THE CONCEPT OF VIOLENCE: A PROPOSED FRAMEWORK FOR THE STUDY OF ANIMAL PROTECTION LAW AND POLICY

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A thesis submitted for the degree of
Doctor of Philosophy of
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DECLARATION

I, Alexandra Broughton McEwan, declare that except where acknowledged in the text, this thesis is my original work, completed under the supervision of Associate Professor Mark Nolan, ANU College of Law, Australian National University and Associate Professor Simone Dennis, School of Anthropology and Archaeology, Australian National University. It has not been submitted for a higher degree at any other university or institution.

Word count: 71 420.

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Signature

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Date

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Editorial assistance was provided by Kathy Fowler, according to the ANU Higher Degree by Research Editing of Theses Guidelines Standards D and E.

This work is dedicated to my parents: Patricia Mary McEwan and Alistair McEwan, and to my friend Miguel Ignacio Terrèn (1963-2015).

Alexandra McEwan
ABSTRACT

This thesis provides a critical framework and a set of methodological tools for analysing animal protection law and policy issues. These tools support the generation of law reform strategies that are responsive to the social and economic conditions of the 21st century. The thesis adopts Australia’s animal protection regime as a case example. Within this field of legal discourse, animal protection is defined according to an operative opposition between ‘animal cruelty’ and ‘animal welfare’. While, as discrete concepts, animal cruelty and animal welfare (hereafter cruelty-welfare) may be important and useful, the cruelty-welfare opposition not only structures the field, but forms a classificatory dynamic by which the relations of power that maintain the status quo are reproduced. Such circumstances constitute what French sociologist and anthropologist Pierre Bourdieu refers to as ‘symbolic violence’. The recognition of these dynamics, and the apparent intractability of the status quo, suggests that a new analytical pathway is needed. It is against this background that the thesis tests whether violence offers a useful alternative frame of analysis.

The response to the thesis question is developed using a cross-disciplinary method that combines legal analysis with aspects of political philosophy and anthropological theory. It develops and applies a method within a framework by which animal protection law is understood in terms of symbolic violence. It adopts Bourdieu’s method for the analysis of a ‘field’ and his concept of ‘habitus’ and combines these methodological tools with political philosopher Giorgio Agamben’s notion of the anthropological machine. It also draws on Alan Norrie’s arguments.
about legal individualism under the influence of neoliberalism.  

Australia’s animal protection regime is reconfigured as a Bourdieusian field. The analysis of *habitus* is informed by a notion of interdependence based on Agamben’s anthropological machine. It is via this unique combination of Bourdieu’s analytical tools and Agamben’s notion of the anthropological machine, along with insights about legal individualism drawn from Alan Norrie’s work, that the concept of violence is extended beyond its use by other animal protection legal theorists. The methodology supports the generation of law reform strategies and provides fresh insights as to why effective law reform in the area of animal protection law is so difficult.

The notion of the anthropological machine is used to reconfigure the classificatory dynamics that take place at the human-animal boundary, within animal protection as an area of criminal law. It focuses on the necessity test that lies at the heart of the offence of animal cruelty, and how the classificatory dynamics that underlie the cruelty-welfare opposition have implications not only for animal cruelty defendants but for other marginalised participants within this field. It is in this vein that, in its deployment of the concept of violence, the thesis situates the interests of animals and humans within the animal protection field as interdependent, rather than parallel, realms of inquiry. Construing Agamben in this way facilitates the extension of Bourdieu’s concept of field to the circumstances of animal use in the 21st century.

The methodology outlined above is tested in three case studies, presented as a triptych:

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5 Agamben, above n 3.

6 Norrie, ‘*Crime, Reason and History*’, above n 4.

1. Whistleblowing in the interests of animal protection within the pork industry;
2. A critique of Queensland’s new ‘serious animal cruelty’ offence; and
3. The potential and limits of law reform relating to animal use industries in Australia, using the greyhound racing industry as a case example.
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<td>Animal Welfare Working Group</td>
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<td>Australian Pork Limited</td>
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<td>Department of Agriculture, Fisheries and Forestry (Queensland)</td>
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<td>Model Code of Practice for the Welfare of Animals</td>
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<td>World Organisation for Animal Health (established as the Office</td>
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All things, when seen and understood in their true relation, are not independent but interdependent with all other things. The Buddha compared the universe to a vast net woven of a countless variety of brilliant jewels, each with a countless number of facets. Each jewel reflects in itself every other jewel in the net and is, in fact, one with every other jewel.

Sogyal Rinpoche

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PROLOGUE

Tereza in the Field

If this work has a protagonist it is Tereza, who speaks to us from my well-worn edition of Milan Kundera's *The Unbearable Lightness of Being*.¹ Tereza's ponderings about power and the nature of relationships as she sits in a field nursing her sick dog, serve as the opening scene for the work that follows and my position at the outset, as a researcher:

Tereza kept stroking Karenin's head, which was quietly resting on her lap, while something like the following went through her mind: there's no particular merit in being nice to one's fellow man. She had to treat the other villagers decently, because otherwise she couldn't live there. Even with Tomas, she was obliged to behave lovingly because she needed him. We can never establish with certainty what part of our relations with others is the result of our emotions – love, antipathy, charity, or malice – and what part is predetermined by the constant power play among individuals.

True human goodness, in all its purity and freedom, can come to the fore only when its recipient has no power. Mankind's true moral test, its fundamental test (which lies deeply buried from view), consists of its attitude towards those who are at its mercy: animals. And in this respect mankind has suffered a fundamental debacle, a debacle so fundamental that all others stem from it.²

I read this novel for a second time in April 2012, one year into my doctoral research, a twenty-year interval between readings. Having happened upon this passage, not only was I inspired, I experienced the thrill of recognition. Like Tereza, I too had nursed my sick, old dog on my country property and the experience led me to question the nature of relationships, intuitions, emotions and what it was that I owe to others, human or animal. For example, though not

¹ Milan Kundera, *The Unbearable Lightness of Being* (Faber and Faber, 1984).

² Kundera, above n 1, 289. See also Thomas Faunce, 'Literature and Ethics' in Ruth Chadwick (ed), *Encyclopaedia of Applied Ethics* (Elsevier, 2nd ed, 2012) 877-84 on the role of canonical literature in the development of legal ethics, and indirectly on the principles underpinning regulatory systems.
without its own mosaic of emotional pain, why was it possible to euthanase my dog while simultaneously rendered a powerless witness to my elderly mother's declining years, caged by severe dementia like a tiny bird. As I continued to read literature in the area of moral philosophy, animals, and the law, I noticed the second paragraph of the passage quoted above in other publications, including one Australian animal law textbook. At first I felt the inevitable disappointment; something I had ‘discovered’ was already in circulation. There really was nothing new under the sun.

On further reflection, I made a more useful observation: quoting this latter paragraph alone severs it from the human thinker of those thoughts, the human feeler of those feelings. The insight floats disembodied. If ‘[w]e cannot have love without lovers, nor deference without squires and labourers’ I imagined returning these thoughts to Tereza, their rightful owner. This seemed to do many things. Most importantly, it allowed one to see Tereza in a field with her dog, as an ordinary, everyday philosopher. It is Tereza who best conveys to the reader the idea that to understand relationships it is necessary to contemplate seriously the role of power in those relationships. What is more, Tereza demonstrates great sensitivity for the role of context in the play of power. She contemplates the dynamics of power in three contexts: towards those with no power, within intimate relationships, and power expressed in the civility that characterises her relationships with local villagers. Similarly, through pondering the contextual dynamics of power and the contested nature of what exactly it is that underpins human obligations towards other animals, this thesis reconsiders Australia’s approach to animal protection law. Throughout I use ‘violence’ as an organising principle and analytical frame.

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Tereza’s musings are given an internal logic by power writ large, as the broader narrative unfolds against the backdrop of the totalitarianism of communist Czechoslovakia. The force of law haunts even our moments of soul-searching solitude. And so, I wonder about political philosopher Giorgio Agamben’s cautious assertion as to ‘an inner solidarity between democracy and totalitarianism ... at a historico-philosophical level ... [that] it alone will allow us to orient ourselves to the new realities and unforeseen convergences of the end of the millennium’.\(^5\)

What might this mean for animals who, at the mercy of humans, are the ultimate victims of ‘this debacle so fundamental that all others stem from it’.\(^6\)


\(^6\) Kundera, above n 1, 289.
CHAPTER 1  INTRODUCTION

Part I THEMES

This thesis provides a critical framework, and a set of methodological tools, for analysing animal protection law and policy issues. These tools support the generation of law reform strategies that are responsive to the social and economic conditions of the 21st century. The thesis adopts Australia’s animal protection regime as a case example, and begins by discussing some of the problems relating to contemporary use of the terms ‘animal welfare’ and ‘animal cruelty’.

Australia’s animal protection regime has been widely criticised.¹ Some critics call for tougher sentencing for cruelty offences,² while others argue that conflicts of interest bias the development of Model Codes of Practice for the Welfare of Animals (MCOPWA) (currently in transition to Standards and Guidelines) and related policies.³ The tenor of these criticisms echoes those made of similar

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regimes in other Anglophone common law jurisdictions.4

As discrete concepts, animal welfare, animal cruelty, and animal rights may be important and useful. However, I wish to explore the idea that the animal cruelty-animal welfare (hereafter cruelty-welfare) binary is a ‘system of symbolic opposition’,5 what social theorist Bourdieu calls ‘symbolic violence’.6 As a form of symbolic violence, the cruelty-welfare opposition structures, and reproduces, the relations of power and dominance that maintain the status quo within animal protection as an area of criminal law. This opposition shapes our engagement with and perceptions of animal protection as a distinct area of law, and as a contested area of social life in Australia.7

The dominance of the cruelty-welfare binary may explain why, in the view of some commentators, ‘the modern animal advocacy movement has largely failed’.8 Similarly, it is possible that the welfare-rights binary constrains animal protection


7 Cronin, above n 5, 64-5; Bourdieu, Outline of a Theory of Practice, above n 5, 168; Bourdieu, Logic of Practice above n 5, 215.

theory. The analysis that follows engages with aspects of the welfare-rights binary though its focus is on cruelty-welfare, as it is this latter binary that defines animal protection as a distinct area of law.

The intractability of the status quo and the conditions of knowledge that constrain the animal protection debate suggest a new analytical pathway is needed. How might the problem be framed in a way that cuts across this binary whilst drawing on the insights that each concept offers? In response to this question, this thesis adopts the concept of ‘violence’ as an alternative frame and method for the study of animal protection law and policy issues.

The need for an alternative way of posing and investigating animal protection law and policy is especially urgent, given the dynamics of animal protection under the influence of neoliberalism, as it is expressed in the dynamics of 21st century capitalism. As animal use industries form a central part of the Australian economy, a critical perspective must approach animal protection as an issue that sits at the nexus between the criminal law and capitalism. For the purposes of this thesis, an ‘animal use industry’ is defined as one that falls within the operation of regulatory instruments such as MCOPWA, or self-regulates under statute, or statutory agreements. Key examples include settings in which animals are raised and killed for food and animal derived products, and used for sports and entertainment. In general, ‘animal use industry’ is the term used by the author to refer to the structures and practices that characterise animal use by larger-scale corporate entities. However, it is possible that the definition may extend to the breeding or use of companion animals, where that breeding falls within the operation of state sanctioned self-regulatory schemes.


A Thesis Question and Chapter Outline

It is against the background of the themes raised above that this thesis takes the form of a thought experiment. It proposes to test the hypothesis that the concept of violence provides a useful alternative frame for the study of animal protection law and policy. This question, however, raises another: how to develop a framework and method to support the analysis of animal protection law and policy questions through the lens of ‘violence’.

The response to the thesis question is developed using a cross-disciplinary method. It develops and applies a set of methodological tools within a framework by which animal protection law is understood in terms of what French sociologist and anthropologist Pierre Bourdieu refers to as ‘symbolic violence’. Animal protection, as a distinct area of criminal law and policy, is examined according to Pierre Bourdieu’s method for the analysis of a ‘field’ and his concept of ‘habitus’. Bourdieu noted that ‘[t]he limits of a field are situated at the point where the effects of the field cease’. For the purposes of this study, those limits are marked by the reach of Australia’s animal protection regime. As part of the application of Bourdieu’s method, this regime will be reconfigured as a Bourdieusian field. Habitus will be applied to participants within this field in a way that draws on political philosopher Giorgio Agamben’s notion of the anthropological machine, and Alan Norrie’s arguments about legal individualism under the influence of


neoliberalism.\textsuperscript{15}

The perspective developed in this thesis is different to those that rely on the use of animal welfare, animal cruelty, or animal rights as their conceptual foundations. First and foremost, it deploys violence as an alternative frame of analysis. Violence is not a speciesist’ concept. Unlike terms such as animal welfare, it does not make an \textit{a priori} assumption that humans and other animals occupy two distinct and separate realms of inquiry. It is also distinguished from other approaches in that it develops a method for applying the concept of violence to animal protection law and policy issues. It does this by bringing together Bourdieu’s method for analysing a field with a notion of interdependence based on the anthropological machine and the negotiation of human-animal boundary.\textsuperscript{16} As a result, whereas as one might propose animal rights according to the model of citizenship,\textsuperscript{17} in the analysis that follows animals and particular groups of humans are taken as simultaneously vying for the social goods that inhere in the notion of social citizenship. It is via this unique combination of Bourdieu’s analytical tools and Agamben’s notion of the anthropological machine, along with insights about legal individualism drawn from Alan Norrie’s work,\textsuperscript{18} that the concept of violence is extended beyond its use by other animal protection legal theorists\textsuperscript{19} and comes to offer a useful alternative framework. In particular, the framework supports a nuanced analysis of how, within the animal protection field, the interests of humans and animals are interdependent. Overall, the arguments put forward explain how it is that the plight of animals is completely entangled in the process by which inequalities between humans, and groups of humans, are maintained and reproduced within the animal protection field.

\textit{In the 21\textsuperscript{st} century, power flows via complex, non-linear, and sometimes...} 


\textsuperscript{16} Agamben, above n 14.

\textsuperscript{17} See Donaldson and Kymlicka, above n 8.

\textsuperscript{18} Norrie, ‘Crime, Reason and History’, above n 15.

\textsuperscript{19} Bryant, ‘Sacrificing the Sacrifice of Animals’, above n 4; Francione and Garner, above n 9.
counterintuitive pathways. Thus, if we pay attention only to the fact that humans perpetrate violence against animals, our attention is diverted from the ways in which humans use animals to maintain hierarchies within human groups and the ways in which these divisions between humans underlie continued large-scale violence against animals. It is in this light that this thesis seeks to reveal and remedy a misrecognition, to demonstrate that the structure of the animal protection field operates against certain animals and certain humans simultaneously.

**Chapter Two** contextualises the thesis question and provides the background to the development of the hypothesis to be tested. It raises preliminary issues as to why ‘animal welfare’ and ‘animal cruelty’ are problematic concepts for the study of animal protection law and policy. It also examines animal protection legal theorists’ use of the term ‘violence’ with a focus on the work of Taimie L Bryant and Gary L Francione.

**Chapter Three** examines the key features of Australia’s animal welfare framework and anti-cruelty legislation. Australia’s approach is described as operating according to two distinct streams which mirror the cruelty-welfare binary.

**Chapter Four** aims to develop an understanding of the scope of violence against animals, defined as ‘animal cruelty’. It presents the findings of an animal cruelty case law review for the period 2002-11 inclusive. It develops a portrayal of the crime of animal cruelty and considers whether animal cruelty provides an adequate basis for a critical perspective on animal protection. It also explores whether the concept of animal cruelty constrains the notion of violence against animals as a phenomenon solely based on individual blameworthiness.

**Chapter Five** provides the account of violence to be adopted as a frame for the study of animal protection law and policy issues. Bourdieu’s notion of symbolic violence and field are discussed, and conceptual links are made between Bourdieu’s work and painter Francis Bacon’s triptych, *Three Studies for Figures at the Base of a Crucifixion*, the figures of which evoke the indeterminacy of the

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20 Bryant, ‘Sacrificing the Sacrifice of Animals’, above n 4.

human-animal boundary and share compositional aspects with Bourdieu’s notion of field. Having discussed symbolic violence and field, the chapter progresses to focus on Giorgio Agamben’s notion of the ‘anthropological machine’ and the human-animal boundary. The idea of a ‘double internal consistency’ is defined and explained, and it is on this basis that the thesis situates the interests of animals and humans within the animal protection field as interdependent. The anthropological machine is utilised as a device to articulate this interdependence as it operates within animal protection, as a distinct area of criminal law. The chapter concludes with a discussion of animal protection laws under Nazi Germany’s Third Reich as a case example of a renegotiation of the human-animal boundary and the ‘double internal inconsistency’ within a criminal law framework.

Chapter Six reconfigures Australia’s approach to animal protection as a Bourdieusian field. The case law review findings from Chapter Four are used to identify the key agents participating in the animal protection field, and this provides the empirical basis for the analysis of habitus. An overview of the case studies in Chapters Seven, Eight, and Nine is provided in terms of how they form a triptych and how their themes relate to the larger theoretical frame of symbolic violence and the cruelty-welfare opposition.

Chapter Seven examines whistleblowing in the interests of animal protection within Australia’s pork industry as an attempt to disrupt symbolic violence.

Chapter Eight is framed by the concept of individual responsibility in criminal law. It examines the enactment of a new ‘serious animal cruelty’ offence under the Criminal Code (Qld).  

Chapter Nine discusses the concept of structural violence. It aims to assess the

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22 Agamben, above n 14, 37.

23 Ibid.

24 See for example, Bourdieu, The Genesis of the Concept of ‘habitus’ and ‘field, above n 11; Bourdieu, Rethinking the State, above n 11; Mahar et al, above n 6, 8-9.

25 Criminal Code Act 1899 (Qld) sch 1 (‘Criminal Code’) s 242.

potential and limits of law reform relating to animal use industries in Australia, using New South Wales’ greyhound racing industry as a case example. 27

**Chapter Ten** concludes the thesis. It assesses whether violence offers a useful framework for the study of animal protection law and policy. It outlines the findings of the case studies and identifies the implications of the case study analyses, utilising them to propose potential areas for law reform. It also offers suggestions as to how the framework established for this project may be of use in subsequent research within and beyond the field of animal protection.

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**Part II BACKGROUND**

**A The Criminal Law and Regulatory Theory**

As this study adopts a view that prioritises criminal law, it is necessary to distinguish a perspective informed by criminal law principles from one that relies on regulatory theory.

In Australia, the majority of animal use industries self-regulate. Self-regulation is a consensual form of regulation. 28 It encompasses ‘an array of regulatory arrangements’ that vary according to the type and level of state involvement, the ‘formality with which those arrangements are established and enforced, the extent to which the self-regulatory body exerts exclusive or monopoly control over the regulated activity and the level at which behaviour is regulated’. 29

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In general, ‘self-regulation’ is a compliance-based regulatory approach. The approach is often conceptualised as a regulatory pyramid, mirrored by an enforcement pyramid, and widely known as the ‘Braithwaite model’. Persuasion, usually through educational strategies and industry engagement, forms the base of the compliance-based regulatory pyramid. Prosecution and criminal penalties form the top of the pyramid and are only employed as a last resort.

The ‘Braithwaite model’ has efficiency as its core value; it mirrors the values and priorities of its regulatees. By contrast, the criminal law has the principle of equal treatment and censure as its priorities. Andrew Ashworth explains the principle of equal treatment and distinguishes the regulatory perspective, noted above, from a view which prioritises the criminal law:

[i]f we posit two people who commit two offences of roughly equivalent gravity, one falling within the ambit of traditional policing and the other falling within a regulatory scheme enforced by a specialist agency, the question is whether it is unfair that the former should be prosecuted when the latter receives only a warning and encouragement to comply by a certain date. There may be obvious differences between the two types of case: the former might be a single incident constituting an offence, whereas the latter may be part of a continuing course of conduct which the enforcer wishes to bring into compliance with the law as soon as feasible (but not necessarily right now). Yet it is difficult to see how this weakens the force of the principle of equal treatment: one could just as well reply

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30 See for example, Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 84-7.


32 Fisse and Braithwaite, above n 30, 140-2.

33 See for example, John Braithwaite, *To Punish or Persuade: The Enforcement of Coal Mine Safety* (State University of New York Press, 1985) 142; Ayres and Braithwaite, above n 26, 35; Fisse and Braithwaite, above n 25, 140-2.


that the continuing course of conduct constitutes a continuing source of
criminality, which ought to be stopped forthwith.\(^{36}\)

Further:

\[\text{[t]he claim must be that the prima facie unfairness of departing from the principle of equal treatment can be justified by the extra law-abidance that the compliance approach generates; but it remains to be demonstrated that extra law-abidance is produced, and, if so, that it can only be achieved by means of a compliance approach to enforcement.}\(^{37}\)

In making the distinction between a person prosecuted under criminal law and one who falls within the operation of the compliance model, Ashworth notes that it is unfair for one person to be prosecuted for an act or omission, when the other person is not. These circumstances offend the principle of equality, that all are equal under the law, especially under the criminal law.

Australia's animal protection regime operates exactly in the manner described by Ashworth. There is an inherent unfairness within the regime, with the result that ‘animal cruelty’ becomes almost solely associated with individual blameworthiness and with violence against animals in the domestic sphere. Also, as noted by Ashworth, this dichotomous approach persists in the absence of evidence that self-regulation results in extra law abidance, and in the face of ongoing evidence to the contrary.\(^{38}\)

It is for these reasons that this study focuses on the unfairness within the animal protection regime by which the law classifies who is cruel and who is not. In doing so the thesis supposes that, in order to make an impact on violence against animals, it is necessary to critically analyse and gain insight into the dynamics that maintain this classificatory process and how this process maintains the status quo among humans.

\(^{36}\) Ibid 248.

\(^{37}\) Ibid.

The analysis does not, therefore, constitute a Kantian argument, that our duties to animals are indirect, or that animals have less inherent worth than humans. It does, however recognise that the plight of animals is completely entangled in the process by which inequalities between humans, and groups of humans, are maintained and reproduced within the animal protection field. They are not separate realms of inquiry.

The cruelty-welfare binary alluded to above, as it manifests within animal protection law, evokes Durkheim and Mauss's ‘primitive forms of classification’. In developing his theoretical program, Bourdieu drew on their work for his account of ‘symbolic forms’ of violence. Bourdieu explained that the authors' ‘primitive’ forms of classification were ‘not transcendental, universal forms, as in the old Kantian tradition, but historically constituted forms associated with historical conditions of production’. In this view, the classificatory dynamics evident within animal protection law, according to the cruelty-welfare binary, would also be ‘historically constituted’ and associated with the conditions of contemporary economic and social reproduction. This meta-theoretical theme will be developed in more detail in subsequent chapters.

39 Immanuel Kant, 'Morality According to Prof. Kant: Mrongovius's Second Set of Lecture Notes (Selections)' in Paul Guyer and Allen W Wood (eds), Lectures on Ethics (Cambridge University Press, 1997) 212.


41 Emile Durkheim and Marcel Mauss, Primitive Classification (Rodney Needham trans, Taylor and Francis, 1963) [trans of: De Quelques Formes Primitive De Classification (first published 1903)].


43 Bourdieu, On the State, above n 6, 165.

44 Ibid.
The connections between human perpetrated harm towards the environment, wild animals and domesticated animals are complex and may be considered within different jurisprudential frames. Harms towards animals as part of broader environmental concerns tend to be conceptualised within earth jurisprudence. Earth jurisprudence aspires to a holism by which each natural element of the earth ought to be allowed to fulfil its role as part of its regional ecosystem. Further, ‘earth jurisprudence’ is theorised as a subset of ‘The Great Jurisprudence’, which has three elements: differentiation, autopoesis (self-making), and communion. Communion refers to the ‘interconnectivity of all aspects of the universe’ and organises all parts of the universe in relation to one another. In this way it emphasises interdependence between species and other parts of the natural world.

