notion that their welfare is protected by the general provisions of the *Animal Welfare Act 1985* (SA) is misleading and generates a myth of animal protection.

What this example serves to illustrate is that the physical compartmentalisation of the key provisions which permit cruelty in Codes of Practice from those which prohibit it in animal welfare statute, serves to generate a myth that Australian animal welfare legislation is operating to genuinely protect nonhuman animals from harm. Viewed in isolation, it appears that Australian animal welfare statutes provide rigid protections for *all* nonhuman animals – including intensively farmed rabbits. Yet, as numerous examples throughout this thesis have demonstrated, Codes of Practice operate in tandem with animal welfare statute to erode the meaningful content of the protections they offer. The result, I suggest, is that the physical

⁵² *Animal Welfare Regulations 2012* (SA) Schedule 2.

⁵³ Chapter 7, Page 50.

⁵⁴ *Model Code of Practice for the Welfare of Animals: Intensive Husbandry of Rabbits* (1991) s2.

⁵⁵ RSPCA Australia, *What Is the Rspca's View on Farming Rabbits for Meat?* < http://kb.rspca.org.au/what-is-the-rspcas-view-on-farming-rabbits-for-meat_357.html >

separation of provisions which enable and prohibit cruelty generates a myth of animal protection.

IV. UNFAIR LABELS AND WEASEL WORDS

A second way in which Australian animal welfare legislation generates a myth of animal protection is through the use of language which fails to communicate precisely what the law allows. The law *should* communicate clearly and honestly with the citizens that it governs. Lon Fuller stated that '[t]he desideratum of clarity represents one of the most essential ingredients of legality', and that that 'proposition is scarcely subject to challenge'.⁵⁶ At its most simple, the requirement of clarity is what makes it possible for citizens to obey the law. As Fuller put it, legislation that fails to be sufficiently clear makes 'legality unattainable by anyone'.⁵⁷ John Gardner made a similar point, stating:

...the law must be such that those subject to it can reliably be guided by it, either by avoiding violating it or to build the legal consequences of having violated it into their thinking about what future actions may be open to them. People must be able to find out what the law is and to factor it into their practical deliberations. The law must avoid taking people by surprise, ambushing them, putting them into conflict with its requirements in such a way as to defeat their expectations and to frustrate their plans.⁵⁸

In the context of the criminal law, Andrew Ashworth stated that the law must abide by the principle of 'maximum certainty',⁵⁹ so that any member of the public can know whether their behaviour is criminal without the aid of a lawyer. His key idea is that the criminal law must provide autonomous and rational citizens with the ability to know what it requires of them, so that they may obey the law, or be aware of the consequences of dissenting.⁶⁰

⁵⁶ Lon Fuller, *The Morality of Law* (Yale University Press, 1964) 63.

⁵⁷ *Ibid* 63.

⁵⁸ J Gardner, in Andrew Ashworth, *Principles of Criminal Law* (6th ed, Oxford University Press, 2009) 57.

⁵⁹ *Ibid* 63.

⁶⁰ *Ibid* 65.

A. One Measure of the Law's Clarity: The Principle of Fair Labelling

One way of assessing the clarity of Australian animal welfare legislation is to look at the way in which the offences it contains are labelled. Ashworth coined the term 'fair labelling' in 1981, in reference to the principle that the criminal law should communicate fairly and clearly with the public.⁶¹ Ashworth and Jeremy Horder have argued that adhering to the principle of 'fair labelling' is essential to ensuring maximum certainty.⁶² It demands that the distinctions that are contained within the criminal law, and represented by labels (for example 'rape', 'murder', 'manslaughter') are both fair and accurate in the way in which they distinguish between moral wrongs and communicate those wrongs to the public. A system of criminal law that contained only a small number of very broad offences, such as 'causing harm to another', would thus be inadequate to the extent that the criminal label of 'causing harm to another' would fail to capture morally relevant distinctions between various types of conduct that amount to causing harm. It would simultaneously be used to describe contexts in which the 'victim suffered death or a mere scratch'.⁶³

There are several reasons why such broad labels would be inadequate. One simple reason is that 'truth is intrinsically valuable',⁶⁴ and that the labels used in the law should communicate the moral character of an offence with honesty. James Chalmers and Fiona Leverick also suggest that labels may limit the amount of discretion available to judges at the time of sentencing, by prescribing maximum sentences attached to specific offences that are clearly delineated from one another.⁶⁵ A label should also be fair to an offender.⁶⁶ Given that the criminal law has a 'condemnatory function',⁶⁷ it seems important that the law distinguishes between people who cause a scratch and people who cause death. Moreover, given that a person's criminal record has long lasting effects on things such as their 'employability or

⁶¹ He then referred to it as 'representative labelling': Andrew Ashworth, 'The Elasticity of Mens Rea' in C. F. H Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworth, 1981) 45, 53.

⁶² Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th ed, Oxford University Press, 2013) 62.

⁶³ Ashworth, above n 61, 53.

⁶⁴ James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *The Modern Law Review* 217, 227.

⁶⁵ *Ibid*, 224-225.

⁶⁶ Victor Tadros, 'Fair Labelling and Social Solidarity' in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice* (Oxford University Press, 2012) 67, 69; Chalmers and Leverick, above n 64, 226.

⁶⁷ Tadros, above n 66, 72.

earning power',⁶⁸ it is important that the criminal law condemns offenders accurately, using labels that 'fairly represent the nature of the offender's criminality'.⁶⁹

The reason why fair labelling matters that is of most relevance to my discussion in this chapter, is that the labelling of criminal offences communicates to the public. It does so by 'reflect[ing] the moral judgements that the public makes about...conduct'.⁷⁰ As such, Ashworth contends, 'where people generally regard two types of conduct as different, the law should try and reflect that difference'.⁷¹ Several commentators agree. Barry Mitchell, for example, has described the labels attached to criminal offences as having a *declaratory* function, since they 'communicate effectively to ordinary people the rules of acceptable and non-acceptable behaviour and the ways in which the criminal justice system deals with unacceptable behaviour'.⁷² Victor Tadros also contends there is 'something intuitive about the criminal law being unfair if its distinctions are too far detached from those used in ordinary morality'.⁷³ Australian animal welfare legislation therefore speaks not only to an offender when it labels an offence, but also to Australian society. The label applied to any animal cruelty offence casts society's judgement onto an offender, and that judgement should be communicated 'with precision, by accurately naming the crime of which they are convicted'.⁷⁴

Australian animal welfare legislation groups morally different forms of conduct together under the same general label. For example, under South Australian legislation, a person who cannot afford to seek veterinary treatment for their animal,⁷⁵ and a person who beats a dog their dog with a stick⁷⁶ could both be charged for 'ill-treating an animal' and thus would both share the same label of 'animal ill-treater'. The legislation mandates this grouping, with 'ill-treatment' being defined in the legislation as covering a very wide range of offences against nonhuman animals, many of which seem morally different in character to each other.

⁶⁸ Chalmers and Leverick, above n 64, 223.

⁶⁹ Ashworth, above n 61, 56; Chalmers and Leverick, above n 64, 227.

⁷⁰ The concept of 'public morality' is not without limitation, given that it is not possible to identify a 'uniform idea of the values that ought to lie behind the criminal law': Tadros, above n 66, 71, 76.

⁷¹ Ashworth, above n 58, 12.

⁷² Barry Mitchell, 'Multiple Wrongoing and Offence Structure: A Plea for Consistency and Fair Labelling' (2001) 64(3) *The Modern Law Review* 393, 398.

⁷³ Tadros, above n 66, 71.

⁷⁴ A. P Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th ed, Hart, 2010) 31-32.

⁷⁵ *Animal Welfare Act 1985* (SA) ss13(2), (3)(b)(iv).

⁷⁶ *Ibid* ss13(2), (3)(a).

Certainly, all forms of ‘ill-treatment’ listed in the South Australian Act result in harm towards a nonhuman animal, and should rightfully be prohibited by legislation that seeks to prohibit cruelty towards nonhuman animals. What is not clear, however, is that the offences contained within the South Australian Act adequately distinguish between different types of offending. The principle of fair labelling requires that the criminal law makes such distinctions, not only to reflect society’s sentiments surrounding morally distinct forms of wrongdoing against nonhuman animals, but also to communicate to society with precision the nature of an offender’s wrongdoing.

What is more troublesome however, are not the distinctions that Australian animal welfare law fails to make between various types of offending, but the distinctions that it *does* make. Throughout this thesis, I have argued that animal welfare legislation permits cruelty towards nonhuman animals, at the same time as it purports to prohibit it. Assessed with reference to the principle of fair labelling, this presents a significant problem. Australian animal welfare legislation distinguishes between various forms of wrongdoing that, ultimately, *all* entail cruelty towards nonhuman animals. A pertinent example can be found in New South Wales. There, the *Prevention of Cruelty to Animals Act 1979* (NSW) states that it is an act of cruelty to unreasonably maim (cause a disabling injury) or infuriate a nonhuman animal.⁷⁷ At the same time, the same Act expressly states that it is not cruelty, to pinion a bird (if it is done in accordance with regulations).⁷⁸

Pinioning is the act of ‘permanently mutilating’ a bird to prevent flight.⁷⁹ Section 4(2)(a) explicitly defines cruelty as *including* an act of pinioning. Yet, in the very next provision, it *excludes* the pinioning of birds in accordance with regulations which dictate how and when the procedure can be performed. This distinction is troubling given that pinioning *in all instances* is a form of disablement, typically achieved by a surgical procedure in which the part of a bird’s wing from which the flight feathers grow is partially amputated.⁸⁰

⁷⁷ *Prevention of Cruelty to Animals Act 1979* (NSW) s4(2)(a)

⁷⁸ *Ibid* s4(2A).

⁷⁹ Penny Hawkins, 'The Welfare Implications of Housing Captive Wild and Domesticated Birds' in Ian Duncan and Penny Hawkins (eds), *The Welfare of Domestic Fowl and Other Captive Birds* (Springer, 2010) 53, 84.

⁸⁰ *Ibid* 84.

Pinioning is generally performed so that birds may be exhibited by humans in open spaces. The New South Wales Government *Guidelines for the Pinioning of Birds* notes the ‘benefits’ of pinioning birds, from the perspective of an animal exhibitor, are

that pinioned birds can be displayed in a more cost-effective way in larger, more open exhibits giving visitors the impression that the birds are “free”, visitors can get closer to the birds, it helps to ensure that the birds do not escape; and the pinioned birds may serve to attract additional wild birds to utilise in an open exhibit.⁸¹

It has also been said that pinioning serves the interests of exhibited birds, because they may benefit from larger, more open enclosures, and they are prevented from flying into enclosure walls which may cause injury.⁸²

The guidelines provide that the procedure of pinioning, using the wingtip amputation methods, may be performed *without anaesthetic* on birds less than three days of age.⁸³ Such amputation causes acute pain, and results in a permanent physical disability. Moreover, Penny Hawkins contends pinioned birds may also suffer from chronic ‘phantom limb’ pain, which has a ‘serious impact on the bird’s quality of life’.⁸⁴ To be clear, the New South Wales *Prevention of Cruelty Act 1979* (NSW) expressly states that causing a bird to be permanently disabled, and permanently infuriated by an inability to fly, ‘is not an act of cruelty’.⁸⁵

It is unclear how pinioning a bird in accordance with the regulations, which permits the procedure being carried out without anaesthetic, is less cruel than another instance of pinioning that is considered ‘cruelty’ for the purposes of the *Prevention of Cruelty to Animals Act 1979* (NSW). From the perspective of fair labelling, the distinction is morally arbitrary and serves to confuse the meaning of ‘cruelty’ as it used in the *Prevention of Cruelty to Animals Act 1979* (NSW). In chapter four, I described provisions that have a similarly troubling effect. Recall that under section 9 of the *Prevention of Cruelty to Animals Act 1979* (NSW), it is an offence to fail to exercise an animal that has been confined to a cage, unless

⁸¹ *New South Wales Guidelines for the Pinioning of Birds* s3.1.

⁸² *Ibid* s3.2.

⁸³ *Ibid* 4.4.

⁸⁴ Hawkins, above n 79, 84.

⁸⁵ For more on why pinioning is cruel, see Elizabeth Tyson, 'For an End to Pinioning: The Case against the Legal Mutilation of Birds in Captivity' (2014) 4(1) *Journal of Animal Ethics* 1.

the species concerned is a ‘stock animal’ or a ‘species which is usually kept in captivity by means of a cage’.⁸⁶

Distinctions of this kind serve to generate a myth of animal protection. The prohibition on pinioning, for example, is merely a token prohibition, because the act of pinioning is still lawful in the primary context in which it would be performed. The requirement that a person exercise a caged animal is similarly tokenistic, given that the duty does not apply if the confined animal is a stock animal or an animal that is ‘normally’ confined to a cage. The principle of fair labelling requires the law to communicate fairly and accurately with the public, yet it most clearly fails in this regard. Many of the prohibitions on cruelty that animal welfare statutes contain are tokenistic and do not accord with the sentiment that animal welfare legislation should reflect human compassion for nonhuman animals.

B. Another Measure of Clarity: Weasel Words

In addition to the fact that Australian animal welfare legislation fails to communicate clearly and honestly with the Australian public, Codes of Practice also fail in this regard. Codes of practice make use of ‘weasel words’ that deflect attention away from facts. Weasel words, by definition are ‘equivocating words or phrases’ that ‘rob a statement of its force’.⁸⁷ George Orwell talked about such language as being ‘designed to make lies sound truthful and murder respectable and to give an appearance of solidity to pure wind’.⁸⁸ Don Watson notes further that weasel words can serve as ‘shields against attack, as camouflage to escape detection, as smokescreens or vapour to blind or repel anyone sniffing out the truth’.⁸⁹

In Australian Codes of Practice, weasel words sustain the myth of animal protection by conferring an image of benignity upon blatant acts of cruelty. Such an image not only serves to conceal the real cruelty that is inflicted on nonhuman animals, but can also operate to legitimate it. I now provide some examples.

⁸⁶ *Prevention of Cruelty to Animals Act 1979* (NSW) s9(1), (1A).

⁸⁷ Susan Butler (ed) *Macquarie Dictionary* (online ed, at 21 November 2017) ‘Weasel Word’.

⁸⁸ George Orwell, ‘Politics and the English Language’ in Sonia Orwell and Ian Angus (eds), *The Collected Essays, Journalism and Letters of George Orwell* (1st ed, Harcourt, Brace, Javanovich, 1968) 4, 127, 139.

⁸⁹ Don Watson, *Watson’s Dictionary of Weasel Words, Contemporary Cliches, Cant and Management Jargon* (Radom House Australia, 2005) 5.

1. Weasel Words and Animal Slaughter

Weasel words are frequently used in Codes of Practice to describe the slaughter of nonhuman animals and serve two functions. They conceal cruelty by describing slaughter with ‘soothing and misleading words’,⁹⁰ and they legitimate cruelty, by describing the slaughter of nonhuman animals in terms that makes that death sound necessary or unavoidable. The *National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes*, for example, provides guidelines not on killing, but on the ‘harvesting’ of kangaroos and wallabies in Australia.⁹¹ Kangaroos are hunted ‘in the largest commercial slaughter of land-based wildlife on the planet’.⁹² The slaughter typically involves egregious cruelty, as kangaroos die over extended periods from non-fatal gunshots. Records from 2002 provide that an estimated 120,000 kangaroos were mis-shot,⁹³ with the result that they suffered for an extended period. Joeys are also frequently orphaned during the slaughter. Although Codes of Practice require orphaned joeys to be ‘euthanased’,⁹⁴ those joeys that have achieved some level of dependence from their mothers often escape hunters only to die later from ‘starvation, exposure or predation’.⁹⁵ An estimated 800,000 joeys are killed as ‘collateral damage’ of the Australian commercial kangaroo industry each year.⁹⁶ To describe such cruelty as a ‘harvest’ fails to accurately convey the reality of what is happening to these animals. The word ‘harvest’ seemingly equates the cruel slaughter of kangaroos and wallabies with the *morally neutral* process of harvesting crops of vegetables or grain.

Codes of Practice also commonly attach the word ‘humane’ to provisions that permit cruelty, to give the appearance of compassion towards nonhuman animals. The *Model Code for the*

⁹⁰ Peter Sankoff, ‘The Welfare Paradigm: Making the World a Better Place for Animals?’ in Sankoff and White (eds), *Animal Law in Australia* (The Federation Press, 2009) 7, 33.

⁹¹ *National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes* s3.

⁹² Voiceless: The Animal Protection Institute, *Kangaroos* < https://www.voiceless.org.au/the-issues/kangaroos#footnote20_5p3u2a0 > .

⁹³ RSPCA Australia, *A Survey of the Extent of Compliance with the Requirements of the Code of Practice for the Humane Shooting of Kangaroos* (Australian Government Department of Environment and Energy, 2002) Part 4.

⁹⁴ *National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Commercial Purposes* s5.

⁹⁵ Voiceless: The Animal Protection Institute, *Kangaroos* < https://www.voiceless.org.au/the-issues/kangaroos#footnote20_5p3u2a0 > .

⁹⁶ *Ibid.*

Welfare of Animals: Poultry refers to ‘humane destruction’.⁹⁷ Section 3.3.45 of the *Australian Code for the Care and Use of Animals for Scientific Purposes* provides guidance on ‘humane killing’.⁹⁸ The *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments* refers to ‘humane destruction’,⁹⁹ ‘humane kill[ing]’,¹⁰⁰ and ‘humane slaughter’.¹⁰¹ The term ‘euthanasia’ is also commonly employed by Codes of Practice. The *Model Code of Practice for the Welfare of Animals: Pigs* outlines recommend procedures for ‘emergency euthanasia’.¹⁰² The Code defines euthanasia as ‘causing a sudden unconsciousness with death occurring when unconscious and without distress, pain, fear or anxiety’.¹⁰³ Yet, an acceptable and recommended method of ‘euthanasia’ for a piglet weighing less than 15kg in weight is blunt force to the head. In this context, the term ‘euthanasia’ provides an image of kindness and mercy that is at odds with what the law allows.¹⁰⁴

The *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments* provides for the ‘efficient, considerate treatment of animals so that stress is minimised’ in preparation for, and during ‘humane destruction’.¹⁰⁵ The Code provides ‘the best handling and slaughter methods to minimise stress and injury in each species’.¹⁰⁶ For pigs, it provides several options for ‘stunning’ prior to slaughter. One ‘acceptable’ option that is used widely in Australia,¹⁰⁷ is as follows:

Stunning pigs by exposure to mixtures of air and carbon dioxide are also acceptable. The mixture recommended in Europe is currently 70% carbon dioxide by volume, and exposure is

⁹⁷ *Model Code of Practice for the Welfare of Animals: Domestic Poultry (4th Edition)* 14.1.

⁹⁸ *Australian Code for the Care and Use of Animals for Scientific Purposes* (2013) s3.3.45.

⁹⁹ *Model Code of Practice for the Welfare of Animals : Livestock at Slaughtering Establishments* 1.1.

¹⁰⁰ *Ibid* 2.3.1.

¹⁰¹ *Ibid* 2.3.2.

¹⁰² *Model Code for the Welfare of Animals: Pigs (3rd Edition)* 7.1-7.4.

¹⁰³ *Ibid* Appendix 5.

¹⁰⁴ C. C Croney and R. D Reynnells, ‘The Ethics of Semantics: Do We Clarify or Obfuscate Reality to Influence Perceptions of Farm Animal Production?’ (2008) 87 *Poultry Science* 387, 389.

¹⁰⁵ *Model Code of Practice for the Welfare of Animals : Livestock at Slaughtering Establishments* 1.1.

¹⁰⁶ *Ibid* 1.5.

¹⁰⁷ To view Australian footage collected by animal activists which document this method of stunning, see:

Animals Australia, *If This Is the 'Best', What Is the 'Worst'?* (2014)

<<http://www.animalsaustralia.org/features/not-so-humane-slaughter/>> .

recommended for 60 seconds. These recommendations may need to be modified for Australian conditions as experience with local conditions increases.¹⁰⁸

The use of carbon dioxide to stun pigs generally requires the pigs to be moved into a crate on a carousel, which is then lowered into a pit containing the carbon dioxide gas. As one crate of pigs sinks into the pit, another empty crate rises to the surface so that more pigs can be loaded in.¹⁰⁹ Industry promotes this method of stunning as ‘humane’, because it takes account of the fact that pigs are intelligent, sensitive animals who are distressed by being separated from each other, handled excessively or being tightly restrained.¹¹⁰ It is also worth noting that from an industry perspective, this method has been associated with ‘positive effects on meat quality’ when compared to electrical stunning methods.¹¹¹

Although the *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments* describes this method of stunning as ‘humane’,¹¹² or ‘considerate’,¹¹³ scientific evidence demonstrates that it is not. The exposure of pigs to a 70% mixture of carbon dioxide in air has been said to ‘produce an excitation phase with movements which resemble escape behaviour...[which] has been considered unacceptable’.¹¹⁴ Although limited research suggests that some breeds of pig become unconscious before reaching this phase of behaviour,¹¹⁵ evidence also suggests that there is still a ‘window’ between the time at which unconsciousness is reached and the time at which suffering begins.¹¹⁶ The likelihood of a significant window of suffering is compounded by the fact that research by Temple Grandin indicates that the way in which different pigs react to the carbon dioxide gas is highly variable, and that ‘there is likely a genetic basis’ which accounts for such variation.¹¹⁷ In

¹⁰⁸ *Model Code of Practice for the Welfare of Animals : Livestock at Slaughtering Establishments* 2.6.2.10.

¹⁰⁹ To view activist footage of this method in use, see: Animals Australia, *If This Is the 'Best', What Is the 'Worst'?* (2014) < <http://www.animalsaustralia.org/features/not-so-humane-slaughter/>>.

¹¹⁰ A Velarde et al, 'Aversion to Carbon Dioxide Stunning in Pigs: Effect of Carbon Dioxide Concentration and Halothene Genotype' (2007) 16(4) *Animal Welfare* 513, 513.

¹¹¹ *Ibid* 513.

¹¹² See for example this statement by Australia’s largest pork producer who use gassing as a stunning method: Rivalea Australia, *Animal Welfare - Humane Processing* <<https://www.rivalea.com.au/AnimalWelfare.aspx#6>>.

¹¹³ *Model Code of Practice for the Welfare of Animals : Livestock at Slaughtering Establishments* 1.1.

¹¹⁴ P Hemsworth, E Jongman and J Barnett, 'The Aversiveness of Carbon Dioxide Stunning in Pigs and a Comparison of the CO₂ Stunner Crate vs. The V-Restrainer' (2000) 67 *Applied Animal Behaviour Science* 67, 68.

¹¹⁵ *Ibid* 68.

¹¹⁶ *Ibid* 68.

¹¹⁷ Temple Grandin, 'Making Slaughterhouses More Humane for Cattle, Pigs, and Sheep' (2013) 11(1) *Annual Review Animal Biosciences* 491, 502.

addition, there are no legal requirements in Australia surrounding the concentration of carbon dioxide that must be used. An inappropriate concentration of carbon dioxide would necessarily increase the suffering of the pigs that are exposed to it. Scientific studies have also indicated that Argon gas may be a more welfare-friendly alternative, used either alone in high concentration or at a lower concentration in conjunction with carbon dioxide.¹¹⁸

The European Farm Animal Welfare Committee, an independent advisory body established by the Government of Great Britain, has deemed carbon dioxide as ‘not acceptable’ from an animal welfare perspective.¹¹⁹ Pigs exposed to carbon dioxide experience irritation of the nasal mucosal membranes and lungs, and carbon dioxide ‘induces severe respiratory distress causing hyperventilation and a sense of breathlessness during the induction phase prior to loss of consciousness.’¹²⁰ A 2007 study also illustrated that temporarily exposing a pig to carbon dioxide in a gas chamber was enough to generate within them a refusal to re-enter that space.¹²¹ This finding remained even with pigs that were familiarised with the process of entering and exiting the crate, and being lowered into a gas pit filled only with atmospheric air.¹²² This refusal demonstrates that the exposure caused them to suffer. In a similar aversion study, pigs were fasted for 24 hours to determine whether a food reward would motivate them to enter a chamber with an atmosphere of 90% carbon dioxide. None of the pigs entered.¹²³

The examples that I have just provided indicate that the use of weasel words can deflect from the fact that Australian Codes of Practice permit cruelty towards nonhuman animals. Pigs that are stunned using exposure to carbon dioxide are treated cruelly. At the same time, the very Code that permits such methods describe them as ‘considerate’ and ‘humane’.¹²⁴ The use of such weasel words does not make the conduct any less cruel in practice. It merely serves to

¹¹⁸ A Raj, 'Behaviour of Pigs Exposed to Mixtures of Gases and the Time Required to Stun and Kill Them: Welfare Implications' (1999) 144(7) *Veterinary Record* 165.

¹¹⁹ Farm Animal Welfare Council, *Report on the Welfare of Farmed Animals at Slaughter or Killing* (2003) Farm Animal Welfare Council < <https://www.gov.uk/government/publications/fawc-report-on-the-welfare-of-farmed-animals-at-slaughter-or-killing> > https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325241/FAWC_report_on_the_welfare_of_farmed_animals_at_slaughter_or_killing_part_one_red_meat_animals.pdf.

¹²⁰ Velarde et al, above n 110, 514. See also Raj, above n 11; Temple Grandin, *The Welfare of Pigs During Transport and Slaughter* < <http://www.grandin.com/references/pig.welfare.during.transport.slaughter.html> >

¹²¹ Velarde et al, above n 110.

¹²² A Velarde et al, 'Aversion to Carbon Dioxide Stunning in Pigs: Effect of Carbon Dioxide Concentration and Halothene Genotype' (2007) 16(4) *Animal Welfare* 513 519.

¹²³ A Raj and N Gregory, 'Welfare Implications of the Gas Stunning of Pigs' (1995) 4(4) *Animal Welfare* 273.

¹²⁴ *Model Code of Practice for the Welfare of Animals : Livestock at Slaughtering Establishments* 2.3.1

deflect attention away from the facts. In the High Court case of *Australian Broadcasting Corporation v Lenah Game Meats*, which I discuss in the following chapter, Justice Kirby commented on footage which showed the lawful slaughter of possums:

The gruesome sights and sounds of brushtail possums being slaughtered would be upsetting to many who might witness and hear the videotape. Doubtless the same would be true of the slaughter of other animals. Such conduct does not become more agreeable by the use of the word 'processing' [to describe their slaughter].¹²⁵

Codes of Practice also describe the cruel deaths of nonhuman animals in terms that make that death sound unavoidable. The use of such language serves to deflect from the fact that the killing is inflicted by humans to serve human interests. The *Model Code of Practice for the Welfare of Animals: Poultry*, describes male hatchlings, which are of no use to the egg industry, as 'surplus hatchlings awaiting disposal'.¹²⁶ The use of weasel words to describe the killing of these hatchlings makes their deaths appear as if they are inevitable or unavoidable. This language deflects from the fact that these hatchlings are killed at the time of hatching purely because they are male, and are thus of no use to the egg industry. Hatchlings 'awaiting disposal' are typically killed by gassing or 'quick maceration'.¹²⁷ Maceration involves the live grinding of male chicks in an industrial grinder.¹²⁸ Footage of maceration collected by activists in Israel has been publicized with an accompanying disclaimer to the public: 'WARNING: disturbing content'.¹²⁹ The *Model Code for the Welfare of Animals: Domestic Poultry*, which permits an identical practice, describes it as 'humane'.¹³⁰

¹²⁵ *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* [2001] HCA 63; 208 CLR 199 AT [143] (per Kirby J).

¹²⁶ *Model Code of Practice for the Welfare of Animals: Domestic Poultry* (4th Edition) 14.1.

¹²⁷ *Ibid* 14.1.

¹²⁸ Esther Han, 'Egg Industry Wants to Stop Grinding and Gassing Millions of Male Chicks to Death', *The Sydney Morning Herald* (Online), 11 June 2016, <<http://www.smh.com.au/business/consumer-affairs/egg-industry-wants-to-stop-grinding-and-gassing-millions-of-male-chicks-to-death-20160611-gpgy5s.html>>.

¹²⁹ Frank Chung, 'Animal Rights Group Releases Undercover Video Showing Baby Chick 'Maceration'', *News* (Online), 30 October 2015, <<http://www.news.com.au/finance/business/manufacturing/animal-rights-group-releases-undercover-video-showing-baby-chick-maceration/news-story/76a43dfc99fb6ad86310d2edb7ef1f01>>.

¹³⁰ *Model Code of Practice for the Welfare of Animals: Domestic Poultry* (4th Edition) 14.1

2. Weasel Words with Respect to Living Conditions

The term ‘housing’ also appears frequently in Codes of Practice.¹³¹ According to Arran Stibbe, discourse surrounding the housing of nonhuman animal is often constructed to make humans appear as though they are an animal’s protector, when in fact they are often the perpetrators of cruelty towards them. Stibbe contends that it is often presented as if ‘[m]odern animal housing is well ventilated, warm, well-lit, clean and scientifically designed...[and] protects animals from predators, disease and bad weather’.¹³² The Australian *Model Code for the Welfare of Animals: Pigs* contains an example of this type of language, providing that ‘[a]ccommodation for pigs must be designed, constructed, and managed in such a way that it protects pigs from adverse weather, injuries, or other harm’.¹³³ Yet, as I demonstrated in chapter four, the actual provisions of Codes of Practice enable pigs to be confined to cages so small they cannot even turn around. This reality is at odds with the notion that their accommodation legally must protect them from ‘harm’.

The examples of ‘weasel words’ I have provided in this chapter demonstrate that Australian animal welfare legislation and Codes of Practice make use of language that fails to communicate honestly and clearly with the Australian public. Using the concept of ‘fair labelling’, I have suggested that the label of ‘cruelty’, as it is used in animal welfare statute, fails to communicate its meaning clearly and accurately. Animal welfare statutes make various distinctions between forms of conduct that should not be viewed in a different moral light. Pinioning is cruel regardless of whether it is performed in accordance with regulations. Confining a nonhuman animal to a cage is also cruel, regardless of what species that nonhuman animal is, or whether it is normally kept in such a confined state. Provisions which purport to prohibit ‘cruelty’ towards nonhuman animals which make such distinctions are purely tokenistic, because they fail to achieve their stated purpose. They facilitate cruelty towards nonhuman animals not only by directly permitting cruel acts towards them, but also by generating a myth of animal protection. I have argued that the same is true with Codes of Practice. They permit cruelty towards nonhuman animals, but they do so cloaked in terms that

¹³¹ Ibid s2.

¹³² A Harnack, *Animal Rights: Opposing Viewpoints* (Greenhouse Press, 1996) 130, in Arran Stibbe, ‘Language, Power and the Social Construction of Animals’ (2001) 9(2) *Society and Animals* 145, 153.

¹³³ *Model Code for the Welfare of Animals: Pigs (3rd Edition)* s4.1.1.

misleadingly describe that cruelty as ‘humane’. Such language does not change the fact that cruelty is cruelty. It merely serves to conceal it.

V. INADEQUATE ENFORCEMENT MECHANISMS

So far I have argued that Australian animal welfare legislation and Codes of Practice generate a ‘myth’ of animal protection in two ways. First, through prohibiting and permitting cruelty in separate legislative instruments, with differing addressees, making it falsely appear as if Australian animal welfare laws genuinely provide protections to all non-human animals. Second, through weasel words contained with Codes of Practice which generate a myth of animal protection by failing to communicate fairly and honestly with the Australian public about what the law allows. In each case, the law purports to do something that it does not do.

In this part, I address a third way in which Australian animal welfare legislation generates a myth of animal protection. Here I am concerned with the enforcement powers that are contained within Australian animal welfare legislation. Although I have argued consistently throughout this thesis that Australian animal welfare provisions are wholly inadequate and permit cruelty, here I suggest that even *unlawful* cruelty towards nonhuman animals is inadequately investigated and prosecuted. Australian animal welfare legislation therefore not only offers inadequate protections to nonhuman animals, it also offers inadequate mechanisms to enforce those inadequate protections.

Enforcement is relevant to the ‘myth’ of animal protection because the enforcement mechanisms contained with Australian animal welfare legislation tell us something about what *type* of laws they are. My suggestion is that the enforcement of Australian animal welfare laws is inadequate, and moreover, that the laws themselves *necessitate* inadequate enforcement. They therefore sustain the myth of animal protection by purporting to prohibit conduct, but simultaneously failing to provide the mechanisms necessary to enforce its key provisions. The result is that many of the laws that purport to prohibit cruelty towards nonhuman animals are little more than words written on paper. Absent adequate enforcement, the notion that Australian animal welfare laws provide animals with protection is merely a myth.

In this chapter, I focus only on the role of the RSPCA as an enforcement agency. The RSPCA have an enforcement role in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria, and Western Australia.¹³⁴ The Northern Territory is the only jurisdiction that does not confer responsibility for animal welfare law enforcement on the RSPCA, with the responsibility laying chiefly with the Animal Welfare Branch of the Northern Territory Department of Primary Industry and Fisheries.¹³⁵ Although other enforcement bodies, such as the state police service and the Department of Agriculture in each Australian jurisdiction also share an enforcement role with the RSPCA,¹³⁶ Deborah Cao suggests that the responsibility for enforcement in all jurisdictions except the Northern Territory rests predominantly with the RSPCA.¹³⁷ There is however, a distinct lack of empirical research which explains precisely how various agencies share enforcement responsibilities in each jurisdiction.¹³⁸ It also appears that each jurisdiction may share it somewhat differently. For example, the website of the Victorian Government suggests that the Department of Economic Development, Jobs, Transport and Resources ‘primarily investigate matters concerning commercial livestock’, whilst the RSPCA ‘primarily investigates complaints about companion animals and non-commercial livestock’.¹³⁹ By contrast, in South Australia, the Department for Environment and Water only directs members of the public to the RSPCA to report an incident of alleged cruelty to a nonhuman animal.¹⁴⁰

Thus, although the RSPCA is only one of several animal law enforcement bodies, I select them as a ‘case study’ in this chapter for four reasons. First, the RSPCA is both unique and interesting because they are a private charitable organisation. At the time of writing, no other branch of criminal law is enforced by such a body. Second, unlike Departments of Agriculture, the RSPCA articulate a clear and singular ‘animal welfare’ mandate. Their

¹³⁴ Cao, above n 29, 221-224.

¹³⁵ Ibid 222; *Animal Welfare Act* (NT) s57.

¹³⁶ Arrangements can be either informal or formal, see: 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* 348, 356.

¹³⁷ Cao, above n 29, 221.

¹³⁸ White, above n 136, 357.

¹³⁹ Government of Victoria, Department of Agriculture, *Reporting Animal Cruelty* <<http://agriculture.vic.gov.au/agriculture/animal-health-and-welfare/animal-welfare/reporting-animal-cruelty>>.

¹⁴⁰ Government of South Australia (Department for Environment and Water) *Report an Offence* <<https://www.environment.sa.gov.au/managing-natural-resources/compliance/report-an-offence>>.

mission is to ‘prevent cruelty to animals by actively promoting their care and protection’.¹⁴¹ By contrast, the animal welfare portfolio belonging to Departments of Agriculture and similar agencies sits alongside other portfolios such as hunting, fishing, and livestock which potentially conflict with one and other. Departments of Agriculture are therefore typically responsible for animal welfare at the same time as they are also responsible for supporting and sustaining the profitability of industries in which animals are routinely treated with cruelty.

Third, published statistics indicate that the RSPCA receive a vast number of cruelty complaints each year. In Victoria, for example, in 2016-2017, the RSPCA (Vic) investigated 10,180 cruelty complaints, laid 382 charges and completed 83 successful prosecutions.¹⁴² By contrast, the Victorian Department of Economic Development, Jobs, Transport and Resources reports that they enquired into 4,912 complaints and prosecuted 69 cases over a five year period (2012-2017).¹⁴³ Thus, even though limited data is available to analyse the varying roles of Departments of Agriculture (or similar) versus the RSPCA in each Australian jurisdiction, it is evident from this one example that the RSPCA receive a substantial number of complaints per annum, and that they are therefore a very significant enforcement body.

Finally, the RSPCA is an interesting case study because, although they state an animal welfare mandate, they are clearly provided with inadequate powers and funding to actually achieve their mission. For example, the RSPCA National Statistics reveal that for 2015-2016, in each state and territory in which the RSPCA operates, *less than one percent* of cruelty complaints received over the previous six years had resulted in a finalized prosecution.¹⁴⁴ In 2015-2016, the RSPCA investigated 62,714 cruelty complaints. In the same year, they finalized only 259 prosecutions with an additional 247 cases pending.¹⁴⁵ Particularly in the context of farm animals, Cao describes prosecutions as ‘more an aberration than the norm’

¹⁴¹ RSPCA Australia, *About Us*, <<https://rspca.org.au/what-we-do/about-us-0>>.

¹⁴² RSPCA Victoria, *Animal Cruelty Offences Data*
<http://rspcavic.org/documents/About%20us/Annual%20Report/2017/AR_AnimalCrueltyOffencesData_2016-17.pdf>

¹⁴³ Government of Victoria, Department of Agriculture, *Record of Prosecutions*,
<<http://agriculture.vic.gov.au/agriculture/animal-health-and-welfare/animal-welfare/record-of-prosecutions>>

¹⁴⁴ RSPCA Australia, *RSPCA Australia National Statistics 2015-2016* (2016)
<<https://www.rspca.org.au/sites/default/files/RSPCA%20Australia%20Annual%20Statistics%202015-2016%20.pdf>> 8

¹⁴⁵ *Ibid* 8.

which she attributes to both inadequate animal protection laws, and inadequate enforcement of the laws as they stand.¹⁴⁶ This is supported by the statements of several Magistrates. For example, in a New South Wales case, a Magistrate explicitly stated:

[i]n more than 25 years sitting as a Magistrate in both city and country areas I can count on the fingers of one hand the number of prosecutions brought for cruelty to animals used in agriculture. I would be surprised if this reflected the extent of animal cruelty in that area of agriculture.¹⁴⁷

Similarly, in *Animal Welfare Authority v Keith William Simpson*,¹⁴⁸ Magistrate Wallace referred to the road transport cruelty case as ‘happily unique’, but noted that ‘in all likelihood other shippers from Queensland and New South Wales have been in the practice of the same things, taking the same sort of risks and everyone’s got away with it’.¹⁴⁹

To an extent, low prosecution rates may be explained by the fact that the RSPCA can take another cause of action to address unlawful animal cruelty. For example, they may issue an infringement notice,¹⁵⁰ or issue a person with a written animal welfare notice, which provides binding instruction as to how the welfare of a given nonhuman animal must be improved.¹⁵¹ Failure to comply with an issued animal welfare notice constitutes a separate offence.¹⁵² It is also possible that a member of the public may report cruelty that is *lawful*. In such an instance, the RSPCA has no legal power to act with respect to that cruelty, and thus no prosecution could result. At the time of writing, there are no published statistics available which explain the alarming gap between the number of cruelty complaints received by the RSPCA annually, and the number of prosecutions they finalise in the same period. However, in what follows, I suggest three key reasons why Australian animal welfare laws are constructed to *necessitate* inadequate enforcement by the RSPCA. First, the RSPCA is provided with inadequate legal powers to inspect private premises by animal welfare legislation. Second, although they are appointed as enforcers of the law, they are underfunded

¹⁴⁶ Cao, above n 29, 224-230.

¹⁴⁷ S Schreiner, 'Sentencing Animal Cruelty' (Paper presented at the Cruelty to Animals: A human problem (RSPCA Scientific Seminar), Canberra, 22 February 2005), cited in Cao, above n 29, 215.

¹⁴⁸ *Animal Welfare Authority v Keith William Simpson* (Unreported, Darwin Magistrates Court, Magistrate Wallace, 4 September 2008).

¹⁴⁹ Ibid [2]; Cao, above n 29, 230.

¹⁵⁰ See for example: *Prevention of Cruelty to Animals Act 1986* (Vic) s37A.

¹⁵¹ See for example: *Animal Welfare Act 1985* (SA) s31B.

¹⁵² See for example: *ibid* s31B(2).

by the Australian Government to the extent that public donations must facilitate enforcement of the law. Third, by virtue of the fact that they are a private charitable organisation, they face conflicting interests which make it possible to question their suitability as a law enforcement body.

A. *The Inadequate Legal Powers of RSPCA Inspectors*

Currently, Australian welfare laws provide inadequate powers to RSPCA law enforcement officers, with the result that consent, and therefore *notice*, is required to inspect many of the locations in which the worst instances of cruelty towards nonhuman animals occur. In the absence of consent, a search warrant is generally required, which can only be obtained based on a reasonable suspicion of the commission of an offence.¹⁵³ This is an alarming problem with serious consequences for how well Australian animal welfare laws can ever be enforced. During parliamentary debate, The Hon. Robert Such stated that providing notice to potential criminals about an imminent inspection did not accord with ‘common sense’.¹⁵⁴ He compared it to warning criminals that operate in secret that they were about to be raided: ‘[i]f you tell people they are to be raided or checked, they will take steps to make sure that they do not infringe the law’.¹⁵⁵ It is for this reason that the element of surprise in criminal law enforcement is routinely employed by the Australian Police, who do not give prior warning of inquiry into suspected persons, and make use of unmarked police cars and plain clothed police officers to enforce the law.

Given that the worst cruelties towards nonhuman animals go on behind closed doors on private properties and in remote locations, there is an obvious problem here. In most jurisdictions in which the RSPCA operates, they may only enter licensed premises with a search warrant that has been obtained on the basis of a *reasonable suspicion that* an animal cruelty offence has, or is, taking place.¹⁵⁶ In many instances, these grounds will therefore constitute a report made by either a ‘whistleblower’ from within the industry, or an activist that has used unlawful means (such as trespass) to obtain evidence of unlawful cruelty.¹⁵⁷ As such, the adequate enforcement of Australian animal welfare legislation implicitly relies upon

¹⁵³ Cao, above n 29, 225.

¹⁵⁴ South Australia, *Parliamentary Debates*, House of Assembly, 4 June 2008, 3598 (Robert Such).

¹⁵⁵ *Ibid.*

¹⁵⁶ Cao, above n 29, 225.

¹⁵⁷ Deborah Cao, *Animal Law in Australia and New Zealand* (Thomson Reuters, 2010).

the unlawful conduct of activists who trespass to provide them with the evidence that they require to form a reasonable suspicion of animal cruelty. This is a theme I develop further in chapter eight, where I argue that animal activists are being stifled by legislation that seeks to punish and deter civil disobedience. The practical effect is that the enforcement mechanisms provided in Australian animal welfare laws *preclude* effective enforcement, in the absence of unlawful conduct by activists or inside ‘tip offs’. Yet, other legislation is operating to stifle these activists, with the result that Australian animal welfare legislation cannot be adequately enforced.

In the Australian Capital Territory, an RSPCA Inspector may enter farm animal premises without the owner’s consent only with a search warrant,¹⁵⁸ or where there are ‘serious and urgent circumstances’ requiring *immediate* exercise of an inspector’s powers.¹⁵⁹ An Inspector may also enter any ‘business premises’ during ‘business hours’ without consent,¹⁶⁰ based on *reasonable grounds* to suspect that an offence is being committed. However, the term ‘business premises’ is not defined by the Act, and it remains unclear whether it provides authority for the RSPCA to enter farming premises.¹⁶¹ The law expressly prevents an animal welfare inspector in the ACT from entering an abattoir in any circumstances, unless ‘the inspector is a veterinary surgeon’, or, is accompanied by one.¹⁶²

In South Australia, an inspector may enter and search, and where necessary, use reasonable force to break into premises or a vehicle,¹⁶³ where they are authorized either by a warrant or necessitated by ‘urgent’ circumstances to do so,¹⁶⁴ and they have a *reasonable suspicion* that an offence has been, or is about to be committed, or an animal is being, has been, or will be unnecessarily harmed if urgent action is not taken.¹⁶⁵

If a South Australian inspector proposes to conduct a routine inspection of premises in the absence of any *reasonable grounds* for suspicion of an offence, they must give the occupier

¹⁵⁸ *Animal Welfare Act 1992* (ACT) s90.

¹⁵⁹ *Ibid* s81(2)(d).

¹⁶⁰ *Ibid* s81(2)(b).

¹⁶¹ Cao, above n 29, 225.

¹⁶² *Animal Welfare Act 1992* (ACT) ss81(5)(a), (b).

¹⁶³ *Animal Welfare Act 1985* (SA) s30(1)(a).

¹⁶⁴ *Ibid* s30(2)(b).

¹⁶⁵ *Ibid* s30(5)(b). Other circumstances warranting entry are contained within ss30(5)(c)-(f).

of the premises notice of the proposed inspection.¹⁶⁶ They must also enable the occupier, or a nominee of the occupier, or both, the opportunity to accompany the inspector throughout the inspection.¹⁶⁷ Further, the inspector must take steps to ‘minimize any adverse effect of the inspection on the business or activities’ at the premises which they inspect.¹⁶⁸ Cao contends such a requirement may provide a basis for delaying routine inspections.¹⁶⁹ It is foreseeable that such a requirement could also curtail the duration of a routine inspection, potentially compromising the thoroughness of the investigation. In the Northern Territory, routine inspection of premises is similarly allowed in the absence of a reasonable suspicion of the commission of an offence, so long as the occupier is provided with 7 days’ notice.¹⁷⁰

In New South Wales, Victoria, Queensland and the Northern Territory, a search warrant is required to enter premises without consent, based on a reasonable suspicion that an offence has been, will be, or is being committed.¹⁷¹ An exception is made in each of these jurisdictions where the situation is so urgent that it necessitates immediate action.¹⁷² The Victorian *Prevention of Cruelty to Animals Act 1986* (Vic) provides special powers of entry for ‘specialist’ inspectors to search premises that are not a person’s dwelling, however they can only do so with written permission from the Minister.¹⁷³ According to Cao, this power is used ‘sparingly’.¹⁷⁴ Troublingly, in New South Wales, a person who commits an offence of cruelty upon poultry confined for egg production under Part 2 of the *Prevention of Cruelty to Animals Regulation 2012* (NSW) is not guilty of an offence if they are a ‘first time offender’. Regulation 19 explicitly provides that a ‘first time offender’ does not commit an offence unless they were given a direction in writing to remedy their contravention within a period of 3 months, *and* they failed to do so. Thus, in New South Wales, persons who are cruel to poultry on private premises must not only be given notice of an imminent inspection to

¹⁶⁶ Ibid s31(1)(a).

¹⁶⁷ Ibid s31(b)(i)-(iii).

¹⁶⁸ Ibid s31(c).

¹⁶⁹ Deborah Cao, *Animal Law in Australia and New Zealand* (Thomson Reuters, 2010) 218.

¹⁷⁰ *Animal Welfare Act* (NT) s62(3).

¹⁷¹ *Prevention of Cruelty to Animals Act 1979* (NSW) ss24D, 24E, *Animal Care and Protection Act 2001* (Qld) s122(1)(c), *Prevention of Cruelty to Animals Act 1986* (Vic) s24(G), *Animal Welfare Act* (NT) s64. Note in the Northern Territory, special provisions apply in the context of abattoirs.

¹⁷² *Animal Welfare Act* (NT) s62(4)(C), *Prevention of Cruelty to Animals Act 1979* (NSW) ss24E(2), *Prevention of Cruelty to Animals Act 1986* (Vic) ss21, 23, 24, *Animal Care and Protection Act 2001* (Qld) s122(1)(e)-(g).