Reference to interdependence is less evident in animal protection theories, in which the individual animal is taken as a morally relevant being and the legal unit of concern. However, the quote from Sogyal Rinpoche which opens this thesis, that ‘all things, when seen and understood in their true relation, are not

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47 Ibid.
48 Ibid 79.
49 Ibid 80.
50 Except perhaps in theories about the connection between violence towards animals and between humans in the context of domestic or family violence. However such theories tend to focus on interconnectedness as arising from psychopathological sources. See for example, Frank R Ascione and Phil Arkow (eds), *Child Abuse, Domestic Violence, and Animal Abuse: Linking the Circles of Compassion for Prevention and Intervention* (Purdue University Press, 1999).
independent but interdependent with all other things” alludes to interdependence as energising the analysis of the Australian animal protection field that follows. However, the concept is approached from a different perspective. Giorgio Agamben’s idea of the anthropological machine and the negotiation of the human-animal boundary are used to articulate this interdependence as it operates within this field.

Overall, animal protection theories and earth jurisprudence mirror their engagement with their respective legislative frameworks: environmental law and animal protection law. Native (or wild) animals, traverse this boundary; they are of concern either as individuals under anti-cruelty legislation or as members of endangered species or ecosystems of national significance.

Until the enactment of animal protection laws in the early 19th century, animals were of interest to the law merely as property: rights relating to the human use, ownership, and taking of animals from the wild. For Jeremy Bentham ‘[p]roperty and law are born together, and die together’. Before the laws there was no property; take away the laws, all property ceases. It follows that animals are completely implicated in the emergence of Law. Indeed, as Francione explains, the domestication and ownership of animals is inextricable to the development of the idea of property and money. The deep connection between animals, law, and money (or wealth) suggests that the entanglement of animals within the law is multilayered.

The traditional significance of domestic animals within the law has been

52 Patrick Gaffney and Andrew Harvey (eds), The Tibetan Book of Living and Dying (Harper Collins, 1993) 37.

53 For example, under the Environmental Protection and Biodiversity Act 1999 (Cth).

54 Wright, above n 51, 6.


56 Ibid.

57 Francione, Introduction to Animal Rights, above n 21, 52.
challenged by the development of a new area of law, which is concerned with animals as morally relevant individuals. In the United States (US), and more recently in Australia, the term ‘Animal Law’ has come to refer to legal advocacy aimed at animal protection.58

In the United States animal protection law is a ‘large-scale, organized movement’ which ‘started in the early 1970s’.59 Perhaps reflecting the movement’s relative maturity, efforts in the US have moved beyond traditional advocacy within the context of animal cruelty prosecutions, to draw on alternative options offered by the common law. For example, animal protection organisations have come to utilise *amicus curiae* briefs to ‘influence judicial decision-making’.60 Another approach, championed by lawyer Steven Wise, aims to secure legal personhood for some sentient species (great apes), relying on the writ of *habeas corpus*.61

Compared with the ‘frontier’ advocacy efforts noted above, Animal Law in Australia is less developed. For example, in Australian courts, ‘the intervention of an *amicus curiae*’ even for human claimants is ‘a relatively rare event’.62 In part, this rarity reflects a lack of clear guidelines as to the circumstances in which


61 In 2013, the Nonhuman Rights Project (NhRP) commenced three suits, on behalf of three captive chimpanzees, requesting that the court issue a writ of *habeas corpus*. NhRP’s submissions were founded on ‘genetic, cognitive, physiological, evolutionary and taxonomic evidence that the plaintiffs [were] autonomous, self-aware, self-determining, and able to choose how to live their lives and provided by some of the world’s greatest working primatologists’. The court refused the writs on the grounds that the chimpanzees were not legal persons. In January 2014 NhRP filed Notices of Appeal in the New York Intermediate Appellate Courts. See <http://www.nonhumanrightsproject.org/category/courtfilings/>; ABC Radio, ‘Chimpanzee Rights in US Court’ ABC Radio National, 17 October 2014 (Fran Kelly) <http://www.abc.net.au/radionnational/programs/breakfast/chimpanzee-rights-in-us-court/5820614>.

62 *Bropho v Tickner* (1993) 40 FCR 165, 172 (Wilcox)).
amicus curiae will be granted.63 These factors notwithstanding, interest in Animal Law has grown over the last decade. At the time of writing, fourteen of Australia’s law schools had introduced Animal Law as an undergraduate elective subject.64 The *Australian Animal Protection Law Journal* was established in 2008. Over the ensuing five years, five Animal Law texts were published by Australasian authors.65

Wright suggests that the appropriate term for this emerging area of legal practice and research might be ‘animal welfare law’.66 For the purposes of this project, a broader term ‘animal protection law’ is adopted, so as to encompass legal advocacy based on animal welfare, animal rights theories, and the law reform strategies that emerge from the following analysis. This analysis develops and applies a framework for the study of animal protection law and policy adopting the concept of violence.

C Domesticated Animals

For the purposes of this thesis, ‘animal protection law’ will be defined by the scope of anti-cruelty statute and relevant legislative instruments. This study is confined to domesticated animals, defined as animals that have been subjected to the process of domestication. Donaldson and Kymlicka define the process of domestication as referring to ‘the ‘human labour’ of selective breeding and genetic manipulation to adapt the animal’s nature for specific ends’,67 and as relating to

63 Radich, above n 60, 34.


66 Wright, above n 51, 6.

67 Donaldson and Kymlicka, above n 8, 74.
animals who are regularly kept or managed by humans.  

Australia’s Animal Welfare Strategy identifies six categories of animals. The discussion will be limited to three of these categories: companion animals, livestock and production animals, and animals used for work, recreation, entertainment and display. Australia’s Animal Welfare Strategy will be discussed in more depth in Chapter Three.

In the domestic sphere, the habits that form the pattern of our lives are, to a greater or lesser extent, shaped by our interactions with animals: as companions, as declared enemies (pests) or as wildlife. We nurture and train our pets. We avoid and feel terrorised by ‘pests’. And we are ambivalent about wild creatures inhabiting our homes without our explicit consent. This familiar interdependence between humans and other animals has developed over more than 10 000 years and reflects continual inter-species adaptation and negotiation. Seemingly a world away from the home are the steel sheds, slaughterhouses and corridors of

68 For a broader discussion of the meaning of domestication see Donaldson and Kymlicka, above n 8, 74-6. The Australian Concise Oxford Dictionary defines domesticate as ‘tame (an animal) to live with humans; accustom to home life and management; naturalise (a plant or animal)’. Australian Concise Oxford Dictionary (Oxford University Press, 5th ed, 2009) 417. In Attorney General (SA) v Bray (1964) 11 CLR 402 at 411, Chief Justice Dixon stated that ‘domestic animals’ are ‘such animals as are commonly kept and cared for in or about human habitations’.

69 Primary Industries Standing Committee, Australian Animal Welfare Strategy, above n 10, 8.

70 Ibid. The other three categories are aquatic animals, animals used in research and teaching, and native, introduced, and feral animals.


72 Thiriet observes that ‘[s]ome species may be regarded as pests by some, but for others they may constitute a national icon (e.g. brumbies), a tourism asset (e.g. camels), a food source (rabbits), an economic resource (e.g. goats)’. Dominique Thiriet, ‘In the Spotlight - The Welfare of Wild Introduced Animals in Australia’ (2007) 24 Environment and Planning Law Journal 417, 419.

cages associated with commercial animal use industries. In these settings, humans touch animals’ bodies though in ways that unavoidably reiterate each animal’s status as property, its ‘thingness’. Despite the dissonances, it is in both the home and commercial animal-use settings that direct human sovereignty over animals is assumed on an everyday basis and in which animals are at the mercy of this supremacy.

Having set out the thesis themes, question, and background, Chapter Two provides the background to the thesis question and surveys the use of the concept of violence by animal protection legal theorists.
CHAPTER 2  BACKGROUND: ANIMAL CRUELTY, ANIMAL WELFARE, AND THE USE OF THE CONCEPT OF VIOLENCE (AND NON-VIOLENCE) IN CONTEMPORARY ANIMAL PROTECTION LEGAL THEORY

Part I INTRODUCTION

The aim of this chapter is to contextualise the thesis question by examining key concepts. Part II of the chapter defines ‘animal cruelty’ and ‘animal welfare’, and examines some of the reasons why animal welfare and animal cruelty are problematic concepts in the context of animal protection law and policy law reform. In the 21st century it is naïve to attempt to understand these terms without reference to market forces, as they are evolving under neoliberalism. For the purposes of this thesis, neoliberalism is defined as having two aspects. First, it is a socio-economic doctrine which emphasises individual freedom, especially economic freedoms and rights related to private property.1 Second, neoliberalism refers to the characteristics of economic markets as they have developed across the globe from the late 1970s onwards.2 These features include ongoing deregulation of international markets and the dismantling of the proactive welfare state.3

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2 David Harvey, A Brief History of Neoliberalism (Oxford University Press, 2005) 2; Don Kalb, ‘Thinking about Neoliberalism as if the Crisis was Actually Happening’ (2012) 20(3) Social Anthropology 318, 320.

3 Dag Einar Thorsen, above n 1, 188-90; Kalb, above n 2, 318; Productivity Commission, Parliament of Australia, Trends in Australian Agriculture Research Paper (Commonwealth of Australia, 2005) 45; Cf John Braithwaite, Regulatory Capitalism (Edward Elgar, 2008) 4. Also, see Faunce who observes that ‘[t]he power and size of supranational corporations in the global economy has increased their ability to strategically formulate, undertake and hide lucrative organizational corruption, bribery and fraud on the public purse’. Faunce et al, ‘Because They Have Evidence: Globalizing Financial Incentives for Corporate Fraud Whistleblowers’ in A J Brown, David Lewis, Richard E Moberly and Wim Vandekerckhove (eds), International Handbook on Whistleblowing Research (Elgar Online, 2014) 381, 381.
methodical destruction of collectives'.\(^4\) Bourdieu argues that neoliberalism involves those political measures ‘that aim to call into question any and all collective structures’ that could serve as an obstacle to the logic of the pure market’ (emphasis in original).\(^5\)

Contrary to the orthodox view, accepted in the broad definition above, John Braithwaite has argued that the 21\(^{st}\) century has seen a proliferation of regulation, that ‘the corporatisation of the world is both a product of regulation and the key driver of regulatory growth, indeed of state growth more generally’.\(^6\) However, it is also the case that ‘deregulation’ can be understood as connoting the displacement of the role of the state in regulating corporations, rather than a diminution in regulation per se.

After the examination of ‘animal cruelty’ and ‘animal welfare’, Part III considers how the concept of violence has been deployed in contemporary animal protection legal theory. The discussion focuses on the work of Taimie L Bryant and Gary L Francione, as both theorists explicitly deploy the term ‘violence’ in their respective works. The discussion extends to Francione’s use of the Jain notion of *ahimsa* or non-violence to assess whether Francione’s rendering of non-violence offers a feasible conceptual basis, or the methodological tools, to support a critical perspective on animal protection law and policy reform. The conclusion of the analysis is that neither the concept of violence, as it is deployed by Bryant or Francione, nor the concept of *ahimsa* as it is used by Francione, offers a framework to support animal protection law and policy reform strategies.

**Part II | BACKGROUND**

**A | Animal Cruelty and Animal Welfare**

Many of the terms that feature in popular and academic debate relating to humanity’s moral and legal obligations towards other animals, property and

\(^4\) Bourdieu, ‘The Essence of Neoliberalism’, above n 1, 2.

\(^5\) Ibid.

persons, human and animal, wild and tame, cruelty and welfare, are contested. This struggle over terminology is symptomatic of the lack of social consensus or coherent narrative about who and what animals are.

Amongst this contestation over language it is necessary to identify the terms that will be adopted within this study. Firstly, for simplicity’s sake, non-human animals will be referred to either according to their species membership, or more generally as ‘animal’. When making reference to or quoting from a specific publication, the use of ‘animal cruelty’, ‘animal welfare’ or related terms will reflect that used in the original publication.

As well as defining animal welfare and animal cruelty, the following sections raise some of the problems related to applying these concepts to contemporary animal protection law and policy. The concept of animal rights is briefly mentioned, although it will be examined in detail in Part III. In later chapters, a theoretical frame and methodological approach based on the term ‘violence’ will be developed and applied in the case studies in Chapters Seven, Eight and Nine.

1 Animal Welfare

As an ethical principle guiding humanity’s obligations to animals, ‘animal welfare’ accepts human use of animals, including killing for food and the use of animals for research purposes. Therefore, it implicitly accepts animals as a form of property. However, it ‘tempers this stance by conceding that the animals involved should be treated humanely’. This is the approach adopted by the Royal Society for the Prevention of Cruelty to Animals (RSPCA). The definition of animal welfare can depend on whether the animal is being used for scientific, legal or other

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9 McEwan, above n 8, 69.

10 Ibid.

11 Ibid.
purposes. The authoritative scientific definition of ‘animal welfare’ is ‘how an animal is coping with the living circumstances in which it lives’. According to the World Organisation for Animal Health, an animal ‘is in a good state of welfare if (as indicated by scientific evidence) it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and if it is not suffering from unpleasant states such as pain, fear, and distress’.

This definition notwithstanding, the term ‘animal welfare’ may apply to both poor and excellent states of being. While the general community tends to assume ‘animal welfare’ as evidencing a positive commitment to the care, health and wellbeing of animals, the phrase is used in a distinctly different way by animal use industries. Even the poorest states of health may fall within the rubric of ‘welfare’ and, as many have shown, lawful standards of ‘welfare’ can fall below the threshold of what would otherwise constitute cruelty. In contrast to animal welfare, animal rights theory has the elimination of animals’ legal status as property as its central aim.

Before moving on to consider animal cruelty, it is worth noting that, although animal welfare and animal rights are argued as if they are mutually exclusive concepts, there is some theoretical overlap. As McEwan notes, both John Stuart Mill (1806-73) and Peter Singer ‘argue for absolute rights within the bounds of


15 See for example, White above n 12.

utilitarian theory’.\textsuperscript{17} Mill concluded that, for humans, the claim for personal security assumes a character of absoluteness.\textsuperscript{18} For Peter Singer, ‘in the present state of knowledge there is a strong case against the slaughter of chimps, gorillas and orangutans. On the basis of what we know now, we should immediately extend to them the same \textit{full protection} against being killed that we extend now to all human beings ... a case can also be made perhaps even to the point of all mammals’ (emphasis added).\textsuperscript{19}

2 \hspace{1cm} \textit{Animal Cruelty}

The phrase ‘animal cruelty’ does not have an objective or consistent definition.\textsuperscript{20} Nonetheless, the stereotypical idea of animal cruelty relates to treatment of an animal that is ‘socially unacceptable’.\textsuperscript{21} This usually involves a human intentionally causing unnecessary pain, suffering, or distress to and/or the death of an animal’.\textsuperscript{22} This portrayal reflects the legislative definition of animal cruelty, which turns on the issue of whether the pain and suffering caused to the animal victim was ‘unnecessary’.\textsuperscript{23} Animal cruelty, like animal welfare, assumes the human use of animals. However, ‘animal cruelty’ can be considered a subset of welfare as ‘unnecessary’ pain and suffering must mean causing excessive pain or suffering in the context of lawful forms of animal use or causing pain where the particular use of the animal victim is not deemed legitimate either by society or the law.

\textsuperscript{17} McEwan, above n 8, 89.


\textsuperscript{19} Peter Singer, \textit{Practical Ethics} (Cambridge University Press, 1993) 132; McEwan, above n 8, 89.

\textsuperscript{20} Frank Ascione, ‘Animal Abuse and Youth Violence’ in \textit{Juvenile Justice Bulletin} (US Department of Justice, 2001); Arnold Arluke states that the meaning of animal cruelty is something ‘that people struggle to make sense of everyday in their private and professional lives’. Arluke, above n 8, 6-7.


\textsuperscript{23} See for example, \textit{Animal Care and Protection Act 2001} (Qld) s 18(2) ‘a person is taken to be cruel to an animal if the person ... (a) causes it pain that, in the circumstances, is unjustifiable, unnecessary or unreasonable; \textit{Ford v Wiley} (1889) 23 QBD 203.
Animal cruelty is a criminal offence in all Australian States and Territories. Queensland and New South Wales have additional animal cruelty offences in their respective general criminal statutes. There are typically two forms of animal cruelty offence: a general offence and aggravated cruelty. Although cruelty to a live animal is a crime, killing an animal is not unlawful per se, as animals’ status as property denies any inalienable right to life. Killing or authorising the killing of an animal by the animal’s owner constitutes lawful disposal of property, as long as the pain and suffering inflicted on the animal during the act of killing does not amount to cruelty. Australian state and territory animal cruelty legislative provisions are discussed in Chapter Three.

Under Australian animal protection legislation, animal cruelty may occur by act or omission, with omissions often taking the form of neglect to provide food and other basic needs, or a failure to seek veterinary care. In its general form, animal cruelty is an offence of strict liability; there is no necessity for the prosecution to prove the existence of mens rea. Despite this, the necessity test applied in animal cruelty cases resembles an objective mens rea, or hybrid (i.e. objective plus subjective) test. The complexities of the distinction between strict liability and mens rea offences will be examined in detail in Chapter Eight.

Aggravated cruelty generally requires intention (or recklessness) on the part of the defendant and refers to cruelty which results in the death, deformity or serious disablement of the animal, or in such severe injury that it would be cruel to keep


25 Criminal Code Act 1899 (Qld) sch 1 ‘Criminal Code’ s 242; Crimes Act 1900 (NSW) s 530.


29 Bell v Gunter (Unreported, Supreme Court of New South Wales, Dowd J, 24 October 1997); Pearson v Janlin Circuses Pty Ltd [2002] NSWSC 1118 (25 November 2002) [7]-[8] (Windeyer J).

30 He Kaw Teh v The Queen (1985) 157 CLR 523, 533-4 (Gibbs CJ).
the animal alive. An example of aggravated animal cruelty would be a failure to provide nutrition to the extent that the animal victim is in an emaciated state and is euthanased on humane grounds. For example, section 9 of the Animal Welfare Act 1993 (Tas) states that ‘a person must not do any act, or omit to do any duty, referred to in section 8 which results in the death or serious disablement of an animal’. Under section 8(1) ‘a person must not do any act, or omit to do any duty, which causes or is likely to cause unreasonable and unjustifiable pain or suffering to an animal’.31

Cruelty will be lawful if, in the circumstances, it is justifiable, necessary, or reasonable.32 Mike Radford notes that English and Scottish courts have interpreted the term ‘unnecessary’ as meaning ‘without good reason’.33 The offence of animal cruelty and the common law test will be examined in Chapters Three and Four, and are the subject of the case study in Chapter Eight.

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Sentence

For utilitarians, from Jeremy Bentham through to Peter Singer, sentience has provided the foundation for moral claims made on behalf of animals.34 This claim takes the form of an interest, which is balanced against the interests of human beings. Bentham was explicit in including all sentient beings in his felicitous calculus, which was to guide the drafting of legislation.35 In anti-cruelty legislation, sentience functions as a proxy for the animal subject, as the capacity to experience pain and suffering suggests a form of existence and being, or subjectivity. In general, animal welfare theories applied to legal questions deploy sentience as the ethical justification for the humane treatment of animals and as the basis of

31 Animal Welfare Act 1993 (Tas).

32 See for example, Animal Care and Protection Act 2001 (Qld) s 18(2)(a).


enforceable interests.\textsuperscript{36}

The capacity to experience pain or suffering, and pleasure, are the foundations of sentience. To be sentient is to be ‘the sort of being who is conscious of pain and pleasure; there is an ‘I’ who has subjective experiences’.\textsuperscript{37} Pain is a means to the end of survival.\textsuperscript{38} Sentience takes into its scope various states of pain, pleasure and more intangible experiences of ‘suffering’; enduring or being subjected to pain, grief, change, punishment, wrong, disablement or damage.\textsuperscript{39} Sentience is a key factor to consider in developing animal protection strategies.

There are two debates relating to sentience in the context of animal protection regulation. The first is the scope of species to which moral (and legal) regard ought to be given. Most scholars who write within the parameters of animal protection law adopt sentience as the relevant moral boundary, although they make specific arguments that go to graduations of sentience and how such differences should be translated as legal interests.\textsuperscript{40}

This first concern overlaps with scientific debate regarding the limits of sentience: where in the world’s great diversity of species does sentience taper off to the point that it is no longer morally relevant? It is generally accepted that all vertebrates, including fish, are capable of feeling pain and experiencing distress.\textsuperscript{41} Cartilaginous fish, such as sharks and rays, may have less capacity than others in this regard.\textsuperscript{42}

\textsuperscript{36} The paradigmatic example is Jeremy Bentham’s utilitarianism. Ibid.


\textsuperscript{38} Francione, \textit{Introduction to Animal Rights}, above n 37, 8.


\textsuperscript{42} Duncan, above n 41, 647.
Cephalopods (for example, octopuses) are sentient, can anticipate events and show surprise when conditions are not as expected.\(^{43}\) The question of whether invertebrate species, such as social insects (ants and bees) have the capacity to suffer and feel pain is a topic of debate.\(^{44}\) With regard to invertebrates, is relevant to note that the definition of ‘animal’ for the purposes of the Prevention of Cruelty to Animals Act 1979 (NSW) includes a crustacean ‘but only when 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’.\(^{45}\)

Finally, plants do not behave in ways that indicate they feel pain and they lack the neurological and physiological structures associated with sentience in humans and other animals.\(^{46}\) Nonetheless, in the view of a Swiss Confederation Federal Ethics Committee on Non-Human Biotechnology meeting held in 2008, ‘plants, like other living organisms, should be considered as part of the moral community, as they are living beings able to experience good and bad effects on their survival’.\(^{47}\)

Australian animal protection legislation limits its scope to vertebrate species and this is the boundary adopted for the purposes of this project (See Appendix A for a summary of the relevant state and territory statutory definitions of animal). Fish fall within the purview of animal protection legislation in most Australian states and territories.\(^{48}\)

\(^{43}\) M J Wells, *Brain and Behaviour in Cephalopods* (Heinemann, 1966) [n.p.], cited in Duncan, above n 42, 647.

\(^{44}\) Duncan, above n 41, 647.

\(^{45}\) Section 4(1)(b).

\(^{46}\) David Favre, ‘Living Property A New Status for Animals within the Legal System’ (2010) *Marquette Law Review* 1021, 1044; At 1045 n 77, Favre notes that: ‘[i]n April of 2008, the Swiss Confederation convened the Federal Ethics Committee on Non-Human Biotechnology (ECNH) to ponder the issue of plants’ rights. Philosophers, geneticists, lawyers and theologians came together to contemplate the moral consideration of plants for their own sake. In citing the commonalities of plants and animals at the molecular and cellular levels, those assembled determined that plants have inherent worth and their own interests, [and] thus, deserve protection’.

\(^{47}\) Quoted in Favre, above n 46, 1045 n 77.

\(^{48}\) Fish are exempted from the definition of animal under the *Animal Welfare Act 2002* (WA) s 5 and the *Prevention of Cruelty to Animals Act 1985* (SA) s 3.
Prominent ‘green criminologist’ Piers Beirne has noted ‘a widespread reluctance to debate the theoretical adequacy of concepts like ‘animal abuse’ and ‘animal cruelty’.

It seems that animal welfare has become a taken-for-granted way of identifying the limits of what humans owe to other animals. As many practices common in animal use industries are hidden from public view, that animal welfare presumes all sorts of animal use has slipped from public consciousness. It seems almost impossible to feasibly argue beyond the welfare framework without calling for an absolute break in the juridical structure of democracy or for a post-human utopia.

Australia’s intensely humanist utilitarian approach to animals means that even those whose advocacy is consistent with an animal welfare position may be labeled ‘extremists’. In May 2013, for example, Animals Australia negotiated an arrangement with the Coles supermarket chain to sell shopping bags which promoted ‘sow stall free pork and cage free hen initiatives’. In its media response, the Victorian Farmers’ Federation stated ‘[f]armers are bewildered by

49 Green criminology can be defined as ‘the study of those harms against humanity, against the environment (including space) and against non-humans committed both by powerful institutions (e.g. governments, transnational corporations, and military apparatuses) and also by ordinary people’. Piers Beirne and Nigel South (eds), Issues in Green Criminology: Confronting Harms Against Environments, Humanity and Other Animals (Willan Publishing, 2007) xiii; Gary Potter, ‘What is Green Criminology’ (November 2010) Sociology Review 8; Mathew Hall, ‘The Roles and Use of Law in Green Criminology’ (2014) 3(2) International Journal for Crime, Justice and Social Democracy 96.


52 Animals Australia states that it is ‘Australia’s foremost national animal protection organisation, representing some 40 member groups and over 1.5 million individual supporters. Animals Australia, along with our global arm, Animals International, has an unprecedented track record in investigating and exposing animal cruelty and for conducting world-first strategic public awareness campaigns.’ Animals Australia, About Us <http://www.animalsaustralia.org/about/>.

Coles’ decision to promote the radical activist group, Animals Australia in its stores" and ‘it is extremely important that Coles note that Animals Australia is not an animal welfare group ... they are [sic] a radical animal rights and activist group’.55

As well as the problem of how best to conceptualise human obligations to other animals, and the various harms that animals experience at the hands of humans, there is the related question of how to avoid ‘speciesist’ language. A reliance on ‘speciesist’ language entails the risk of continually reasserting the hierarchical division between humans and other species which lies at the heart of humanity’s disregard for the suffering of other species. Speciesism expresses ‘a prejudice or attitude of bias in favour of the interests of members of one’s own species and against those of members of other species’.56 It has parallels to racism and sexism, in that the boundary of the group also forms the boundary of moral concern.57 However, as will be discussed in Chapter Five, these analogies are not ‘straightforward or simple’.58

For authors writing within the area of critical animal studies, the issues outlined above form the context for expressions of concern about the need to avoid ‘speciesist’ language. Piers Beirne notes that while the often-used term ‘nonhuman animals’ is a good reminder that the ground of human-animal relations is ‘marked


by speciesist language’, its use entails its own complexities and pitfalls. For example, by referring to ‘nonhumans’ we define other animals in the negative, based on attributes that are allegedly enjoyed by humans alone.

In Australian statute, the meaning of ‘animal’ varies across jurisdictions, and according to the purposes of particular legislation. Section 530(3) of the Crimes Act 1900 (NSW) (serious animal cruelty) defines animal as ‘a mammal (other than a human being), a bird or a reptile’. For the purposes of the Criminal Code (Qld) ‘animal’ includes any living creature other than mankind.

Currently, animal protection legislation conceptualises violence against animals as ‘animal cruelty’. Whether this term is able to support the type of analysis required to adequately support animal protection law reform in the 21st century will be further explored in later chapters. Assuming that animal cruelty and animal welfare are adequate concepts for this purpose entails the risk of misrecognising and inadvertently contributing to the reproduction of the power relations that structure the status quo. Bourdieu defined misrecognition as a form of forgetting, whereby the subject or person perceives the world as a ‘spectacle or representation capable of being taken in with a single gaze’. The problems relating to the reliance on these terms will be examined in detail in Chapters Three, Four, Six and Eight.

Part III THE CONCEPT OF VIOLENCE IN ANIMAL PROTECTION LEGAL THEORY

Most legal scholars writing within the parameters of animal protection look to reform of the legal categorisation of animals as the answer to the problem of

59 Piers Beirne, ‘For a Nonspeciesist Criminology: Animal Abuse as an Object of Study’ (1999) 37(1) Criminology 117, 118 n 1; Arluke, above n 7, 6.

60 Beirne, ‘For a Nonspeciesist Criminology’, above n 59, 117, 118 n 1.

61 Under the Competition and Consumer Act 2010 (Cth) s 4 the definition of ‘goods’ includes ‘animals, including fish’.

62 Criminal Code (Qld) s 1; The Animal Care and Protection Act 2001 (Qld) s 11(1)(a) defines ‘animal’ as ‘any of the following (a) a live member of a vertebrate animal taxon; examples: an amphibian, a bird, a fish, a mammal other than a human being and a reptile’.

animal exploitation. Arguments generally go to graduations of sentience and how such differences might be translated into legal interests as various forms of property or personhood. Few theorists adopt the concept of violence as an analytical tool or as a theoretical basis for law reform strategies. Gary L Francione and Taimie L Bryant, both North American legal scholars, are notable exceptions. This Part examines Francione’s and Bryant’s use of the term violence to assess whether either scholar’s work offers a coherent underpinning for an animal protection research framework.

As well as invoking the term violence at various points, both Francione’s and Bryant’s arguments have two discernible aspects: legal and ethical. With regard to their legal arguments, they share the view that it is animals’ legal status as property which underlies humanity’s continued exploitation of animals in its many forms. Francione’s basic thesis is that ‘as long as animals are property, they can never be members of the moral community’. Both scholars support the rejection of animals’ status as property and the conferral of legal personhood upon sentient animals. In this way they diverge from theorists such as Steven Wise, who adopts sentience as the basis for his advocacy for legal personhood for animals, though focuses on autonomy and cognitive capacity, or philosopher Tom Regan who


65 See for example, Wise, Drawing the Line, above n 64; See also Lesley J Rogers and Gisela Kaplan, ‘Think or be Damned: The Problematic Case of Higher Cognition in Animals and Legislation for Animal Welfare’ (2006) 12 Animal Law 151.


68 Bryant, ‘Sacrificing the Sacrifice of Animals’, above n 66, 254.

69 Wise, Rattling the Cage, above n 64; Wise, Drawing the Line, above n 64.
developed the concept of ‘subjects of a life’.\textsuperscript{70}

Although it is implicit in Bryant and Francione’s argument that animals ought not to have the status of property, it is in the ethical aspects of their work that each invokes the term ‘violence’ and links the concept to theory. Bryant refers to philosopher Jacques Derrida’s perspective on violence against animals.\textsuperscript{71} In his highly influential animal rights or abolitionist position, Francione draws on the Jain notion of \textit{ahimsa} or ‘non-violence’ as the basis for his arguments for ethical veganism.\textsuperscript{72} The following discussion presents an overview of Bryant and Francione’s approach to the concept of legal personhood for animals and considers their engagement with theories of violence.

\textit{A \hspace{1em} Francione and Bryant on Legal Personhood for Sentient Animals}

Francione has developed his animal rights position over that past two decades, in several books.\textsuperscript{73} The analysis that follows is based on the most recent iteration of his philosophy,\textsuperscript{74} in which he focuses on food animals.\textsuperscript{75} With regard to companion animals, Francione’s view is that ‘we should stop bringing domesticated nonhumans into existence, and this would include dogs and cats’.\textsuperscript{76}

In using the term ‘right’ Francione means to protect an animal’s interest ‘even if

\textsuperscript{70} Regan defines subjects-of-a-life as animals ‘who have beliefs and desires; perception, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference and welfare interests; the ability to initiate action in pursuit of their desires and goals; a psycho-physical identity over time; an individual sense of their own welfare independent of their utility to others’. Tom Regan, \textit{The Case for Animal Rights} (Routledge and Kegan Paul, 1983) 243.


\textsuperscript{72} Francione, ‘The Abolition of Animal Exploitation’, above n 66.


\textsuperscript{74} Francione and Garner, \textit{The Animal Rights Debate}, above n 73.

\textsuperscript{75} Francione, ‘The Abolition of Animal Exploitation’, above n 66, 2.

\textsuperscript{76} Ibid 79
the consequences would weigh against that protection’.\(^{77}\) He distinguishes his position from other animal rights theorists such as Tom Regan and Bernard Rollins, whose ‘application of liberal rights approach to nonhuman animals does not require the abolition of the use of all sentient beings’.\(^{78}\) In Francione’s view, animal rights theory ‘requires the abolition of animal use’, distinguishing this from the regulation of animal exploitation as the primary concern of the welfare position.\(^{79}\)

Bryant agrees with Francione regarding the need to dismantle animals’ status as property. However, in the face of the widespread social acceptance and the entrenched nature of human use of animals, Bryant is more circumspect as to the efficacy of directing animal protection advocacy towards legal personhood, acknowledging that the question ‘raises a series of difficult cultural and legal questions’.\(^{80}\) These questions include the goal of such reform (autonomy or humane exploitation), the extent to which the status of property must be dismantled, and which animals warrant protection.\(^{81}\) Bryant therefore offers two definitions of legal personhood. The first is broad legal personhood, based on ‘the extent to which animals have characteristics that make them similar to humans’.\(^{82}\) In Bryant’s view it is better to avoid pursuing this form of legal personhood as it relies on the endless demand for proof that animals bear the required similarity to humans and a commitment to similarity arguments to substantiate animals’ moral worth.\(^{83}\) Her second, narrow definition of personhood refers to ‘legal recognition of animals as having standing’ as an ‘aggrieved person’ in order to bring legal actions under animal protection laws.\(^{84}\) Thus Francione and Bryant diverge at this point, in that Bryant recommends a narrow approach to reform which builds on

\(^{77}\) Ibid 20.

\(^{78}\) Ibid 1.


\(^{80}\) Bryant, ‘Sacrificing the Sacrifice of Animals’, above n 66, 253.

\(^{81}\) Ibid.

\(^{82}\) Ibid 258.


\(^{84}\) Bryant, ‘Sacrificing the Sacrifice of Animals’, above n 66, 258.
existing options available within the law.

1 **Bryant’s Use of the Term ‘Violence’**

Bryant draws on Derrida’s thoughts about ‘sacrificing the sacrifice of animals’ and explores this idea by identifying occasions where the law displays a willingness to abstain from killing an animal, despite a lawful authority to do so. The circumstance Bryant examines is a court’s decision to overrule instructions set out in a will that the deceased’s companion animal be euthanased. On submission of a person willing to take over the care of the animal, the court may use its discretion to overrule the instructions set out in the will. Bryant’s example of the circumstances in which the law is willing to ‘sacrifice the sacrifice of animals’ is narrow, unusual and does not centre on animal cruelty as a criminal offence. In its current state, and without extensive elaboration, it has neither the capacity to support a framework that aims to broaden the concept of animal cruelty, nor is it suitable as a basis for wider law reform proposals.

2 **Francione on Violence Against Sentient Animals**

Francione seeks to expand the way we think about violence against animals, stating:

‘[I]n a world in which eating animal products is considered by most people as normal or natural … violence will quite likely be seen as nothing more than an act of simple criminality and will do nothing to further progressive thinking about the issue of animal exploitation.’

The ‘act of simple criminality’ alludes to the inadequacy of the legal conceptualisation of violence against animals as ‘cruelty’. On this point the author and Francione agree. However, although Francione refers to other forms of violence, such as structural and political violence, he does not consider these according to a particular methodology by which the meaning of violence is made

85 Ibid 256.
86 Ibid.
87 Ibid.
intelligible. He states that he opposes ‘arbitrary violence’, though does not consider that arbitrary violence, or non-rational violence is precisely that which the law currently defines as unlawful. In focussing on the violence of ‘eating animal products’, Francione relies on individual responsibility and conscience as the driving force for social change; it is cultural change that will gradually dismantle animals’ status as property. The abolitionist position posits that the abolition of animal use can be achieved incrementally, through the practice of ‘ethical veganism’. Ethical veganism ‘seeks to exclude ... all forms of exploitation of, and cruelty to, animals for food, clothing or any other purpose ... [i]n dietary terms it denotes the practice of dispensing with all products derived wholly or partly from animals’.

As ethical veganism rejects the commodity status of animals, animals’ status as persons emerges out of this practice of abstinence. In locating the solution within the individual, Francione’s solution sits beyond the reach of the animal protection field.

Francione sees animal welfare, which relies on incremental regulatory reform to improve the plight of animals, and the ‘pro-violence’ position as ‘theoretically similar’. This implies that engagement with existing animal protection law, as the animal welfare position does, requires an acceptance of violence. Yet, even if one accepts that the law and the juridical field is structured by constitutional and

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89 See Walter Benjamin, ‘Critique of Violence’ in Reflections: Essays, Aphorisms, Autobiographical Writings (Edmund Jephcott trans, Schocken Books, 1986) 237. In the area of animal protection, rational violence, that is, violence sanctioned by the state in the form of regulatory standards is lawful. By contrast, irrational violence against animals is deemed animal cruelty, as the end is not legitimate. See also Benjamin Morgan, ‘Undoing Legal Violence: Walter Benjamin and Giorgio Agamben’s Aesthetics of Pure Means’ (2007) 34(1) Journal of Law and Society, 46, 50


91 Ibid.


94 Ibid 82.
continuing violence, ultimately, Francione too would be relying on the force of law to change animals’ status from property to persons.

This analytical blind-spot suggests a lack of engagement with jurisprudential theories of violence, as posed during the 20th century. If Francione is to avoid reliance on the force of law he will have to be satisfied with personhood arising from changes in cultural practice and associated transformations in human consciousness. To speculate, it could take millennia to achieve his goal, possibly much longer than animal welfare’s incremental approach to law reform. As the translation of animals’ status from property to personhood could only be realised by the exercise of the violence of the law, legal personhood for animals is categorically beyond the reach of Francione’s non-violent abolitionist position. How would veganism successfully sit alongside the unreformed and unreformable legal status of animals as property? Francione does not address this crucial point and thus his abolitionist program is rendered one of purely ethical rather than legal reform.

These issues notwithstanding, Francione’s proposal offers an important starting point; it raises the possibility of developing a framework for the study animal protection law that adopts non-violence as its basis. However, the absolutism evident in his interpretation of ahimsa generates paradoxes, the implications of which he would be sure to disagree.


96 Francione states ‘[i]f we had a political movement centred around the moral idea that animal use cannot be justified … we could get legislation that would actually prohibit significant animal uses as part of a campaign aimed at explicit abolition’. Francione, ‘The Abolition of Animal Exploitation’, above n 66, 253.

Ahimsa and non-possession are Jainism's two cardinal religious and moral virtues.\(^98\) Ahimsa is the broadest principle and within it lie two further doctrines: Anekantavada and Aparigraha. Anekantavada serves to 'promote social harmony and to reduce the tension and violence that arise from absolutist views of truth'.\(^99\) Ahimsa provides the basis for the long and continuing tradition of widely-practiced vegetarianism among lay Jains.\(^100\) Jains are generally not vegans and continue to consume dairy products and eggs within the bounds of vegetarianism.\(^101\)

In calling for a social transformation based on a commitment to ethical veganism, Francione's absolutism holds within it the seed of radical conservatism. By taking rights theory to its outer limits, Francione invites the emergence of a contrary tendency; there is a paradox inherent in Francione's rational conclusion. In the author's view, Giorgio Agamben's assertion, quoted in the prologue of this thesis, regarding the 'inner solidarity between democracy and totalitarianism' refers to this phenomenon.\(^102\)

If the majority were to adhere to veganism, as is Francione's vision, would it be possible to prevent the political will of this majority in establishing coercive legislative regimes with penalties against those who were found to consume eggs or dairy?\(^103\) One can assume that, on the basis of his personal and the abolitionist 'non-violent ethic', Francione would repudiate laws which prescribed veganism.\(^104\) Yet the potential for such dogma is evident when Francione talks of the 'the failure of Jains to adopt veganism rather than vegetarianism as a baseline' as 'making ahimsa appear arbitrary and thus weakening its normative force as a foundational


\(^100\) Gary L Francione, Ahimsa in Jainism and the Moral Imperative of Veganism (2014) 2.


\(^102\) Agamben, Homo Sacer, above n 97, 11.

\(^103\) See Francione’s response to Robert Garner’s assertion that the abolitionist position is ‘fundamentalist’ in Francione and Garner, The Animal Rights Debate, above n 73, 176-9.

principle’. If Francione is putting forward *ahimsa* as a normative argument the fact that it has no implications for law reform targeting animal cruelty means that there is also no pressure for the law to move towards this norm of non-violence.

The doctrine of *Anekantavada* attenuates the absolutism of a literal reading of *ahimsa*. Within Jain doctrine, the *Ākārāṅga Sūtra* prohibits killing and mistreating animals, though it does not exclude eating eggs or other food stuffs that might be collected from wild or agrarian animals. For example, there may be times of drought or famine in which the lay Jain may choose to feed his or her children with any available foodstuffs as a matter of immediate survival. In this way, Jainism might be understood as offering a defence of necessity for the lay Jain.

In the same circumstances the Jain ascetic may choose to fast to death. Laidlaw notes that despite the importance of the principle and practice of *ahimsa* in Jainism, ‘there is also well-established doctrinal approval and indeed fulsome public celebration of what is basically religious suicide: premeditated and deliberate self-killing’. The example of fasting in dire circumstances is not an example given by Laidlaw, however, it is conceivable.

In his response to Jain justifications for vegetarianism, Francione argues *Anekantavada* (the doctrine against absolutism) ‘concerns ontology’ and ‘has nothing to do with morality’. If Francione is to defend this stance he must also agree that speciesism, based on anthropocentrism, an ontological concern, has nothing to do with the morality which allows humans to use and commit violence against animals. Further, he must reject the assertion that ontology as posed by the history of western metaphysics and its humanism from Aristotle, through Kant and to Heidegger also has no moral implications.

*Anekantavada* captures the dialectic within the idea that all substances have a type

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106 Ibid 10.
107 Laidlaw, above n 98, 181.
108 Ibid.
of permanence, yet simultaneously states of matter are continually in flux.\textsuperscript{110} Within Jain epistemology \textit{Anekantavada} indicates ‘the nature of reality according to which every object possesses infinite aspects’.\textsuperscript{111} It follows that if each object possesses infinite aspects then each object must also contain its opposite. This can only mean that the doctrine of \textit{ahimsa} is not absolute, it too must carry its opposite, a trace of violence, within it. Lastly, it could be argued that violence manifests as a material substance, in forms of injury or harm to bodies. It therefore falls within the doctrine of \textit{Anekantavada} and supports the argument that violence and non-violence are inextricable.

In conclusion, the practice of ethical veganism based on freedom of choice is an important strategy for decreasing violence directed against animals. However, the discussion of \textit{Anekantavada} above indicates that \textit{ahimsa}, as a state maintained across a whole society across time, is an ideal, evocative of Jacques Derrida’s observation that absolute violence and complete non-violence are both impossibilities.\textsuperscript{112} The adversarial nature of the law means that the realisation of an interest for one party will simultaneously involve the abrogation of another’s. The problems inherent in Francione’s use of \textit{ahimsa} demonstrate that adopting \textit{ahimsa} as a basis for a framework which aims to analyse animal protection as a semi-autonomous field is virtually impossible. The language and thinking required must be able to cut across law and society, rather than assume the law and society as mutually exclusive fields.

The preceding discussion indicated that Francione’s use of the term violence includes killing animals and possibly any other human-caused pain and suffering. Bryant’s use of the term violence pertains to ‘sacrificing the sacrifice of animals’, that is, to not kill an animal in a specific circumstance. However, neither scholar gives a systematic account of the concept of violence in the context of animal protection law and policy.

\textsuperscript{110} Ibid.
\textsuperscript{111} Unto Tähtinen, \textit{AHIMSA: Non-Violence in Indian Tradition} (Rider and Company, 1976) 84.
Part IV  

CONCLUSION

This chapter achieved three objectives. First, it examined some problems relating to the contemporary use of the terms animal welfare and animal cruelty. One of the central issues discussed in Part II was that animal use industries dictate the meaning of the phrase 'animal welfare' and, as mentioned, actively marginalise animal protection advocates in the media and in other forms of public discourse. For these and the other reasons explained above, the concepts of animal welfare and animal cruelty may be problematic as foundations for a critical perspective on animal protection law and policy. In light of this, new analytical tools are needed. This need forms the basis for the hypothesis that the concept of violence may offer a useful alternative framework. Further, in adopting the concept of violence, the exploration that follows will challenge the idea that violence against animals is a phenomenon confined to individual responsibility. This narrow definition of violence against animals diverts attention from the way in which such associations might be made intelligible within a broader socio-political context of violence.

Part III examined the use of the concept of violence in animal protection legal theory. The aim was to ascertain whether there was an existing account of violence that could be adopted as the foundation of a critical perspective on animal protection law and policy. The focus was on Gary Francione's highly influential animal rights position, which adopts the Jain religion's concept of ahimsa (non-violence) to argue for ethical veganism, and for animals to be conferred with personhood. The analysis demonstrated that, because it categorically denies reliance on the force of law, Francione's notion of ahimsa could not sustain a framework for the study of animal protection of law and policy. With regard to the dismantling of animals' legal status as property and, by implication, the conferral of legal personhood, Francione is caught in a paradox. He cannot argue for legal personhood: to achieve this change would require the violence of the law and this would be in contradiction with Francione's account of ahimsa. This paradox renders Francione's argument one confined to ethics rather than law reform.

The concepts examined throughout this chapter, animal cruelty, animal welfare, and the use of the concept of violence in contemporary animal protection legal theory, form the background for the thesis question. The aim of the thesis is to
reframe animal protection law and policy questions in a manner that provides a critical perspective and to identify or develop the methodological tools required to support law reform strategies suited to the socio-economic conditions of the 21st century.

However, before proceeding to these tasks of framing and construction, the regulatory foundations and parameters defining the analysis need to be established. Chapter Three examines the key features of Australia’s animal protection framework and thereby establishes the legislative scope for the thesis question. It also examines the offence of animal cruelty.
CHAPTER 3  AUSTRALIA’S ANIMAL PROTECTION
FRAMEWORK: AN OVERVIEW

Part I  INTRODUCTION

This chapter defines the legislative boundaries for the thesis question. It examines the structure of Australia’s animal protection regime and how violence against animals is conceptualised and regulated within this framework. In achieving these objectives, the chapter begins to develop a response to the thesis question. Portraying the current regime provides some indication as to the meaning of ‘violence against animals’, when confined to the legal definition of ‘animal cruelty’. Considering violence in this manner is the first essential step in answering the thesis question. Chapter Four develops this analysis by exploring the animal protection framework in operation, by way of an animal cruelty case law review.

This chapter describes Australia’s animal protection framework as comprising two streams, which operate according to the cruelty-welfare binary. The ‘animal cruelty’ stream is deterrence-oriented and centres on punitive measures under the provisions of state and territory anti-cruelty legislation.1 In general, the ‘animal welfare’ stream relates to the use of animals for commercial purposes. It emphasises industry compliance and operates according to Braithwaite’s enforcement pyramid.2 Hence, the analysis lends support to the notion that cruelty–welfare is a symbolic opposition that structures and reproduces the relations of power within animal protection as a regulatory regime.

Part II examines the general features of state and territory anti-cruelty legislation. The offence of cruelty in its general and aggravated form is explained and the application of the common law ‘necessity’ test is discussed. Anti-cruelty legislation ostensibly protects all animals falling within the definition of ‘animal’ therein (See


2 John Braithwaite, To Punish or Persuade: The Enforcement of Coal Mine Safety (State University of New York Press, 1985) 142; Goodfellow, above n 1, 184; Brent Fisse and John Braithwaite, Corporations, Crime and Accountability (Cambridge University Press, 1993) 84-7.
Appendix A). However, in effect, the deterrence stream largely pertains to animals kept in the domestic sphere, those ‘commonly kept and cared for in and about human habitations’. The aim of England’s first anti-cruelty enactment, on which Australia’s state and territory legislation was modelled, was to prohibit bull-baiting and the overworking of beasts of burden. Over the past two centuries, the emphasis has gradually shifted from agricultural animals to companion animals, reflecting the influence that agricultural industries and research interests now exert on the process of law making and law enforcement. Anti-cruelty legislation may also be relied upon to prosecute acts of cruelty perpetrated against ‘free-living animals’, be they native or introduced species, or other categories of animals when such acts are detected and reported.