¹⁷³ *Prevention of Cruelty to Animals Act 1986* (Vic) s24L

¹⁷⁴ Cao, above n 29, 219.

ensure their compliance with animal welfare regulations. They are also not to be found guilty of an offence if the cruelty they committed constitutes a first-time offence.¹⁷⁵

In Western Australia, an Inspector may enter farm animal premises if they reasonably suspect an offence has occurred, and without consent, provided they have obtained a search warrant,¹⁷⁶ or have provided the occupier with a minimum of 24 hours' notice of the intended inspection and not received an objection.¹⁷⁷ The Western Australian *Animal Welfare Act 2002* (WA) also provides a power for inspectors to enter non-residential properties, or premises occupied by a scientific establishment without warrant, consent, or notice where they believe an offence has been or is likely to be committed.¹⁷⁸ However, Department Policy curtails this power and restricts it to use only in 'high-level emergency' situations.¹⁷⁹

Tasmania is the only Australian jurisdiction in which inspectors are granted the power to enter, search and investigate premises (other than a dwelling), for the purposes of enforcing the *Animal Welfare Act 1993* (Tas) *without* the need for obtaining a warrant prior to entry.¹⁸⁰ The power to enter, search, and inspect however must still be accompanied by a reasonable belief that an offence has been, is being, or will be committed. However, an officer in Tasmania who has been authorized by the Minister, may also search, enter and inspect at any reasonable time, premises in which animals are sold, presented for sale, assembled or kept for commercial purposes.¹⁸¹ According to the Tasmanian Government website, unannounced welfare inspections take place on farms 'about once every 2 years'.¹⁸²

Given that the RSPCA can generally only inspect premises based on a *reasonable suspicion* of cruelty to nonhuman animals, it is difficult to see how they can ever form a basis to inspect industries without somehow being alerted to potential wrongdoing. The unlawful operations

¹⁷⁵ *Prevention of Cruelty to Animals Regulation 2012* (NSW) r19.

¹⁷⁶ *Animal Welfare Act 2002* (WA) s38(1)(c)

¹⁷⁷ *Ibid* s38(1)(b)

¹⁷⁸ *Ibid* ss38(d), (e).

¹⁷⁹ Western Australia, *Parliamentary Debates, 10 March 2009*, Questions on Notice – farm inspections by animal welfare inspectors, The Hon Peter Collier MP.

¹⁸⁰ *Animal Welfare Act 1993* (Tas)16(1).

¹⁸¹ *Ibid* s16(2).

¹⁸² Parks Tasmanian Government Department of Primary Industries, Water and Environment, *Animal Welfare Inspections of Intensive Farms* < <http://dpiwwe.tas.gov.au/biosecurity-tasmania/animal-biosecurity/animal-welfare/animal-welfare-inspections-of-intensive-farms> > .

of animal activists facilitate law enforcement by providing these alerts.¹⁸³ In chapter eight, I discuss the recent exposé of live baiting in the greyhound industry by animal activists, as a key example of how unlawfully obtained evidence is central to the enforcement of Australian animal welfare legislation. Until the RSPCA is provided with stronger powers to inspect private premises routinely and without the need for notice or a reasonable suspicion of wrongdoing, it is difficult to see how law enforcement, particularly in the agricultural context, can ever be effective in the absence of unlawful trespass and covert surveillance by activists or internal whistleblowers.

In England, this barrier to effective animal welfare law enforcement is being partially addressed by the introduction of mandatory CCTV surveillance in abattoirs, to be accessed at any time by authorized persons to ensure compliance with animal welfare laws.¹⁸⁴ Similar attempts are being made in Australia, but have not yet led to legislative change.¹⁸⁵ Absent such measures to improve transparency in the Australian context, Australian animal welfare laws continue to sustain only a myth of animal protection which posits that Australian animal welfare laws are doing something far removed from that which they *actually* do.

B. RSPCA Funding Issues Preventing Enforcement and Prosecution

In conjunction with their inadequate inspection powers, the RSPCA is also challenged by significant resource constraints, given that they are a charity funded by the public.¹⁸⁶ Although the RSPCA does receive some government funding in recognition of the law enforcement role they perform, this funding is insufficient to cover their expenses in this area. The South Australian RSPCA's annual report, for example, documents a total income of \$15,807,566 for the 2015-2016 financial year. Of that total income, only \$1,232,962 (7.80%) was Government funded. The clear majority of the RSPCA's income, (73.42%) was from

¹⁸³ See for example: Adam Hegarty, 'Tip-Off Leads to RSPCA Rural Hills Property and Seizing More Than 100 Dogs', *The Advertiser* (Online), 10 June 2013, <<http://www.adelaidenow.com.au/news/south-australia/tipoff-leads-to-rspca-raiding-rural-hills-property-and-seizing-more-than-100-dogs/news-story/39901882a21831cf64c0407ae73ac8a2>>.

¹⁸⁴ Rebecca Smithers, 'All Slaughterhouses in England to Have Compulsory Cctv', *The Guardian* (Online), 11 August 2017, <<https://www.theguardian.com/environment/2017/aug/11/all-slaughterhouses-in-england-to-have-compulsory-cctv>>.

¹⁸⁵ Most recently see the motion in the Australian senate for the introduction of CCTV in slaughterhouses: Commonwealth, *Parliamentary Debates*, Senate, 29 November 2017, 64 (Derryn Hinch).

¹⁸⁶ Cao, above n 29, 228.

public donations, marketing (including the retail of pet supplies), and legacies.¹⁸⁷ The situation is similar in other states, with the RSPCA Victoria recording a Government funded income of \$2,000,000 (5.16%) of a total income of \$38,787,000 in the 2016-17 financial year. This was a reduction from \$3,000,000 of Government funded income the previous year, with only \$1,000,000 of the funding provided for the operation of the inspectorate.¹⁸⁸ The most significant source of income during this period for the RSPCA Victoria during this period was public bequests which comprised 41.17% of their total income.¹⁸⁹

Turning then to the RSPCA's expenses, it is possible to see that the Government funded portion of their income, supplied in recognition of their role in enforcing the animal welfare legislation, does not cover their expenses in this area. In South Australia for example, the RSPCA's expenses for 2015-2016 associated with the enforcement of the *Animal Welfare Act 1975 (SA)* were \$2,470,429. This means that for this particular financial period, the RSPCA (SA)'s Government funded income associated with law enforcement made up 7.8% of their total income, while their expenses in the same area were 16.5% of their total expenses. The Queensland RSPCA similarly reported a total Government funded income of 4% for inspectorate and rescue, with a corresponding 8% expenditure in the same field for the 2015-2016 financial year.¹⁹⁰ This suggests that the Australian public indirectly funded the remainder of the RSPCA (SA) and RSPCA (Qld)'s inspectorate and prosecution work for this period via donations.¹⁹¹ The Victorian RSPCA does not provide the exact costs of the inspectorate work, but does provide a total expenditure of \$23,760,000 on 'animal welfare'.¹⁹² The fact that they do not specify the precise costs of their inspectorate work is illustrative of the fact that it is difficult to divorce their expenditure in one area from their expenditure in another. I return to this point below.

¹⁸⁷ RSPCA South Australia annual report 2015-2015, available here: http://www.rspcasa.org.au/wp-content/uploads/2016/09/RSPCASA_AR201516_finalScreen.pdf

¹⁸⁸ RSPCA Victoria, *Annual Report for the Financial Year Ended 30 June 2017 (2016-2017)* < http://rspcavic.org/documents/About%20us/Annual%20Report/2017/RSPCAVIC_FinancialStatement_2016-17.pdf > 3.

¹⁸⁹ Ibid 9.

¹⁹⁰ RSPCA Queensland Annual Report 2015-2016 available here: <https://www.rspcaqld.org.au/who-we-are/annual-report>

¹⁹¹ Cao, above n 29, 229.

¹⁹² RSPCA Victoria, *Annual Report for the Financial Year Ended 30 June 2017 (2016-2017)* < http://rspcavic.org/documents/About%20us/Annual%20Report/2017/RSPCAVIC_FinancialStatement_2016-17.pdf > 9.

Animal welfare law is the only branch of criminal law in Australia that is enforced predominantly by a publically funded private charity. Even though other government departments may supplement the RSPCA's enforcement mechanism, Cao points out that no jurisdiction in Australia has an independent department charged with responsibility for animal welfare alone. The result, is that funding constraints may also limit law enforcement by Government departments, given that funding and therefore animal welfare law enforcement is a 'political matter which may be subordinated by other funding priorities'.¹⁹³

From a practical perspective, funding constraints faced by the RSPCA also mean that even where they have the legal authority to inspect and enforce and prosecute under animal welfare legislation, costs may prevent them from doing so. They may be forced to respond 'tactically' to cruelty complaints, responding immediately to only the worst cases of cruelty and prosecuting only those that are likely to lead to a person being found guilty. The RSPCA state the problematic nature of resources constraints as it effects prosecution rates on their website:

Whilst the RSPCA has an excellent prosecution record, the financial penalty of losing a case can be extremely high. Court cases and potential appeals can be extremely costly and difficult to anticipate. Fines imposed by the court, are allocated to the State Government and whilst costs can be awarded to the RSPCA, these are often difficult to recover from offenders.¹⁹⁴

An additional resource difficulty faced by the RSPCA is that their total income per annum is used to cover the very broad range of animal welfare initiatives which the RSPCA assumes responsibility for in Australian society. Enforcement of state based welfare legislation is only one of their many expenses and initiatives, and is the only one for which they receive any Government funding. Yet, since their initiatives are all focused on improving animal welfare to some degree, they are all arguably interconnected making it difficult to divorce their funding needs in one area from their needs in another. For example, the RSPCA is responsible for caring for and re-homing animals that have been surrendered to them or seized during property raids, which is necessarily linked to their role of inspecting potential breaches of animal welfare law. When officers enter premises, and uncover an animal that is sick or injured, they have the legal authority to seize that animal if necessary. Once they have

¹⁹³ Cao, above n 29, 229.

¹⁹⁴ RSPCA Victoria, *Prosecutions* < <http://rspcavic.org/services/inspectorate/prosecutions> > .

seized an animal, they then generally provide it with veterinary care. They may also need to euthanize an animal or re-home it. The number of animals that land in the RSPCA's care each year is huge. The RSPCA's published statistics for 2015-2016 indicate that during that one year period they received 137,391 animals into their care across the country.¹⁹⁵ From 2006-2016, they re-homed, released into the wild or re-united with their families 701,943 animals across Australia.¹⁹⁶

Caring for these animals comes at a great expense to the RSPCA. For example, in the 2016 financial year in Victoria, the RSPCA's (Vic) animal welfare related expenditures totalled \$22,622,000 of a total expenditure of \$34,372,000 (equating to 66%).¹⁹⁷ These costs cover things such as the provision of these animals with shelter, feed, grooming, veterinary care, behavioural assessments and training where appropriate. The RSPCA's extensive adoption and fostering program is also costly, as is the strong online and social media presence that they maintain.¹⁹⁸

In addition to the physical care of nonhuman animals, the RSPCA also raises community awareness of animal welfare issues. This is inextricably linked to their role as enforcers of animal welfare law, since they inform the public of welfare issues to reduce the number of breaches of animal welfare law that they must therefore police. Further, they work directly with animal industries to improve welfare standards and offer the opportunity to certify products in accordance with the RSPCA 'approved farming scheme'.¹⁹⁹ This scheme establishes voluntary animal welfare standards that exceed existing regulatory requirements, and allows compliant producers to apply to market their product as 'RSPCA approved'. The RSPCA also runs veterinary clinics in some locations, which offers the community competitively priced veterinary services such as de-sexing, vaccination, micro-chipping and euthanasia.

¹⁹⁵ RSPCA Australia, *RSPCA Report on Animal Outcomes from Shelters, Care and Adoption Centres* (2015-2016) < <https://www.rspca.org.au/sites/default/files/RSPCA%20Report%20on%20animal%20outcomes%202015-2016.pdf> > 1.

¹⁹⁶ Ibid.

¹⁹⁷ RSPCA Victoria, *Annual Report 2015-2016* < http://rspcavic.org/documents/About%20us/Annual%20Report/2016/RSPCAVIC_AR_15-16_FinancialsStatement_web.pdf > .

¹⁹⁸ For example the RSPCA has an adoption Facebook page and website: www.adoptapet.com.au

¹⁹⁹ RSPCA Australia, *Approved Farming Scheme* < <https://rspcaapproved.org.au/> > .

These funding constraints illustrate something important about the type of laws that Australian animal welfare laws are. The myth of animal protection suggests they are laws that prohibit cruelty. Yet, the financial constraints faced by the RSPCA who are charged with the responsibility of enforcing those laws render them ill-equipped to adequately perform this task. Moreover, they are unable to engage in the types of test litigation that are essential to challenging a number of widely accepted cruel practices.²⁰⁰

C. RSPCA and Conflicts of Interest

Whilst it is not within the scope of this chapter to discuss it in depth, there also exists a substantial question surrounding whether the appointment of the RSPCA as an enforcement body under animal welfare legislation is appropriate at all.²⁰¹ The RSPCA is not only afforded inadequate legal powers and are chronically underfunded. By virtue of the fact that they are private charity that stands for 'animal welfare', at the same time as they charged with the duty of enforcing laws which permit cruelty to nonhuman animals, they are also riddled with ethical conflicts that raise questions regarding their suitability as a law enforcement body.

Before turning to explain these ethical conflicts, it is informative to first pay brief attention to the history of the RSPCA. The RSPCA has its origins in the Society for the Prevention of Cruelty to Animals which was formed in England in 1824.²⁰² It emerged in the context of an intellectual climate in which concern for animal welfare was growing. This is reflected by the fact that it was formed in England shortly after the first English anti-cruelty statute was passed in 1822, known as the *Cruel Treatment of Cattle Act 1822*. That legislation was pioneering, as it was the first piece of legislation to provide the English Courts with the

²⁰⁰ Cao, above n 29, 225.

²⁰¹ See for example: Genevieve Alison, 'Parliamentary Committee Report Urges RSPCA to Be More Transparent', *The Herald Sun* (Online), 22 August 2017, <<http://www.heraldsun.com.au/news/victoria/parliamentary-committee-report-urges-rspca-to-be-more-transparent/news-story/41162047a528ea78d7e674a3562a3d5c>> Unknown, 'RSPCA Inspectors Overworked, Reputation Threatened by 'Emotional' Activism: Review', *ABC News* (Online), 6 October 2016, <<http://www.abc.net.au/news/2016-10-06/rspca-reputation-at-risk-due-to-emotional-activism-report-says/7908344>>.

²⁰² Cao, above n 29, 61

power to impose fines and imprisonment for acts of cruelty towards cattle, horses, or sheep.²⁰³

As similar concerns for animal welfare emerged in nineteenth century Australia, Australia's first Society for the Prevention of Cruelty to Animals was formed in 1871 during a public meeting to discuss the ill-treatment of horses.²⁰⁴ Other Australian jurisdictions then followed suit, with Societies forming in Tasmania (1878), New South Wales (1873), South Australia (1875), Queensland (1883), Western Australia (1892), the Australian Capital Territory (1955) and the Northern Territory (1965).²⁰⁵ The Societies became Royal Societies for the Prevention of Cruelty to Animals in 1923, following the award of Royal Warrant.²⁰⁶ Informal meetings between all societies began to take place in 1965. By 1980, all eight RSPCA's agreed to forming a national Society to unify and represent the eight member societies.

Following the emergence of the RSPCA in Australia, the first Australian anti-cruelty legislation was enacted in Van Diemen's land in 1837.²⁰⁷ New South Wales enacted similar legislation in the 1860s.²⁰⁸ These early laws reflected changing attitudes by enacting what White describes as broad 'prohibition[s] on cruelty to animals'.²⁰⁹ However, from the 1860s onwards, this prohibition was continually refined, and by the 20th century, jurisdictions began carving out 'exceptions' for farming practices that served commercial purposes (such as castration and branding).²¹⁰ In the 1970s and 1980s, the States gave 'blanket exemptions for farming practices'.²¹¹ As I described in Chapter 4, similar, but more limited exceptions still exist today.

Thus, the RSPCA was formed at a time when animal welfare was only an emergent public concern, meaning that they represented the interests of nonhuman animals when they had little (or no) legislative protections. Now however, the RSPCA operates in a very different context, in which extremely strong tensions exist between the public expectation that the RSPCA continues to advocate for animals, and the fact that the laws which claim to protect

²⁰³ Cao, above n 29, 61.

²⁰⁴ RSPCA Australia, *Our History* <<https://www.rspca.org.au/what-we-do/about-us/our-history>>.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ White, above n 136, 349.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.* 350.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

nonhuman animals from cruelty also operate to permit and approve of some of the most cruel practices towards some of the most vulnerable species. As a publically funded charity, these tensions create significant ethical conflicts for the RSPCA. On the one hand, they are charged with the responsibility of enforcing laws which permit cruelty to animals, and they are afforded Government funding in recognition of this role (albeit inadequate). Yet, on the other hand, they are also an organisation that relies heavily on public donations to fulfil their mandate of existing to protect the welfare of ‘all creatures great and small’. To this end, the RSPCA is answerable to the public, which oftentimes leads them to campaigning against the very same laws that they are charged with enforcing.

Unsurprisingly, this has led to the RSPCA being heavily criticized for conflicts of interest by both those who are concerned about animal welfare and those within industry.²¹² For example, in 2016, the Hon. Robert Brown, of the Shooters and Fisher’s party, claimed that the RSPCA was

once a well-respected charity, [that] has now become overzealous, drunk on power, and dominated by animal liberationists who put the so-called rights of animals ahead of human rights...this organisation plays judge, jury and executioner...the fact that the RSPCA is actively campaigning against the continuation of the greyhound racing industry but is granted a seat at the table by Premier Mike Baird to examine the greyhound racing industry’s future is ridiculous and it is fraught with danger...It can be either a policing body for animal welfare or a campaign house, but it cannot be both.²¹³

In 2016, Victorian Shooters and Fishers Party MP Jeff Bourman tabled a notice in the upper house, requesting a Parliamentary Inquiry in the RSPCA’s ‘funding...objectives and activates and the use of its powers’.²¹⁴ Media reports suggested that Victorian duck shooters were angered by the RSPCA’s public opposition to lawful duck shooting, which they attribute to the ‘radicalisation’ of the charity.²¹⁵ Western Victorian Member of Parliament, Simon Ramsay, stated that the Coalition pledged its support because the RSPCA ‘have branched into areas now which I believe are outside their charter, into larger animals where they become

²¹² *Economy and Infrastructure Committee*, Parliament of Victoria, *Inquiry into the RSPCA Victoria* (2017) 23; Unknown, ‘Watch: Shocking Footage inside RSPCA Approved Free-Range Farm’, *Yahoo7* (Online), 21 June 2017, <<https://au.news.yahoo.com/a/36077880/mt-barker-free-range-chicken-farm-denies-wrongdoing-after-shocking-footage-emerges/>>.

²¹³ New South Wales, *Parliamentary Debates*, Legislative Council, 18 October 2016, 40 (Robert Brown).

²¹⁴ Chris McLennan, ‘Victorian Hunters set their sights on RSPCA’ *The Weekly Times* (online), 4 August 2016, <<https://www.weeklytimesnow.com.au/news/politics/victorian-hunters-set-their-sights-on-rspca/news-story/d976588d8bf76deeda5f6d4a20835ca8>>.

²¹⁵ *Ibid.*

activists with animal rights groups...the loopy left fringe'.²¹⁶ The inquiry was conducted by the Legislative Council for the Economy and Infrastructure Committee, of which the Hon. Jeff Bourman is a member. The Terms of Reference for the inquiry included 'the appropriateness and use of its powers', 'the appropriateness and use of [Government] funding' and 'any other consequential matters'.²¹⁷ The report considered the fact that the RSPCA (Vic) was being increasingly criticized by stakeholders for its 'activism' with respect to 'lawful activities' such as jumps racing and duck hunting,²¹⁸ as well as battery cages and the live export of animals,²¹⁹ as well as two 'high profile' alleged instances of negligent conduct by the RSPCA (Vic).²²⁰

A key concern raised in the resulting report was a strong view held by industry that the RSPCA was being 'influenced...by ideologies that might pull them towards an animal rights flavour'.²²¹ The report also noted that the parliamentary committee had heard anecdotal evidence from industry stakeholders that the RSPCA (Vic) had connections to 'extremist animal activist groups'.²²² However, the inquiry did not recommend that the RSPCA take any particular action with response to these allegations, and rather recommended merely that the RSPCA be 'mindful' of the issues that had been raised by stakeholders.²²³

By contrast, the RSPCA is also routinely criticised by lobby groups such as Animal Liberation (Vic). They claim, for example, that:

A donation to the RSPCA funds schemes and campaigns that condone animal cruelty and the unnecessary death and exploitation of pigs, chickens and turkeys...The RSPCA receives royalties from its approved farming scheme...[it] is the only animal protection organisation that has legal powers to prosecute animal cruelty, yet it receives money from the very industries it is supposed to police – a clear conflict of interest.²²⁴

²¹⁶ Chris McLennan, 'Victorian Parliament Launches Probe into RSPCA', *The Weekly Times* (online), 23 August 2016, <<https://www.weeklytimesnow.com.au/news/politics/victorian-parliament-launches-probe-into-rspca/news-story/533d4f4486fdcd3f4ef94f4daf76d293>>.

²¹⁷ *Economy and Infrastructure Committee*, Parliament of Victoria, *Inquiry into the RSPCA Victoria* (2017) vii.

²¹⁸ Ibid 3.

²¹⁹ Ibid 24.

²²⁰ Ibid 3-4.

²²¹ Ibid 23.

²²² Ibid.

²²³ Ibid 25.

²²⁴ Animal Liberation Victoria, *RSPCA Betrayal* (14 May 2016) <<https://www.alv.org.au/articles/rspca-betrayal/>>.

These concerns originate from the fact that the RSPCA facilitate and legitimate some of the cruellest practices towards nonhuman animals, at the same time as they purport to stand for the prevention of cruelty ‘for all creatures great and small’.²²⁵ The RSPCA ‘approved farming scheme’,²²⁶ mentioned above, accredits facilities that inflict cruelty upon nonhuman animals. The scheme is intended to offer consumers more welfare friendly animal products that are produced on farms that have higher standards than those required by Codes of Practice. Yet, they still permit cruelty. For example the *Layer Hens: RSPCA Approved Farming Schemes Standards* permit the cruel practice of de-beaking,²²⁷ meaning that farms that practice de-beaking can be accredited by the RSPCA scheme and marketed to consumers as being more welfare friendly. In this particular example, the RSPCA’s ethical conflict is clear: they approve of more ‘welfare friendly’ products because they are *less* cruel than other alternatives on the market. Yet, they are still cruel, and therefore contrary to the RSPCA’s claim to exist for the purposes of protecting animal’s from cruelty.

A similar example comes from 2012, when the RSPCA standards for pig farming came under criticism because of a complaint to the Australian Competition and Consumer Commission (‘ACCC’) pertaining to misleading and deceptive conduct by ‘Primo Smallgoods’.²²⁸ The packaging of Primo Smallgoods read ‘free range’ and ‘RSPCA approved’, which communicated to consumers that their product was animal welfare friendly. The ACCC found that the ‘free range’ claim was untrue, and so was misleading consumers.²²⁹ They thus required Primo smallgoods to withdraw the claim from their products.²³⁰ The finding again demonstrates the ethical dilemmas that the RSPCA face as their accreditation system purports to offer consumers options that are animal welfare friendly,²³¹ at the same time as it grants

²²⁵ RSPCA Australia, *For All Creatures Great and Small* < <https://www.rspca.org.au/> > .

²²⁶ RSPCA Australia, *Approved Farming Scheme* < <https://rspcaapproved.org.au/> > .

²²⁷ *Layer Hens: RSPCA Approved Farming Scheme Standards (2015)*

²²⁸ Anne Greenaway, ‘RSPCA Approved Farming Labels Challenged’, *Daily Liberal* (Online), 24 November 2012, <<http://www.dailyliberal.com.au/story/1141797/rspca-approved-farming-labels-challenged/>>; Sarina Locke, ‘Primo Smallgoods Has Declined to Comment, Other Than to Say Its Label Is Approved by the RSPCA’, *ABC News* (Online), 11 January 2012, <<http://www.abc.net.au/news/rural/2012-01-11/primo-smallgoods-has-declined-to-comment-other/6095480>>.

²²⁹ P&M Quality Smallgoods Pty Ltd (trading as Prima Smallgoods), *Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87b of the Competition and Consumer Act 2010* (24 July 2015)

<<http://registers.accc.gov.au/content/item.phtml?itemId=1188918&nodeId=7d39afa8c2b8d0ddb4f6eea53912cb98&fn=Primo%20accepted%20section%2087B%20Undertaking%20-%202024%20July%202015.pdf>>

²³⁰ *Ibid.*

²³¹ Greenaway, above n 206; Locke, above n 206.

approvals to facilities that cannot be described as free range, and are therefore not commensurate with animal welfare.