The Commonwealth has a major influence on the development and implementation of animal welfare standards for many of the animal-use industries that fall within the ‘animal welfare’ regulatory stream. For this reason, Part III discusses the role of Commonwealth, with a focus on the development and implementation of Model Codes of Practice for the Welfare of Animals (MCOPWA) and their transition to Standards and Guidelines.

3 Generally the legislative definition of ‘animal’ includes vertebrate species.

4 A-G (SA) v Bray (1964) 111 CLR 402, 411 (Dixon CJ).


6 Mike Radford, Animal Welfare Law in Britain: Regulation and Responsibility (Oxford University Press, 2001); O’Sullivan, above n 5, 111, 148.

7 See Siobhan O’Sullivan for a discussion regarding the inequitable standards of protection afforded to companion animals, as compared to ‘economically-productive’ animals. Siobhan O’Sullivan, ‘Australasian Animal Protection Laws and the Challenge of Equal Consideration’ in Peter Sankoff and Steven White (eds), Animal Law in Australasia (Federation Press, 2009) 108, 114-7; Siobhan O’Sullivan, above n 5, 29-31.


9 O’Sullivan, above n 5, 28-30.

In the compliance-based regulatory approach, law administration, law enforcement and policy development are generally the responsibility of government departments of agriculture and primary industry.\textsuperscript{11} A division of labour in law enforcement responsibilities between the RSPCA and government departments is often established by way of a Memorandum of Understanding.\textsuperscript{12} Animals born, raised, and killed in animal use industries regulated within this stream are conceived to be at the extreme end of the property paradigm, as ‘economic units’.\textsuperscript{13} The compliance-based regulatory approach employed in these settings tends to view breaches of animal welfare standards as ‘technical rule violations’ or ‘side-effects’ of business operations.\textsuperscript{14}

Part II \hspace{1cm} \textbf{STATE AND TERRITORY ANTI-CRUELTY LEGISLATION}

In Australia, states and territories hold primary jurisdiction for the preparation and enforcement of anti-cruelty legislation.\textsuperscript{15} The threshold protection afforded to animals is that cruelty to an animal is a criminal offence.\textsuperscript{16} Cruelty can occur by act or omission, with omissions often taking the form of neglect of basic needs, or a

\textsuperscript{11} Goodfellow, above n 1, 194; This approach has also been adopted in New Zealand. See for example, Danielle Duffield, ‘Instant Fines for Animal Abuse?: The Enforcement of Animal Welfare Offences and the Viability of an Infringement Regime as a Strategy for Reform’ (Honours Thesis, Otago University, October 2012) 15.


\textsuperscript{14} Goodfellow, above n 1, 184; Bloom, above n 13, 18-19.


failure to seek veterinary care. In this area, local governments have responsibility for some areas of domestic and unwanted animal control, as well as public health. As a whole, the scheme operates against the background of the common law rule that domesticated animals are a form of personal property. By contrast, wild animals, prima facie, are not owned by persons.

The legal categorisation of wild as opposed to domestic animals has its genesis in English feudal law, under which ‘moveables in their natural state’ such as birds of the air, were outside humankind’s patrimony. Ownership arose, in the first instance, by occupation: ‘whoever first reduces a wild thing into his possession’ was the owner. Animals such as swans, venison in the forest, and great fish such as whales, sturgeons, porpoises and dolphins could only be acquired through royal grant or prescription.

Taking animals from the wild has been substantially restricted. State and


19 Saltoon v Lake [1978] 1 NSWLR 52; Caulfield, above n 16, 5; Radford, Animal Welfare Law in Britain, above n 6.

20 In Yanner v Eaton (1999) 201 CLR 351, 369 the majority (Gleeson CJ, Gaudron, Kirby and Hayne JJ) rejected the assertion that the relevant statute vested property in the state. The subject matter of the Fauna Conservation Act 1974 (Qld) was ‘with very limited exceptions, intended by that Act to remain outside the possession of, and beyond disposition by, humans’ 351, 368 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

21 J H Baker, An Introduction to English Legal History (Butterworths, 2nd ed, 1979) 317.

22 Ibid.

23 Case of Swans, R v Yong (1592) 7 Co Rep 15.

24 Baker, above n 21, 317.

25 This is achieved through various licensing regimes.
territory legislation may assert ownership of all wild\textsuperscript{26} (free-living) animals.\textsuperscript{27} However, such assertions contradict the common law rule as to the possibility of ownership in wild animals.\textsuperscript{28} It is possible that these claims confuse a right of property with the right to regulate how possession of a wild animal may be obtained.\textsuperscript{29}

\textsuperscript{26} Thiriet uses the term ‘wild’ to refer to introduced animals (commonly referred to as ‘pest’, feral or invasive) and native animals; those who live beyond the domestic realm. Dominique Thiriet, ‘Out of Eden: Wild Animals and the Law’ in Peter Sankoff, Steven White and Celeste Black (eds), \textit{Animal Law in Australasia} (Federation Press, 2\textsuperscript{nd} ed, 2013) 226, 241.

\textsuperscript{27} \textit{Yanner v Eaton} (1999) 201 CLR 351; An assertion of this type is made in the \textit{Nature Conservation Act 1992} (Qld) s 83(1); J H Baker, above n 21, 317; For a discussion of the legislative framework pertaining to wild animals see Thiriet, ‘Out of Eden’, above n 26; Adrian Bradshaw et al, ‘Title to Goods, Ideas, Financial Instruments and Virtual Property’ in \textit{Australian Property Law: Cases and Materials} (Lawbook, 4\textsuperscript{th} ed 2011) 203, 207.

\textsuperscript{28} Baker, above n 21, 317.

\textsuperscript{29} In \textit{Yanner v Eaton} (1999) 201 CLR 351, 369; For further discussion of this case see Steven White, ‘Animals in the Wild, Animal Welfare and the Law’ in Peter Sankoff and Steven White (eds), \textit{Animal Law in Australasia} (Federation Press, 2009) 230, 233-4.
A General Features of State and Territory Anti-Cruelty Legislation

Anti-cruelty legislation is primarily enforced by RSPCA inspectors in each state or territory.\(^3^0\) For example, for the purposes of the Prevention of Cruelty to Animals Act 1986 (Vic) ‘a full-time or part-time officer of the Royal Society for the Prevention of Cruelty to Animals ... who is approved as a general inspector by the Minister in writing’ is a general inspector.\(^3^1\) Police officers also have enforcement powers under the relevant legislation. For example, in Victoria a ‘general inspector’ includes ‘any member of the police force’.\(^3^2\) In addition, in remote regions, departments of agriculture and primary industry inspectors may respond to domestic animal protection matters.\(^3^3\) Police involvement in animal cruelty matters focuses on emergencies and cases of aggravated cruelty.\(^3^4\) In most jurisdictions the RSPCA does not routinely investigate livestock issues.

1 The Legislative Meaning of ‘Animal’

The definition of ‘animal’ for the purposes of state and territory anti-cruelty legislation includes a live vertebrate.\(^3^5\) With regard to invertebrates, Queensland, the Australian Capital Territory (ACT), and New South Wales (NSW) make

\(^3^0\) See also Caulfield, above n 16, 172-85; Goodfellow, above n 1, 188; Annabel Markham, ‘Animal Cruelty Sentencing in Australia and New Zealand’ in Peter Sankoff, Steven White and Celeste Black (eds), Animal Law In Australasia (Federation Press, 2nd ed, 2013) 208, 210.

\(^3^1\) Section 18(1)(b)(ii).

\(^3^2\) Prevention of Cruelty to Animals Act 1986 (Vic) s 18(1)(a). Under the Prevention of Cruelty to Animals Act 1979 (NSW) s 4 ‘officer’ means ‘a member of the police force or an inspector within the meaning of the Animal Research Act 1985 (NSW)’.


\(^3^4\) Goodfellow, above n 1, 189; Ellis, above n 33, 21.

\(^3^5\) The exception to this is Victoria; the Prevention of Cruelty to Animals Act 1979 (Vic) does not define ‘animal’. Tasmania and Queensland refer to ‘live vertebrates’: Animal Welfare Act 1993 (Tas) s 3; Animal Care and Protection Act 2001 (Qld) s 11 (1). The Prevention of Cruelty to Animals Act 1979 (NSW) s 4(1) and the Animal Welfare Act 1999 (NT) s 4 make specific reference to amphibians, birds, and reptiles. Fish are included in the Animal Welfare Act 1999 (NT) s 4, Animal Welfare Act 1992 (ACT) s 2, Prevention of Cruelty to Animals Act 1979 (NSW) s 4 and the Animal Care and Protection Act 2001 (Qld) s 11, though are excluded from the definition of ‘animal’ in Western Australia and South Australia. Animal Welfare Act 2002 (WA) s 5; Prevention of Cruelty to Animals Act 1985 (SA) s 3.
reference to the class *Cephalopoda* and/or *Malacostraca* (crustaceans).\(^{36}\) NSW limits the scope of its legislation to crustaceans in or on premises where food is prepared for retail sale and for human consumption.\(^{37}\) Queensland takes the broadest approach, including a ‘live creature of or at a stage of the life cycle of species’ from either class.\(^{38}\) Tasmania and Western Australia respectively refer to ‘any other creature prescribed’ under the Act’s provisions and ‘a live invertebrate of a prescribed kind.’\(^{39}\) The legislative definition of ‘animal’ in each state and territory is summarised in Appendix A.

Overall, the definition of ‘animal’ is wide in that in some jurisdictions the scope of protection reflects evidence of sentience in some invertebrate species. Variation in definitive scope is one of many undesirable cross-jurisdictional inconsistencies in Australian anti-cruelty legislation.\(^{40}\)

2 **Legislative Purpose**

The purpose of anti-cruelty legislation extends to promoting welfare in various ways, preventing cruelty, treating animals in a humane manner, and setting standards for the care and use of animals. The ACT, South Australia and Tasmania have no express purpose provisions, however South Australia and the ACT both refer to the ‘promotion of animal welfare’.\(^{41}\) In the Northern Territory and Victoria the legislative purpose includes the promotion of community awareness about the welfare of animals.\(^{42}\) Queensland and Western Australia both make reference to

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\(^{37}\) *Prevention of Cruelty to Animals Act 1979* (NSW) s 4(1) (definition of ‘animal’).

\(^{38}\) *Animal Care and Protection Act 2001* (Qld) s 11(1)(d) (definition of ‘animal’).

\(^{39}\) *Animal Welfare Act 1993* (Tas) s 3 (definition of ‘animal’); *Animal Welfare Act 2002* (WA) s 5 (definition of ‘animal’).

\(^{40}\) See Alex Bruce, *Animal Law in Australia: An Integrated Approach* (LexisNexis Butterworths, 2012) 82; Caulfield, above n 16, 19.


\(^{42}\) *Animal Welfare Act 1999* (NT) s 3(c); *Prevention of Cruelty to Animals Act 1986* (Vic) s 1(c).
‘community expectations’. Section 3 of the *Animal Care and Protection Act 2001* (Qld) refers to the expectation that persons ‘in charge of animals will ensure that they are properly treated and cared for’ and secondly, ‘to allow for advances in scientific knowledge about animal biology and changes in community expectations’. New South Wales promotes welfare by reference to the individual’s responsibility to provide care, treat humanely, and ‘ensure the welfare of the animal’. Of those jurisdictions which contain an express purpose provision, Queensland is notable for the absence of the term ‘cruelty’. Each state and territory’s legislative purpose provision is summarised in Appendix B.

In summary, the purpose of state and territory anti-cruelty legislation is relatively broad in that most jurisdictions make explicit reference to animal welfare, rather than merely animal cruelty. Queensland and Tasmania reflect this in that they include a duty of care provision, which shifts the jurisprudential basis of the animal cruelty offence towards civil concepts of negligence. For example, the *Animal Care and Protection Act 2001* (Qld) provides ‘[a] person in charge of an animal owes a duty of care to it’.

Further, ‘[t]he person must not breach the duty of care’.

Examples of a breach under section 17(1) ‘include not taking reasonable steps to provide the animal’s needs for the following in a way that is

43 *Animal Care and Protection Act 2001* (Qld) s 3(a)(ii); *Animal Welfare Act 2002* (WA) s 3(2)(c).

44 *Animal Care and Protection Act 2001* (Qld) s 3(a)(ii).


46 *Prevention of Cruelty to Animals Act 1979* (NSW) s 3(b)(i).

47 Ibid s 3(b)(ii).

48 Ibid s 3(b)(iii).

49 *Prevention of Cruelty to Animals Act 1979* (NSW) s 3(a); *Animal Welfare Act 1999* (NT) s 3(b); *Animal Care and Protection Act 2001* (Qld) s 3; *Prevention of Cruelty to Animals Act 1986* (Vic) s 1(a), s 3(1).

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

51 *Animal Welfare Act 1993* (Tas) s 6 ‘A person who has the care or charge of an animal has a duty to take all reasonable measures to ensure the welfare of the animal’.

52 Section 17(1).

53 *Animal Care and Protection Act 2001* (Qld) s 17(2).
appropriate’: ‘food and water’ and ‘accommodation or living conditions for the animal’.\textsuperscript{54}

However, there is a paradox at work within this regime, related to the term ‘animal welfare’. First, in general, compliance with relevant MCOPWA provides either an exemption or a defence to a charge of cruelty. With regard to exemptions, for example, the \textit{Prevention of Cruelty to Animals Act 1986} (Vic) does not apply to ‘any act or practice with respect to the farming, transport, sale or killing of any farm animal which is carried out in accordance with a Code of Practice’.\textsuperscript{55} With regard to defences, for example, the \textit{Animal Welfare Act 2002} (WA) section 25 states ‘[i]t is a defence to a charge under section 19(1) for a person to prove that the person was acting in accordance with a relevant code of practice’.\textsuperscript{56}

MCOPWA will be discussed in Part II. As a result of the operation of exemptions, the meaning of animal welfare transitions from a general, broad obligation to a list of specific, detailed practices set out in MCOPWA. Yet, in some cases the treatment of animals under MCOPWA would amount to cruelty (or even aggravated cruelty) were those practices applied in a domestic setting. For example, under the \textit{Model Code of Practice for the Welfare of Animals: Pigs} it is lawful to hold a sow in a farrowing stall not much bigger that the size of her body for six weeks at a time.\textsuperscript{57}

As a result of the operation of this legislative scheme, animal welfare only maintains its broad meaning, as set out in the purpose provisions of anti-cruelty statute mentioned above, in relation to companion animals.

\textsuperscript{54} \textit{Animal Care and Protection Act 2001} (Qld).

\textsuperscript{55} Section 6(1)(c).

\textsuperscript{56} Section 25.

There are considerable inconsistencies between anti-cruelty legislation across the states and territories. For example, the *Animal Care and Protection Act 2001* (Qld) contains an express duty of care provision. In contrast, although the *Prevention of Cruelty to Animals Act 1979* (NSW) refers to failures to provide food, drink, or shelter to an animal of whom a person is ‘in charge’, it does not include an express duty of care provision. New South Wales also differs from Queensland in that New South Wales has an aggravated cruelty offence. However, both jurisdictions have a serious animal cruelty offence in their respective general crimes statute. Queensland modernised its animal protection legislation in 2001 and its criminal law has been codified since 1899. New South Wales is a common law jurisdiction for criminal law, enacting its first animal cruelty legislation when a colony, in the 1850s. With regard to liability for animal cruelty, the defendant charged will be a person or persons either actually or constructively ‘in charge’ of the animal at the time of the offence.

1 Animal Cruelty as a Strict Liability Offence

The general offence of animal cruelty is one of strict liability. In *Bell v Gunter*, Dowd J stated that animal cruelty fell within the category enumerated by Gibbs CJ.

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58 Bruce, above n 40, 82; Caulfield, above n 16, 19.

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

60 *Prevention of Cruelty to Animals Act 1979* (NSW) s 8(1).

61 Ibid s 6.

62 *Crimes Act 1900* (NSW) s 530; *Criminal Code* (Qld) s 242.

63 *Criminal Code* (Qld).


66 (Unreported, Supreme Court of New South Wales, Dowd J, 24 October 1997).
in *He Kaw Teh v The Queen*.\(^{67}\) The offences were such that the legislative intention was not to require a component of *mens rea* in the proof of the offence.\(^{68}\) The decision in *Bell v Gunter*\(^ {69}\) is in keeping with early English cases. In *Duncan v Pope* (‘*Duncan v Pope*’) the court ‘rejected the notion that intention was required, stating that the question turned on whether there was ‘cruelty in fact’.\(^ {70}\) The view in *Duncan v Pope*\(^ {71}\) was affirmed in *Bowyer v Morgan*.\(^ {72}\)

*Bell v Gunter*\(^ {73}\) related to a prosecution for aggravated cruelty.\(^ {74}\) That Dowd J did not find the aggravated form of the offence to have a mental element is noteworthy, as this is inconsistent with criminal law doctrine on other aggravated offences, especially non-fatal offences against the person.\(^ {75}\) *Bell v Gunter*\(^ {76}\) was followed in *Pearson v Janlin Circuses Pty Ltd*,\(^ {77}\) in which Justice Windeyer noted that the decision in *Bell v Gunter*\(^ {78}\) also applied to the general form of the offence.\(^ {79}\)

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\(^{67}\) (1985) 157 CLR 523.

\(^{68}\) *Bell v Gunter* (unreported, Supreme Court of New South Wales, Dowd J, 24 October 1997) [17] citing *He Kaw Teh v The Queen* (1985) 157 CLR 523; *He Kaw Teh v The Queen* (1985) 157 CLR 533-4 (Gibbs CJ).

\(^{69}\) (Unreported, Supreme Court of New South Wales, Dowd J, 24 October 1997).


\(^{71}\) (1899) 63 JP 217.

\(^{72}\) (1906) 70 JP 253, 255 (Bray J).

\(^{73}\) (Unreported, Supreme Court of New South Wales, Dowd J, 24 October 1997).

\(^{74}\) *Prevention of Cruelty to Animals Act 1979* (NSW) s 6(1).

\(^{75}\) For example, see the *Crimes Act 1900* (NSW) s 61J(2)(c) (sexual assault in company).

\(^{76}\) (Unreported, Supreme Court of New South Wales, Dowd J, 24 October 1997).

\(^{77}\) [2002] NSWSC 1118.

\(^{78}\) (Unreported, Supreme Court of New South Wales, Dowd J, 24 October 1997).

\(^{79}\) Under the *Prevention of Cruelty to Animals Act 1979* (NSW) s 5(1)-(2); *Pearson v Janlin Circuses Pty Ltd* [2002] NSWSC 1118, [7]-[8] (Windeyer J); In obiter, Windeyer J stated, at [8], ‘although not necessary to the decision, the Court of Appeal in *Fleet v District Court of NSW* [1999] NSWCA 363 appears to have approved the decision in *Bell v Gunter* albeit in parenthesis’. 51
Generally, after the *actus reus* is established, the ‘necessity test’ is applied.\(^{80}\) The ‘necessity test’ has its origins in the common law though the terms ‘unnecessary’, ‘unjustifiable’, or ‘unreasonable’ have been integrated into many statutory definitions of cruelty.\(^{81}\) The common law test was first formulated and applied in the mid-19\(^{th}\) century. In *Budge v Parson*\(^{82}\) the court held that ‘the cruelty intended by the statute’ was ‘the unnecessary abuse of the animal’.\(^{83}\) This interpretation was approved and elaborated upon in *Ford v Wiley*,\(^{84}\) a case which concerned a farmer who had dehorned his cattle, causing the animals’ immense pain and suffering. The court was required to interpret the term ‘cruelly’. Lord Coleridge CJ stated the word ‘necessary’ must be understood in the context of whether an act was undertaken for an ‘adequate and reasonable object’.\(^{85}\) However, Judge Hawkins noted that the ‘castration of young horses’ and male ‘animals intended for use or for food’ were common practices although they may not be justifiable in all cases.\(^{86}\)


\(^{81}\) Animal Care and Protection Act 2001 (Qld) s 18(2) ‘a person is taken to be cruel to an animal if the person ... (a) causes it pain that, in the circumstances, is unjustifiable, unnecessary or unreasonable; Animal Welfare Act 1992 (ACT) s 8(1) ‘[a] person commits an offence if the person causes an animal unnecessary pain’; Animal Welfare Act 1999 (NT) s 9(3) ‘a person is cruel to an animal (whether or not the person is in charge of the animal) if the person ... (a) causes the animal unnecessary suffering’; Prevention of Cruelty to Animals Act 1979 (NSW) does not refer to unnecessary in its general prohibition against cruelty. However the definition of cruelty in section 4(2) ‘includes ... any act or omission as a consequence of which the animal is unreasonably, unnecessarily or unjustifiably (d) inflicted with pain’; Animal Welfare Act 1993 (Tas) s 8(1) ‘[a] person must not do any act, or omit to do any duty, which causes or is likely to cause unreasonable and unjustifiable pain or suffering to an animal’; Animal Welfare Act 2002 (WA) s 19(2)(e) ‘in any other way causes the animal unnecessary harm’; Animal Welfare Act 1985 (SA) s 13(3) ‘a person ill-treats an animal if the person (a) intentionally, unreasonably or recklessly causes the animal unnecessary harm’; Prevention of Cruelty to Animals Act 1986 (Vic) s 9(1)(c) ‘does or omits to do an act with the result that unreasonable pain or suffering is caused, or is likely to be caused, to an animal’.

\(^{82}\) (1863)129 3 B & S 382.

\(^{83}\) *Budge v Parson* (1863) 3 B & S 382, 385 (Wightman J).

\(^{84}\) (1889) 23 QBD 203.

\(^{85}\) Ibid 210.

\(^{86}\) Ibid 219 (Hawkins J).
Their Honours added that any pain or suffering caused to an animal should be proportionate to the object.\textsuperscript{87} As such, the pain caused must not ‘so far outbalance the importance of the end as to make it clear to any reasonable person that the object should be abandoned rather than the disproportionate suffering be inflicted’.\textsuperscript{88} In referring to the ‘reasonable person’ the court introduced an objective test, an innovation which will be explored further in Chapter Eight.