Recent media coverage has also documented ‘shocking conditions’ at Perth’s *Mt Barker Free Range Farms* which is accredited under the RSPCA’s approved farming scheme.²³² The report showed chickens suffering ‘respiratory problems, burns and...cannibalism’.²³³ The RSPCA had allegedly audited this farm in both March 2017 and May 2017, with ‘no corrective actions taken’, prior to the release of this footage in June 2017.²³⁴ At the time of writing, the RSPCA approved farming scheme website is directly promoting *Mt Barker Free Range Farms* as having ‘room to move’, with an accompanying image of apparently healthy and happy chickens roaming freely in an appealing enriched outdoor environment.²³⁵

The RSPCA faces several ethical dilemmas due to their competing interests. They are charged with the responsibility of enforcing laws which permit cruelty towards nonhuman animals. At the same time, they purport to be opposed to animal cruelty, and are involved in actively opposing some forms of lawful cruelty. They also seek to improve animal welfare by legitimating some of the cruellest practices, and marketing them to consumers as welfare friendly products simply because they reflect high standards of care than the comparable legal requirements dictated by Codes of Practice. The ethical dilemmas faced by the RSPCA are compounded by the fact that they are a publically funded charity, and thus seemingly have a responsibility to respond to public sentiment surrounding the ways that nonhuman animals should be treated.

The conflicting interests of the RSPCA sustain the myth of animal protection. Australian animal welfare laws give legal power to the RSPCA to inspect and prosecute instances of unlawful animal cruelty. In doing so, they task a publically funded charity, that is riddled with ethical dilemmas, with the role of enforcing laws that are supposed to prohibit cruelty and reflect our ‘compassion’ for nonhuman animals. These factors indicate that Australian animal welfare legislation provides inadequate enforcement mechanisms for its protective

²³² Unknown, 'Watch: Shocking Footage inside RSPCA Approved Free-Range Farm', *Yahoo7* (Online), 21 June 2017, <<https://au.news.yahoo.com/a/36077880/mt-barker-free-range-chicken-farm-denies-wrongdoing-after-shocking-footage-emerges/>>.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ RSPCA Australia, *Approved Farming Scheme* <<https://rspcaapproved.org.au/>> .

provisions. Absent adequate enforcement, the notion that Australian animal welfare laws ensure animal protection is merely a myth.

VI. CONCLUSION

In this chapter, I have suggested that Australian animal welfare laws generate a myth of animal protection. This myth is established and maintained in three ways. First, by the physical separation of provisions which prohibit cruelty from those which permit it. Animal welfare legislation communicates a prohibition on cruelty to the public which is consistently undermined by Codes of Practice. Codes of Practice are addressed specifically to those engaged in cruelty towards nonhuman animals. Standing alone, Australian animal welfare legislation therefore falsely appears to protect *all* nonhuman animals from cruelty.

Second, the law fails to communicate honestly and fairly with the Australian public regarding what it allows. Australian animal welfare legislation prohibits ‘cruelty’, but makes distinctions between various forms of conduct that result in cruel acts being described as ‘non-cruelty’. The result is that the legal label of ‘cruelty’ fails to honestly and fairly communicate its meaning to the Australian people. In addition, Codes of Practice use weasel words to cloak cruel practices in an image of compassion for nonhuman animals. Such language serves to conceal that cruelty, and to sustain the myth of animal protection. Third, Australian animal welfare legislation provides inadequate enforcement powers to the RSPCA. This means that animal welfare legislation is not only poorly enforced, but that the very laws that prohibit cruelty *necessitate* poor enforcement by providing an underfunded charity with inadequate powers to inspect private premises.

The myth of animal protection facilitates cruelty towards nonhuman animals by making that cruelty invisible. Invisibility is a barrier to the types of discourse that are essential to securing change for nonhuman animals. If the Australian public believes that nonhuman animals are already protected from cruelty, they have no need to demand a change to their treatment. In chapter eight, I argue that Australian law goes to great lengths to maintain this myth by stifling activists who seek to expose cruelty. The stifling of activists not only prevents the enforcement of animal welfare laws which rely upon ‘tip offs’ of animal cruelty, but it also sustains the myth of animal protection, which keeps cruelty out of sight so that it may remain out of mind.

**CHAPTER 8: KEEPING CRUELTY INVISIBLE: LAWS THAT PUNISH AND
DETER CIVIL DISOBEDIENCE**

I. INTRODUCTION

‘The reason that activists are a ‘threat’ isn’t that they are breaking windows. It’s that they’re creating them’.¹

In the previous chapter, I suggested that Australian animal welfare legislation generates a myth of animal protection in three ways. First, the word ‘cruelty’ is used in a way that does not communicate fairly and honestly with the Australian public. Moreover, I suggested that Codes of Practice use weasel words that mislead the public as to how nonhuman animals may be treated by law. In addition, animal welfare statutes provide inadequate enforcement mechanisms, with the result that acts of unlawful cruelty go unnoticed or are not prosecuted. Australian animal welfare laws therefore hold out the promise of animal protection that they systematically fail to meet. This myth facilitates cruelty by communicating a false message that cruelty is prohibited, but also serves to legitimate cruelty by informing the way that we interpret what Australian animal welfare laws and Codes of Practice allow.

In this chapter, I turn to consider the potential operation of legislation that may silence activists who work to debunk the myth that Australian animal welfare laws protect nonhuman animals from cruelty. My argument is that advocacy that engages law enforcement and makes cruelty visible to the Australian public is silenced by anti-protest laws. Laws that silence activists necessarily facilitate cruelty towards nonhuman animals by keeping that cruelty invisible and sustaining the myth of animal protection that I established in the previous chapter. As long as cruelty is invisible, the public is uninformed and cannot participate meaningfully in the democratic processes and discussions that are essential to policy change or law reform for nonhuman animals.

This chapter is divided into three parts. In the first part, I provide a prima facie justification for acts of civil disobedience that invade an individual’s privacy. I suggest that a claim to privacy in democratic society can give way to a public interest in obtaining information about how animals are raised and killed to serve human interests. Acts of activism that serve the public interest may therefore justifiably infringe an individual’s claim to privacy. Second, I suggest that civil disobedience is morally justified in Australia’s democratic society. Using

¹ Will Potter, quoted in New South Wales, Parliamentary Debates, Legislative Council, 26 August 2015 (Mehreen Faruqui)

criteria put forward by thinkers such as John Rawls and Henry Bedau, I argue that activists who unlawfully trespass to document cruelty towards nonhuman animals are morally justified in doing so where their actions are public, conscientious, nonviolent and aimed at generating policy or legal change.

Having provided a prima facie justification for acts of civil disobedience on behalf of nonhuman animals, in the second part of this chapter, I explain the link between acts of civil disobedience and the generation of policy and legal change for nonhuman animals. My argument is that animal activists who expose cruelty inform public debate surrounding our treatment of nonhuman animals. They also facilitate law enforcement for the reasons I discussed in chapter seven. Where activists document lawful cruelty, they ‘debunk’ the myth of animal protection, and facilitate public discourse that is essential to the democratic process that may yield change for nonhuman animals.

In the third part of this chapter, I discuss three examples of Australian legislation that may inhibit acts of civil disobedience by deterring and punishing activists that trespass to covertly document instances of cruelty. They are the proposed *Criminal Code (Animal Welfare Amendment) Bill 2014* (Cth), and the *Surveillance Devices Act 2016* (SA), and the *Biosecurity Act 2015* (NSW). While trespass is already unlawful in Australia, each of these pieces of legislation seek to further deter activism by providing new powers to law enforcement and dramatically increasing penalties for trespass. These functions, I contend, will further silence activism, and in doing so inhibit the democratic process and prevent the enforcement of Australian animal welfare laws.

II. WHEN UNLAWFUL CONDUCT IS JUSTIFIED

Before explaining how some Australian legislation may be operating to silence and deter animal activists, it is necessary to provide a prima facie justification for civil disobedience on behalf of nonhuman animals within the Australian context. Like all forms of activism, animal activism can take many forms. It is possible to conceptualise these various forms of activism as existing on a spectrum. At one end, there are activists who participate in lawful acts of leafletting, or peaceful protest. At the other end of the spectrum, there are activists that

conduct themselves violently and cause physical harm to others.² Somewhere along this scale, sit activists that engage in unlawful, non-violent forms of activism on behalf of nonhuman animals. Trespass is a particularly common method of activism. Generally, activists who trespass do so to ‘gather and subsequently disseminate information’ pertaining to the cruel treatment of nonhuman animals on private property.³ This form of activism arguably sits on the lower end of the spectrum of animal activism. It involves unlawful conduct, but does not involve violence, nor does it necessarily involve the destruction of property. A little higher on the spectrum are activities where activists enter private properties to steal nonhuman animals. These activists may be found guilty of serious criminal trespass and property theft, although they do so to rescue nonhuman animals from cruel conditions.⁴

In this chapter, I focus only on acts of trespass that are conducted with the intent of performing covert surveillance, and how these acts may be morally justified as acts of civil disobedience. Trespass and covert surveillance form my focus for three reasons. First, these methods of activism are becoming increasingly popular, and form the overwhelming majority of documented cases of activism on behalf of nonhuman animals.⁵ Second, because several examples illustrate that incognito methods are successful in generating change for nonhuman animals. Third, the success of these methods is making them increasingly controversial and activist identities are increasingly being constructed in the media and by Australian politicians as ideological extremists, and even ‘terrorists’.⁶

² Mark Townsend and Ned Temko, 'How Animal Rights Groups Destroyed My Family's Life', *The Guardian* (Online), 28 August 2005, <<https://www.theguardian.com/science/2005/aug/28/businessofresearch.animalrights>>; Esther Hadley, 'Animal Liberation Front Bomber Faces Jail after Admitting Arson Bids', *The Guardian* (Online), 18 August 2006, <<https://www.theguardian.com/uk/2006/aug/18/animalwelfare.topstories3>>

³ Clare McCausland, Siobhan O'Sullivan and Scott Brenton, 'Trespass, Animals and Democratic Engagement' (2013) 19 *Res Publica* 205

⁴ Iain Burns, 'Animal Rights Activist Films Himself Freeing PIG from Farm and Speeding Away Together in His Getaway Car', *Daily Mail* (Online), 2 August 2017, <<http://www.dailymail.co.uk/news/article-4752024/Animal-rights-activist-films-freeing-PIG-farm.html>>

⁵ The method has become so popular that an Australian website entitled ‘Aussie Farms’ was launched in 2014 to publish covertly obtained footage from many Australian farms and abattoirs : *Aussie Farms* (2014) <<https://www.aussiefarms.org.au/>> .

⁶ Will Potter, 'Australia Risks Copying Us 'Ag-Gag' Laws to Turn Activists into Terrorists', *The Sydney Morning Herald* (Online), 1 May 2014, <<http://www.smh.com.au/environment/animals/australia-risks-copying-us-aggag-laws-to-turn-animal-activists-into-terrorists-20140501-37k8i.html>>; ABC News, 'Animal Rights Activists 'Akin to Terrorists', Says NSW Minister Katrina Hodgkinson', *ABC News* (Online), 18 July 2013, <<http://www.abc.net.au/news/2013-07-18/animal-rights-activists-27terrorists272c-says-nsw-minister/4828556>>.

To provide a moral justification for civil disobedience in this part, I reply to two common objections to activists who trespass and undertake covert surveillance. The first objection is that such actions invade the privacy of property owners. The second is activism involving trespass is unlawful and thus morally unjustifiable. I consider each of these issues in the context of Australia's democratic society, and in light of the fact that the Australian public has no lawful means to observe cruelty that is taking place behind closed doors.

A. *Lawful Means of Observing Cruelty Not Available*

The Australian public has no lawful means of observing cruelty towards nonhuman animals on private property. As I explained in the chapter one, nonhuman animals are private property, routinely kept on private premises. The treatment of nonhuman animals within private industry is therefore 'inaccessible' to the public.⁷ Currently, the only way the public can observe how nonhuman animals are being treated within private industry is to either observe their treatment directly with consent from the owner, or unlawfully enter premises to observe them without permission (or to rely on footage collected by somebody else who has). Activists who trespass to document cruelty, therefore provide the public with a window into private premises that would not otherwise be available to them.

As I discussed in chapter seven, invisibility operates to facilitate and legitimate the operation of animal protection laws which *permit* animal cruelty. Moreover, the enforcement of Australian animal welfare legislation implicitly relies upon acts of trespass for the RSPCA to form a 'reasonable suspicion' of unlawful cruelty towards nonhuman animals. The result is that Australian animal welfare laws *rely* upon the unlawful conduct of activists if they are to be adequately enforced.

Yet, activists who wish to gain visual access to the treatment of nonhuman animals on private premise must commit a criminal offence or tortious act to do so. The tort of trespass to land is actionable *per se*, meaning that a person may be sued for it even if they did not cause any tangible damage to the property in question.⁸ Activists entering farming premises for example may therefore be liable for trespass even if they merely walk on to the property to take photos

⁷ McCausland, O'Sullivan and Brenton, above n 3, 206.

⁸ Bernadette Richards, Karinne Ludlow and Andy Gibson, *Tort Law in Principle* (5th ed, Thomson Reuters, 2009) 106.

and then leave. This reflects the fact that trespass itself is an unlawful intrusion on the right of a property owner to exclusively possess their property. In the High Court case of *Plenty v Dillon*,⁹ Gaudron and McHugh JJ made this point explicitly, stating that ‘an action for trespass to land...serves the purpose of vindicating the plaintiff’s right to the exclusive use and occupation of his or her land. The appellant is entitled to have this right of property vindicated by a substantial award of damages’.¹⁰ In the case of *TCN Channel Nine Pty Ltd v Anning*,¹¹ the New South Wales Court of Appeal similarly concluded that ‘general damages should reflect the significant purpose of vindicating the...right to exclusive possession’.¹²

Criminal trespass is characterised by the act of entering a property without the consent of an owner. In South Australia for example, a person may be found guilty of criminal trespass if they enter a premise to interfere with the owner’s enjoyment of that premise, and they are asked to leave but fail to do so forthwith, or returns to the premise again within 24 hours.¹³ In such an instance, a maximum penalty of \$2500, or 6 months imprisonment may apply.¹⁴ An activist may also commit serious criminal trespass if they enter and remain in a private place with the intention of committing a further offence involving theft, an offence against the person, or interference with property of a type punishable by imprisonment for three or more years.¹⁵ A person who commits serious criminal trespass in a non-residential building (such as a farm premise, for example) may be penalised with imprisonment for 10 years, or 20 years if the offence was aggravated.¹⁶

There have been numerous requests for greater transparency with respect to how nonhuman animals are treated,¹⁷ which could serve to remove the need for unlawful conduct to observe how nonhuman animals are being treated on private premises. Should there be a move towards greater transparency, such that the public can *lawfully* be informed about how nonhuman animals are raised and killed within private industry, the justifications for civil

⁹ (1991) CLR 635.

¹⁰ *Plenty v Dillon* (1991) 171 CLR 635, 655 (Gaudron J and McHugh J).

¹¹ (2002) 54 NSWLR 333.

¹² *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333, 365 (Spigelman CJ).

¹³ *Summary Offences Act 1953* (SA) s17A.

¹⁴ *Ibid.*

¹⁵ *Criminal Law Consolidation Act Amendment Act 1976* (SA) s168.

¹⁶ *Ibid* s169.

¹⁷ See for example the *Food Amendment (Recording of Abattoir Operations) Bill 2015* (NSW) which seeks to introduce mandatory CCTV in New South Wales abattoirs and knackereries. See also a more recent motion moved in the senate for the introduction of CCTV in slaughterhouses: Commonwealth, *Parliamentary Debates*, Senate, 29 November 2017, 64 (Derryn Hinch).

disobedience involving trespass provided in this chapter may require revisiting. As O’Sullivan and co-authors conclude: the state must ‘either take responsibility to enter private property and be more pro-active in making policy or accept that non-state actors will attempt to perform that role’.¹⁸ Even if the state should move towards improving transparency, there may still exist a legitimate role for activists, who do not have a vested financial interest in the continuation of cruelty towards nonhuman animals, and who have no financial incentive to continue to facilitate its concealment.

Whilst it is not within the scope of this chapter to detail what transparency measures could be introduced, Humane Society International has suggested that greater transparency could be achieved through ‘simple measures’, including accurate and fair labelling of products, the installation of CCTV cameras in commercial facilities that breed, raise or slaughter nonhuman animals and the introduction of programs that allow the public to have access to operating farms.¹⁹ They have also recommended improvements in enforcement and monitoring of animal protection laws, a point which I addressed in the previous chapter.²⁰ Until greater transparency is achieved with respect to how nonhuman animals are lawfully treated in Australia, activist activity remains a ‘sad necessity’ for making cruelty towards nonhuman animals visible to the public.²¹ Put simply, the problem is this: ‘[i]f animal protection laws were adequate with sufficient compliance monitoring and enforcement, then there would be no need for undercover investigations to expose cruelty and neglect’.²²

B. *Privacy and Democracy*

Activists who trespass and covertly obtain footage of cruelty towards nonhuman animals act unlawfully. Farmers whose land is trespassed upon by activists also routinely state that the trespass amounts to a wrongful invasion of privacy. The *Australian Chicken Growers Council*, for example, stated that the lawful conduct of industry should not be subject to ‘harassment, threats, vandalism and or trespass’ by animal advocates, who ‘may not agree

¹⁸ McCausland, O’Sullivan and Brenton, above n 3, 219.

¹⁹ Humane Society International, Submission No 48 to Senate Rural and Regional Affairs and Transport Legislation Committee, *Criminal Code Amendment (Animal Protection) Bill 2015*, March 2015, 1.

²⁰ Ibid 1.

²¹ Ibid 2.

²² Ibid 1.

with intensive agriculture, or in fact any animal production system'.²³ During parliamentary debate, David Ridgeway MP stated:

I think the debate raging that animals are deliberately mistreated by [producers] is a bit of nonsense...I am looking forward to having further discussions with the pork industry, and particularly the intensive animal industry, just to ensure that, on one hand, animals are not mistreated but also that people's privacy and the way they go about their daily business is not impacted on.²⁴

Australian law is already protective of an individual's privacy. Although there is not currently a cause of action available for an invasion of privacy in Australia,²⁵ the High Court of Australia has anticipated that such an action may become available in the future.²⁶ Even without such a cause of action, Australian law indirectly protects privacy in a myriad of ways. As I explained in the chapter three, the owner of real property has a legal right to exclusively possess it. The law of trespass is intended to protect that right, and the breach of privacy and exclusive possession that is involved in trespass is the reason why the tort of trespass is actionable *per se*.²⁷ The tort of private nuisance is similarly designed to protect a plaintiff's enjoyment of their private land.²⁸ Personal information is also protected by laws in Australia such as *The Privacy Act 1988* (Cth) which governs the collection, use, holding and disclosure of personal information.

Activists invade privacy when they trespass and covertly obtain footage of cruelty towards nonhuman animals within private businesses. However, it is necessary to say two brief things about the claim that activists who do so *unduly* invade such privacy. First, it is not clear that a person who operates a private business has an inalienable right to privacy. This point was made in *obiter* by the High Court of Australia in the case of *Australian Broadcasting*

²³ Australian Chicken Growers' Council Limited, Submission No 59 to Senate Standing Committees on Rural and Regional Affairs and Transport, an Inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015, 12 March 2015, 3.

²⁴ South Australia, *Parliamentary Debates*, Legislative Council, 1 July 2014, 520 (The Hon D.W Ridgeway)

²⁵ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479

²⁶ *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* [2001] HCA 63; 208 CLR 199, [191] (Kirby J).

²⁷ Bernadette Richards, Karinne Ludlow and Andy Gibson, *Tort Law in Principle* (5th ed, Thomson Reuters, 2009) 106.

²⁸ *Ibid* 409.

Corporation v Lenah Game Meats.²⁹ In 2001, Lenah Game Meats sought an injunction against the Australian Broadcasting Corporation, preventing the publication of covertly obtained footage documenting lawful cruelty towards possums in an Australian possum abattoir. One of the arguments put forward by Lenah Game Meats which was considered by the High Court, was that the publication would amount to an invasion of privacy. In considering this argument, Chief Justice Gleeson identified a ‘grey area’ that exists somewhere between that which is private and that which is public. He stated:

There is no bright line which can be drawn between what is private and what is not. Use of the term ‘public’ is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford.³⁰

This statement by the High Court is persuasive in any determination about what may constitute a private act. The mere fact that activists are entering a ‘private’ business space which is intended to preclude the public gaze, does not mean that the conduct within that space is protected by an inalienable right to privacy.

Second, it is a fundamental tenet of liberal democratic society that private interests be ‘balanced against public and personal goods’.³¹ One of the most significant liberal commentaries on this point was made by John Stuart Mill, who claimed that ‘the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others’.³² Although Mill did not extend his conception of ‘others’ to nonhuman animals, his argument has been influential for those theorising when individual rights should be abrogated for the greater good. A similar point, specifically pertaining to an individual’s claim to privacy, was also made by the Australian Law Reform Commission in their 2014 report entitled *‘Serious Invasions of Privacy in the*

²⁹ *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* [2001] HCA 63; 208 CLR 199 (*‘Lenah’*).

³⁰ *Ibid* [42] (Gleeson CJ).

³¹ McCausland, O’Sullivan and Brenton, above n 3, 213.

³² John Stuart Mill, ‘On Liberty’ in John Gray and G.W Smith (eds), *J.S Mill’s on Liberty in Focus* (Taylor and Francis, 1991) 23, 30.

Digital Era, which stated that privacy is ‘an important public interest, but it must be balanced with, and sometimes give way to, other rights and interests’.³³ They continued:

[a]lthough respecting privacy will promote free expression and the free media necessary for effective democracy, privacy can sometimes conflict with these and other important public interests. Where breaching someone’s privacy is justified for an important public interest, privacy must give way.³⁴

In 2010, the New South Wales Law Reform Commission reached a similar conclusion, stating that ‘the interest in privacy is not absolute’ and that the public interest in protecting privacy must also be balanced against other competing public interests.³⁵

Precisely what constitutes the ‘public interest’ will always depend on the facts of any given case. In *McKinnon v Treasury*,³⁶ Tamberlin J remarked that the term ‘public interest’ ‘does not have any fixed meaning’.³⁷ He continued: ‘[i]t is of the widest import and is generally not defined or described in the legislative framework, nor, generally speaking, can it be defined’.³⁸ A statutory reference to the ‘public interest’ therefore does not mandate any particular outcome, but rather requires a ‘conclusion or determination which best serves the advancement of the interest of welfare of the public, society or the nation’, to be determined by reference with the facts of any given case.³⁹ Whilst not providing a definitive answer to the question of whether animal welfare issues are always in the public interest, Kirby J provided some direction in *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited*, stating:

The concerns of a governmental and political character must not be narrowly confined. To do so would be to restrict, or inhibit, the operation of the representative democracy that is envisaged by the Constitution. Within that democracy, concerns about animal welfare are clearly legitimate matters of public debate across the nation. So are concerns about the export of animals and animal products. Many advances in animal welfare have occurred only

³³ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2004) 143.

³⁴ *Ibid.*

³⁵ New South Wales Law Reform Commission, ‘*Protecting Privacy in New South Wales*’ Report No 127, (2010) xv.

³⁶ (2005) 145 FCR 70.

³⁷ *McKinnon v Treasury* (2005) 145 FCR 70, 75 [8] (Tamberlin J).

³⁸ *Ibid* 75 [8] (Tamberlin J).

³⁹ *Ibid* 75 [9] (Tamberlin J).

because of public debate and political pressure from special interest groups. The activities of such groups have sometimes pricked the conscience of human beings.⁴⁰

In the same case, Callinan J noted that the method of slaughter of nonhuman animals in Australia may be a matter of public interest, even where the chosen method is lawful. He stated:

[t]he processes adopted by the respondent were neither novel nor confined to the slaughter of possums; they are of a kind generally employed in the slaughter of cattle, sheep and goats for meat. It may also be accepted that the killing and processing for export of possums as creatures native to Australia may well be capable of being matters of public interest.⁴¹

Any claim to privacy that rests solely on the fact that one's conduct occurs on privately owned land must thus be subjected to the public interest test. The 'grey area' between what is private and what is public is not simplified merely by reference to the location in which that conduct takes place. Moreover, it is a fundamental tenet of democratic society that a public or private interest in privacy may give way to other competing public interests, and I have suggested that the publication of footage documenting cruelty towards nonhuman animals may fall within the scope of the public interest.

C. When Unlawful Conduct is Justified

A common objection to unlawful activism is that activists unjustifiably take the law into their own hands. Australian deputy Prime Minister Barnaby Joyce (previously the Minister for Agriculture) for example has stated:

You cannot decide to take the law into your own hands. Once you do that...where does it stop? Everyone has an own purview an ethical reason [sic] to break into some industry because of what they judge to be correct. That judgment is overwhelmingly done by the police, or it is done by the RSPCA; it can't be done by people of their own volition.⁴²

⁴⁰ *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* [2001] HCA 63; 208 CLR 199, 217-218.

⁴¹ *Ibid* [230].

⁴² Jared Owens and Brenan Cormick, 'Barnaby Joyce Criticises Activists in Greyhound Live-Bait Expose', *The Australian* (Online), 17 February 2015, <<http://www.theaustralian.com.au/news/nation/barnaby-joyce-criticises-activists-in-greyhound-live-bait-expose/story-e6frg6nf-1227223167503>>.

However, it is necessary to make two points in response to this. First, the claim that citizens have a prima facie duty to obey the law is subject to intense debate. Second, even if one accepts that citizens have a duty to obey the law, civil disobedience may still be morally justified. I consider each of these points in turn.

1. *The Authority of Law*

There are ongoing conversations about whether citizens have a prima facie moral obligation to obey the law. According to John Hasnas, the question of whether the law creates moral obligations is an ‘ancient one’,⁴³ which has been met with a variety of responses. Hasnas suggests that among these commentators, there is ‘no one...[who] argues that the duty to obey the law is a fundamental moral duty – one that is worth complying with for its own sake’.⁴⁴ However, it is possible to identify thinkers who have argued that there may be a moral duty to obey laws, even if those laws are unjust or violate an individual’s rights. For example, Thomas Hobbes has argued that there exists a duty to obey the law to avoid chaos or the ‘weakening of an otherwise just legal system’.⁴⁵ Hobbes said that ‘perpetual war, of every man against his neighbour’ would ensue if citizens failed to obey the law, and were thus ‘masterless’.⁴⁶ Thomas Aquinas made a similar claim, arguing that even an unjust law may ‘bind in conscience’.⁴⁷ Although Aquinas argues that ‘a law that is not just, seems to be no law at all’, he also held that a moral duty to obey an unjust law still exist where obedience will ‘avoid scandal or disturbance’.⁴⁸

Political thinkers such as John Rawls and Jeremy Waldron have argued for the existence of a moral duty to obey the laws of *just* institutions. Rawls stated that

[f]rom the standpoint of justice and fairness, a fundamental natural duty is the duty of justice. This duty requires us to support and to comply with just institutions that exist and apply to us...if the basic structure of society is just, or as just as it is reasonable to expect in the

⁴³ John Hasnas, ‘Is There a Moral Duty to Obey the Law?’ (2013) 30(1-2) *Social Policy and Philosophy* 450, 452.

⁴⁴ Ibid 454.

⁴⁵ Peter Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2015) 99.

⁴⁶ Thomas Hobbes, *Leviathan* (The Floating Press, first published 1651, 2009 ed) 305.

⁴⁷ Thomas Aquinas in J Budziszewski, *Commentary on Thomas Aquinas' Treatise on Law* (Cambridge University Press, 2014) 386.

⁴⁸ Ibid 386.

circumstances, everyone has a natural duty to do his part in the existing scheme. Each is bound to these institutions independent of his voluntary acts, performative or otherwise.⁴⁹

Similarly, Waldron stated '[i]t is morally imperative that the demands of justice be pursued *period*', and that there exists a requisite 'natural duty to support the laws and institutions of a just state'.⁵⁰ John Finnis has adopted a similar approach, suggesting that a moral duty to obey the law stems from the fact that the law has a unique ability to coordinate society in pursuit of common goods. He contends, 'the existence of the legal order creates a shared interest which gives everyone moral reason to collaborate with the law's coordination solutions, i.e. moral reason to regard the law as (morally) authoritative'.⁵¹ What these arguments share is the view that a moral obligation to obey the law is instrumental in securing a 'more ultimate, compelling moral end'.⁵²

A different perspective is that the law has no *prima facie* moral authority over its citizens. On this view, law that is unjust, or fails to accord with a conception of the greater good, may be considered 'defective', and may fail to make any moral command over citizens.⁵³ According to William Godwin, blind obedience to unjust law confounds the 'authority which depends on force, with the authority that arises from reverence and esteem', and is a 'violation of political justice'.⁵⁴ Similarly, Scott Shapiro contends that an 'over-reliance on authority...[t]o cede too much decision-making to others is both foolhardy and morally irresponsible'.⁵⁵

A more polemical view put forward by Robert Wolff, is that a moral obligation to obey the law is contrary to the 'primary obligation' of humans to maintain moral autonomy.⁵⁶ Wolff claims: '[t]he autonomous man, insofar as he is autonomous, is not subject to the will of another. He may do what another tells him, but not *because* he has been told to do it'.⁵⁷ Moreover, Wolff contends

⁴⁹ John Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press, 1971) 99.

⁵⁰ Jeremy Waldron, 'Special Ties and Natural Duties' (1993) 22(1) *Philosophy and Public Affairs* 3, 3, 28.

⁵¹ John Finnis, 'Law as Co-Ordination' (1989) 2(1) *Ratio Juris* 97102

⁵² Hasnas, above n 43, 454; Waldron, above n 50, 9.

⁵³ Peter Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2015) 97.

⁵⁴ William Godwin, *Enquiry Concerning Political Justice* (Batoche Books, 2000)143

⁵⁵ Scott Shapiro, 'Authority' (2000) *Stanford/Yale Jr Faculty Forum Reserach Paper 00-05; Cardozo Law School, Public Law Reserach Paper No. 24*
<https://law.yale.edu/system/files/documents/pdf/Faculty/Shapiro_Authority.pdf> 10.

⁵⁶ Robert Wolff, *In Defense of Anarchism* (University of California Press, first published 1970, 1998 ed) 18

⁵⁷ *Ibid*14.

there can be no resolution of the conflict between the autonomy of the individual and the putative authority of the state. Insofar as man fulfils his obligation to make himself the author of his decisions, he will resist the state's claims to have authority over him. That is to say, he will deny that he has a duty to obey the laws of the state *simply because they are the laws*.⁵⁸

Whilst it is not within the scope of this chapter to contribute to these conversations regarding the law's authority, the commentaries indicate that the proposition that citizens have a moral duty to uphold the law in all cases is subject to intense scholarly debate and that there is no fixed or agreed upon position. Any claim that activists who trespass act immorally, simply because their conduct is unlawful, must therefore be tested against these wide ranging perspectives. This is particularly pertinent in the context of animal welfare, where the laws that ostensibly protect the welfare of nonhuman animals, implicitly rely upon the unlawful conduct of activists to provide the RSPCA with a 'reasonable suspicion' of animal cruelty before they may enter and inspect private premises.

D. A Statement on Civil Disobedience

In conjunction with scholarship about the authority of law, legal and political theorists also debate whether there is a justification for civil disobedience. My discussion in this part deals with acts of positive disobedience, and is thus different from the discussion in the previous surrounding the authority of law and when law may have the ability to bind a population in conscience. Whilst it is unnecessary for the purposes of my argument to provide a full account of what actions might constitute civil disobedience, a brief analysis of some key commentators on the topic reveals that there is a *prima facie* moral justification for trespass with an intent to covertly obtain footage of lawful cruelty towards nonhuman animals.

The morality of breaking the law in the name of civil disobedience has attracted significant scholarly attention.⁵⁹ One view is that 'disobedience may be justifiable under certain political systems, for instance, Nazi or Communist dictatorships, [but] it is never or almost never

⁵⁸ Ibid 18.

⁵⁹ With respect to animal advocacy, see: McCausland, O'Sullivan and Brenton, above n 3; Tony Milligan, 'Animal Rescue as Civil Disobedience' (2017) 23 *Res Publica* 281; Siobhan O'Sullivan, Clare McCausland and Scott Brenton, 'Animal Activists, Civil Disobedience and Global Responses to Transnational Justice' (2017) 23 *Res Publica* 261.

justifiable in a democracy'.⁶⁰ In 1970, former Prime Minister of Australia, John Gorton articulated this view, stating: '[a]s to inciting people to break the law, I think there can be no excuse whatsoever for those in a community where the opportunity exists to change the law through the ballot box'.⁶¹ T.H Green made a similar claim:

Supposing then the individual to have decided that some 'command of a political superior' is not for the common good, how ought he to act in regard to it? In a country like ours, with a popular government and settled methods of enacting and repealing laws, the answer of common sense is simple and sufficient. He should do all he can by legal methods to get the command cancelled, but till it is cancelled, he should conform to it.⁶²

The view that democratic citizens may be under a *prima facie* moral duty to obey the law has also been discussed by McCausland, O'Sullivan and Brenton in the specific context of animal activism. They suggest that democratically passed laws represent the 'majority view' and may therefore make a stronger moral claim over citizens than other types of laws passed by other forms of government.⁶³ However, even if one accepts this view, civil disobedience may still be justified in a democratic society provided it meets certain criteria. This is particularly so in the context of nonhuman animals, where trespass currently presents the *only* means available for monitoring the conduct of private industries without warning, and is therefore an essential component of enforcement of Australian animal welfare legislation.

In this context, civil disobedience does not *weaken* the democratic state, but is rather a 'hallmark' of it.⁶⁴ Civil disobedience in the form of trespass is essential to 'mak[ing] the majority realize that what is for it a matter of indifference is a matter of great importance to others',⁶⁵ and thus 'limited disobedience...can have an important part to play' in a democratic society.⁶⁶ Moreover, disobedience might be essential to 'ensuring the accountability of those

⁶⁰ Peter Singer, *Democracy and Disobedience* (Oxford University Press, 1974) 1. Note that Singer critiques this view.

⁶¹ Quoted in *ibid* 1.

⁶² T Green, *Lectures on the Principles of Political Obligation* (Batoche Books, first published 1907, 1999 ed) 75.

⁶³ McCausland, O'Sullivan and Brenton, above n 3, 207.

⁶⁴ Burdon, above n 53, 98.

⁶⁵ Singer, above n 60, 84. Note Singer contends that once the public are not willing to re-consider, the disobedience 'must be abandoned'.

⁶⁶ *Ibid* 87.

in power’, and because of the ‘role it plays in bringing publicity to or perhaps a fair hearing’ on animal welfare issues, that are most clearly of public concern.⁶⁷

According to Hannah Arendt, civil disobedience in a democratic society is an ‘activity that mediates between a need for change and a need for stability’.⁶⁸ It does not undermine the authority of the law *per se*, but rather is an act that implicitly accepts its legitimacy.⁶⁹ As Peter Burdon puts it, ‘dissent implies consent’.⁷⁰ Thus, for Arendt, acts of civil disobedience in a democratic society acknowledge the authority of law as a tool that can ‘stabilise and legalize change once it has occurred’, though her personal view is that ‘the change itself is always the result of extra legal action’.⁷¹ Given that, as I explained in chapter seven, the RSPCA is only authorized to enter private premises based on a reasonable suspicion of cruelty, it is clear that civil disobedience is essential not only to making animal cruelty *visible*, but to enabling the enforcement of Australian animal welfare laws. To this end, it is possible to see how civil disobedience, in the form of trespass, explicitly affirms the authority of law, in the sense that it is often intended to bring to light unlawful conduct that is contrary to the values and provisions of Australian animal welfare legislation.

Numerous thinkers have sought to define the limits of what constitutes justifiable law breaking. For the purposes of this chapter, I describe a cautious definition by drawing on the work of Henry Bedau and John Rawls. I describe it as ‘cautious’ because it is narrower and more reserved than other theories of civil disobedience, which I mention below. Civil disobedience, according to Rawls, is ‘a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in law or policies of the government.’⁷² It is morally justified on the basis that it is a ‘political act...guided and

⁶⁷ Burdon, above n 53, 98.

⁶⁸ Verity Smith, ‘Hannah Arendt on Civil Disobedience and Constitutional Patriotism’ in Roger Berkowitz, Jeffrey Katz and Thomas Keenan (eds), *Thinking in Dark Times: Hannah Arendt on Ethics and Politics* (Fordham University Press, 2010) 106; Hannah Arendt, ‘Civil Disobedience’ in *Crises of the Republic* (Harcourt, 1972) 79; Jay Bernstein, ‘Promising and Civil Disobedience: Arendt’s Political Modernism’ in Roger Berkowitz, Jeffrey Katz and Thomas Keenan (eds), *Thinking in Dark Times: Hannah Arendt on Ethics and Politics* (Fordham University Press, 2010) 116.

⁶⁹ Hannah Arendt, ‘Civil Disobedience’ in *Crises of the Republic* (Harcourt, 1972)

⁷⁰ Peter Burdon, *Hannah Arendt: Legal Theory and the Eichmann Trial* (Routledge, 2017) 77.

⁷¹ Arendt, above n 69, 80.

⁷² Rawls, above n 49, 364. Rawls distills this definition from the writing of Hugo Bedau: Hugo Bedau, ‘On Civil Disobedience’ (1961) 58(21) *The Journal of Philosophy* 653.

justified by political principles, that is, principles of justice which regulate the constitution and social institution generally'.⁷³

Rawls' account of civil disobedience may be critiqued as being too narrow. Joseph Raz, for example, has pointed out that at times, the requirement of nonviolence 'may well have much more severe consequences than many an act of violence'.⁷⁴ Raz provides the example of a nonviolent strike by ambulance drivers, which could lead to significant fatalities and suffering. Raz therefore contends 'violence for political gains cannot be rejected absolutely',⁷⁵ as consideration must be given to the context and the potential outcomes of non-violent methods. A stronger view is that violence is prima facie justified in the context of civil disobedience. John Morreal for example defends violence where it is used in a deliberate and limited fashion to achieve limited ends.⁷⁶ Peter Gelderloos puts forward an even stronger position, and argues that nonviolent methods 'invariably lead to dead ends'.⁷⁷ He claims the requirement of nonviolence is based on 'falsified histories of struggle...[i]t's methods are wrapped in authoritarian dynamics, and its results are harnessed to meet government objectives over popular objectives. It masks and even encourages patriarchal assumptions and power dynamics'.⁷⁸

Moreover, the method of 'applying' a cautious definition of civil disobedience to the context of animal activism is not without limitation. According to Kimberley Brownlee, while such an approach is 'standard...when examining civil disobedience', she contends that 'definitions tend to be overly rigid' and tend, as a consequence, to anticipate evaluation'.⁷⁹ Moreover, it is rarely possible to determine whether a particular form of disobedience can be justified 'in the abstract'.⁸⁰ As Peter Singer suggests, 'to expect any work of theory to give answers to questions is to expect more than theory alone can give'.⁸¹ It is also important to note that

⁷³ Rawls, above n 49, 365. Although I do not explore it here, it is worth noting that Rawl's conception of justice is subject to debate. See Singer, above n 60, 87.

⁷⁴ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd ed, Oxford University Press, 2009)267

⁷⁵ Ibid 268.

⁷⁶ John Morreall, 'The Justifiability of Violent Civil Disobedience' (1976) 6(1) *Canadian Journal of Philosophy* 35, 36.

⁷⁷ Peter Gelderloos, *How Nonviolence Protects the State* (South End Press, 2007) 2

⁷⁸ Ibid 2

⁷⁹ Kimberley Brownlee, 'Features of a Paradigmatic Case of Civil Disobedience' (2004) 10 *Res Publica* 337, 337.

⁸⁰ Singer, above n 60, 64.

⁸¹ Ibid 64.

Rawls's overall conception of justice is human-centric,⁸² and thus it is unlikely that Rawls would have contemplated civil disobedience on behalf of nonhuman animals as justifiable in the first place.⁸³ Regardless of these limitations, my use of a cautious definition of civil disobedience serves to illustrate that even civil disobedience, narrowly defined, can justify acts of trespass on behalf of nonhuman animals. I now consider how each criterion of the cautious conception of civil disobedience may apply in the context of animal activists who trespass to document cruelty towards nonhuman animals.

1. *Public*

For Rawls, civil disobedience is a 'public act' that is 'addressed to public principles [and] done in public...openly with fair notice; it is not covert or secretive'.⁸⁴ Hugo Bedau makes a stronger claim, arguing that acts of civil disobedience are 'necessarily *public*'.⁸⁵ Bedau contends that if an act of civil disobedience is done privately or in secret, the act itself must constitute an 'embarrassment to the dissenter', motivating the concealment of his conduct from public view.⁸⁶ An act that would cause such 'embarrassment', he contends could not be considered civil disobedience. This is because civil disobedience requires that the dissenter 'views what he does as a civic act, an act that properly belongs to the public life of the community'.⁸⁷ On this basis, Bedau contends that the Government and the public should be informed in advance of any intention to engage in an act of civil disobedience.⁸⁸ O'Sullivan and co-authors similarly contend that 'secrecy is not compatible with an open and public appeal to common conceptions of justice'.⁸⁹

Animal activists can meet the requirement that their conduct be public, given that they publicize the footage that they covertly obtain. Part of their activism is necessarily performed

⁸² Peter Singer, 'Disobedience as a Plea for Reconsideration' in Hugo Bedau (ed), *Civil Disobedience in Focus* (Routledge, 1991) 122, 126.

⁸³ McCausland, O'Sullivan and Brenton, above n 3, 208.

⁸⁴ Rawls, above n 49, 366.

⁸⁵ Bedau, above n 72, 656.

⁸⁶ Ibid 655.

⁸⁷ Ibid 656. For a critique of this position, see Tony Milligan, 'Animal Rescue as Civil Disobedience' (2017) 23 *Res Publica* 281, where Milligan critiques the idea that identify concealment is necessarily sinister.

⁸⁸ Bedau, above n 72, 656.

⁸⁹ McCausland, O'Sullivan and Brenton, above n 3, 210. For a critical perspective on forms of struggle that take place in private, see James Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale University Press, 1985)

in private, since alerting the subjects of covert surveillance to the fact that they are being filmed may cause them to moderate their behaviour. Publicizing an intent to engage in civil disobedience would therefore undermine the act of civil disobedience in the first place.⁹⁰ However, provided that activists publicize their findings, and in doing so ‘make it known that an act of civil disobedience has occurred, and what the motivation behind it is’, it seems the public communication element would be satisfied.⁹¹

The publicity requirement seems even more clearly satisfied given that activists who operate in secret can justify the reasons for behaving covertly in the first place. The ability to provide such a justification will ‘reduce the perception that the intention of the disobedient act was deception, rather than in the interests of a conscientiously and politically supportable view’.⁹² In the context of animal activism, where publicity would potentially undermine one’s ‘attempt to communicate through civil disobedience’,⁹³ covert conduct is arguably justified when it is published after the fact.⁹⁴

2. *Conscientious*

An act of civil disobedience must be ‘conscientious’, meaning that the ‘dissenter proposes to justify his disobedience by an appeal to the incompatibility between his political circumstances and his moral convictions’.⁹⁵ The requirement that civil disobedience be conscientious does not mandate that one prove that their moral convictions are ‘true and justified’.⁹⁶ Rather, according to Brownlee, the requirement of conscientiousness necessitates that any action be performed in light of views that are sincere, serious and morally consistent with the course of action taken.⁹⁷ In addition, an action can only be conscientious if the person undertaking it has engaged in some form of utilitarian analysis in which they weigh the consequences of performing the act versus those of non-performance. A dissenter should thus believe that the law makes a prima facie claim upon them,⁹⁸ and that it is ‘not lightly to

⁹⁰ McCausland, O’Sullivan and Brenton, above n 3, 209.

⁹¹ Brownlee, above n 79, 349.

⁹² McCausland, O’Sullivan and Brenton, above n 3, 210.

⁹³ Brownlee, above n 79, 348.

⁹⁴ Tony Milligan, ‘Animal Rescue as Civil Disobedience’ (2017) 23 *Res Publica* 281, 293-294.

⁹⁵ Bedau, above n 72, 659.

⁹⁶ Brownlee, above n 79, 342.

⁹⁷ *Ibid* 343.

⁹⁸ Bedau, above n 72, 660.

be disturbed'.⁹⁹ An act of civil disobedience will be conscientious where the dissenter believes 'it would be worse for everyone to suffer the consequences of the objectionable law than it would be for everybody to suffer the consequences of his...civil disobedience'.¹⁰⁰ Animal activists might satisfy the requirement of possessing a sincere and serious belief, if they contest systematic and routine forms of cruelty towards nonhuman animals that are positively permitted by the laws that purport to prohibit it.

3. *Nonviolent*

An act of civil disobedience must also be non-violent in nature. According to Bedau, an act of disobedience that is violent in nature simply cannot be described as 'civil'.¹⁰¹ Though I have indicated that the acceptability of violence as a tool of civil disobedience is the subject of debate, a strong case can be made that trespass satisfies Bedau's conception of non-violence:

the agent does not try to accomplish his [sic] aim either by initiating or by threatening violence, that he does not respond with violence or violent resistance during the course of his disobedience....and thus that he is prepared to suffer without defence the indignities and brutalities that often greet his act.¹⁰²

The conduct of animal activists who trespass one private land to document cruelty would meet this requirement. While some activists do use 'intentionally distressing shock tactics...[that] are not a legitimate part of the civil disobedience tool-kit', those can be easily distinguished from the conduct of those who merely enter private premises.¹⁰³ On the cautious view, activists who do engage in violent, threatening or destructive behaviour operate in a way that 'is at risk of falling outside the scope of civil disobedience'.¹⁰⁴ In one example, a family who ran a guinea pig farm was on the receiving end of the threatening and destructive conduct of several animal activists. In 2006, those threats and harassments culminated in the theft of a family members body from the grave.¹⁰⁵ Such vicious acts clearly

⁹⁹ Ibid 661.

¹⁰⁰ Ibid 660.

¹⁰¹ Ibid 656.

¹⁰² Ibid 656.

¹⁰³ McCausland, O'Sullivan and Brenton, above n 3, 271.

¹⁰⁴ Ibid.

¹⁰⁵ Steven Morris, David Ward and Riazat Butt, 'Jail for Animal Rights Extremists Who Stole Body of Elderly Woman from Her Grave', *The Guardian* (Online), 21 May 2006, <<https://www.theguardian.com/uk/2006/may/12/animalwelfare.topstories3>>.

fall outside the scope of civil disobedience on the cautious view by failing to meet the requirement of non-violence. If civil disobedience is a tool with which citizens can legitimately and justifiably break the law to *oppose* violence, coercion and injustice, the cautious view maintains that it is imperative that the act of civil disobedience itself remains free from these things.

4. *Aiming to Change Government Policy or Law*

Finally, an act of civil disobedience must be directed at the government because of an objectionable law or policy. This does not necessarily require that a dissenter engaging in an act of civil disobedience break the same law that they object to.¹⁰⁶ Rather, an act of civil disobedience may involve breaking one law but be aimed at a different objectionable law ‘indirectly’.¹⁰⁷ This is pertinent in the context of animal activism, where engaging in trespass and unlawful covert surveillance addresses government policy and failing animal welfare legislation indirectly. According to Bedau, the fact that one may target objectionable laws ‘indirectly’ and still participate in civil disobedience is necessary given that some of the most objectionable laws are not ‘open to direct resistance by anyone except those who administer them’.¹⁰⁸ Nevertheless, there should be a ‘meaningful connection’ maintained between the offence that is committed and the law that is being opposed by the act of civil disobedience.¹⁰⁹ That connection seems well maintained in the context of animal activism involving trespass and covert surveillance, since the criminal and civil laws prohibiting trespass are precisely those that facilitate the secrecy that sustains cruelty towards nonhuman animals.