The reasoning set out in \textit{Ford v Wiley} forms the basis of the ‘necessity test’.\textsuperscript{89} However, the question as to whether the common law test should be read into all provisions in modern anti-cruelty statute is an open one. For example, a reading of the \textit{Animal Care and Protection Act 2001} (Qld) section 18(2) suggests that the test does not apply to section 18(2)(b)-(d). Section 18(2) states ‘a person is taken to be cruel to an animal if the person does any of the following to the animal:

\begin{enumerate}
\item causes it pain that, in the circumstances, is unjustifiable, unnecessary or unreasonable;
\item beats it so as to cause the animal pain;
\item abuses, terrifies, torments or worries it;
\item overdrives, overrides, or overworks it.
\end{enumerate}

\textsuperscript{90} An interpretation that the necessity test does not apply to section 18(2)(b)-(d) is supported by the disjunctive nature of the provision. In addition, the explicit

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{87} Ibid 220 (Hawkins J), 210 (Coleridge CJ).
\item \textsuperscript{88} Ibid 220 (Hawkins J).
\item \textsuperscript{89} Radford, above n 80, 35 n 3; See for example, \textit{Animal Care and Protection Act 2001} (Qld) s 18(2)(a). In addition, see the \textit{Prevention of Cruelty to Animals Act 1979} (NSW) s 4 (2) ‘[f]or the purposes of this Act, a reference to an act of cruelty committed upon an animal includes a reference to any act or omission as a consequence of which the animal is unreasonably, unnecessarily or unjustifiably: (a) beaten, kicked, killed, wounded, pinned, mutilated, maimed, abused, tormented, tortured, terrified or infuriated’. Also, see \textit{Prevention of Cruelty to Animals Act 1986} (Vic) s 9(1)(a). A more expansive early definition of the word ‘necessary’ was discussed by the St Louis Court of Appeals, \textit{State v Bogardus}, 4 Mo. App. 215, 216-17 (1877) (Hayden J): ‘[t]he flesh of animals is not necessary for the subsistence of man, at least in this country, and by some people it is not used. Yet it would not be denied that the killing of oxen for food is lawful. Fish are not necessary to any one, nor are various wild animals which are killed, and sold in market; yet their capture and killing are regulated by law. The words ‘needlessly’ and ‘unnecessarily’ must have a reasonable, not an absolute and literal meaning attached to them’. See also Gary L Francione ‘The Abolition of Animal Exploitation’ in Gary L Francione and Robert Garner, \textit{The Animal Rights Debate: Abolition or Regulation?} (Columbia University Press, 2010) 1, 89 n 48.
\item \textsuperscript{90} \textit{Animal Care and Protection Act 2001} (Qld) s 18(2).
\end{enumerate}
\end{footnotesize}
reference to ‘unnecessary’ as part of the general proscription on the infliction of pain in section 18(2)(a) suggests that the term may not be relevant to the specific forms of pain and suffering set out in section 18(2)(b)-(d). Furthermore, terms such as ‘tormenting’ or ‘abusing’ involve gratuitous pain and suffering by definition and thus, prima facie, could not be construed as necessary, reasonable or justifiable, in any circumstances. Unfortunately, given the lack of resources for prosecutions, very low prosecution rates, and the understandable priority given to cases of egregious cruelty, it is unlikely that the application of the ‘necessity test’ to the subsections referred to above will be considered by the courts in the foreseeable future. Furthermore, there would be evidentiary challenges associated with, for example, proving that an animal was tormented, (as set out in section 18(2)(c)) if that was the sole harm sustained.

There is little discussion of Ford v Wiley91 in Australian animal cruelty case law.92 One notable exception is the Department of Local Government and Regional Development v Emanuel Exports Pty Ltd (the ‘Al Kuwait Case’),93 which concerned the export of live sheep. Magistrate Crawford applied the necessity test to the facts, stating that ‘in the context of the case’ the commercial gain had ‘to be balanced against the likelihood of pain, injury or death to relevant sheep shipped in the second half of the year’.94 Her Honour concluded that the harm suffered to the sub-population of sheep at risk was ‘unnecessary’.95 Notwithstanding this, the defendants were acquitted. Section 109 of the Australian Constitution provides that ‘when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’. It was on this basis that Magistrate Crawford found an ‘operational inconsistency’ between the Animal Welfare Act 2002 (WA) and the Australian Meat and Livestock Industry Act 1997 (Cth).96 This case will be discussed in more detail in Chapter

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91 (1889) 23 QBD 203.
93 [Unreported, Perth Magistrates Court, Crawford Magistrate, 8 February 2008].
94 Ibid [99].
95 Ibid.
96 Ibid [194].
Four.

To establish the offence of animal cruelty the prosecution must prove that pain and suffering has been inflicted on the animal victim and establish a causative link between the pain and suffering and the defendant’s act or omission. State and territory anti-cruelty legislation recognises both physical and mental forms of pain and suffering.\(^{97}\) It is not necessary that the pain or suffering be ‘prolonged or severe’.\(^{98}\) As cruelty often takes place on the defendant’s private property there is a strong likelihood that the prosecution will encounter difficulties in gathering evidence to establish causation.\(^{99}\) After the *actus reus* is proved, the two-limb test is applied:

1. Was the purpose legitimate?
2. Was the pain and suffering inflicted reasonably proportionate to that object?

With regard to question one, very few illegitimate purposes are recognised in the context of anti-cruelty law. Sankoff identifies three: sadism or cruelty for no reason, waste of economic capital, for example, if a practice ‘damages an animal’s worth without providing a corresponding gain’, and ‘laziness and poor management’ on the part of animal owners.\(^{100}\) Question two requires the decision maker to ask whether ‘the beneficial end’ justified the means, that is, ‘the extent of the suffering caused’.\(^{101}\) The pain and suffering caused to the animal victim, prima facie cruelty, will be lawful if, in the circumstances, it was justifiable, necessary, or

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\(^{97}\) For example, tormenting can involve mental suffering and mental harm only. See for example *Prevention of Cruelty to Animals Act 1986* (Vic) s 9(1)(a).

\(^{98}\) Radford states that this ‘imports the idea of the animal undergoing unnecessary pain, distress or tribulation’, quoting *Patchett v MacDougall* 1984 SLT 152, 154. Radford, *Animal Welfare Law in Britain*, above n 6, 243.


\(^{100}\) Peter Sankoff, ‘The Protection Paradigm’, above n 80, 18-20.

\(^{101}\) *Ford v Wiley* 23 (1889) QBD 203, 219 (Hawkins J); Radford, ‘The Meaning of ‘Unnecessary Suffering’, above n 80, 38.
reasonable. Mike Radford notes that English and Scottish courts have interpreted the term ‘necessary’ as meaning ‘without good reason’. See Appendix C for a tabulated summary of animal cruelty provisions in Australian state and territory anti-cruelty legislation.

(a) Aggravated Cruelty

In addition to the general cruelty offence, most jurisdictions have an aggravated form of cruelty. The threshold harm for the offence of aggravated cruelty is ‘serious harm’, ‘serious disablement’, ‘serious injury’ or death. With regard to killing an animal, the prosecution must prove ‘that the animal suffered before death or that the act of cruelty was the cause of death’. The case review conducted as part of this project (presented in Chapter Four) indicated that, in general, serious harm, serious disablement, or serious injury will usually be met by an injury so severe as to justify that the animal victim is euthanased to relieve his pain.

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102 See for example, Animal Care and Protection Act 2001 (Qld) s 18(2)(a).
105 Animal Welfare Act 1985 (SA) s 13(1)(a). Section 3 of the Act defines serious harm as (a) harm that endangers an animal’s life; or (b) harm that results in an animal being so severely injured, so diseased or in such physical condition that it would be cruel not to destroy the animal; or (c) harm that consists of, or results in, serious and protracted impairment of a physical or mental function; Animal Welfare Act 1993 (NT) s 10(2) defines serious harm to animal, mean: (a) harm that endangers the animal’s life; or (b) harm that results in the animal being so severely injured, so diseased, or in such physical condition, that it would be cruel not to destroy the animal; or (c) harm that consists of, or results in, serious and protracted impairment of a physical or mental function.
106 Prevention of Cruelty to Animals Act 1979 (NSW) s 4(3)(b). NSW does not include a definition of ‘serious disablement’. Animal Welfare Act 1993 (Tas) s 9 refers to death or serious disablement. The Prevention of Cruelty to Animals Act 1986 (Vic) s 10 does not include a definition of ‘serious disablement’.
107 Animal Welfare Act 1992 (ACT) s 7A(1)(c). Section 7A(3) serious injury, to an animal, means any injury (including the cumulative effect of more than 1 injury) that (a) endangers, or is likely to endanger, the animal’s life, or (b) is, or is likely to be, significant and longstanding.
or her pain and suffering. Relevant circumstances include emaciation secondary to malnourishment resulting from neglect,\(^{109}\) instances in which the defendant has failed to euthanase an animal suffering from a late stage terminal illness,\(^{110}\) or an attack on an animal where the injuries sustained justify euthanasia.\(^{111}\) Representative case scenarios will be explored in more depth in Chapter Four.

In some jurisdictions, the offence of aggravated cruelty has a fault element, evidenced by reference to ‘intention’ or ‘recklessness’. The relevant provisions in the ACT,\(^{112}\) Northern Territory,\(^{113}\) and in South Australia\(^{114}\) refer to either ‘intention’ or ‘recklessness’. Aggravated cruelty provisions in NSW and Victoria do not refer to a fault element.\(^{115}\) Hence, the offence maintains the character of strict liability with presumably the presence of aggravating circumstances, along with the threshold harm to the animals, enabling a finding of guilt. It follows that, in these states, criminal negligence may result in a conviction for aggravated cruelty where the neglect results in serious disablement, serious injury or death of the animal. Anti-cruelty legislation in Queensland and Western Australian does not include an aggravated cruelty offence. Therefore, the court would consider aggravating circumstances within sentencing deliberations. Aggravating circumstances for assault include the use of ‘offensive weapons’.\(^{116}\) The author was unable to locate Australian sentencing guidelines for animal cruelty offences.

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\(^{109}\) Downey v Boulton (No. 5) [2010] NSWCA 240 (15 September 2010); Bell v Gunter (Unreported, Supreme Court of New South Wales, Dowd J, 24 October 1997).


\(^{112}\) Animal Welfare Act 1992 (ACT) s 7A. Section 7A refers to ‘serious injury’.

\(^{113}\) Animal Welfare Act 1999 (NT) s 10.

\(^{114}\) Animal Welfare Act 1985 (SA) s 13(1). Section 13(1)(b) refers to ‘serious harm’.

\(^{115}\) Prevention of Cruelty to Animals Act 1979 (NSW) s 4(3); Prevention of Cruelty to Animals Act 1986 (Vic) s 10.

\(^{116}\) Pittman v Di Francesco (1985) 4 NSWLR 133, Crimes Act 1900 (NSW) ss 33-33B, serious assault committed ‘in company’, Crimes Act 1900 (NSW) s 35(1) and assaults against victims of special status, see for example, Crimes Act 1900 (NSW) s 66A.
Animal cruelty sentencing guidelines for Magistrates in the UK specify the following non-exhaustive list of factors: the offender was in a position of special responsibility, an adult involved children in offending; where the animal(s) were kept for livelihood, the use of a weapon, the offender ignored advice or warnings, or the offence was committed for commercial gain. 117 The Appendix D Flowchart summarises state and territory aggravated cruelty provisions. The offence of animal cruelty will be the topic of a doctrinal analysis in Chapter Eight.

(b) Animal Cruelty Offences in General Criminal Statute

In addition to the provisions discussed above, the Crimes Act 1900 (NSW) and the Criminal Code (Qld) provide that serious animal cruelty is an offence. 118 The more recently-enacted Queensland offence states that ‘a person who, with the intention of inflicting severe pain or suffering, unlawfully kills, or causes serious injury or prolonged suffering to, an animal commits a crime’. 119 In NSW serious animal cruelty occurs where a person who, with the intention of inflicting severe pain on an animal, ‘tortures, beats or commits any other serious act of cruelty on an animal’, 120 and ‘kills or seriously injures or causes prolonged suffering to the animal’. 121

The maximum penalty for the offence in Queensland is seven years imprisonment 122 and in NSW it is five years imprisonment. 123 In Queensland,

118 The Criminal Code (Qld) was amended in August 2014 by the Criminal Law Amendment Act 2014 (Qld) s 27, which introduced the indictable offence of ‘serious animal cruelty’. See also Steven White, ‘New Animal Cruelty Offence’ (2012) 37(1) Alternative Law Journal 64.
119 Criminal Code (Qld) s 242.
120 Crimes Act 1900 (NSW) s 530(1)(a).
121 Ibid s 530(1)(b).
122 Criminal Code 1899 (Qld) s 242.
123 Crimes Act 1900 (NSW) s 530(1).
defences are provided in section 242(2). In NSW, circumstances in which a person will not be held criminally responsible include ‘conduct which has occurred in the course of, or for the purposes of, routine agricultural or animal husbandry activities’.

With regard to the defence in NSW, it should be noted that there is potential for torturing an animal to be considered lawful if it falls within the meaning of, for example, ‘routine agricultural or animal husbandry activities’. The legislature may not have intended that torturing an animal would fall within the defence, and it is possible that the provision reflects a drafting oversight. Nonetheless, the example provides some indication as to the breadth of defences to animal cruelty charges available to animal use industries.

Apart from the two offences noted above, general criminal statutes in all states and territories include a range of offences relating to acts directed towards, and potentially causing harm to, animals. Most of these crimes constitute forms of stealing or damage to property.

C Defences to Cruelty

Where animal cruelty is an offence of strict liability (as noted above, this applies to the general offence, and aggravated cruelty in some jurisdictions) the common law

124 Section 242(2) An act or omission that causes the death of, or serious injury or prolonged suffering to, an animal is unlawful unless it is authorised, justified or excused by (a) the Animal Care and Protection Act 2001 (Qld); or (b) another law, other than section 458 of this Code. Section 242(3) defines serious injury (a) the loss of a distinct part or an organ of the body; or (b) a bodily injury of such a nature that, if left untreated, would (i) endanger, or be likely to endanger, life; or (ii) cause, or be likely to cause, permanent injury to health.

125 Crimes Act 1900 (NSW) s 530(2)(a) ‘in accordance with an authority conferred by or under the Animal Research Act 1985 or any other Act or law, or (b) ... in the course of or for the purposes of routine agricultural or animal husbandry activities, recognised religious practices, the extermination of pest animals or veterinary practice’. Section 532 prohibits killing or seriously injuring animals used for law enforcement.

126 Crimes Act 1900 (NSW) s 530(2)(b).

127 Ibid.

128 For example, the Criminal Code (Qld) Chapter 44: offences analogous to stealing relating to animals.

129 For example, under the Crimes Act 1900 (ACT) s 400 ‘damage to property’, includes (f) for an animal, ‘harm or kill the animal’.
defence of honest and reasonable mistake of fact is available to the defendant.\(^{130}\)

The defence of honest and reasonable mistake of fact was developed in *Proudman v Dayman*\(^{131}\) and has four elements:

1. There must be a mistake and not mere ignorance;
2. The mistake must be one of fact and not law;
3. The mistake must be honest and reasonable; and
4. The mistake must render the accused's act innocent.\(^{132}\)

The fourth element does not apply in Queensland and Western Australia.\(^{133}\)

In addition to the common law defence, there are a range of statutory defences. Using Part Three of the *Animal Welfare Act 2002* (WA) as an example, these include:

- Self-defence or protecting another person or an animal;\(^{134}\)
- That the person was a veterinary surgeon, or was acting on the instructions of a veterinary surgeon;\(^{135}\)
- That the 'act' was authorised by law;\(^{136}\)
- The ‘offence was done’ in accordance with a generally accepted animal husbandry practice;\(^{137}\)
- The person was acting in accordance with a relevant code of practice;\(^{138}\)

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\(^{131}\) *Proudman v Dayman* (1941) 67 CLR 536; Bronitt and McSherry, above n 130, 218; Brown et al, above n 130, 388.

\(^{132}\) *Proudman v Dayman* (1941) 67 CLR 536, 540 (Dixon J).

\(^{133}\) These are Griffith Code jurisdictions. The Northern Territory has a dual system in which some parts of the *Criminal Code* (NT) follow the Western Australian and Queensland model; other parts follow the *Criminal Code* (ACT) and the *Criminal Code* (Cth) model. Bronitt and McSherry, above n 130, 218-9.

\(^{134}\) *Animal Welfare Act 2002* (WA) s 20.

\(^{135}\) Ibid s 21.

\(^{136}\) Ibid s 22.

\(^{137}\) Ibid s 23.
- Where the ‘person in charge’ is not in actual custody;\textsuperscript{139} or
- The act was part of a prescribed surgical or similar operations, practices and activities.\textsuperscript{140}

\textbf{D Animal Cruelty Statistics}

One of the challenges in progressing understanding of animal protection law in Australia is the lack of primary material for analysis. Data on enforcement activities reported by state and territory RSPCA branches have been reported as inconsistent\textsuperscript{141} and little information about the activities of government agencies and other bodies responsible for law enforcement relating to many animal use industry sectors is made available to the public.\textsuperscript{142}

The above notwithstanding, RSPCA Australia publishes national statistics for each financial year. Figures reported include the number of animals received, euthanased, re-homed, the cruelty complaints received by RSPCA inspectorates, and prosecutorial activity. For the year 2011-12, 58 per cent of prosecutions involved dogs, 12 per cent involved cats and nine per cent involved livestock.\textsuperscript{143}

\textsuperscript{138} Ibid s 25.
\textsuperscript{139} Ibid s 28.
\textsuperscript{140} Ibid s 30.
\textsuperscript{141} Ellis, above n 33, 23-4.
\textsuperscript{142} Ibid 24.
Table 3.1  
*RSPCA Australia Statistics for all Australian State and Territories.*

<table>
<thead>
<tr>
<th>RSPCA Australia statistics*</th>
<th>2009-10(^{144})</th>
<th>2010-11(^{145})</th>
<th>2011-12(^{146})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of animals received</td>
<td>159,007</td>
<td>157,094</td>
<td>131,525</td>
</tr>
<tr>
<td>Dogs received</td>
<td>68,746</td>
<td>67,573</td>
<td>55,563</td>
</tr>
<tr>
<td>Cats received</td>
<td>65,717</td>
<td>64,617</td>
<td>52,337</td>
</tr>
<tr>
<td>Other animals(^{147})</td>
<td>24,544</td>
<td>24,904</td>
<td>23,625</td>
</tr>
<tr>
<td>Complaints</td>
<td>Not reported</td>
<td>59,916</td>
<td>Not reported</td>
</tr>
<tr>
<td>Complaints investigated****</td>
<td>53,544</td>
<td>54,398</td>
<td>51,961</td>
</tr>
<tr>
<td>Prosecutions</td>
<td>247</td>
<td>275</td>
<td>266***</td>
</tr>
<tr>
<td>Convictions</td>
<td>185</td>
<td>208</td>
<td>298**</td>
</tr>
<tr>
<td>Charges laid</td>
<td>1014</td>
<td>923</td>
<td>982</td>
</tr>
<tr>
<td>People charged</td>
<td>253</td>
<td>289</td>
<td>329</td>
</tr>
<tr>
<td>Cases pending</td>
<td>100</td>
<td>149</td>
<td>130</td>
</tr>
<tr>
<td>Routine inspections</td>
<td>703</td>
<td>368</td>
<td>327</td>
</tr>
</tbody>
</table>

*These figures represent the overall totals for RSPCA organisations in Australian states and territories. As the RSPCA does not have an inspectorate in the Northern Territory, Northern Territory data are from the Darwin Regional Branch.

**For 2011-12 this was reported as convictions recorded.

***For 2011-12 this was reported as ‘prosecutions finalised’.\(^{148}\) There is an addition statistic reported, ‘successful prosecutions’ (i.e. facts proved in relation to principal charges), as 257.

****Across 2009-10, 2010-11, and 2011-12, RSPCA Australia reported these figures as ‘complaints’ and ‘complaints investigated’.

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\(^{144}\) RSPCA Australia, *RSPCA Australia National Statistics 2009-2010*, 8 [https://www.rspca.org.au/].

\(^{145}\) RSPCA Australia, *RSPCA Australia National Statistics 2010-2011*, 8 [https://www.rspca.org.au/].

\(^{146}\) Ibid 8.

\(^{147}\) Ibid 2. ‘Other animals’ includes ‘horses, small animals, livestock, and wildlife’.

\(^{148}\) Criminal charges may be finalised via several different methods. ‘The main categories of finalisation are: adjudicated finalisations, where the court has made a finding as to the guilt or otherwise of the defendant; finalisation by transfer to another level of court, or withdrawal of a charge by the prosecution. Other methods include the defendant being unfit to plead, or deceased. Australian Bureau of Statistics, *4513.0 - Criminal Courts, Australia, 2007-08* [http://www.abs.gov.au/ausstats/ausstats/abs@.nsf/].
As indicated in Table 3.1, for the year 2011-12, across Australia, the RSPCA investigated 51,961 cruelty complaints and finalised 266 prosecutions. It is not possible to provide an accurate number of animals that fall within DAFF (Qld)’s responsibilities. However, that this number would fall within the millions is suggested by that fact that, in Australia, approximately nine million cattle are killed per year. Further, 595.7 million chickens were slaughtered for meat in the year 2013-14. In light of these figures, the low number of complaints and prosecutions in this sector is remarkable. Finally, with regard to the racing industry, the paucity of publicly available data on animal cruelty complaints or prosecutions means that it is impossible to provide an estimate of activity within this sector. A Memorandum of Understanding between RSPCA (NSW) and Greyhound Racing NSW (GRNSW) provides that unless the RSPCA (NSW) receives ‘a complaint from GRNSW there is nothing to investigate’. There is a substantial risk that an arrangement which relies on data flow from an industry body to a law enforcement agency will bias the reporting of incidents in the industry’s favour. It is possible that some of the prosecutions made by the RSPCA, referred to in Table 3.1, concerned horses or greyhounds in the racing industry. However, in evidence

149 RSPCA Australia, above n 144, 8.

150 Interview with Paul Willett, Principal Bio-security Officer for Inspectors, Department of Agriculture, Fisheries and Forestry, Queensland (Telephone Interview, 4 October 2013).


153 Legislative Council (NSW) Select Committee on Greyhound Racing in New South Wales, Parliament of New South Wales, Sydney, 6 Feb 2014, 31 (R Borsak, Chair). Mr Borsak put this statement as part of a question to Mr O’Shannessy, Chief Inspector RSPCA NSW. Mr O’Shannessy agreed that this statement captured the essence of the agreement. Evidence to Select Committee on Greyhound Racing in New South Wales, Parliament of New South Wales, Sydney, 6 February 2014, 31 (Mr O’Shannessy).
submitted to the 2013 Select Committee on Greyhound Racing in New South Wales, Mr O’Shanessy, Chief Inspector RSPCA NSW reported that of approximately 15 000 animal cruelty complaints made in NSW during 2013, 79 concerned greyhounds.\textsuperscript{154} Mr O’Shanessy added that ‘in the past few years ... we have had a number of cases’.\textsuperscript{155} However, ‘[s]ome of the more notable ones ... did not relate to animals that are currently in the industry’.\textsuperscript{156} It is likely that the situation in other states and territories would mirror that in NSW.

\section*{Part III \hspace{1cm} The Role of the Commonwealth}

Australia’s anti-cruelty laws sit within a national ‘animal welfare’ framework, articulated in the \textit{Australian Animal Welfare Strategy and National Implementation Plan 2010-14} (AAWS).\textsuperscript{157} Although the \textit{Australian Constitution} does not specifically address animal welfare, the Commonwealth exercises specific responsibilities related to its Constitutional powers.\textsuperscript{158} The relevant powers include: trade and commerce with other countries, and among the states,\textsuperscript{159} quarantine,\textsuperscript{160} fisheries in Australian waters beyond territorial limits\textsuperscript{161} and external affairs.\textsuperscript{162} The globalisation of economic markets and the international environmental agenda has

\begin{itemize}
\item \textsuperscript{154} Evidence to Select Committee on Greyhound Racing in New South Wales, Parliament of New South Wales, Sydney, 6 February 2014, 31 (Mr O’Shanessy).
\item \textsuperscript{155} Ibid 24.
\item \textsuperscript{156} Ibid.
\item \textsuperscript{157} Primary Industries Standing Committee, \textit{Australian Animal Welfare Strategy}, above n 15.
\item \textsuperscript{158} \textit{Commonwealth of Australia Constitution Act 1900} (Imp) 63 & 64 Vict c12 s9 (‘Australian Constitution’)Australian Constitution s 51. The areas of legislation enacted under these heads of powers include those pertaining to live export and import of domestic, exotic and native animals. For example, the \textit{Environment Protection and Biodiversity Conservation Regulations 2000} (Cth) reg 9A.05 sets out the welfare conditions relating to the import and export of wildlife. With regard to domestic animals, the \textit{Customs (Prohibited Imports) Regulations 1956} (Cth) reg 3 sch 1 was used to prohibit the import of four breeds of dog. See Andrew Bartlett, ‘Animal Welfare in a Federal System: A Federal Politician’s Perspective’ in Peter Sankoff and Steven White (eds), \textit{Animal Law in Australasia} (Federation Press, 2009) 376, 381; White, ‘Regulation of Animal Welfare in Australia’, above n 12, 348.
\item \textsuperscript{159} Australian Constitution s 51(i).
\item \textsuperscript{160} Ibid s 51(ix).
\item \textsuperscript{161} Ibid s 51(x).
\item \textsuperscript{162} Ibid 51(xxxix).
\end{itemize}
seen the Commonwealth assume an increasingly influential role in this area. This is reflected in the stated purpose of the AAWS to ‘provide national and international communities with an appreciation of animal welfare arrangements in Australia’ and to ‘provide future directions for improvements in animal welfare’. Growing consumer concern with the ethics of consumption and the bio-security risks associated with international trade in live animals and animal-derived products have seen animal welfare emerge as an influencing factor on international trade.

The Commonwealth’s participation in animal welfare policy turns on the wealth generated by animal use industries, as noted in the AAWS:

Animal industries form a central part of the Australian economy … [l]ivestock industries have a gross annual value of approximately $20 billion: $6 billion is spent on the nation’s 33 million pet animals; the horse sector contributes an estimated $6 billion to the national accounts.

Between 2005-14 the Commonwealth’s role was one of ‘leadership and coordination’, with the aim of ‘improving national consistency in legislation and outcomes and to increase efficiency in public expenditure by reducing duplication of effort’. The AAWS has been the central policy document for the achievement of this goal. It identifies six key categories of animal use:

163 Primary Industries Standing Committee, Australian Animal Welfare Strategy, above n 15, ii.
168 Ibid.
1. Livestock and production animals;  
2. Companion animals;  
3. Aquatic animals;  
4. Animals used in research and teaching;  
5. Animals used for work, recreation, entertainment and display; and  
6. Native, introduced, and feral animals.  

The AAWS supports a technical working group for each of the six categories noted above. Working groups are ‘responsible for applying the national priorities and overall strategic goals and objectives at an operational level, identifying projects and providing advice on issues’.  

The circumstances described above were in place for nearly a decade (2005-14). The 2010-14 AAWS expired and in 2014, the federal government cut AAWS funding in order to save an estimated ‘$3.3 million over three years’. New programs under the AAWS were frozen. The AAWS ceased from 1 July 2014. The federal government announced its plan to disband the Australian Animal Welfare Advisory Committee and transfer responsibility for the AAWS to the Commonwealth Department of Agriculture. According to the AAWS website, ‘management of AAWS implementation is now the responsibility of the states and territories’. However, the author was unable to locate a formal handover  

169 Ibid 8.  
170 Ibid 8, 19.  
171 Ibid 8, 19.  
173 Ibid.  
174 Ibid. The Australian Animal Welfare Advisory Committee was an advisory group comprising representatives of the livestock industries, researchers, veterinarians and animal welfare advocates whose role was to provide consensus advice to Government on animal welfare policy.  
175 Ibid.  
announcement or documentation of the handover process. In summary, for nearly
a decade the Commonwealth played a central role in the development and
coordination of animal welfare regulation and policy. However, as a result of the
changes initiated in 2014, its role now focuses on international trade and live
export.

A Model Codes of Practice for the Welfare of Animals and the
Transition to Standards and Guidelines

It is beyond the scope of this thesis to provide an exhaustive discussion of the
Commonwealth’s role in all six categories. Since the early 1980s much of the
Commonwealth’s efforts have been directed towards the development of MCOPWA.
In addition to the *Australian Code of Practice for the Care and Use of Animals for
Scientific Purposes*, a suite of MCOPWA has been developed under the auspices
of successive national animal welfare committees. The MCOPWA can be
distinguished from animal welfare standards that apply under federal
legislation and other codes developed at state and territory levels. The
following brief discussion focuses on MCOPWA and their transition to Standards
and Guidelines.

The development of the first Australian code of practice for animal welfare was
initiated by the chicken, meat and egg industries, in the late 1970s. In the early
1980s a Sub-Committee on Animal Welfare was formed and proceeded to endorse
the development of a range of national codes. It was decided that these codes of

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179 For example the Department of Primary Industries (Qld), *Queensland Code of Practice for the Welfare of Animals in Circuses 2003* (State of Queensland, 2003). This is a compulsory Code under the *Animal Care and Protection Regulation 2012* (Qld).

180 Neumann and Associates Pty Ltd, above n 164, 4.
practice would be MCOPWA and thus not binding on the states and territories.\textsuperscript{181} Later administrative rearrangements led to the establishment of the Animal Welfare Working Group (AWWG) in 2002.\textsuperscript{182} Codes outline ‘the management (including handling, transport and slaughter) of all principal livestock species’, and set ‘minimum standards and specify the duty of care to be given to animals’.\textsuperscript{183} There are 22 MCOPWA;\textsuperscript{184} some are species-specific, such as ‘the sheep’,\textsuperscript{185} and ‘the goat’,\textsuperscript{186} while others address the welfare standards applicable to animals in certain circumstances, for example, in saleyards\textsuperscript{187} or during road transport.\textsuperscript{188} There are also MCOPWA for animals managed within specific farming systems, for example, ostriches,\textsuperscript{189} and domestic poultry.\textsuperscript{190} The MCOPWA for Transportation of Livestock has been reviewed and replaced by the \textit{Australian Animal Welfare Standards and Guidelines for the Land Transport of Livestock} (Animal Health Australia, 2008).

\begin{thebibliography}{99}
\bibitem{181} Ibid
\bibitem{182} Ibid 4.
\bibitem{183} Commonwealth Department of Agriculture, Fisheries and Forestry, above n 18, 29.
\bibitem{184} Kevin de Witte, \textit{Development of the Australian Animal Welfare Standards and Guidelines for the Land Transport of Livestock} (Animal Health Australia, 2008) 1; Geoff Neumann and Associates Pty Ltd, above n 164, 4; Bruce, above n 40, 81; Dale and White, above n 164, 151, 155.
\end{thebibliography}
Standards and Guidelines—Land Transport.

The transition to Standards and Guidelines is progressing. Standards and Guidelines for Sheep and for Cattle have been endorsed by Australian States and Territories. However, MCOPWA remain highly relevant. Further, while the aim of the implementation of Standards and Guidelines is to achieve greater cross-jurisdictional regulatory consistency, their status in terms of exemptions and defences to the offence of animal cruelty is unlikely to be very different from MCOPWA.

Model Codes of Practice for the Welfare of Animals are either exempted from anti-cruelty legislation or compliance provides a defence to a charge of cruelty. In Victoria, MCOPWA are exempted from anti-cruelty legislation. In Western Australia and the Northern Territory compliance with a MCOPWA may form a defence to a charge of cruelty. In Queensland compliance with a code of practice is an exemption to a charge of cruelty. In NSW, section 34A of the Prevention of Cruelty to Animals Act 1979 (NSW) provides neither a defence nor an exemption to a charge of animal cruelty. However, section 34A(3) provides that ‘compliance or

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195 The Prevention of Cruelty to Animals Act 1986 (Vic) does not apply to s 6(1)(c) ‘any act or practice with respect to the farming, transport, sale or killing of any farm animal which is carried out in accordance with a Code of Practice’. Compliance with a Code of Practice may form a defence to a charge of cruelty. See Animal Welfare Act 2002 (WA) s 25 and the Animal Welfare Act 1999 (NT) s 79. In Queensland, compliance with a Code provides an exemption: Animal Care and Protection Act 2001 (Qld) ss 38, 40(1).
196 Prevention of Cruelty to Animals Act 1986 (Vic) s 6(1)(c).
197 Animal Welfare Act 2002 (WA) section 25 states ‘[i]t is a defence to a charge under section 19(1) for a person to prove that the person was acting in accordance with a relevant code of practice’. Under the Animal Welfare Act 1999 (NT) s 79(1) ‘[i]t is a defence to a prosecution for an offence under this Act if the defendant establishes that the act or omission constituting the offence, or an element of the offence, was (a) in accordance with an adopted code of practice’.
198 Animal Care and Protection Act 2001 (Qld) s 40.
failure to comply, with any guidelines prescribed or adopted by the regulations for the purposes of section 34A(1) is admissible in evidence’. In practice, it is likely that the section 34A operates as a defacto defence provision. Overall, inconsistent relationships between MCOPWA and state and territory legislation has led to variations in the extent to which industries have adopted MCOPWA, subsequent compliance, and enforcement.

The adoption of MCOPWA has been inconsistent both in terms of the number of MCOPWA adopted, the extent to which each MCOPWA is adopted, and the legal status of the MCOPWA post-adoption. A MCOPWA may be adopted in part or in total. Further, some parts of a MCOPWA may be mandatory and others voluntary. In an attempt to improve cross-jurisdictional consistency, MCOPWA are undergoing a transition to Standards and Guidelines. The first set of Standards and Guidelines, developed under the auspices of Animal Health Australia, concerned the land transport of livestock. Whereas MCOPWA are not compulsory under current arrangements, the new Standards (although not the Guidelines) are to be adopted as mandatory requirements under state and territory anti-cruelty legislation and regulations. Standards are ‘the acceptable animal welfare requirements designated’.

199 Section 34A(1) of POCTAA states ‘[t]he regulations may prescribe guidelines, or may adopt a document in the nature of guidelines or a code of practice as guidelines, relating to the welfare of species of farm or companion animals’.


201 Bruce, above n 40, 217-8; White, above n 12.

202 This is the situation in Queensland. See Animal Care and Protection Act 2001 (Qld) ss 16, 38, 40.


204 Ibid 1; de Witte, above 145, 1.

met under law for livestock welfare purposes’. In Queensland, the *Australian Animal Welfare Standards and Guidelines-Land Transport* became a compulsory requirement under the *Animal Care and Protection Regulation 2002 (Qld)* in January 2014. Enforcement of these Standards commenced as of 1 August 2014. In Victoria, the Standards became prescribed as of 5 March 2013, ‘by reference into enforceable regulations under the *Livestock Management Act 2010 (Vic)*’.

According to the relevant business plan, the States and Territories are not required to recognise the ‘whole standards and guideline documents’ and may change a standard. Such changes may include ‘non-implementation’ of the Standard with ‘agreement on the necessary actions to support that decision’. Guidelines, when adopted, ‘may be used as a legal defence’ to a charge of animal cruelty. However, where changes to a Guideline are proposed, neither public consultation, nor a Regulatory Impact Statement, will be required. These processes suggest a potential for replication of the inconsistencies associated with adoption of MCOPWA and their relationship with animal cruelty offence provisions. Early signs that such inconsistencies are likely to develop are evident in a Memorandum of Understanding signed by the NSW Farmers’ Association and the NSW government in March 2015, in which the NSW government re-affirmed its


208 Ibid.

209 Ibid.


211 Ibid.

212 Ibid.

213 Ibid 14.
Part IV    CONCLUSION

This chapter has described the legislative and policy boundaries to which the thesis question relates and the foundations for the remainder of the thesis. Australia’s animal protection framework takes the form of two regulatory streams. The first focuses on punitive measures related to the offence of animal cruelty. The other pertains to commercial animal use industries, and operates under a compliance model. Practices set out in MCOPWA and other approved Standards and Guidelines indicate what amounts to lawful treatment of animals in those settings.

Part II discussed state and territory anti-cruelty legislation. In general, the scope of anti-cruelty legislation is limited to vertebrate species. The offence of animal cruelty has two forms: general and aggravated. Although the general offence of animal cruelty is one of strict liability, it is important to note that the general and aggravated forms do not conform to a distinct division between strict liability and those offences which require proof of a mental element. Queensland and NSW also have an animal cruelty offence in their respective general criminal statutes.

Australia’s approach to animal protection is complex. The RSPCA, a non-government organisation with limited resources, takes primary responsibility for law enforcement. As was noted in Part II, across Australia, RSPCA branches receive around 50,000 animal cruelty complaints per year and commence approximately 250 prosecutions per year. Commercial animal use industries are regulated under a compliance model. The regulation of animal use industries under the animal welfare rubric conceals the reality that a range of the standards deemed lawful in industry settings would amount to cruelty or aggravated cruelty if they were applied to animals living in the domestic realm. This was made clear by the breadth of the defence for serious animal cruelty under section 530(2)(b) of the Crimes Act 1900 (NSW).

In conclusion, this chapter has offered an insight into how violence against

domestic animals is conceived in Australia's criminal justice system and the Nation's broader animal welfare framework. It is clear that the cruelty-welfare binary is built into the regulatory and law enforcement system. The analysis above will be amplified in Chapter Four, which reports on an animal cruelty case law review. The case law review aims to further develop understanding as to the meaning of violence against animals as 'animal cruelty'.
CHAPTER 4 ANIMAL CRUELTY IN AUSTRALIA: A CASE LAW REVIEW

Part I INTRODUCTION

This chapter builds on the analysis of Australia’s animal protection regime presented in Chapter Three. It explores what the concept of violence against animals, when defined as ‘animal cruelty’, contributes to the regulation of human obligations towards animals. The inquiry takes the form of a review of animal cruelty case law for the period 2002-11 inclusive, supplemented by animal cruelty media reports. As discussed in Chapter Three, as a criminal offence, animal cruelty refers to acts or omissions that cause unnecessary pain, suffering, injury, or the death of an animal.

After the case law review findings are presented and discussed, the analysis considers whether ‘animal cruelty’ offers a suitable basis for a framework for the study of animal protection law and policy. Asking and responding to these questions, as articulated above, is a prerequisite for theorising the concept of violence, a task that will be undertaken in Chapter Five.

Part II describes the methodology developed for the case law review and the data collection process. It is a method developed in response to several research challenges in the area of animal protection law, including the paucity of Australian higher court decisions on animal cruelty1 and the difficulties associated with obtaining first instance judgments.2 The method adopted included searches for animal cruelty judgments on Australian legal research databases and the collation of Voiceless: the animal protection institute (Voiceless) animal cruelty alerts (VACA).


The judgments located were triangulated with the Voiceless media alerts to strengthen the validity of the conclusions made about the usefulness of the concept of animal cruelty.

Part III presents the findings of the review. It reports on the number and type of judgments and media reports identified and presents a series of case notes. In Part IV, one representative case note is presented from each of eleven identified case categories. The aim is to provide a snapshot of the complete sample.

Part V discusses what the concept of animal cruelty indicates about Australia’s animal protection regime. It concludes that the concept of violence against animals, defined as ‘animal cruelty’, does not provide a useful framework for the study of animal protection law and policy. This is due to the fact that it is an excessively narrow definition of violence against animals. Based on the judgments and media alerts reviewed, the meaning of ‘animal cruelty’ is generally confined to the domestic sphere. Generally, animal cruelty concerns egregious intentional harm or injury to animals, or neglect of dogs that are either companion animals or being raised to become companion animals.

Part II Background and Methodology

Whereas traditional legal scholarship tends to focus on the study of appellate court decisions as declarative or constitutive of the law, a review of animal cruelty case law is an exercise primarily concerned with criminal justice in its summary form, the lower of McBarnet’s ‘two tiers of justice’. In this well-known and widely adopted typology higher court decisions are for ‘public consumption’ and display the ‘ideology of justice’. In contrast, summary justice is ‘deliberately structured in defiance of the ideology of justice’.

McBarnet identifies two barriers to research in this lower tier. The first is ‘the dominant image of the work of the lower courts of criminal justice’ as ‘trivial’ and

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3 Ibid 143.
4 Doreen J McBarnet, Conviction: Law, the State and the Constitution of Justice (MacMillan, 1981) 123.
5 Ibid 138.
6 Ibid 153.
the ‘inherent paradox in the very idea of prosecuting trivial offences’.  

They are ‘too trivial to interest the public’.  

McBarnet’s argument confirms the place of animal cruelty within the legal system’s larger enterprise, not only in Australia but across the common law world. This, in turn, leads to the second barrier: a lack of primary material available for analysis. For example, Annabel Markham notes that it is difficult to obtain sentencing notes and ‘records kept by prosecuting agencies often lack the detail needed for comparative purposes’.

While higher courts drive the evolution of the common law, summary justice is an expanding, dynamic area central to the administration of criminal punishment. An example of this expansion, in the area of animal protection law, was the introduction, in NSW, of an alternative summary jurisdiction for the indictable offence of aggravated cruelty. This occurred with the enactment of the Protection of Cruelty to Animals Act 1979 (NSW).

For the year 2011-12, 572 251 defendants’ matters were finalised in Australia’s criminal courts, of which 523 168 were finalised in Magistrates’ Courts. A mere 15 479 (less than three per cent) were finalised in higher courts. In summary, the division between higher and lower courts poses a risk for legal scholarship in that researchers may dedicate ‘disproportionate time and emphasis to detailed textual analysis of statistically rare and possibly unrepresentative appellate court decisions as ‘declaratory’ of ‘the law’.

For example, Debra Muller-Harris argues that one reason for the few animal cruelty prosecutions in the US includes local political influence to ignore such ‘trivial actions against perpetrators of ‘minor’ crimes’. Debra Muller-Harris, ‘Animal Violence Court: A Therapeutic Jurisprudence-based Problem Solving Court for the Adjudication of Animal Cruelty Cases Involving Juvenile Offenders and Animal Hoarders’ (2011) 17 Animal Law 313, 336.

Markham, above n 1, 213.  

Brown et al, above n 2, 251.  

See New South Wales, Parliamentary Debates, Legislative Assembly, 7 November 1979, 2676-7 (Crabtree).  


Brown et al, above n 2, 143.
Attractions for adopting the traditional approach include the ease with which higher court judgments can be accessed and the established legitimacy of this form of inquiry. Underlying this are positivist assumptions at play about what the law is, including the notion that it is possible to understand ‘the law’ while neither asking questions about ‘the entirety of the legal enterprise’, nor its social impact.\(^\text{15}\)

With regard to animal cruelty prosecutions, based on RSPCA statistics, there are approximately 250-300 animal cruelty prosecutions commenced per year.\(^\text{16}\) Therefore, a total of approximately 2500-3000 prosecutions were commenced during the 2002-11 case law review search period. Most animal cruelty charges are resolved by way of guilty plea,\(^\text{17}\) and a fine.\(^\text{18}\) Custodial sentences are rarely imposed.\(^\text{19}\) Imprisonment is more likely to be imposed when there is ‘an act of extreme violence towards a domestic animal’.\(^\text{20}\)

### A Data Collection

The review identified judgments available on Australian databases *LexisNexis AU* and *AustLII* for the period 2002 to 2011 inclusive. After the database searches were completed, Australian Animal Law textbooks were scanned to locate additional case citations.\(^\text{21}\) Finally, animal cruelty case media reports were located via Voiceless’\(^\text{22}\) ‘animal cruelty alert’ e-service to which the author was a subscriber. Voiceless is an independent, non-profit ‘think tank’ whose objective is


\(^{17}\) RSPCA Australia, *Australia National Statistics 2011-2012*, above n 16; Markham, above n 1, 212.

\(^{18}\) Ibid 215.

\(^{19}\) Ibid 213-4.

\(^{20}\) Ibid 215.

\(^{21}\) At January 2012 these texts were Caulfield above n 1, Peter Sankoff and Steven White (eds), *Animal Law In Australasia* (Federation Press, 2009); Deborah Cao, *Animal Law in Australia and New Zealand* (Lawbook, 2010); Bruce, above n 1, and Graeme McEwen, *Animal Law: Principles and Frontiers* (2011) <www.bawp.org.au>.

to build ‘influential networks in support of animal protection’.  

1 Database Search for Animal Cruelty Judgments

(a) Anti-Cruelty Legislation

The initial case search was conducted using *LexisNexis AU*, an Australian legal information database. Supplementary searches were conducted on state and territory court websites. Each state and territory anti-cruelty statute includes a number of provisions that might found a charge of animal cruelty. Therefore, to maximise yield, the title of each jurisdiction’s anti-cruelty legislation was used as the search term. This search strategy was replicated on each state and territory court website. As the majority of state and territory court websites link to *AustLII*, this provided a cross reference for the cases identified via *LexisNexis AU*. Additional judgments from New South Wales were located via *Caselaw*.

(b) Criminal Statute

The aim of the criminal statute search was to identify provisions relevant to animal cruelty and to identify cases relating to those provisions. A search was conducted

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23 Ibid.


26 The legislation title was entered into the ‘legislation considered’ box rather than the search term box.

on each State and Territory’s general criminal statute, using the term ‘animal’.\(^{28}\) Most of the provisions including the word ‘animal’ related to stealing livestock or other property offences, reflecting the common law view that harm caused to an animal is significant only for its impact on the owner’s property rights.\(^{29}\) At the time of the search only one jurisdiction, New South Wales, contained an animal cruelty offence within its general criminal statute.\(^{30}\) Since then, as was discussed in Chapter Three, Queensland has amended the \textit{Criminal Code} (Qld) to introduce a serious animal cruelty offence.

\textit{(c) \hspace{1cm} Australian Animal Law Textbooks}

At February 2012 there were five published Animal Law texts in Australia.\(^{31}\) These texts were scanned to identify additional case citations.

\section{Media Reports of Animal Cruelty Cases}

Given the methodological limitations of the case law review outlined above, the last step in the data collection process was the collation of ‘Voiceless animal cruelty alerts’ (VACA). The aim of collating these media alerts was to provide a data source to triangulate the sample of judgments located, and thereby strengthen the validity of the conclusions made about the usefulness of the concept of animal cruelty. The media alerts provided some indication that the meaning of ‘animal cruelty’ conveyed by the cases was common to other cases which were not available on legal research databases.

\footnote{28 \textit{Criminal Code} (Qld); \textit{Crimes Act 1990} (ACT); \textit{Crimes Act 1900} (NSW); \textit{Crimes Act 1958} (Vic); \textit{Criminal Law Consolidation Act 1935} (SA); \textit{Criminal Code} (Tas); \textit{Criminal Code 1913} (WA); \textit{Criminal Code} (NT).}

\footnote{29 For example, \textit{Criminal Code} (Qld) s 468(1) ‘Any person who wilfully and unlawfully kills, maims, or wounds, any animal capable of being stolen is guilty of an indictable offence (2) If the animal in question is stock, the offender is guilty of a crime, and is liable to imprisonment for 7 years’.}

\footnote{30 \textit{Crimes Act 1900} (NSW) s 530.}

\footnote{31 At January 2012 these texts were Caulfield, above n 1, Sankoff and White, above n 21; Cao, above n 21; Bruce above n 1, and McEwen, above n 21. In 2013, Peter Sankoff, Steven White and Celeste Black (eds), \textit{Animal Law in Australasia} (Federation Press, 2nd ed, 2013) was scanned in order to optimise the number of cases located within the 2002-11 search parameters.}
During the period over which the review was conducted, Voiceless\textsuperscript{32} coordinated a national general Animal Law discussion board and a regular email service: ‘Voiceless Animal Cruelty Alerts’ (VACA). These alerts summarised animal cruelty matters in the press and were delivered electronically, usually on a weekly basis. At that time, Voiceless used a newsfeed media monitoring service, *Meltwater News*, to collate material for its animal cruelty alerts.\textsuperscript{33} According to its website, *Meltwater News* tracks keywords, phrases, and topics ‘in over 192,000 sources from over 190 countries and 100 languages ... [t]hese sources are monitored consistently throughout the day’.\textsuperscript{34} The search terms used by Voiceless (at 18 September 2012) were:

- Code of practice animals*;
- Animal law;
- Cruelty complaint*;
- Animal cruelty prosecution;
- Animal cruelty penalties;
- Animal cruelty penalty;
- Animal cruelty litigation;
- Animal cruelty legislation;
- Animal welfare – connected to RSPCA.\textsuperscript{35}

The VACA the author received during the period 1 July 2011 – 30 June 2012 were collated and tabulated (See Appendix E for a summary of the VACA collated). The one-year period was selected for two reasons. First, as the Voiceless animal cruelty alert service commenced in the late 2000s, it would not have been possible to collect alerts for the complete 2002-11 period. Second, a one year sample was considered to be reasonable given that the focus of this inquiry was case law; the purpose of collating the media alerts was to demonstrate the representativeness of

\textsuperscript{34} Ibid.
\textsuperscript{35} Interview with Ruth Hatten, Legal Counsel, Voiceless (Telephone, 18 September 2012).
the primary data. Voiceless animal cruelty alerts were an ideal data source in this respect as they were dedicated to animal cruelty matters, usually animal cruelty prosecutions or convictions. As a result, there was a close if not exact alignment between the definition of ‘animal cruelty’ used in the VACA alerts and that in the judgments. However, the fact that the VACA alerts related to cases that had gained media attention suggested that they may have been legally or socially significant, or appealed to readers’ moral sensibilities. Alternatively, the fact scenarios may have reflected the media responding to community expectations that news stories be shocking.36

Part III FINDINGS

A Case Law Review

A total of 49 judgments were located (See Appendix F. Seven of these were excluded from the sample (See Appendix F for excluded cases and rationale for exclusion). In addition, eight brief case notes were located in Australian Animal Law textbooks; two case notes were excluded (See Appendix F). These findings are summarised in Table 3.1.