This discussion has sought to demonstrate that acts of animal activism may be characterised as civil disobedience. While it is difficult to undertake a thorough assessment of the different forms activism might take, this discussion has shown that *prima facie*, trespass to document cruelty towards nonhuman animals may be morally justified in a democratic society where the action is sufficiently public, conscientious and non-violent, and is intended to affect general policy or legal change. I have also argued that even though an individual has a

¹⁰⁶ Bedau, above n 72, 657.

¹⁰⁷ *Ibid* 657.

¹⁰⁸ *Ibid* 657.

¹⁰⁹ McCausland, O’Sullivan and Brenton, above n 3, 209.

limited right to privacy, animal welfare matters are legitimate matters of public interest, and may therefore be a basis upon which individual privacy rights can be justifiably be abrogated.

III. MAKING INVISIBLE CRUELTY ‘VISIBLE’: DEBUNKING THE MYTH

Having provided a prima facie case for justifying acts of civil disobedience by animal activists, I turn now to draw a link between such acts and the alleviation of cruelty towards nonhuman animals. I divide this discussion into two parts: (1) the generation of public debate, and (2) the link between animal visibility and regulatory attention.

A. *Generating Public Debate and Enabling Law Enforcement*

There are many examples of the Australian media publicizing footage covertly collected by activists engaging in civil disobedience. The footage has depicted both lawful and unlawful cruelty. For example, in 2012, covertly obtained footage from Australia’s largest duck meat producer, *Pepe’s Ducks*, showed ducks denied access to water, trapped under metal grates and unable to walk or weight bear.¹¹⁰ In 2013, Animal Liberation released anonymously provided footage of turkeys being ‘bashed, kicked and stomped on’ at *Inghams* poultry slaughterhouse in New South Wales.¹¹¹ Also in 2013, activist footage revealed male calves at a Victorian slaughterhouse being prodded excessively with cattle prods ‘and sometimes even thrown’ to force them into the slaughterhouse.¹¹² In 2014, animal rights group *PETA* released covertly obtained footage from within Australian shearing sheds, documenting sheep being ‘roughly handled, punched in the face and stamped upon. One sheep was beaten with a hammer while another was shown having a deep cut crudely sewn up’.¹¹³ In 2015, footage was released to the public showing live possums, piglets and rabbits being used as ‘baits’ by

¹¹⁰ Australian Broadcasting Corporation, 'Disturbing Footage Prompts Calls for Duck Farming Changes', 7.30, 19 June 2012 (Bronwyn Herbert).

¹¹¹ Megan Levy, 'Torture for Fun: Police Given Shocking Abattoir Footage', *The Sydney Morning Herald* (Online), 21 March 2013, <<http://www.smh.com.au/national/torture-for-fun-police-given-shocking-abattoir-footage-20130320-2ggm2.html>>.

¹¹² Australian Broadcasting Corporation, 'Victorian Abattoir Accused of Cruel Treatment of Unwanted Dairy Calves', *Lateline*, 1 February 2013 (Hamish Fitzsimmons).

¹¹³ Oliver Milman, 'Sheep Cruelty Video Sparks RSPCA Investigation', *The Gaurdian* (Online), 2014, <<https://www.theguardian.com/world/2014/jul/11/sheep-cruelty-video-sparks-rspca-investigation>>.

Australian greyhound trainers.¹¹⁴ In 2016, allegations of cruelty were made against a Hobart abattoir, after covertly obtained footage was collected depicting pigs ‘beaten with pipes, kicked in the head...[and] failed attempts to stun animals’.¹¹⁵ In 2017, Animal Liberation Tasmania provided anonymous footage to the Primary Industries Department depicting calves being mistreated at a Tasmanian abattoir. The footage depicted ‘workers beating male calves until they collapsed and throwing them to the ground by the ears’.¹¹⁶

These public ‘exposés’ documenting cruelty towards nonhuman animals can cause financial damage to the industries that are exposed. They can also generate heated public debate surrounding our treatment of nonhuman animals. For example, In May 2011, ABC current affairs program *Four Corners* publicised covertly collected footage of Australian cattle being mistreated in Indonesian export abattoirs.¹¹⁷ The footage showed Australian cattle in Indonesian markets subjected to torture and abuse, and slaughtered whilst fully conscious. Some cattle were subjected to 33 cuts with a knife prior to an apparent loss of consciousness or death. The footage led to the announcement by then Prime Minister Julia Gillard of a temporary suspension of the trade.¹¹⁸ The cost to Australia’s live export farmers was reportedly significant, with a class action currently before the court seeking compensation for financial losses.¹¹⁹ During the hearing, the court was reportedly told that Australia’s meat sales had dropped by 15 percent in the week following the program, in response to ‘public revulsion’ over the cruelty they had seen.¹²⁰ This followed the 2006 ban on live exports to Egypt, which was enacted following the public release of footage of extreme animal cruelty

¹¹⁴ Australian Broadcasting Corporation, 'Making a Killing', *Four Corners*, 16 February 2015 (Caro Meldum-Hanna).

¹¹⁵ Peta Carlyon, 'Tasmanian Abattoir Investigated over Animal Cruelty Claims', *ABC News* (Online), 14 October 2016, <<http://www.abc.net.au/news/2016-10-14/tasmanian-abattoir-accused-of-animal-cruelty/7924804>>.

¹¹⁶ Unknown, 'Abattoir Boss Admits Calves Ill-Treated after Animal Liberation Releases Video', *ABC News* (Online), 4 May 2017, <<http://www.abc.net.au/news/2017-05-04/abattoir-owner-admits-calves-ill-treated/8495952>>.

¹¹⁷ Australian Broadcasting Corporation, 'a Bloody Business', *Four Corners*, 30 May 2011 (Sarah Furguson, Michael Doyle).

¹¹⁸ Naomi Woodley, 'Government to Suspend Live Cattle Exports', *ABC News* (Online), 9 June 2011, <<http://www.abc.net.au/news/2011-06-08/government-to-suspend-live-cattle-exports/2750312>>.

¹¹⁹ Sara Everingham and Kristy O'Brien, 'Cattle Industry Launches Class Action against Federal Government, Seeking Compensation over Live Export Ban', *ABC News* (Online), 28 October 2014, <<http://www.abc.net.au/news/2014-10-28/cattle-industry-launches-class-action-over-live-export-ban/5845650>>.

¹²⁰ Nick Dole, 'Australia's Meat Sales Plunged 15pc after Indonesian Cattle Cruelty Revelations, Court Told', *ABC* (Online), 20 July 2017, <<http://www.abc.net.au/news/2017-07-20/australia-meat-sales-plunged-15pc-over-cattle-cruelty-court-told/8729300>>.

in Egyptian slaughterhouses, in which cattle had their tendons slashed as a method of restraint.¹²¹

In 2015, an exposé entitled ‘Making a Killing’ aired on the Australian television show, *Four Corners*. This revealed the use of live animal baits in the Australian greyhound racing industry, and is a powerful example of how activists engaging in trespass and covert surveillance may generate change for nonhuman animals by raising public awareness of animal welfare issues, and enabling the enforcement of animal welfare provisions. The practice of live baiting is already unlawful in Australia,¹²² yet the undercover footage captured by Australian animal advocacy groups revealed that the practice was notoriously widespread, with some of the biggest industry names engaging in the activity. The footage exposed greyhound trainers and handlers using live rabbits, piglets and possums to train racing greyhounds. In some instances, ‘bait’ animals were kept in cages and bred to ensure an ongoing supply of ‘baits’. In most instances, these live ‘bait’ animals were tied to a lure and sent around the racing track. The greyhounds were released to catch them and maul them – a method in the industry known as bleeding. The industry rationale behind ‘bleeding’ is that the greyhounds will race faster if they are encouraged to develop a prey instinct. The act of capturing live prey and the taste of blood is thought to engage such an instinct.¹²³

In the weeks following the exposé, the greyhound racing industry in Australia experienced widespread public backlash. Nine major corporate sponsors of greyhound racing pulled their funding and support from the industry.¹²⁴ The Greyhound Racing Board of New South Wales was requested to stand down by Minister for Racing, Troy Grant. The CEO was also stood down.¹²⁵ In addition, the entire racing board of Victoria resigned, with the Chairman even stating: ‘I can no longer be satisfied that live baiting was restricted to the small band of

¹²¹ Jane Bardon, 'Egypty Live Cattle Export Ban Lifted', *ABC Rural* (Online), 9 May 2008, <<http://www.abc.net.au/site-archive/rural/qld/content/2007/s2240355.htm>>.

¹²² *Animal Care and Protection Act 2001* (Qld) s32, *Prevention of Cruelty to Animals Act 1979* (NSW) s21, *Prevention of Cruelty to Animals Act 1986* (Vic) s13, *Animal Welfare Act 1985* (SA) s13(3)(f), *Animal Welfare Act* (NT) s21, *Animal Welfare Act 2002* (WA) s32.

¹²³ Australian Broadcasting Corporation, 'Making a Killing', *Four Corners*, 16 February 2015 (Caro Meldum-Hanna).

¹²⁴ Animals Australia, *When You Go to the Greyhound Races - What Are You Really Betting On?* (2015) <<http://www.greyhoundcruelty.com/>> Sponsors who have withdrawn their support include: ATC Insurance Solutions, McDonalds, Schweppes, Hyundai, Autobarn, Bendigo Bank, Century 21, Macro Meats, and Lion.

¹²⁵ Chris Roots, 'Greyhound Racing NSW Board and Chief Executive Stand Down as Live Baiting Scandal Engulfs the Sport', *The Sydney Morning Herald* (Online), 15 February 2015, <<http://www.smh.com.au/sport/greyhound-racing-nsw-board-and-chief-executive-stand-down-as-live-baiting-scandal-engulfs-the-sport-20150218-13io51.html>>.

immoral criminals'.¹²⁶ Racing Queensland's Integrity manager was provisionally stood down, only to be reinstated following an internal review.¹²⁷ Five notable Queensland trainers, Reg Kay, Tom Noble, Debra Arnold, James Harding and Tony McCabe, received life-time bans from the sport, preventing them from owning, training, or preparing a registered racing animal and attending the Brisbane Greyhound races.¹²⁸ Tom Noble was charged with seven counts of animal cruelty, with Detective Superintendent Mark Aimsforth stating his was 'only the commencement of a number of arrests'.¹²⁹ Noble pleaded guilty to the charges and was handed a three-year, wholly suspended jail sentence in September 2016. The Attorney General appealed the decision to suspend the sentence, with a decision on that matter yet to be made.¹³⁰

Thirty nine trainers across the three exposed states were suspended pending further investigations.¹³¹ Racing Queensland stood down 29 trainers.¹³² In Western Australia, the racing industry increased live baiting penalties from a maximum 12 month disqualification from the sport, to a maximum 10 year disqualification and \$50,000 fine.¹³³ The RSPCA also offered a reward of \$10,000 for any information leading to live-baiting convictions.¹³⁴ In South Australia, the *Animal Welfare (Greyhound Training) Amendment Bill 2015* was

¹²⁶ Peter Caillard, *Statement from Grv Chair Peter Caillard* (2015) Greyhound Racing Victoria <<http://www.grv.org.au/news/2015/02/23/statement-grv-chair-peter-caillard/>> at 2015 2015.

¹²⁷ Beth Newman, 'Greyhound Live Baiting: How It Unfolded', *Brisbane Times* (Online), 2 June 2015, <<http://www.brisbanetimes.com.au/queensland/greyhound-live-baiting-how-it-unfolded-20150601-ghefy6.html>>.

¹²⁸ Ben Dorries and Ray Thomas, 'Five Greyhound Trainers Banned for Life for Live Baiting, 28 NSW Dogs Barred from Racing', *Courier Mail* (Online), 3 March 2015, <<http://www.couriermail.com.au/news/queensland/five-queensland-greyhound-trainers-banned-for-life-for-live-baiting-28-nsw-dogs-barred-from-racing/story-fnn8dlfs-1227244939020>>

¹²⁹ Josh Bavas, 'Greyhound Live Baiting: Ipswich Trainer Tom Noble Granted Bail on Seven Animal Cruelty Charges', *ABC News* (Online), 10 March 2015 <<http://www.Abc.Net.Au/News/2015-03-10/Qld-Man-Charged-with-Animal-Cruelty-Greyhound-Live-Baiting/6293234>>.

¹³⁰ Melanie Petrinc, 'Greyhound Live-Baiting Scandal: State Wants Tom Noble to Serve Jail Time', *Courier Mail* (Online), 17 March 2017, <<http://www.couriermail.com.au/news/queensland/crime-and-justice/greyhound-livebaiting-state-wants-tom-noble-to-serve-jail-time/news-story/f7fcaade4a4d91eb1298452c942b04f7>>.

¹³¹ Animals Australia, *10 Ways You Helped Achieve Justice for Greyhound Racing Victims* (2015) <<http://www.animalsaustralia.org/features/live-baiting-investigation-outcomes.php>> .

¹³² Unknown, 'Racing Queensland Stands Down 23 More Trainers after Live Baiting Scandal', *ABC News* (Online), 17 March 2015, <<http://www.abc.net.au/news/2015-03-17/queensland-racing-stands-down-23-more-greyhound-trainers/6325130>>.

¹³³ Unknown, 'WA Imposes Life Ban, \$50k Fine for Greyhound Industry Live Bait Offenders', *ABC News* (Online), 20 February 2015, <[http://www.abc.net.au/news/2015-02-20/wa-imposes-life-ban,-\\$50k-fine-for-greyhound-live-bait-offenders/6165436](http://www.abc.net.au/news/2015-02-20/wa-imposes-life-ban,-$50k-fine-for-greyhound-live-bait-offenders/6165436)>.

¹³⁴ Courtney Bembridge, 'Greyhound Racing: RSPCA Receives Reports of Live Baiting in WA', *ABC News* (Online), 27 February 2015, <<http://www.abc.net.au/news/2015-02-27/rspca-receives-reports-of-live-baiting-in-wa/6270198>>.

introduced to amend the South Australia *Animal Welfare Act 1985* to include penalties of up to \$50,000 or 4 years imprisonment for live baiting.¹³⁵ The Bill also created new a mandatory licensing scheme for anybody who wishes to own and operate a bullring (greyhound training facility) in South Australia.¹³⁶ In July 2016, the New South Wales Premier Mike Baird announced that greyhound racing would be banned from July 2017 onwards, following a special commission of inquiry which found ‘overwhelming evidence of animal cruelty, including mass greyhound killing and live baiting’.¹³⁷ He commissioned an inquiry into the sport,¹³⁸ following which he contended there was ‘no other alternative’ but to ban it.¹³⁹ Within three months of announcing this ban, Baird revoked this decision due to mounting political and media pressures, opting instead for a 41 million dollar overhaul of the Greyhound industry.¹⁴⁰ In Victoria, a 2015 legislative amendment passed to increase the penalty for ‘live baiting’ from 240 penalty units to 500 penalty units.¹⁴¹ The Amendment also introduced a new offence of attending a premises (with no reasonable excuse) on which live baiting is occurring for the purposes of ‘bleeding’ a greyhound.¹⁴² In November 2017, the Australian Capital Territory passed a legislative amendment banning greyhound racing from April 30, 2018.¹⁴³

Whilst substantial ethical questions still remain about the ethical viability of the Australian greyhound industry, the ‘Making a Killing’ exposé compiled by activists generated substantial, important public discourse surrounding whether the sport is conducive to animal welfare at all.¹⁴⁴ Moreover, it is clear that ‘without the aid of hidden cameras, trespass,

¹³⁵ *Animal Welfare (Greyhound Training) Amendment Bill 2015*, 15D.

¹³⁶ *Ibid* s15E.

¹³⁷ Unknown, 'Greyhound Racing to Be Banned in New South Wales, Baird Government Announces', *ABC News* (Online), 7 July 2016, <<http://www.abc.net.au/news/2016-07-07/greyhound-racing-to-be-banned-in-new-south-wales/7576816>>

¹³⁸ New South Wales, *Special Commission of Inquiry into the Greyhound Racing Industry in New South Wales* (2015)

¹³⁹ Unknown, 'Mike Baird's Greyhound Racing Industry Ban Backflip: Everything You Need to Know', *ABC News* (Online), 11 October 2016, <<http://www.abc.net.au/news/2016-10-11/everything-you-need-to-know-about-mike-baird-greyhounds/7921306>>

¹⁴⁰ Sean Nicholls, 'The \$41 Million Bill for Mike Baird's Greyhound Backdown', *The Sydney Morning Herald* (Online), 28 March 2017, <<http://www.smh.com.au/nsw/the-41-million-bill-for-mike-bairds-greyhound-backdown-20170328-gv823y.html>>

¹⁴¹ *Prevention of Cruelty to Animals Amendment Act 2015* (Vic)

¹⁴² *Prevention of Cruelty to Animals Act 1986* (Vic) s13(1G)

¹⁴³ *Domestic Animals (Racing Greyhounds) Amendment Bill 2017* (ACT).

¹⁴⁴ Sam De Brito, 'Opinion Poll: Greyhound Racing and Live Baiting: Time to Ban the 'Sport of Grubs'', *Central Western Daily* (Online), 19 February 2015, <<http://www.centralwesterndaily.com.au/story/2893371/opinion-poll-greyhound-racing-and-live-baiting-time-to-ban-the-sport-of-grubs/>>

anonymous sources and undercover investigators infiltrating the industry’;¹⁴⁵ the widespread, unlawful use of nonhuman animal baits in this ‘sport’ would not yet have been discovered. The public would still be unaware of the many animal welfare issues that exist within the Australian greyhound racing industry.

In the Australian case of *ABC v Lenah Game Meats*,¹⁴⁶ the High Court of Australia also noted in *obiter* the potentially damaging consequences of allowing the public to view the mistreatment of nonhuman animals to the companies which rely upon it – even where that mistreatment is *legal*. It is implicit within this statement that the public who become *aware* of cruelty towards nonhuman animals may make different consumer choices as a response. In *Lenah*, the High Court explicitly noted that no evidence had been adduced at any stage to suggest that the Respondent had failed to comply with the applicable *Animal Welfare Code of Practice for Processing Brush Tail Possums* in the slaughter of possums,¹⁴⁷ and that the methods employed by the Respondent’s business were not different in kind from other slaughter methods used routinely throughout Australia with respect to other nonhuman animals.¹⁴⁸ Nevertheless, Chief Justice Gleeson accepted that the footage in question, ‘like many other lawful animal slaughtering activities...if displayed to the public, would cause distress to some viewers’.¹⁴⁹ Justice Kirby also remarked that the footage contained ‘gruesome sights and sounds’, which ‘would be upsetting to many who might witness and hear the videotape’.¹⁵⁰ The Court also accepted the respondent’s argument that ‘the likely effect [of publication]...could be potentially catastrophic for present business and the business which it may be able to do in the future especially in new markets’.¹⁵¹ Quoting the respondent, the Court stated:

The distribution and publication of this film is likely to adversely and substantially affect the [respondent’s] business. The film is of the most gruesome parts of the [respondent’s] brush tail possum processing operation. It shows possums being stunned and then having their throats cut. It is likely to arouse public disquiet, perhaps even anger, at the way in which the

¹⁴⁵ Siobhan O’Sullivan, ‘New Laws Could Stop Revelations of Animal Abuse’, *Sydney Morning Herald* (Online), 2015, <<http://www.smh.com.au/comment/new-laws-could-stop-revelations-of-animal-abuse-20150217-13go4u.html>>.

¹⁴⁶ *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* [2001] HCA 63; 208 CLR 199.

¹⁴⁷ *Ibid* 293 [233] (Callinan J).

¹⁴⁸ *Ibid* 261 [143] (Kirby J).

¹⁴⁹ *Ibid* 221 [25] (Gleeson CJ).

¹⁵⁰ *Ibid* 261 [143] (Kirby J).

¹⁵¹ *Ibid* 237 [78] (Gummow and Hayne JJ).

[respondent] conducts its lawful business. This is no different from any animal slaughtering operation in Australia, which is normally hidden from public view.¹⁵²

In opening the High Court's judgment, Gleeson CJ provided that the fact that the 'the broadcasting would cause financial harm to the respondent' was 'unchallenged evidence'. Gleeson CJ further noted that financial loss to the respondent following publication of the footage was 'not inherently improbable',¹⁵³ and that '[a] film of a vertically integrated process of production of pork sausages, or chicken pies, would unlikely be used for sales promotion'.¹⁵⁴

The fact that footage depicting cruelty towards nonhuman animals may damage a business, suggests that the public does not wish to financially support such cruelty. In turn, it is possible to conclude that the footage capture by activists is essential in generating public debate and shaping consumer choices. On numerous occasions, animal activists have made cruelty towards nonhuman animals visible to the public, and have stimulated the types of discussion that are necessary to generate change. Moreover, these discussions are central not only to public awareness and policy reform, but also to keeping animal welfare matters on the regulatory agenda.

B. *Linking Animal Visibility to Increased Legal Regulation*

Siobhan O'Sullivan has explored the relationship between visibility and the amount of regulatory attention afforded to nonhuman animals. In her study in the New South Wales context, O'Sullivan demonstrates that those nonhuman animals that are made more *visible*, are more likely to be provided with more welfare protections by law. O'Sullivan argues that of 12 Codes of Practice which pertain to animal welfare and are enforceable in the New South Wales context, five of these pertain to animals that are highly visible: 'exhibited, sports and gaming animals'. Four apply to another highly visible class of nonhuman animals: those that we keep as 'companions'. By contrast, only *one* Code of Practice relates to the treatment of each nonhuman animal that is routinely kept *invisible*: agricultural animals and research

¹⁵² Ibid 221 [25] (Gleeson CJ).

¹⁵³ Ibid.

¹⁵⁴ Ibid.

animals. This leads O’Sullivan to conclude that ‘as the level of animal visibility rises, so too does the number of legal instruments’.¹⁵⁵

Whilst the sheer *quantity* of legislative protections offered to a nonhuman animal does not necessarily correlate to better *quality* protections, O’Sullivan contends that the connection between high visibility and regulatory activity remains important.¹⁵⁶ The correlation is important because increased regulatory attention generates and facilitates the ongoing discussions surrounding how nonhuman animals should be treated and protected by law that I mentioned above. Peter Sankoff makes a similar point, arguing that consistent and predicable review is the ‘best’ feature of any animal welfare law – precisely because it facilitates these ongoing discussions.¹⁵⁷ According to Sankoff, increased regulatory attention ensures that ‘animal law is *always* on the agenda, and in relative terms, the next chance to reform a practice is just around the corner’.¹⁵⁸ Therefore, activists who consistently make ‘invisible’ nonhuman animals ‘visible’ may generate greater regulatory attention towards these species and generate more frequent discussions surrounding how they ought to be treated.

O’Sullivan’s study demonstrates that civil disobedience therefore is not only a ‘sad necessity’ for public awareness surrounding the cruelty that the law allows, but may also be an essential component of the law reform process. Activists engaging in civil disobedience work to keep animals in our sight. Correspondingly, they succeed in keeping them, and their treatment, at the forefront of our minds.

IV. LAWS THAT THREATEN CIVIL DISOBEDIENCE ON BEHALF OF NONHUMAN ANIMALS

Given the link between public awareness of cruelty towards nonhuman animals and consumer choices, it is unsurprising that the increasing number of animal activists engaging in trespass and covert surveillance has been met by strong opposition. Agricultural groups, the media and members of parliament have all been vocal in urging the introduction of new laws to

¹⁵⁵ Siobhan O’Sullivan, *Animals, Equality and Democracy* (Palgrave Macmillan, 2011)116.

¹⁵⁶ Ibid 116. Note O’Sullivan explains the relationship is not always consistent.

¹⁵⁷ Peter Sankoff, ‘The Animal Rights Debate and the Expansion of Public Discourse: Is It Possible for the Law Protecting Animals to Simultaneously Fail and Succeed?’ (2012) 18(2) *Animal Law* 281, 304.

¹⁵⁸ Ibid 304.