Although the anti-cruelty legislation title for each jurisdiction was used as a search term, not all of the cases located concerned animal cruelty prosecutions. Three of the judgments concerned animal protection advocates (either as applicants or respondents) in matters relating to animal cruelty. For example, in Windridge,37 animal protection advocates were respondents in a civil action after they had trespassed onto property leased by a piggery in order to gather video evidence of alleged animal cruelty.

1 LexisNexis AU Cases

Thirty-three (33) cases were identified via LexisNexis AU: three of these were excluded (See Appendix F). No cases were retrieved for the Australian Capital Territory or the Northern Territory. The result from the Northern Territory was


37 Windridge Farm Pty Ltd v Grassi [2010] NSWSC 335 (19 March 2010).
consistent with the absence of an RSPCA inspectorate in that jurisdiction. One case was located each from Tasmania and Victoria.

2 Court Websites: AustLII and Caselaw

Three additional cases were located from Queensland. One of these cases was excluded from the sample as it was heard under the repealed Animal Protection Act 1925 (Qld).\(^\text{38}\) The two cases included were Hudson v Miskell [2011] QDC 44 and R v Romano [2008] QCA 140. Four cases were located from New South Wales via Caselaw: RSPCA v Hamilton [2008] NSWLC 13 (14 July 2008), R v McMahon [2006] NSWDC 81 (3 November 2006), Richardson v Royal Society for the Prevention of Cruelty to Animals [2008] NSWDC 342 (17 December 2008), and Larobina v R [2009] NSWDC 79 (8 April 2009). No other cases were identified as a result of this search strategy.

3 Australian Animal Law Texts

Animal Law texts were scanned for additional case citations\(^\text{39}\) and summaries of unreported matters. Malcolm Caulfield's Handbook of Australian Animal Cruelty Law\(^\text{40}\) formed the starting point for this part of the search as it contained a tabulated summary of animal cruelty decisions identified via AustLII,\(^\text{41}\) spanning the mid-1990s to 2007.\(^\text{42}\)

Five additional citations falling within the 2002-11 period were identified in Caulfield's AustLII summary.\(^\text{43}\) Two of the judgments referred to were decided

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39 Caulfield, above n 1; Cao, above n 21; McEwen, above n 21.
40 Caulfield, above n 1.
42 Caulfield, above n 1, 36.
under the repealed *Animal Welfare Act 1920* (WA) and were excluded from the sample on this basis.\(^4^4\) Another three case citations were identified in the text: *Department of Regional Government and Local Department v Emanuel Exports* (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008) (‘Al Kuwait Case’); *Rural Export & Trading (WA) v Hanheuser* [2008] FCAFC 156, and *Australian Wool Innovation Limited v Newkirk* [2005] FCA 290.

In addition to case citations, Caulfield discusses two case scenarios relating to cruelty complaints made by employees in intensive piggeries in South Australia.\(^4^5\) One of these cases, *Ludvigsen*,\(^4^6\) resulted in an animal cruelty prosecution although the judgment was not available online. As the other case scenario, Wasleys Piggery, did not result in a prosecution, it was excluded from the sample. In summary, six case citations and one case note falling within the search parameters were located in Caulfield.\(^4^7\)

An additional six brief case summaries regarding cruelty charges for the treatment of agricultural animals were located in Cao.\(^4^8\) These cases were all unreported Magistrate decisions. One case was decided prior to 2002 and was excluded as it was beyond the search parameters.\(^4^9\) No additional judgments were located via Bruce\(^5^0\) or McEwen.\(^5^1\) One extra case citation was located in Sankoff, White and

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45 These were Wasleys Piggery, and Ludvigsen Family Farms. Caulfield, above n 1, 222-9.

46 *RSPCA v Ludvigsen* (unreported, Magistrates Court of South Australia, Magistrate Fahey, 7 September 2007).

47 Caulfield, above n 1.


50 Bruce, above n 1.
Black. However, it was excluded as it fell outside the 2002-11 search parameters.

Table 4.1 summarises animal cruelty judgments located via Australian legal research databases and Australian Animal Law texts for the period 2002-11. It also summarises the case notes identified in Animal Law textbooks. In total, the final sample comprised 42 judgments, across all jurisdictions, and six case notes. The results of the search strategies discussed above are tabulated in Appendix F.

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51 McEwen, above n 21.

52 The edition originally scanned was Sankoff and White, Animal Law In Australasia, above n 21. Sankoff et al, Animal Law In Australasia (Federation Press, 2nd ed, 2013) was scanned to optimise the identification of judgments up to and including 2011.

A total of 103 VACA relating to animal cruelty matters were identified for the period 1 July 2011–30 June 2012. A significant proportion of the VACA (42 of 103, approximately 33%) concerned dogs alone. Eighteen of the 103 VACA (approximately 21%) were cases involving a failure to provide proper and sufficient food to dogs in the domestic sphere. Twelve VACA related to horses (12 of 103, approximately 9%). Two of these concerned the horseracing industry.
Thirty-four VACA related to acts of cruelty rather than cruelty as a result of an omission. Lastly, there was a distinct lack of matters pertaining to animals in the racing industry, or in animal use industries. This point will be given further consideration in Part V. Overall, in terms of the types of animals involved, whether the cruelty was caused by an act or omission, and the setting in which the offence occurred, there was a general alignment between the animal cruelty prosecutions reported in the VACA and the judgments retrieved as a result of the search strategies.

Part IV Animal Cruelty Cases: A Snapshot

A Context

It is beyond the scope of the discussion to present all of the judgments located. Instead, what follows is an animal cruelty case law snapshot. It comprises a series of case notes, each representing one of the eleven case categories summarised in Table 4.2, below. The case categories were identified according to the case law located. The case categories were created according to the key features of the judgments: the type of animal/s involved, whether the offence was one of act or omission, and the setting in which the offence took place.

Table 4.2 refers to fact scenarios rather than cases or judgments. This is because several judgments located via the case law review related to the same fact scenarios. The facts concerning Mr Fleet accounted for three judgments.\(^{60}\) Dart\(^{61}\) accounted for three judgments, four judgments related to the facts in Hunter,\(^{62}\) and three judgments related to the fact scenario in Robertson.\(^{63}\) Therefore, the number

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of fact scenarios is lower than the total number of judgments and case notes combined. The total number of judgments and case notes was 48, however, they related to 39 fact scenarios.

The types of animals and the proportion of specific species appearing in the judgments and VACA alerts set out in Table 4.2 mirror the RSPCA animal cruelty prosecutions by type of animal summarised in Table 4.3 below. This finding suggests that despite its small size, the case law sample reflects the activity within the wider field of animal protection enforcement. The VACA are summarised in Appendix E.

The content summarised in Table 4.2 will be analysed in more depth in Part V.
Table 4.2
Animal Cruelty Fact Scenarios. *

<table>
<thead>
<tr>
<th>Fact Scenario</th>
<th>Cases</th>
<th>VACA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case notes: Scenarios N = 39</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Domestic violence</td>
<td>2 dogs</td>
<td>2</td>
</tr>
<tr>
<td>Failure to euthanase</td>
<td>2 Dog, cat</td>
<td>0</td>
</tr>
<tr>
<td>Livestock neglect</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td>Equine neglect</td>
<td>4</td>
<td>9</td>
</tr>
<tr>
<td>Canine neglect</td>
<td>3</td>
<td>27</td>
</tr>
<tr>
<td>Cruelty act not omission</td>
<td>8 cats, possum, puppy, cats</td>
<td>34 64</td>
</tr>
<tr>
<td>Breeding hoarding</td>
<td>3 dogs</td>
<td>15</td>
</tr>
<tr>
<td>Transport</td>
<td>4 Sheep, live export</td>
<td>0</td>
</tr>
<tr>
<td>Factory farm</td>
<td>2 intensive piggery; poultry</td>
<td>1</td>
</tr>
<tr>
<td>Animal Welfare Organisations</td>
<td>3 culling goats; intensive piggery; sheep mulesing</td>
<td>2 65</td>
</tr>
<tr>
<td>Exhibition animal</td>
<td>1 elephant</td>
<td>0</td>
</tr>
<tr>
<td>Feline neglect</td>
<td>0</td>
<td>5</td>
</tr>
</tbody>
</table>

*The case categories are based on the judgments located. Therefore, there are 12 columns, however there are 11 case categories. This is because there were no cases located regarding general feline neglect. However, there were five VACA located relating to feline neglect.

64 Four of these media alerts related to dog breeders docking dogs’ tails: see Appendix E.

65 This relates to two animal welfare workers being accused of animal cruelty: see Appendix E.
Table 4.3
Total RSPCA Cruelty Prosecutions by Type of Animal as Percentage.

<table>
<thead>
<tr>
<th></th>
<th>2009-10&lt;sup&gt;66&lt;/sup&gt;</th>
<th>2010-11&lt;sup&gt;67&lt;/sup&gt;</th>
<th>2011-12&lt;sup&gt;68&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dogs</td>
<td>60%</td>
<td>32%</td>
<td>58%</td>
</tr>
<tr>
<td>Cats</td>
<td>10%</td>
<td>10%</td>
<td>12%</td>
</tr>
<tr>
<td>Birds</td>
<td>3%</td>
<td>2%</td>
<td>2%</td>
</tr>
<tr>
<td>Horses</td>
<td>14%</td>
<td>4%</td>
<td>15%</td>
</tr>
<tr>
<td>Livestock</td>
<td>11%</td>
<td>48%</td>
<td>9%</td>
</tr>
<tr>
<td>Wildlife</td>
<td>Noted though percentage not reported</td>
<td>Noted though percentage not reported</td>
<td>Noted though percentage not reported</td>
</tr>
</tbody>
</table>

With regard to the statistics in Table 4.3, it should be noted that during the year 2010-11, 48 per cent of RSPCA reported prosecutions concerned livestock. Given that the number of yearly prosecutions sits at 250 for all jurisdictions and these would often concern a single animal, it is likely that there was one major prosecution commenced in 2010-11 that concerned approximately 150 livestock animals.<sup>69</sup>

B  Selected Animal Cruelty Case Law

1  Animal Cruelty in the Context of Intimate Partner Violence


Zegura<sup>70</sup> and Bond<sup>71</sup> concerned animal cruelty within the context of inter-personal


<sup>69</sup> The author contacted RSPCA Australia, via its email query page, for clarification regarding this figure. The inquiry was registered as received however the author did not receive a response.

<sup>70</sup> [2006] NSWCCA 230.

<sup>71</sup> [2011] SASC 19.
violence. Both involved a male defendant killing, by stabbing, the dog owned by their respective female partners. In *Bond*,\(^72\) the defendant stabbed his girlfriend’s dog to death while the couple was having an argument in their unit. He was affected by alcohol at the time, had a history of alcohol abuse and was the recipient of the disability pension. Bond picked up a knife which he had used in his employment as a butcher and wounded the dog in a way that would have taken some time for the dog to die. The dog would have experienced pain and difficulty breathing.\(^73\) Bond was charged with aggravated cruelty and sentenced to imprisonment for five months.\(^74\) His appeal against the severity of the sentence, against conviction, and his claim of an abuse of power on the part of the magistrate, was dismissed.\(^75\)

2Failure to Euthanase a Terminally Ill Animal as Constitutive of Cruelty


Mr Fleet lived in the outer western suburbs of Sydney and owned a German Shepherd dog. On 5 March 1997, at the instigation of the RSPCA (NSW), the dog, ‘Jason’, was seized by the police, examined and destroyed. Jason was 14 years of age and according to the RSPCA, was in an emaciated condition. The dog’s condition was secondary to a terminal illness and Fleet was resisting having the dog euthanased.

Mr Fleet was charged with two offences under the *Prevention of Cruelty to Animals Act 1979* (NSW): aggravated cruelty\(^76\) and failure to inform an authorised officer of

\(^{72}\) Ibid.

\(^{73}\) Ibid [3] (Duggan J).

\(^{74}\) Ibid [22].

\(^{75}\) Ibid [12].

\(^{76}\) Section 6.
his name and address. He was found guilty of both charges. No conviction was entered for the cruelty charge, though Fleet was convicted and fined $500 with costs of $51 in relation to the charge under section 27A. Fleet appealed to the District Court. District Court Judge Karpin found the offences proved and ‘indicated an intention to make similar orders to those made in the local court’. In a subsequent appeal, decided in October 1999, the NSW Court of Appeal quashed Karpin DCJ’s orders, remitted the proceeding on the animal cruelty charge to the district court and stayed proceedings on the section 27A charge.

In Fleet, Meagher JA stated that Karpin DCJ’s conduct of the case ‘left much to be desired’ and that the charge made under s 27A was ‘ludicrous, since the RSPCA well knew Mr Fleet’s name and address’. His Honour observed that Fleet:

‘had been accused of two offences one of which he did not commit [s 27A], he genuinely felt that his beloved dog had been destroyed without reason, he had been arrested by the police when he should not have been, the RSPCA had organized publicity to accompany his arrest, his house had been ransacked, and he had failed to be treated with justice by either the Local Court or the District Court. Nonetheless, he hardly seemed co-operative in getting his second trial back on the rails.’

The remitted proceedings were heard by Nield DCJ between June and August 2000. Mr Fleet requested that his Honour state a case to the Court of Criminal Appeal on

79 Ibid [10].
80 Fleet v District Court of NSW [1999] NSWCA 363. This case does not appear in this sample as it did not fall within the 2002-11 search parameters.
82 Ibid.
84 Ibid [1].
85 Ibid [3].
four questions of law. Nield DCJ declined to state a case, on the basis that none of the questions were questions of law arising within the appeal requiring the statement of a case. Fleet then applied for orders that the RSPCA recall its five witnesses referred to in a letter dated 11 September 2000. Judge Nield declined to make the order.

Eventually, the proceedings were dismissed as a result of Fleet’s failure to appear before the Court. Fleet proceeded to make an application to the Court of Appeal for an order in certiorari regarding the judgment and orders made by Judge Nield. The grounds for the application included that Judge Nield’s refusal to state a case constituted a refusal to exercise jurisdiction, a denial of procedural fairness and a denial of natural justice.

The original criminal proceedings suffered defects. However, due to the reasons noted above, Fleet’s case was not determined on the merits. Fleet later commenced civil proceedings alleging a variety of causes of action against the RSPCA, two RSPCA officers, the State of New South Wales, and the District Court of New South Wales.

3 Livestock Neglect

Perrett v Williams [2003] NSWSC 381 (9 May 2003); Mansbridge v Nichols [2004] VSC 530 (17 December 2004); Anderson v Moore [2007] WASC 135 (22 June 2007); RSPCA v Hamilton [2008] NSWLC 13 (14 July 2008); RSPCA v Kyriackou (unreported, Melbourne Mgt Court, Magistrate Smith, 26 September 2008); Richardson v RSPCA [2008] NSWDC 342 (17 December 2008); Downey v Boulton (No. 5) [2010] NSWCA 240 (15 September 2010)

86 Ibid [26].
87 Ibid [1] (Meagher JA).
88 Ibid [42] (Hodgson JA).
89 Ibid [61] (Hodgson JA).
90 Mr Flood made the following pleadings: malicious prosecution, false imprisonment, wrongful arrest, trespass to the person, trespass to goods, illegal search and seizure and misfeasance in public office [3]. He also asserted that, ‘in contravention of the International Covenant on Civil and Political Rights, he was tortured’. Fleet v Royal Society for the Prevention of Cruelty to Animals NSW [2007] NSWSC 334 (14 April 2007) [7] (Simpson J).
Downey v Boulton (No. 5) [2010] NSWCA 240 related to offences committed by Ms Downey, who ran cattle on a property in northern NSW. In early 2007, RSPCA officers had expressed concern as to the lack of feed available on the property and the emaciated condition of the cattle. In June 2007, Downey was issued with 96 court attendance notices under the Prevention of Cruelty to Animals Act 1979 (NSW), alleging offences of aggravated cruelty and failure to provide proper and sufficient food. In October 2008 Magistrate Mackintosh found each of the offences proved. Penalty was imposed by way of a bond in respect of each offence and the Downey was ordered to pay the costs of the prosecution.

Downey lodged a notice of appeal to the District Court in relation to each of the offences. The matter was listed before Boulton ADCJ. His Honour dismissed an application submitted by the applicant seeking leave to adduce fresh evidence. Downey made further applications to Boulton ADCJ, requesting that His Honour disqualify himself from hearing the appeal, claiming a reasonable apprehension of bias and challenging the constitutional validity of Boulton ADCJ’s appointment as an acting judge of the District Court of NSW. His Honour rejected these challenges.

The grounds of Downey’s appeal to the Court of Appeal included a challenge to the ‘authority’ of the RSPCA, that the original pleadings in relation of the section 8 offence were inadequate, that the proceedings in the District Court were invalid in relation to the appointment of Boulton ADCJ, and that there was a reasonable apprehension of bias on His Honour’s part. Downey was unsuccessful on all grounds and the appeal was dismissed.

4 Equine Neglect


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92 Ibid s 8.
93 Pursuant to the Crimes (Sentencing Procedure) Act 1999 (NSW) s 10.
In *Foster v RSPCA*, the appellant had pleaded guilty before a Magistrate to three offences. First, that in March 2004 he had ill-treated a male horse by failing to provide it with appropriate and adequate food. Second, he pleaded guilty to ill-treating the same male horse in that he failed to take any reasonable steps to alleviate pain suffered by the horse by reason of age, illness or injury. Foster had also pleaded guilty that he failed to provide the horse with supplementary feed while he was a person under a direction to do so.

The horses were examined by the RSPCA and found to be in ‘desperate need of assistance both for food and of medical treatment’. One horse was euthanased because an untreated, infected injury had resulted in lameness. Foster appealed against the fine of $3000, against the amount imposed for airfares for the prosecution bringing his brother from Western Australia, and against an order made that he be forbidden from acquiring or having custody of any more than two horses. Judge Anderson dismissed the appeal, concluding that within the context of the circumstances of the ill-treatment and the appellant’s late guilty plea, the fine was not unreasonable and could not be regarded as excessive.

5 Canine Neglect


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99 Ibid [12].

100 Ibid [17].

Goodwin v RSPCA (SA)\textsuperscript{102} related to an appeal against orders made by a magistrate. The appellant, Goodwin, had been charged under the *Prevention of Cruelty to Animals Act 1985* (SA).\textsuperscript{103} He was the owner of Harry, a Heeler-Ridgeback cross-bred dog, and had failed to provide Harry with appropriate and adequate food.\textsuperscript{104} Goodwin pleaded not guilty to the charge and the matter went to trial. He was found guilty of the charge and a conviction was recorded. Justice Besanko imposed a penalty of 100 hours of community service and ordered Goodwin to pay costs totalling $5696.49. The costs included the respondent’s legal costs, witness fees, a veterinary fee and a fee for the care of Harry while Harry was held by the RSPCA ($2930). Besanko J also ordered that Harry be forfeited to the RSPCA and that Goodwin be prohibited from acquiring or having custody of any animal until further order.\textsuperscript{105}

Goodwin appealed the conviction and the sentence on the basis that the penalty was excessive. He submitted that the number of community service hours was excessive and that he should not have been ordered to pay the fee relating to Harry’s care.\textsuperscript{106} His Honour found that Harry had been kept by the RSPCA because there was a possibility that Goodwin might successfully defend the charge and then demand the dog back.\textsuperscript{107} This was a reasonable course of action. Goodwin’s appeal was dismissed.\textsuperscript{108}

\section*{Cruelty as an Act Rather Than an Omission}

*RSPCA v Kenneth Paulger* (unreported, Maroochydore Magistrates Court, Magistrate Taylor, 10 March 2006); *R v McMahon* [2006] NSWDC 81 (3 November 2006); *Towers-Hammon v Burnett* [2007] QDC 282 (15 June 2007) (‘Towers-

\textsuperscript{102} Ibid [3] (Besanko J).

\textsuperscript{103} Section 13.

\textsuperscript{104} Goodwin v RSPCA (SA) [2006] SASC 79 [3] (Besanko J). The charges were laid under the *Prevention of Cruelty to Animals Act 1985* (SA) s 13(1).


\textsuperscript{106} Ibid [31] (Besanko J).

\textsuperscript{107} Ibid [34].

\textsuperscript{108} Ibid [35].
In *Towers-Hammon v Burnett*\(^\text{109}\) the appellant (an RSPCA inspector) was the complainant in a prosecution brought against Mr Burnett for cruelty to animals. Towers-Hammon appealed on the grounds that the penalty imposed was inadequate. Burnett had pleaded guilty to the charge of animal cruelty and was fined $1800 in default of 30 days' imprisonment. A conviction was recorded. The appellant submitted that a fine of at least $5000 and/or a term of imprisonment would have been appropriate.\(^\text{110}\)

Burnett was 59 years of age at the time of the offence. He had a criminal history in Queensland and New South Wales mainly relating to property offences. He had no convictions for animal cruelty offences. He was charged under section 18 of the *Animal Care and Protection Act 2001* (Qld) for beating several cats ‘with an iron bar, causing them pain that was, in the circumstances, unjustifiable, unnecessary or unreasonable’.\(^\text{111}\) He had done so in front of Mr Payne, the cats’ owner, who wanted to re-home the cats.

At first instance, the Magistrate noted ‘no suggestion of any pleasure or intention to deliberately inflict unnecessary pain’.\(^\text{112}\) Her Honour had concluded that Burnett ‘was trying to assist a person who wanted to dispose of his cats, but who at least appeared initially to think that that would be by finding an alternative home for them’.\(^\text{113}\)

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\(^{111}\) Ibid.

\(^{112}\) Ibid [21] (Britton J).