‘crack down’ on animal activists, and to deter them from obtaining and publishing footage depicting cruelty towards nonhuman animals. The push for the introduction of such legislation has been justified on numerous grounds. Many commentators have sought to characterise activists as untrustworthy, or as persons that the public should fear. For example, Brian Ahmed, a battery egg farmer from Victoria, stated that whilst he was proud of his farm, he was concerned about how easy it would be for activists to ‘fabricate an image’ and to make his intensive farm look ‘overcrowded’.¹⁵⁹ The Pastoral and Grazier’s association voiced a similar concern, and asserted a difference between ‘whistleblowers, who do act in good faith’ and animal activists, who supposedly act in bad faith.¹⁶⁰ They suggested that activists who release ‘inflammatory material’ to the public, and rely upon the ‘court of public opinion’, are capable of ‘manipulat[ing] the law by moulding public sentiment’.¹⁶¹

Some of the most powerful commentary has come from Australian political leaders. Primary Industries Minister Katrina Hodgkinson, for example, has made it appear that activists who oppose cruelty towards nonhuman animals are failing to act in the public interest. She stated activists are seeking ‘media opportunit[ies] to spread [their] own grubby tactics’.¹⁶² Hodgkinson has also claimed that activists intentionally sensationalise their claims: ‘animal activist organisations are not an authority in this [animal welfare] space...animals have been disturbed in the middle of the night [by activists]...that makes the animals distressed...that makes for really good footage if your ultimate goal is to promote veganism or to promote human qualities onto animals...’.¹⁶³ The *Sydney Morning Herald* has reported on similar views. One of those is the views of US Senator David Hinkins, who said that that legislation

¹⁵⁹ ABC Radio, ‘the Battle over Animal Welfare and Ag-Gag Laws’, *Bush Telegraph*, 21 July 2014 (Temple Grandin, Brian Ahmed, Sue Middleton, Katrina Hodgkinson, Emmanuel Giuffre, Chris Delforce, Tom Whitty) <[Http://www.Abc.Net.Au/Radionational/Programs/Bushtelegraph/the-Battle-over-Animal-Welfare-and-Ag-Gag-Laws/5612314](http://www.Abc.Net.Au/Radionational/Programs/Bushtelegraph/the-Battle-over-Animal-Welfare-and-Ag-Gag-Laws/5612314)>.

¹⁶⁰ Pastoral and Grazier’s Association, Submission No 62 to Senate Standing Committee on Rural and Regional Affairs and Transport, an Inquiry into the *Criminal Code Amendment (Animal Protection) Bill 2015*, 6 March 2015, 2.

¹⁶¹ O’Sullivan, above n 156, 1.

¹⁶² ABC Radio, ‘the Battle over Animal Welfare and Ag-Gag Laws’, *Bush Telegraph*, 21 July 2014 (Temple Grandin, Brian Ahmed, Sue Middleton, Katrina Hodgkinson, Emmanuel Giuffre, Chris Delforce, Tom Whitty) <[Http://www.Abc.Net.Au/Radionational/Programs/Bushtelegraph/the-Battle-over-Animal-Welfare-and-Ag-Gag-Laws/5612314](http://www.Abc.Net.Au/Radionational/Programs/Bushtelegraph/the-Battle-over-Animal-Welfare-and-Ag-Gag-Laws/5612314)>

¹⁶³ Ibid.

to prevent activism is necessary to protect against ‘vegetarian people who are trying to kill the animal industry’.¹⁶⁴

Activists have also been portrayed as ideological extremists who present a danger to Australian society. Minister Gail Gago described activists as ‘ideological warriors [who take] up absolute positions’.¹⁶⁵ Speaking at the New South Wales Farmers Association’s annual conference, Hodgkinson declared of activists: ‘These people are vandals. These people are akin to terrorists’.¹⁶⁶ Pat Mitchell, a member of Australian Pork Limited and the Victorian Farmers Federation called them ‘agro-terrorists’.¹⁶⁷ Victorian agriculture Minister Peter Walsh used the term ‘animal terrorists’.¹⁶⁸ The use of such language mirrors conversations in the United States context, in which the phrase ‘terrorist’ is commonly used with respect to animal rights activists. The United States Federal Bureau of Investigations (FBI) has classified animal advocates as proponents of ‘special interest extremism’, which they state has emerged as a ‘serious domestic terrorist threat’.¹⁶⁹ According to the FBI, the animal liberation movement is ‘extremist...committed to ending the abuse and exploitation of animals’.¹⁷⁰

Given that these types of allegations are being made against activists, it is unsurprising that there are several pieces of legislation in Australia that appear to have been substantially motivated by a desire to curtail civil disobedience by animal activists. Animal welfare groups describe these laws as ‘ag-gag’ laws, because they have the effect of ‘gagging’ activists operating to expose cruelty in agricultural industries. The term ‘ag-gag’ originated in the

¹⁶⁴ Will Potter, 'Australia Risks Copying Us 'Ag-Gag' Laws to Turn Activists into Terrorists', *The Sydney Morning Herald* (Online), 1 May 2014, <<http://www.smh.com.au/environment/animals/australia-risks-copying-us-ag-gag-laws-to-turn-animal-activists-into-terrorists-20140501-37k8i.html>>

¹⁶⁵ South Australia, *Parliamentary Debates*, Legislative Council, 5 June 2014. 375 (Gail Gago).

¹⁶⁶ ABC News, 'Animal Rights Activists 'Akin to Terrorists', Says NSW Minister Katrina Hodgkinson', *ABC News* (Online), 18 July 2013, <<http://www.abc.net.au/news/2013-07-18/animal-rights-activists-27terrorists272c-says-nsw-minister/4828556>>.

¹⁶⁷ Unknown, 'Sheep and Wool Industry Agreement Needed on Peta and Animal Activists', *Sheep Central* (Online), 29 June 2015, <<https://www.sheepcentral.com/sheep-and-wool-industry-agreement-needed-on-peta-and-animal-activists/>>.

¹⁶⁸ Warwick Long, 'Trespass Laws Front and Centre at Victorian Electoral Debate on Agriculture, and Both Sides of Politics Agree', *ABC News* (Online), 2 October 2014, <<http://www.abc.net.au/news/rural/2014-10-02/ag-debate-trespass/5785922>>.

¹⁶⁹ The Federal Bureau of Investigation, *Animal Rights Extremism and Ecoterrorism* (2004) The Federal Bureau of Investigation < <https://archives.fbi.gov/archives/news/testimony/animal-rights-extremism-and-ecoterrorism> > .

¹⁷⁰ Ibid.

American media,¹⁷¹ and is being increasingly used to describe laws that have the effect of punishing acts of animal activism and whistleblowing on behalf of nonhuman animals. Ag-gag laws need not explicitly target animal activists to have the ‘gagging’ effect. It is sufficient that a general law may be used to serve this purpose for it to be described as ‘ag-gag’. In what follows, I discuss the potential ‘ag-gag’ operation of the proposed *Criminal Code Amendment (Animal Protection) Bill 2015* (Cth), the *Surveillance Devices Act 2016* (SA), and the *Biosecurity Act 2015* (NSW)

A. *Criminal Code Amendment (Animal Protection) Bill 2015 (Cth)*

Although the *Criminal Code Amendment (Animal Protection) Bill 2015* (Cth) is still before the Parliament, it is my starting point for this part because it is the most overt piece of ‘ag-gag’ law to be proposed in the Australian jurisdiction. This Bill proposes new provisions that specifically target animal activists. Two of these provisions are excluded from my discussion in this chapter because they penalize forms of activism that I have suggested cannot be neatly characterised as civil disobedience on the cautious view. Division 385 of the Bill, for example, proposes mandatory prison terms for ‘interfering with the carrying on of animal enterprises’, which includes conduct that destroys or damages property,¹⁷² or causes fear of death or serious bodily injury to those who work in animal enterprise or their relatives.¹⁷³ There is ongoing debate surrounding the justifiability of property damage and violence as methods of civil disobedience that are outside the scope of this chapter.¹⁷⁴ Of interest to this discussion however, is division 383, which deals with failures to report malicious cruelty to nonhuman animals after that cruelty has been recorded.

Under Division 383, a person will commit an offence if they make a visual record of what they believe to be malicious cruelty to animals, and fail both to notify an animal welfare law enforcement authority within one business day about that cruelty, and to provide that footage (and all copies) to that authority within five business days. This requirement to report cruelty only applies to those who have *filmed* it, and is therefore targeted towards activists or whistle-

¹⁷¹ Mark Bittman, ‘Who Protects the Animals?’, *The New York Times* (Online), 26 April 2011, <https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?_r=0>

¹⁷² *Criminal Code Amendment (Animal Protection) Bill 2015* (Cth) div 385.5

¹⁷³ *Ibid* div 385.10.

¹⁷⁴ John Morreall, ‘The Justifiability of Violent Civil Disobedience’ (1976) 6(1) *Canadian Journal of Philosophy* 35, 38; Tony Milligan, *Civil Disobedience: Protest, Justification and the Law* (Bloomsbury, 2013) 17.

blowers who document cruelty. Div 383 does not extend to those who merely *witness* cruelty (but fail to film it). The RSPCA has campaigned for a more general mandatory reporting law of this type, which would extend to all people who witness cruelty, regardless of whether they choose to document it.¹⁷⁵ In 2014, the Agriculture Minister Barnaby Joyce described the RSPCA's proposition as 'excessive', claiming that there should be some 'latitude to self-monitoring' in the livestock sector.¹⁷⁶

The motivation behind the introduction of a provision requiring the mandatory submission of film depicting cruelty towards nonhuman animals to law enforcement authorities is two-fold. On the one hand, Senator Chris Back, who introduced this Bill, identified a strong need to protect

citizens against a minority who believe they are above the law, who seek to take the law into their own hands, to invade the privacy of those engaged in their own lawful pursuit or who would use some activist zeal to put lives and livelihoods at risk.¹⁷⁷

This provision may therefore be important in protecting the privacy of those who are the subject of covert surveillance. However, Back also asserts an animal protection motivation, claiming that a 'person who withholds from authorities footage of suspect malicious animal cruelty to animals for days, weeks, or even months, is not acting in the best interests of animal protection'.¹⁷⁸ In both the explanatory memorandum and second reading speech accompanying the Bill, Back refers to the fact that the Australian community is opposed to malicious cruelty towards animals: it is 'illegal and...totally unacceptable',¹⁷⁹ and is something which the Australian community 'has no tolerance' for.¹⁸⁰ One of the key ways in which he suggests this Bill meets the objective of animal protection is by 'ensur[ing] that animals are protected against further unnecessary cruelty caused by a delay in reporting'.¹⁸¹

¹⁷⁵ Cath McAloon and Lucy Barbour, 'RSPCA Calls for Laws to Make Reporting of Animal Abuse Mandatory', *ABC News* (Online), 25 August 2014, <<http://www.abc.net.au/news/rural/2014-08-22/nrn-rspca-animal-laws/5689764>>.

¹⁷⁶ Colin Bettles, 'Mandatory Reporting 'Excessive': Joyce', *Farm Weekly* (Online), 30 August 2014, <<http://www.farmweekly.com.au/news/agriculture/general/news/mandatory-reporting-excessive-joyce/2709826.aspx>>.

¹⁷⁷ Commonwealth, *Parliamentary Debates*, Senate, 11 February 2015, (Christopher Back)

¹⁷⁸ *Ibid* 61.

¹⁷⁹ *Ibid* 481.

¹⁸⁰ Explanatory Memorandum, *Criminal Code Amendment (Animal Protection) Bill 2015*, 1.

¹⁸¹ *Ibid* 1.

Even though Back has maintained an animal protection motivation behind this provision, activist groups have been fast to condemn the Bill on the basis that it curtails covert surveillance techniques and silences activism. The Animal Welfare League Australia states that a prohibition on gathering evidence over extended periods ‘reduces the capacity to gather evidence and build a case, thereby placing animals at greater risk’.¹⁸² The RSPCA states that although they do ‘not condone illegal activities in pursuit of animal welfare objectives’ it remains ‘impossible not to acknowledge the significant impact many private investigations have had on the development of animal welfare law and policy, consumer protection and awareness, and the general public dialogue on animal welfare matters in Australia’.¹⁸³

Moreover, the RSPCA acknowledges that there are examples in which activist activity has been central to identifying acts of widespread cruelty within industry.¹⁸⁴ For example, the RSPCA contends that the exposé of the widespread use of live animal baits in the Australian greyhound racing industry, discussed in the previous part,¹⁸⁵ would not have been possible if the activists who compiled the evidence were required to curtail their investigations and hand the matter over to authorities prior to gathering ‘comprehensive evidence implicating multiple trainers in multiple states for multiple offences over a period of time’.¹⁸⁶ The RSPCA attributes their successful prosecution of several greyhound trainers, as well as the widespread law and policy reform with respect to the regulation of greyhound racing to the ‘comprehensive evidence’ collected by activists over a sustained period.¹⁸⁷

The strength of that investigation is that commentators could not justifiably dismiss the evidence of cruelty towards nonhuman animals as a mere one-off by individual operators, as they have done in other contexts. For example, even though *Animals Australia* has now revealed over 20 cases of cruelty to Australian animals in live export markets since 2003, live export industry supporters continue to diminish claims that the industry *as a whole* is cruel

¹⁸² Animal Welfare League Australia, Submission No 45 to Senate Rural and Regional Affairs and Transport Legislation Committee, *Criminal Code Amendment (Animal Protection) Bill 2015*, March 2015, 1.

¹⁸³ Royal Society for the Prevention of Cruelty to Animals, Submission No 52 to Senate Rural and Regional Affairs and Transport Legislation Committee, *Criminal Code Amendment (Animal Protection) Bill 2015*, March 2015, 3.

¹⁸⁴ *Ibid* 4.

¹⁸⁵ Australian Broadcasting Corporation, 'Making a Killing', *Four Corners*, 16 February 2015 (Caro Meldum-Hanna)

¹⁸⁶ Royal Society for the Prevention of Cruelty to Animals, Submission No 52 to Senate Rural and Regional Affairs and Transport Legislation Committee, *Criminal Code Amendment (Animal Protection) Bill 2015*, March 2015, 3.

¹⁸⁷ *Ibid* 3.

towards nonhuman animals. After footage emerged in 2012 from Pakistan showing the brutal slaughter of 21,000 Australian exported sheep, Senator Joe Ludwig remarked that was simply a case of a single ‘mistake’ and a ‘slip’.¹⁸⁸ Thus, any provision that may require activists to restrict the length of their investigation could have the effect of ‘defeat[ing] the detection of hundreds of other instances of criminal conduct... operate[ing] to permit the perpetuation of systemic cruelty and criminal conduct.’¹⁸⁹ It is for this reason that the RSPCA claims that ‘[i]nstead of acting proactively to address the cruelty, [the proposed] Bill operates reactively to inhibit its exposure’.¹⁹⁰

In critiquing this Bill, animal protection groups have largely failed to address the ethical claim that Senator Back is making. In electing to film or document cruelty, the nonhuman animals under surveillance are being used as a means to an end. The activists are choosing not to intervene and end suffering, when it may be within their power to do so. The *National Farmers Federation*, therefore states that ‘delay[s] in reporting of [cruelty is] likely to contribute to serious implications for the animals involved’.¹⁹¹ The *Australian Lot Feeders’ Association* similarly claims that failing to report cruelty towards nonhuman animals necessarily ‘prolong[s] the suffering of the animals affected’.¹⁹² While activists may be motivated by animal protection on a much bigger scale, they still must grapple with the ethical dilemma of using nonhuman animals and their suffering in an instrumental way.

The moral justification for documenting cruelty is strongest where the cruelty being documented is *lawful*. Reporting legal cruelty to the RSPCA will not yield any positive results for nonhuman animals, since the RSPCA can only enforce the provisions of Australian animal welfare legislation. However, when activists document *unlawful* cruelty and fail to report it for an extended period, the ethical dilemma they must grapple with is more complex.

¹⁸⁸ Unknown, ‘Ludwig Defends Live Exports after Fresh Cull Footage’, *ABC News* (Online), 6 November 2012 2012, <<http://www.abc.net.au/news/2012-11-05/ludwig-defends-live-export-after-sheep-cull-footage/4354720>>.

¹⁸⁹ Barristers Animal Welfare Panel, Submission No 240 to Senate Standing Committees on Rural and Regional Affairs and Transport, *an Inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015*, 15 March 2015, 3.

¹⁹⁰ Royal Society for the Prevention of Cruelty to Animals, Submission No 52 to Senate Rural and Regional Affairs and Transport Legislation Committee, *Criminal Code Amendment (Animal Protection) Bill 2015*, March 2015, 5.

¹⁹¹ National Farmers’ Federation, Submission No 41 to Senate Rural and Regional Affairs and Transport Legislation Committee, *Criminal Code Amendment (Animal Protection) Bill 2015*, March 2015, 8.

¹⁹² Australian Lot Feeders’ Association, Submission No 68 to Senate Rural and Regional Affairs and Transport Legislation Committee, *Criminal Code Amendment (Animal Protection) Bill 2015*, March 2015, 2.

Either activists report cruelty immediately in the hope that the cruelty will be stopped by law enforcement agencies, or they continue to observe that cruelty for an extended time, in the hope of generating more widespread change, such as policy and law reform. At the time of writing, it is not clear whether the *Criminal Code Amendment (Animal Protection) Bill 2015 (Cth)* will continue to be the subject of parliamentary debate. The RSPCA has also questioned whether it would be constitutionally valid, given that it is proposed as a Bill pertaining to ‘animal protection’ with respect to which the Commonwealth has no constitutional power to pass laws.¹⁹³ The Bill was last restored to Notice Paper in August 2016.

B. *Surveillance Devices Act 2016 (SA)*

In South Australia, the *Surveillance Devices Act 2016 (SA)* prohibits the act of installing, using and maintaining surveillance devices to record activity or conversations without prior consent from the parties being observed.¹⁹⁴ Moreover, it prohibits the act of publishing the content of that recording, unless such a Judge determines that the publication should be made in the public interest.¹⁹⁵ The maximum penalty for participating in covert surveillance under the *Surveillance Devices Act 2016 (SA)* is \$15,000, or 3 years imprisonment in the case of natural person.¹⁹⁶ Publishing covertly obtained footage without a judicial order carries a maximum penalty of \$10,000. The South Australian Law Society claims these provisions are ‘ag-gag’ law, because they make exposing cruelty to nonhuman animals more difficult. Specifically, Mr Perotta, on behalf of the society, claims that section 10 of the Bill ‘is in actuality ag-gag law’ which ‘is about targeting undercover investigations into animal cruelty’.¹⁹⁷ It is quite clear how this law could be used to punish or deter civil disobedience by animal activists. As I have demonstrated, the covert collection of footage documenting cruelty towards nonhuman animals, and the subsequent publication of that footage, is a key tool used by activists to generate public discourse surrounding out treatment of nonhuman

¹⁹³ Royal Society for the Prevention of Cruelty to Animals, Submission No 52 to Senate Rural and Regional Affairs and Transport Legislation Committee, *Criminal Code Amendment (Animal Protection) Bill 2015*, March 2015, 3.

¹⁹⁴ *Surveillance Devices Act 2016 (SA)* ss4, 5.

¹⁹⁵ *Ibid* s10.

¹⁹⁶ *Ibid* ss4, 5.

¹⁹⁷ The Law Society of South Australia, Submission to Attorney General, *Surveillance Devices Bill 2015*, 26 November 2015 5.

animals. Such methods could clearly be penalised by this legislation, and appear to have been an anticipated target.

Before the *Surveillance Devices Bill 2016* (SA) was passed, it appeared before Parliament in two earlier incarnations: the *Surveillance Devices Bill 2012* (SA) and the *Surveillance Devices Bill 2014* (SA). In the second reading speech that accompanied the 2014 incarnation of the Act, Minister Gago referred to the possibility that the general provisions within the Bill could be used against animal activists. She stated that debate surrounding the 2012 Bill had generated ‘strongly held positions [which] were not and are not reconcilable’.¹⁹⁸ She stated ‘ideological warriors took up absolute positions... animal rights activists wanted to record what they thought were breaches of animal rights’ whilst ‘farmers wanted to ban them.’¹⁹⁹ During 2014 parliamentary debate on surrounding the Bill, Robert Brokenshire MP supported the Bill on the basis that activists ‘deliberately target agriculture because they have an agenda which is not in the national...interest....this bill would go a long way toward stopping some of that’.²⁰⁰

In contrast with these statements, the 2014 Attorney General John Rau went to great lengths to assure the public that the *Surveillance Devices Bill 2014* (SA) was *not* a piece of ag-gag law. He stated that it amounts to an ‘erroneous interpretation’ to read the 2014 Bill as a piece of ag-gag legislation.²⁰¹ He claimed that those with an interest in animal protection were ‘hijacking’ the conversation, and that: ‘it is more about whether you, in your backyard, can be imposed upon by somebody outside your property, by either them covertly, or in other words secretly bugging your backyard by filming you, and then they can publish that whether it's in the public interest or not’.²⁰² According to Rau, evidence of animal cruelty could reasonably fall within the ‘public interest’ exception established by the Act, though he maintained that such a determination should be decided by the Court, and not the publisher themselves.²⁰³ In a 2014 interview with *ABC Rural* with respect to an earlier edition of the Bill,²⁰⁴ Attorney General John Rau stated that the Bill ensured that determinations as to what constitutes the

¹⁹⁸ South Australia, *Parliamentary Debates*, Legislative Council, 5 June 2014, 375 (Gail Gago).

¹⁹⁹ *Ibid.*

²⁰⁰ South Australia, *Parliamentary Debates*, Legislative Council, 23 September 2014 972 (Robert Brokenshire).

²⁰¹ Nikolai Beilharz, 'Rau Rejects Idea of 'Ag Gag' Laws in South Australia', *ABC Rural* (Online), 2 July 2014, <<http://www.abc.net.au/news/2014-07-02/sach-ag-gag/5566580>>

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Surveillance Devices Bill 2014* (SA)

‘public interest’ would be made by the Court as an ‘objective umpire’, rather than a person with a vested interest in making a publication.²⁰⁵

Following the passage of the *Surveillance Devices Bill 2015* (SA) into South Australian law, Tammy Franks MP introduced the *Surveillance Devices (Animal Welfare) Amendment Bill 2016* (SA). This amendment sought to address concerns held by activists that the provisions within the *Surveillance Devices Act 2016* (SA) could be used to stifle their activities. The amendment sought to define animal welfare matters as prima facie being in the public interest in two ways. First, by adding an exception to section 10 of the Act, which prohibits the release of covertly obtained footage, where the material concerned relates to issues of animal welfare,²⁰⁶ and second, by creating a rebuttable presumption that the use of a listening or optical surveillance device to obtain information on material relating to issues of animal welfare is in the public interest.²⁰⁷

This amendment Bill, which was intended to ensure that the activity of activists would be exempted from the general application of the *Surveillance Devices Act 2015* (SA), was negated at second reading, with a majority of 10 (4 ayes and 10 noes). In responding to the Bill, the Hon. J.M.A Lensink stated that the Liberal party ‘sympathetic as [they] are’ to the cause, would not be supporting the Bill because they did not think the amendment was ‘necessary to genuinely protect animal welfare interests’.²⁰⁸ The Hon. J.M Gazzola argued that the amendment was too wide-ranging in scope, and that the proposed amendment was ‘premature’, since the Act had not yet been tried in practice.²⁰⁹ Franks concluded that the *Surveillance Devices Act 2016* (SA) ‘silences the proper role of exposing illegality, unethical behaviour, cruelty not just to animals but... specifically to animals’.²¹⁰

²⁰⁵ Nikolai Beilharz, 'Rau Rejects Idea of 'Ag Gag' Laws in South Australia', *ABC Rural* (Online), 2 July 2014, <<http://www.abc.net.au/news/2014-07-02/sach-ag-gag/5566580>>

²⁰⁶ *Surveillance Devices (Animal Welfare) Amendment Bill 2016* (SA)s4.

²⁰⁷ *Ibid* s5(2).

²⁰⁸ South Australia, *Parliamentary Debates*, Legislative Council, 2 November 2016 (JMA Lensink MP)

²⁰⁹ *Ibid* (JM Gazzola MP)

²¹⁰ Leah MacLennan, 'Ag-Gag Bill Will Make Exposing Animal Cruelty Harder: Law Society', *ABC News* (Online), 3 December 2015, <<http://www.abc.net.au/news/2015-12-03/ag-gag-bill-surveillance-devices-sa-parliament/6994516?pfmredir=sm>>

C. *The Biosecurity Act 2015 (NSW)*

Another means by which activists who trespass to covertly obtain footage may be punished or deterred is through biosecurity laws. In New South Wales, the *Biosecurity Act 2015 (NSW)* contains provisions which may be used to deter or punish activists who engage in civil disobedience and enter biosecure premises without consent. The *Biosecurity Act 2015 (NSW)* ‘provide[s] a framework for the prevention, elimination and minimization of biosecurity risks posed by biosecurity matter, dealing with biosecurity matter, carriers and potential carriers, and other activities that involve biosecurity matter, carriers or potential carriers’.²¹¹ The Act creates a general ‘biosecurity duty’ that applies to *all* individuals. The duty provides that:

Any person who deals with biosecurity matter or a carrier and who knows, or ought reasonably to know, the biosecurity risk posed or likely to be posed by the biosecurity matter, carrier or dealing, has a biosecurity duty to ensure that, so far as is reasonably practicable, the biosecurity risk is prevented, eliminated or minimized.²¹²

Under section 23(1) of the Act, any person who fails to discharge that duty is guilty of an offence. Activists entering biosecure premises would likely be deemed ‘carriers’ of ‘biosecurity matter’ under the Act, and could therefore be charged under s23(1) of the *Biosecurity Act 2015 (NSW)*, regardless of whether their conduct actually caused a biosecurity breach. If a breach of this duty can be characterised as ‘intentional or reckless’, and the breach ‘caused, or was likely to cause, a significant biosecurity impact’, the maximum penalty for an individual is \$1,100,000 or 3 years imprisonment.²¹³ Any other breach is characterised as a category 2 offence, which carries a maximum penalty of \$220,000.²¹⁴ Activists could clearly be penalized under these provisions.

In addition to the general biosecurity duty provisions, the *Biosecurity Act 2015 (NSW)* also creates the offence of failing to report a suspected ‘biosecurity event’.²¹⁵ Where the failure to notify is ‘intentional or reckless’ it carries the same maximum penalty as a category one breach of biosecurity duty.²¹⁶ According to *Voiceless*, this provision could ‘extend

²¹¹ *Biosecurity Act 2015 (NSW)* s3

²¹² *Ibid* s22.

²¹³ *Ibid* s279.

²¹⁴ *Ibid* s280.

²¹⁵ *Ibid* ss38-40.

²¹⁶ *Ibid* ss40(2), 279.

inappropriately’ to the conduct of ‘unrelated third parties, such as media personnel or animal groups that are given or become aware of recordings of animal cruelty’.²¹⁷

In addition to their stated purpose, the provisions within the *Biosecurity Act 2015* (NSW) may also be used to target activists engaging in civil disobedience. During a 2015 roundtable discussion between Barnaby Joyce (then the Minister for Agriculture), and Niall Blair (then the Minister for Primary Industries), which was focused on the ‘serious and potentially devastating issue of farm trespass’, it was made clear that the provision of the *Biosecurity Act 2015* were intended to be used to penalise activists.²¹⁸ Mr Blair stated that the Government had released a policy on the issue, entitled the NSW Farm Incursions Policy,²¹⁹ which, among other things, included the introduction of the *Biosecurity Bill 2015* (NSW), ‘which supports the prosecution of people who deliberately create biosecurity risks’.²²⁰ Minister Joyce added:

People who illegally enter farms and conduct unlawful surveillance not only cause distress to farmers and animals, they disrupt vital business practices and can even injure and kill animals, causing widespread production losses...Let’s be clear – to break and enter is a crime and all farmers have the right to be protected against unauthorized persons on their property’.²²¹

Whilst biosecurity is undoubtedly important for the health and safety of nonhuman animals and the agricultural sector more widely, any assertion that advocates pose a substantial threat to biosecurity is not grounded in facts. At the time of writing, the only Australian example of an activist causing a biosecurity breach occurred *intentionally* in 2013 by animal activist Ralph Hahnheusser. Intentionality is important here, because there are no recorded instances of activists inadvertently causing biosecurity breaches. Hahnheusser’s conduct is distinct from the usual conduct of activists, because he deliberately contaminated the feed and water troughs of approximately 1700 sheep with ham. He publicized his activities the following day via release of a video documenting his actions. The sheep were intended for export to Muslim

²¹⁷ Voiceless: The Animal Protection Institute, *Animal Law in the Spotlight: Update on the NSW Biosecurity Act* (2015) < <https://www.voiceless.org.au/content/animal-law-spotlight-update-nsw-biosecurity-act-0> >

²¹⁸ Barnaby Joyce and Niall Blair 'National Focus on Farm Trespass', (Media Release, Doc No Unknown, 2 August 2015).

²¹⁹ Department of Primary Industries (New South Wales), *Right to Farm Policy* < <http://www.dpi.nsw.gov.au/land-and-water/land-use/lup/legislation-and-policy/right-to-farm-policy> >

²²⁰ Joyce and Blair, above n 219.

²²¹ Ibid.

countries, and thus the deliberate contamination of their feed rendered them unsuitable for Halal consumption and prevented the sheep from being exported.²²²

Hahnheusser was charged for his actions under s45DB the *Trade Practices Act 1974* (Cth) which prohibits a person hindering another person engaging in export. The fact that he was charged under existing legislation suggests that the provisions under the *Biosecurity Act 2015* (NSW) could overlap with existing law to provide an alternative avenue for producers to prosecute activists under provisions that carry far greater penalties than existing legislation. The primary judge in the federal court found that the requirements of s45DB were made out, but held that Hahnheusser's actions fell within s45DD(2), which provides an exception where the hindering is for the dominant purpose of environmental protection.²²³ Given that Hahnheusser's actions were intended to 'protect the sheep from suffering as a result of live export' the judge found that the environmental protection exception was made out. On appeal, the full Federal Court of Australia found that the environmental protection exception did not extend to Hahnheusser's actions, and that the 'environmental protection' exception applied not to the preservation of individual animals, but rather to the preservation of an environmental system more broadly. If Hahnheusser's actions had have been aimed at preventing the extinction of sheep, the defence may have applied. However, the mere fact that sheep form part of the environment did not mean that his efforts to protect those individuals amounted more broadly to 'environmental protection'.²²⁴ When the matter was re-tried, Hahnheusser was ordered to pay damages in the sum of \$72,873.73 for financial loss.²²⁵

Given that, at the time of writing, Hahnheusser's intentional biosecurity breach is the only recorded instance of contamination caused by animal activists, the potential operation of the *Biosecurity Act 2015* (NSW) to stifle activists more generally is concerning. Given the necessarily covert nature of what animal activists do, it is difficult to ascertain precisely what biosecurity precautions activists take. Some evidence indicates that activists do take biosecurity precautions,²²⁶ while industry stakeholders maintain that any person entering a

²²² Unknown, 'Animal Rights Activist Charged over Sheep Feed Sabotage', *Sydney Morning Herald* (Online), 21 November 2003, <<http://www.smh.com.au/articles/2003/11/21/1069027296534.html>>

²²³ *Rural Export and Trading (WA) Pty Ltd v Hahnheusser* (2007) 243 ALR 356.

²²⁴ *Rural Export & Trading (WA) Pty Ltd and Another v Hahnheusser* (2007) 169 FCR 583, 594.

²²⁵ *Rural Export & Trading (WA) Pty Ltd and Another v Hahnheusser* (2009) 177 FCR 398.

²²⁶ New South Wales, Parliamentary Debates, Legislative Council, 26 August 2015 (Mehreen Faruqui). See videos of activist footage compiled for the Australian documentary on pig farming, 'Lucent' : <<http://www.aussiepigs.com/lucent>>.

farm unannounced poses a biosecurity risk. Australian Pork Limited, for example claims that an examination of footage obtained by activists reveals that they entered different farms ‘on the same or consecutive nights’.²²⁷ This, they contend, contravenes biosecurity best practice, which dictates a space of three days left between visits to different farms to prevent the spread of disease.²²⁸ Ultimately, protection of Australian biosecurity must be balanced against the need for public awareness about how nonhuman animals are lawfully treated within private property. In its current form, it is not clear that the *Biosecurity Act 2015* (NSW) strikes this balance appropriately.

V. CONCLUSION

In this chapter, I have provided examples of two pieces of Australian legislation, and one Bill, which could operate to punish and deter acts of civil disobedience on behalf of nonhuman animals. I have argued that acts of activism that may be characterised as acts of civil disobedience are prima facie justified in Australia’s democratic society. Such acts are essential to enabling the enforcement of Australian animal welfare laws for the reasons described in chapter seven. They also arm the public with information about how our laws enable nonhuman animals to be treated that is not reasonably available by any other lawful means. Such information is to generating public debate of the kind that is required to debunk the myth of animal protection in Australia, and to facilitate change in Government policy and law for nonhuman animals.

Whilst each piece of legislation I have discussed in this chapter protect legitimate interests, they may also be used to punish or deter activists who are currently operating to provide the public with information that they need to participate meaningfully in democratic processes. Moreover, I have argued that continued public unawareness surrounding lawful cruelty towards nonhuman animals sustains and facilitates that cruelty. If the public are unaware that Australian animal welfare laws facilitate cruelty towards nonhuman animals, then they are precluded from objecting to it. The research of Siobhan O’Sullivan also demonstrates a link

²²⁷ Australian Pork Limited, Submission No 58 to Senate Standing Committees on Rural and Regional Affairs and Transport, an Inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015, 12 March 2015, 2.

²²⁸ Ibid 2.

between the visibility of nonhuman animal species and the regulatory attention that they are afforded. The greater visibility afforded to a particular species, the more regulatory attention they appear to receive. The result is that increased visibility engenders greater public discourse that is central to alleviating cruelty towards nonhuman animals and stimulating a need for law and policy reform with respect to animal welfare.

CHAPTER 9: CONCLUSION

I. SUMMARY OF ARGUMENT

In this thesis, I have argued that Australian animal welfare laws and Codes of Practice are facilitating cruelty towards nonhuman animals. My argument has been that the very laws that purport to protect nonhuman animals from harm are thus directly responsible for *facilitating* cruelty towards them. I have described this cruelty as occurring on numerous levels: it is contained within the explicit words of the law and it is also legitimated by the unarticulated premises on which these laws are based.

I have shown in chapter three that the distinction between legal ‘persons’ and legal ‘property’ is fundamental to law, and facilitates cruelty towards nonhuman animals. Legal ‘persons’ have legal rights and legal duties. Legal things do not. Although nonhuman animals present a *sui generis* case of legal ‘things’ that have some of their interests protected in law, they remain objects that can be legitimately owned and used for human benefit, even where such ownership and usage entails cruelty or an indifference to their suffering. In critically analysing the legal status of nonhuman animals, I considered the writings of key thinkers on the legal status of nonhuman animals: Gary Francione and Steven Wise. Both Wise and Francione have campaigned for the inclusion of nonhuman animals within the category of persons. Yet, their arguments consistently affirm a conception of the legal person as tied to the *human*. My contention was not only that nonhuman animals are legal property, and that such classification facilitates cruelty towards them. It was also that the key theorists on the topic of the legal status of nonhuman animals implicitly affirm a conception of the legal person that necessitates the exclusion of nonhuman animals from that concept. As long as the category of the legal person remains tied to the *human*, nonhuman animals will necessarily be excluded. The problem, I argued, is not that the law fails to appreciate those nonhuman animals possess interests. It is that they are precisely that: *nonhuman*.

Having explained the legal characterisation of nonhuman animals as legal property, in chapter four I demonstrated how this classification shapes the way the interests of nonhuman animals are protected in Australian animal welfare legislation. My argument was that Australian animal welfare laws do not prohibit cruelty *per se*. Rather, cruelty is *prima facie* lawful, provided it can be justified as either ‘reasonable’ or ‘necessary’ with respect to human interests. Given that nonhuman animals are legal property, my contention was that determinations of what constitutes ‘necessary’ or ‘reasonable’ cruelty rely on a background

assumption that nonhuman animal interests matter less than the human rights to use them as property to serve their own interests. The result is that virtually any form of cruelty may be lawful, provided it can be justified with respect to human interests. Moreover, in many circumstances, a relatively trivial human interest may justify egregious cruelty towards nonhuman animals. In this chapter, I also explained how Codes of Practice dictate a separate set of standards for those who have a positive interest in using nonhuman animals for human purposes. These Codes reflect the property status of nonhuman animals, because they facilitate and permit cruelty that serves human interests. The problem is thus that those nonhuman animals that are the most vulnerable to cruelty by human hand are effectively exempted from the protective reach of Australian animal welfare legislation.

In the fifth chapter, I returned to the concept of ‘necessary’ and ‘reasonable’ cruelty, to assess how nonhuman animal interests are reflected in law. I expanded upon the analysis provided in chapters three and four, (where I explained that the interests of nonhuman animals are *prima facie* less important than human interests in inflicting cruelty), and argued that some species of nonhuman animal are positively commodified by law. As commodities, nonhuman animals are conceptualised merely as products that can be exchanged for money in the marketplace. They are fetishized, in that value is attributed to them only with respect to the extent to which they can be exchanged for money or other commodities. The way in which the commodity is produced, or, in the case of nonhuman animals, the type of life and death they are given, does not count. As commodities, nonhuman animals are perceived as having no value outside the price that can be attained for their bodies. In the context of laws which offer protections to nonhuman animals only where their interests do not unreasonably infringe human property interests, this presents an obvious problem. Practically *any* form of cruelty can be deemed legitimate if the nonhuman animal that is being inflicted with cruelty is constructed by law as a commodity who possess *no interests at all*.

In the sixth chapter, I shifted my focus. Instead of looking not at what the law *says* about cruelty, I considered what it *does not say*. I identified examples of Australian animal welfare laws which make an express declaration of inaction with respect to some of the worst forms of cruelty towards nonhuman animals through the use of knowingly inadequate definitions, legal fictions and express exclusions. In each instance, I argued that the law declares a decision to ignore certain forms of cruelty by expressly excluding them from the reach of animal protection legislation. Such a declaration is an active stance, and thus reflects the fact

that Australian animal welfare laws are positively complicit in these forms of cruelty. The very fact that the laws contains an express declaration of inaction with respect to some forms of cruelty reflects the fact that they *licensing cruelty*. Otherwise there would be no reason to explicitly exempt cruel practices from general anti-cruelty provisions. In carving out a part of law that intentionally ignores some of the most serious types of cruelty towards nonhuman animals, the very same laws that purport to protect nonhuman animals are absolutely complicit in facilitating and permitting their mistreatment.

In the seventh chapter, I argued that Australian animal welfare laws and Codes of Practice generate and sustain a myth of animal protection. I explained that Australian animal welfare laws, which typically contain provisions which purport to prohibit cruelty, are physically separated from the provision contained within Codes of Practice that typically permit it. Given that Codes of Practice are intended for a specific audience, namely those who work in the industries that are governed by Codes, they do not address the Australian public. The result is that Australian animal welfare laws, read alone, appear to prohibit cruelty. At the same time, separate provisions contained within Codes of Practice operate to erode any meaningful content contained within these protections. The second way in which the myth of animal protection is generated by Australian animal welfare laws and Codes of Practice is through the misleading use of terms which fail to communicate honestly with the Australian public. The label of ‘cruelty’ is used, but fails to reflect the meaning that the Australian public typically ascribe to the term. Similarly, weasel words operate to confer a false sense of benignity on blatant acts of cruelty. In each instance, Australian animal welfare laws and Codes of Practice misleadingly appear to protect nonhuman animals from cruelty. In the final part of this chapter, I considered the inadequate enforcement mechanisms provided by Australian animal welfare law. My suggestion was that Australian animal welfare laws are not only poorly enforced as a matter of fact, but they are constructed in such a way that they cannot be adequately enforced. The powers given to RSPCA inspectors are so inadequate that effectively law enforcement relies upon unlawful acts of trespass by animal activists who document animal cruelty. In the absence of adequate enforcement powers, the ideal of animal protection is nothing but a myth.

In the final chapter, I considered the extent to which other laws operate to protect the myth of animal protection, and to inhibit the enforcement of Australian animal welfare laws by stifling animal activists. Activists who seek to expose cruelty towards nonhuman animals by

trespassing on private property infringe both civil and criminal law. Increasingly however, ‘ag-gag’ laws are being introduced with the intent of stifling activists. They do so through the creation of additional means by which activists may be prosecuted, and through the provision of harsher penalties. These laws facilitate cruelty towards nonhuman animals, by silencing the work of those who seek to expose it to the public. They stifle activists, and in doing so silence the conversations that are necessary to reforming the law. Moreover, they impede the enforcement of Australian animal welfare laws which implicitly rely upon unlawful acts of activism. Cruelty that is kept out of sight, is cruelty that is kept out of mind.

II. DIRECTIONS FOR FUTURE RESEARCH

This thesis has offered an overview of the numerous, complex ways in Australian animal welfare legislation and Codes of Practice permit cruelty towards nonhuman animals. I have however not sought to identify *every* way in which they do so; nor have I addressed the significant question of how we ought to address their lawful cruel treatment. There therefore exist many important directions for future research that may extend the arguments contained within this thesis.

From the outset, I applied a limitation to the scope of this thesis. I have looked only at instances where the law was permitting cruelty towards nonhuman animals. This limitation served the important purpose of testing the law against its own stated premise. However, more thinking must be done with respect to the bigger question of precisely what our laws should be doing with respect to nonhuman animals. Is a prohibition on cruelty enough? Are we, for example, morally justified in slaughtering nonhuman animals if we do so ‘humanely’? Are we entitled to breed, keep and use nonhuman animals for entertainment in rodeos if we do not inflict pain? Is it morally justified to use nonhuman animals instrumentally, as scientific research subjects? Though many thinkers have dedicated a great deal of time to answering these questions,¹ more work could be done to determine how our moral duties should be reflected in animal protection laws. Moreover, an additional, related question remains as to whether laws which permit the breeding, use, keeping and slaughter of

¹ Peter Singer, *Animal Liberation* (2nd ed, Pimlico, 1990); Tom Regan, *The Case for Animal Rights* (2nd ed, University of California Press, 2004); Gary Francione, 'Taking Sentience Seriously' (2006) 1(1) *Journal of Animal Law and Ethics* 1.

nonhuman animals for human purposes, can it ever truly live up to their stated purpose of prohibiting cruelty towards nonhuman animals.² Is there such a thing as ‘humane’ slaughter? If there is, is it possible to achieve it given the rate at which meat is currently produced?

A related future research question pertains specifically to the legal status of nonhuman animals. If, as this thesis contends, animal protection laws are failing to actually protect nonhuman animals from harm, there remains the question of whether changing the legal status of nonhuman animals is first, possible, and second, is the way to ensure their adequate legal protection. As I argued in chapter three, key commentators on the legal status of nonhuman animals, Francione and Wise, present impassioned arguments in favour of the inclusion of nonhuman animals within the category of legal persons. Yet, their arguments are marked by a lack of clarity surrounding what the legal person is, and who or what may be a legal person. I explained that a more explicit, technical and concise assessment of the concept of legal ‘personhood’ may provide insight into the reason why their impassioned arguments have failed to convince jurors in the American context. Yet, significant scope remains to extend my inquiry to consider some other important questions: is the concept of the ‘person’ ever truly an ‘empty slot’? If it can be, how can nonhuman animals come to be included in it? What type of legal arguments would need to be made? Moreover, what type of legal protections would nonhuman animals be granted as legal ‘persons’?

Such questions should be answered in light of other work being done on the legal status of nonhuman animals which seeks to remove them from the classification of ‘property’, but does not seek to include them as ‘persons’. David Favre (who I mentioned in the literature review), has suggested that a guardianship model may be more appropriate.³ Pietrzykowski has offered an alternative suggestion. Namely, that nonhuman animals be classified as ‘non-personal subjects of law’.⁴ This characterisation, he suggests, offers the benefits of recognising the interests of nonhuman animals in law by providing them with some legal rights to protect those interests without categorising them as persons. Pietrzykowski also suggests that this approach has the benefit of corresponding ‘more accurately to the

² For two perspectives on these types of question, see Gary Francione and Robert Garner, *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, 2010).

³ David Favre, 'A New Property Status for Animals: Equitable Self-Ownership' in Nussbaum and Sunstein (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 234.

⁴ Thomas Pietrzykowski, 'The Idea of Non-Personal Subjects of Law' in Thomas Pietrzykowski and Visa Kurki (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer, 2017) 119, 49.

similarities and dissimilarities between humans and animals'.⁵ Given that the legal status of nonhuman animals is central to the way in which the law protects them, it is imperative that thinking in this area continues to be developed. Efforts should be made to understand precisely the relationship between the legal status of nonhuman animals, and the inadequate protections they are offered by animal welfare legislation.

The other substantial research question that remains at the conclusion of this thesis is what the solution may be to the various legal problems I have identified in this thesis. The arguments within this thesis were advanced within the confines of the existing legal framework in Australia. Thus, it was thus restricted to a critique of existing laws and legal paradigms. I did not purport to conceptualise an alternative legal system, nor did I seek to suggest what solutions there may be to various problems I have identified throughout this thesis. Such a reconceptualization presents an important direction for future research as alternative theories of law may offer more promise for nonhuman animals than the existing liberal legal paradigm.⁶

My arguments in chapter seven would be significantly strengthened by quantitative research that examines in more detail the way in which Australian animal welfare laws are enforced. At present, data are not available that explain the 'gap' between cruelty reports made by the public, and the number of prosecutions that take place. Further research that tracks cruelty complaints could inform further thinking on the role of the RSPCA as enforcers of the law. In addition, more quantitative research is needed to track precisely which cruelty complaints are addressed by the RSPCA, and which are addressed by other law enforcement agencies.

An additional question emerges from chapter eight regarding the justification offered for civil disobedience in the context of animal welfare. Whilst I drew on a substantial body of literature in defining civil disobedience in that chapter, more thinking must be done regarding the limits of civil disobedience with specific reference to the context of animal welfare. For example, what constitutes 'violence' in this context? Is violence justified? If so, when? A more robust justification for civil disobedience in the specific context of activists who seek to inform the public about lawful animal cruelty seems important. Such analysis could

⁵ Ibid.

⁶ Ibid. Reconceptualisations of the law have taken place in other contexts. See for example: Peter Burdon, 'Earth Jurisprudence and the Project of Earth Democracy' in Peter Burdon and Michelle Maloney (eds), *Wild Law - in Practice* (Routledge, 2014) 19.

contribute to law reform initiatives that seek to improve transparency regarding how nonhuman animals are treated. Moreover, with the law being increasingly used to stifle the actions of animal activists, a more robust justification of civil disobedience in this space could be used to protect activists and clarify the scope of legitimate activist activity.

III. CONCLUDING REMARKS

In this thesis, I have argued that Australian law is facilitating cruelty towards nonhuman animals. I have identified six ways in which the very laws that purport to prohibit cruelty do the precise opposite. I have tested animal protection laws against their own premises and commitments, and have revealed that they consistently fail to meet their stated objectives. Moreover, I have identified ambivalence regarding what their true objectives are.

The challenge that lies ahead in adequately protecting nonhuman animals from cruelty not only requires that the law be reformed to genuinely prohibit cruelty, and to reflect the values that underpin Australian animal welfare laws. It also requires a radical shift at the societal level and at the level of the individual. For as long as people continue to see nonhuman animals as things, or as commodities that exist for instrumental purposes, they will continue to be treated with cruelty. Moreover, that cruelty will continue to be justified as ‘reasonable’ or ‘necessary’. As Henry Beston explains:

We need another and a wiser and perhaps a more mystical concept of animals. Remote from universal nature, and living by complicated artifice, man in civilization surveys the creature through the glass of his knowledge and sees thereby a feather magnified and the whole image in distortion. We patronize them for their incompleteness, for their tragic fate of having taken form so far below ourselves. And therein we err, and greatly err. For the animal shall not be measured by the man. In a world older and more complete than ours ' they move finished and complete, gifted with extensions of the senses we have lost or never attained, living by voices we shall never hear. They are not brethren, they are not underlings; they are other nations, caught with ourselves in the net of life and time, fellow prisoners of the splendour and travail of the earth.⁷

⁷ Henry Beston, *The Outermost House: A Year of Life on the Great Beach of Cape Cod* (Selwyn & Blount, 1928) 40.

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