\(^{113}\) Ibid.
On appeal, Judge Britton concluded that the facts showed that the respondent’s conduct was callous.\textsuperscript{114} Of particular concern were ‘the actions of the respondent in relation to the first cat, which were observed by a witness, and that he continued to strike despite the protestations of Payne’.\textsuperscript{115} His Honour also referred to ‘the nature of the injuries inflicted ... the fact that one kitten was left alive, but seriously injured, and that all of the animals were disposed of by being dumped in a St Vincent de Paul bin’.\textsuperscript{116} These facts demonstrated that the respondent’s conduct was callous. Judge Britton concluded that the Magistrate did not have ‘sufficient regard’ to the callousness of the Burnett’s conduct\textsuperscript{117} and ‘had erred in concluding that Burnett was trying to help Payne, or if she was entitled to reach that conclusion gave it too much weight’.\textsuperscript{118} Further, Judge Britton found that the Magistrate ‘failed to have sufficient regard to the maximum penalty provided by the Act’.\textsuperscript{119} In the circumstances, the penalty imposed fell ‘well below what is the appropriate range for this offence’.\textsuperscript{120}

His Honour noted the ‘degree of violence used and the nature of the injuries inflicted, the callousness demonstrated by the respondent, and the need for denunciation and deterrence both general and personal’.\textsuperscript{121} Burnett received a sentence of three months’ imprisonment and was to pay costs of appeal, fixed at $3552.90.\textsuperscript{122}

\footnotesize
\begin{itemize}
  \item \textsuperscript{114} Ibid [28].
  \item \textsuperscript{115} Ibid.
  \item \textsuperscript{116} Ibid.
  \item \textsuperscript{117} Ibid [36] (Britton J).
  \item \textsuperscript{118} Ibid.
  \item \textsuperscript{119} Ibid.
  \item \textsuperscript{120} Ibid.
  \item \textsuperscript{121} Ibid [38]
  \item \textsuperscript{122} Ibid [38]-[39] (Britton J).
\end{itemize}
Cruelty Within the Context of Companion Animal Breeding and Hoarding


Four of the cases located pertained to actions based on the neglect of animals on the part of Mrs Robertson, who bred and sold poodle dogs on a large scale from premises at Buccan, in Queensland.¹²³ She also ran a boarding facility for dogs and cats.¹²⁴ This case note summarises Robertson v Hollings.¹²⁵ In early 2008, an RSPCA employee appointed as an inspector under the Animal Care and Protection Act 2001 (Qld)¹²⁶ seized 105 dogs from Robertson’s property. There was evidence that the dogs were being kept amongst faeces, and had matted coats that were impacted with dried faeces and other matter. Some dogs had severe conjunctivitis, dental deficiencies or other illnesses. The animals seized were forfeited pursuant to an order of the Magistrates Court.¹²⁷

Robertson appealed and started a number of proceedings against several respondents including the RSPCA (Qld), the State of Queensland, and the Minister for Primary Industries (Qld).¹²⁸ She was a self-represented litigant and the issue of the adequacy of her pleadings was raised before the court on at least six occasions.


¹²⁵ Ibid.

¹²⁶ Under section 143.


occasions.\textsuperscript{129}

In \textit{Robertson v Hollings}\textsuperscript{130} the first respondent was a television production company based in New Zealand. Robertson alleged trespass and a breach of right of privacy in relation to the release of video footage of the plaintiff and her dogs taken on her premises and at an RSPCA shelter.\textsuperscript{131} However, Judge Lyons was unable to identify a viable cause of action from the relevant section of Robertson’s Statement of Claim: no elements were pleaded and no allegations of fact in support were made out. Mrs Robertson submitted:

\begin{quote}
I’m still getting abused, your Honour, but such is life, I guess, but it’s got to stop. You see, and this continuing releasing of information and data which is not true, is terrible, but that’s -- and that was caused by a breach of my privacy, a breach of my right to privacy which is identified in \textit{Groves v Pervis} [sic].\textsuperscript{132}
\end{quote}

Judge Lyon concluded that the statement of claim ‘did not contain any viable causes of action adequately pleaded’.\textsuperscript{133} Furthermore, His Honour accepted that Robertson had ‘no prospect of success given her inability to frame a competent pleading’.\textsuperscript{134} Her application for leave to file the proposed statement of claim was refused and judgment ‘entered in favour of the first, second and third defendants’.\textsuperscript{135}

\section*{8 Cruelty During Transportation}

Rural Export and Trading v Hahnheuser [2007] FCA 1535 (4 October 2007); Department of Local Government and Regional Development v Emanuel Exports Pty Ltd (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008) (‘Al Kuwait Case’); Department of Local Government and Regional Development v Emanuel Exports Pty Ltd (Unreported, Supreme Court of Western Australia, 19 June 2007); Department of Local Government and Regional Development v Emanuel Exports Pty Ltd (Unreported, Supreme Court of Western Australia, 20 November 2007)\textsuperscript{129} \textsuperscript{130} \textsuperscript{131} \textsuperscript{132} \textsuperscript{133} \textsuperscript{134} \textsuperscript{135}
The *Al Kuwait Case*\(^{138}\) concerned the export of sheep from Fremantle to Kuwait. The events occurred in November 2003. The prosecution was commenced by the Department of Local Government and Regional Development (WA), subsequent to an investigation undertaken by Animals Australia and Compassion in World Farming into the welfare of sheep during a voyage of the *Al Kuwait*.\(^{139}\) After making a complaint to the Western Australian police and the RSPCA, Animals Australia took a complaint to the Director General of the Department of Regional Government and Local Department (WA).\(^{140}\) In November 2007 proceedings were commenced against the exporter, Emanuel Exports, and two company directors. Three charges of cruelty were laid under the *Animal Welfare Act 2002* (WA).\(^{141}\) The charge was that a sub-population of the sheep on board, A-class wethers and Muscat wethers numbering around 13 000, was transported during a time of the year in which there was an increased risk of harm in the form of inanition (starvation) and salmonellosis.\(^{142}\) Hence, the sheep were transported in a way that was likely to cause unnecessary harm according to the wording of section 19(3) of the *Animal Welfare Act 2002* (WA). As such, the prosecution was not required to

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\(^{136}\) This citation is from a case note in Cao, above n 21, 203.

\(^{137}\) This citation is from a case note included in Cao, above n 21, 196.

\(^{138}\) (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008).

\(^{139}\) Caulfield, above n 1, 201.

\(^{140}\) Ibid 202.

\(^{141}\) Sections 19(1) and 19(3).

\(^{142}\) *Al Kuwait Case* (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008) [50].
prove that harm occurred; only that it was 'likely'.

Through the stockman for the journey, Emanuel was a ‘person in charge’ of the sheep. Emanuel contracted to transport the sheep in November, despite the likelihood of higher mortality rates to the identified category of sheep. Based on research submitted, Magistrate Crawford found that the sheep were more likely to suffer harm. Her Honour applied the necessity test to the facts stating that ‘in the context of the case’ the commercial gain had ‘to be balanced against the likelihood of pain, injury or death to relevant sheep shipped in the second half of the year’. Her Honour concluded ‘that any harm suffered to fat adult sheep was unnecessary’. This conclusion notwithstanding, the defendants were acquitted, as Magistrate Crawford found an operational inconsistency between the Animal Welfare Act 2002 (WA) (AWA (WA)) and the Australian Meat and Livestock Industry Act 1997 (Cth). Section 109 of the Australian Constitution provides that ‘when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’. Whereas the AWA (WA) prohibited the transport of sheep in November due to ‘the likelihood of unnecessary harm’, the

143 Ibid [76] (Magistrate Crawford); Her Honour cited Waugh v Kippen (1986) 160 CLR 156, 166-7 (Gibbs, CJ) stating that ‘likely’ meant ‘something less than probability but more than a remote possibility; a real or not remote chance or possibility regardless of whether it is less or more than 50 per cent’.

144 Animal Welfare Act 2002 (WA) s 5; Al Kuwait Case (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008) [38].


146 Ibid [80].

147 Ibid [99].

148 Ibid [194].

149 Ibid.

150 Ibid [198], [195], [201]; Victoria v The Commonwealth (1937) 58 CLR 618, 630 (Dixon J); Telstra Corporation Limited v Worthing [1999] 197 CLR 161, 76 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); Ex parte McLean (1930) 43 CLR, 472, 483 (Dixon J); Blackley v Devondale Cream (Vic) Pty Ltd (1968) 117 CLR, 253, 258-9 (Bachssel CJ).

151 Al Kuwait Case (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008) [195].
Commonwealth regime ‘permitted export of fat sheep by sea, in November’.  

After the *Al Kuwait* decision was handed down, the WA State Solicitor provided advice to the Department of Local Government and Regional Development that Magistrate Crawford had erred in her verdict and that the defendants ‘should not have been acquitted’. According to Animals Australia, the Director General of the Department of Local Government ‘instructed the State Solicitor to lodge an appeal in the WA Supreme Court’. However, the appeal was withdrawn subsequent to instructions from Ljiljanna Ravlich, the then WA Minister for Local Government and Regional Development. This executive interference in judicial proceedings was a clear breach of the separation of powers.

9  Cruelty in the Context of Intensive Farming

*RSPCA v Ludvigsen* (unreported, Magistrates Court of South Australia, Magistrate Fahey M, 7 September 2007); *Department of Police and Emergency Management v Glen Peter Balke* (unreported, Hobart Magistrates Court, Magistrate Hill, (29 May 2009)

The judgments in this category were not available online. Therefore, the following summary of *Ludvigsen* relies on lawyer Malcolm Caulfield’s commentary and Mark Parnell’s speech to the South Australian Legislative Council, made in March

152 Ibid [194].
153 Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008).
155 Ibid.
156 Ibid.
157 *RSPCA v Ludvigsen* (unreported, Magistrates Court of South Australia, Magistrate Fahey, 7 September 2007).
2007. Ludvigsen will be the subject of a case study in Chapter Seven. The case concerned employees making complaints to the management of the Ludvigsen piggery about the state of various pigs and complaints to the RSPCA (SA) regarding alleged animal cruelty. In the first instance, the RSPCA (SA) assessed the initial employee complaint as ‘vague’, assumed it was being made by a disgruntled employee, and chose not to act. The RSPCA (SA) contacted Ludvigsen’s director regarding the situation. The whistleblower employee was dismissed shortly thereafter.

At a later date, with the permission of an employee, Animal Liberation attended the piggery, obtained video footage and lodged a complaint with the RSPCA (SA). The RSPCA (SA) responded immediately and subsequently initiated proceedings against Greg Ludvigsen, the piggery’s director, on three cruelty charges relating to three pigs, including a failure to take reasonable steps to alleviate pain. Magistrate Fahey found that the pigs had been in significant distress and that ‘although the acts were not deliberate, they were cruel’ and ‘something to be deplored’. Ludvigsen pleaded guilty. He was fined $1500 and was ordered to pay the RSPCA’s costs of $1300.

10  Exhibition Animals


159 South Australia, Parliamentary Debates, Legislative Council, 14 March 2007, 1628 (Mark Parnell)

160 RSPCA v Ludvigsen (unreported, Magistrates Court of South Australia, Magistrate Fahey, 7 September 2007)

161 Caulfield above n 1, 225.

162 Ibid.

163 The defendant was charged under the Prevention of Cruelty to Animals Act 1985 (SA) s 13(1).

164 Cao, above n 21, 199.

165 Caulfield, above n 1, 228, citing ‘personal communication from Animal Liberation (SA)’, 7 September 2007.
Pearson\textsuperscript{166} was an appeal from a Magistrate’s decision. The magistrate had dismissed an action claiming that Janlin Circuses had authorised a cruelty offence under the \textit{Prevention of Cruelty to Animals Act 1979} (NSW).\textsuperscript{167} ‘Arna’ was an Asiatic elephant who had been kept by Janlin Circuses for a number of years without any contact with other elephants.\textsuperscript{168} In December 2000 Janlin Circuses ‘authorised three elephants to be kept in close proximity to Arna’.\textsuperscript{169} After a few hours the three elephants were then taken away.\textsuperscript{170} It was alleged that as result of this act, Arna was unreasonably, unnecessarily or unjustifiably abused, tormented, infuriated or inflicted with pain.

The Magistrate considered that the evidence could establish that Arna had become distressed and therefore ‘was inflicted with pain within the terms of the Act’.\textsuperscript{171} However, the Magistrate concluded that the offence was one which required \textit{mens rea} to be proved.\textsuperscript{172} On appeal, Justice Windeyer referred to Dowd J in \textit{Bell v Gunter}\textsuperscript{173} finding that the offence of cruelty was one of strict liability and that the magistrate had erred. The proceeding was remitted to be reheard.\textsuperscript{174}

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\textit{Matters Involving Animal Protection Organisations or Individual Animal Protection Activists (Entities Without Prosecuting Powers Under State and Territory Anti-cruelty Legislation)}

\textit{Australian Wool Innovation v Newkirk} [2005] FCA 290 (22 March 2005); \textit{Animal Liberation v Dept of Environment and Conservation} [2007] NSWSC 221 (8 March

\textsuperscript{166} [2002] NSWSC 1118 (25 November 2002).
\hfill

\textsuperscript{167} Section 5(2).
\hfill

\textsuperscript{168} Pearson v Janlin Circuses Pty Ltd [2002] NSWSC 1118 [1](Windeyer J).
\hfill

\textsuperscript{169} Ibid.
\hfill

\textsuperscript{170} Ibid.
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\textsuperscript{171} Ibid [5].
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\textsuperscript{172} Ibid [6].
\hfill

\textsuperscript{173} (Unreported, Supreme Court of New South Wales, Dowd J, 24 October 1997). Justice Windeyer noted that \textit{Bell v Gunter} was approved by the Court of Appeal in \textit{Fleet v District Court of NSW} [1999] NSWCA 363. \textit{Pearson v Janlin Circuses Pty Ltd} [2002] NSWSC 1118 [7]-[8] (Windeyer J).
\hfill

Animal Liberation v Dept of Environment and Conservation\textsuperscript{175} involved an application for an interlocutory injunction to restrain a proposed operation to aerially shoot goats and pigs in the Nattai Reserve and Wollondilly River Nature Reserve. The application was based on the argument that the proposed cull was likely to involve acts of cruelty under the Prevention of Cruelty to Animals Act 1979 (NSW), section 5.\textsuperscript{176} These acts of cruelty were likely to occur because, if the shooting was done from the air, there was a risk that animals would be wounded and thus experience a drawn-out and unnecessarily painful death.\textsuperscript{177} Animal Liberation relied on evidence of what had occurred during a previous aerial shooting operation.\textsuperscript{178}

Justice Hamilton held that Animal Liberation did not have standing as the association did not have a special interest in shooting.\textsuperscript{179} In Australia, the general common law standing test is that the applicant has either a private right, or is able to establish a ‘special interest in the subject matter’.\textsuperscript{180} In Australian Conservation Foundation v Commonwealth\textsuperscript{181} Gibbs J stated that a ‘special interest’ did ‘not mean a mere intellectual or emotional concern. A ‘person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a; wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law

\textsuperscript{175} [2007] NSWSC 221.
\textsuperscript{177} Ibid.
\textsuperscript{178} Ibid [2].
\textsuperscript{180} Australian Conservation Foundation v Commonwealth (1980) 146 CLR 493.
\textsuperscript{181} (1980) 146 CLR 493.
generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor * locus standi*.

In distinguishing the case from a previous decision in which Judge Hamilton had ordered an injunction, His Honour referred to the uncertainty in the evidence led and the fact in the previous decision the respondent had not objected to the standing of the plaintiff to seek an injunction. Animal Liberation was ordered to pay the defendant’s costs.

**Part V DISCUSSION**

This chapter considered the orthodox concept of violence against animals, defined as ‘animal cruelty’, to determine how animal cruelty has been interpreted by the courts and what this indicates about Australia’s animal protection regime. This research task aimed to develop an understanding of the meaning of ‘animal cruelty’ according to case law.

*A Was the Sample Representative of Activity Within the Field?*

Whether ‘animal cruelty’ has been a useful analytical concept within the confines of the research task discussed in this chapter depends, to a significant extent, on whether it is possible to come to some general conclusions about the findings of the case law review. If so, it will also be possible to assess the contribution the concept of animal cruelty makes to understanding Australia’s animal protection regime. Most animal cruelty prosecutions are finalised by way of guilty plea, with appeals often made on issues of fact rather than questions of law. Most first instance judgments cannot be retrieved from Australian legal research databases.

Although it may not be possible to establish with certainty that the group of judgments presented above is representative of the general population of animal

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182 Ibid 530 (Gibbs J).
183 Ibid [3].
185 Markham, ‘Animal Cruelty Sentencing’, above n 1, 212.
186 Caulfield, above n 1, 20.
cruelty cases, they do reflect current trends regarding the types of acts and
omissions, perpetrated by whom and in what setting, that are evident in the VACA,
relevant RSPCA data, and previous research in this area.\footnote{187}

Based on RSPCA statistics there would have been a total of approximately 2500-
3000 prosecutions commenced during the 2002-11 case law review search period.
Therefore, with a total of 42 judgments and six case notes, the sample size is small
(approximately 1.5%). It was in anticipation of a small sample size that the
decision was made to triangulate the judgments with media alerts. The source of
the media alerts was important in terms of the potential to develop valid
conclusions.

The judgments located were not the statistically rare or unrepresentative
appellant court decisions associated with traditional legal scholarship.\footnote{188} Some of
the judgments located via the various search strategies were first instance
decisions from Magistrates’ courts and therefore sat within, rather than above, the
broader population of cases. Most of the judgments on appeal were decisions made
by a single judge.

Overall, the judgments and the VACA reflect broad trends regarding the types of
acts and omissions, perpetrated by whom, and in what setting, that are prosecuted
under state and territory anti-cruelty legislation. The findings were consistent with
Malcolm Caulfield’s observation as to the paucity of reported animal-cruelty case
law in Australia\footnote{189} and previous research demonstrating that the majority of
animal cruelty prosecutions concern companion animals.\footnote{190} The lack of cases
regarding cruelty committed in intensive animal use industries also reflects
current prosecutorial activity in this setting.\footnote{191}

\footnote{187} See for example, Caulfield, above n 1; Siobhan O’Sullivan, Animals, Equality and Democracy
(Palgrave MacMillan, 2011).

\footnote{188} Brown et al., above n 2, 143.

\footnote{189} Caulfield, above n 1, 2.

\footnote{190} O’Sullivan, above n 187.

\footnote{191} Cao, above n 21, 174.
B  What Does the Concept of Violence Against Animals, Defined as ‘Animal Cruelty’, Contribute to Our Understanding of Australia’s Animal Protection Regime?

With regard to the meaning of animal cruelty these judgments indicate that, in general, ‘animal cruelty’ can be taken to refer to circumstances in which an individual human intentionally causes harm or injury to an individual animal, or neglects a dog/s in a domestic setting. Even in the cases involving dog breeding or hoarding, the aim was to supply dogs as companion animals. The meaning of ‘animal cruelty’ also extended to neglect of horses, and occasionally to livestock. The cases concerning livestock neglect (7 cases) are probably best understood against the backdrop of Australia’s ‘Millennium Drought’. The period 2001-09 was ‘the longest uninterrupted series of years with below median rainfall in southeast Australia since at least 1900’.\(^{192}\) Overall, the sample reflects a variation of McBarnet’s typology in that we see is the law’s treatment of companion animals displaying the ‘ideology of justice’ for ‘public consumption’,\(^ {193}\) thereby enabling and stabilising the continuance of a compliance model for larger industries.

The VACA reflected this narrow meaning of animal cruelty. It can be noted that 34 of the 103 alerts related to intentional acts of harm perpetrated by an individual in a domestic setting, and 27 of the 103 alerts related to the neglect of dogs as companion animals. To speculate, even if all Magistrates’ registers had been combed to locate every animal cruelty decision on file, it is highly likely that the trends identified would be similar to those evident in this sample.

In light of the above, animal cruelty has proven a useful concept to adopt when conducting research relating to primary legal materials: case law, legislation and related materials. It has been shown to be an important concept to apply as a first line investigative tool. However, using the concept is unlikely to facilitate a critical analysis of animal protection law and policy that goes beyond companion animals, or notions of blameworthiness and criminal responsibility as residing within the

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\(^{193}\) McBarnet, above n 4, 138.
individual.

C Does the Concept of Violence Against Animals, Defined as ‘Animal Cruelty’ Offer a Useful Framework for the Study of Animal Protection Law and Policy?

On the basis of the research presented above, it can be concluded that the concept of animal cruelty fails to capture many areas of human perpetrated harm to animals that are in need of inquiry and law reform. Its apparent inability to effectively reach beyond the domestic realm indicates that it is unsatisfactory as the foundation for a framework for the study of animal protection law and policy. To develop a critical perspective, the requisite conceptual framework must reach beyond the orthodox and legal definition of violence against animal that is currently conceptualised as animal cruelty.

The narrow meaning of animal cruelty was reflected in the fact that, although the case law review search period spanned a decade, there were no judgments identified relating to intensive farm settings (there were two case notes). In addition, there was a paucity of matters relating to cruelty in the racing industry. This is remarkable given recent revelations of animal cruelty in the greyhound racing industry.194 This result could be due to a lack of enforcement.195 In the case of the greyhound racing industry, it is likely that this absence reflects the weakness of the self-regulation model provided for under state and territory Racing Acts.196

Each judgment located within the case law review represents the end point of a pathway of decisions made by law enforcement agencies, and within the broader criminal justice system. This raises the question as to the structures, systems and decisions that keep matters outside the courts, and practices that maintain the

194 See for example, Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report (New South Wales Parliament, March 2014).


196 Racing Act 1999 (ACT); Greyhound Racing Act 2009 (NSW); Racing and Betting Act 2011 (NT) Racing Act 2002 (Qld) Racing Regulation Act 2004 (Tas); Western Australian Greyhound Racing Association Act 1981 (WA); Racing Act 1958 (Vic).
status quo. It also raises the question as to the role participants play within this field in reproducing extant power relations.

Part VI    CONCLUSION

This chapter provided a response to the question: What can the concept of violence against animals, defined as ‘animal cruelty’, contribute to our understanding of Australia’s animal protection regime? It developed an answer to this question by conducting a review of animal cruelty judgments for the period 2002-11 inclusive, supplemented by a sample of relevant media alerts. This material was analysed to consider what ‘animal cruelty’ indicated about Australia’s animal protection regime. The process formed the basis for the conclusion that animal cruelty was a useful tool for research relating to primary legal materials, but has a very narrow meaning.

Based on the material analysed in this chapter, animal cruelty refers to intentional harm or injury to domestic animals in the domestic setting, with a focus on dogs in domestic settings. The majority of prosecutions concerned individual defendants. Essentially, it is the narrowness of the concept of animal cruelty that renders it unsatisfactory as the basis for the development of a critical perspective on animal protection law and policy.

Despite the significant methodological limitations, the case law review was an important first step in responding to the thesis question. It was a prerequisite for the work of theorising the concept of violence to be undertaken in Chapter Five.
CHAPTER 5  THE CONCEPT OF VIOLENCE: A PROPOSED FRAMEWORK FOR THE STUDY OF
ANIMAL PROTECTION LAW AND POLICY

Plate 5-1 Francis Bacon: Three Studies for Figures at the Base of a Crucifixion 1944, Tate, London
Part I INTRODUCTION

Bourdieu notes that ‘[e]ven the simplest linguistic exchange’ enlivens a ‘web of historical power relations between the speaker ... audience ... and the groups to which they respectively belong’. Hence, although ‘animal cruelty’ and ‘animal welfare’ may be important and useful concepts in and of themselves, they are embedded in a ‘web of historical relations’ that constitute animal protection as a field of criminal law. Therefore, to adopt the term ‘animal cruelty’ as the basis of an analytical framework would be to accept the power relations that are implicit in its definition. Overall, the problems associated with continued reliance on these concepts, as explicated in previous chapters, including the manner in which these concepts constrain the animal protection debate, suggest a new analytical pathway is needed. It is against this background that his chapter develops the argument that violence offers a feasible alternative frame for the study of animal protection law and policy.

Part II outlines the rationale for adopting the concept of violence and sets forth an account of violence to be adopted as a method. This account of violence will be used, in Chapter Six, to reconfigure animal protection as a Bourdieusian field. It will also provide the logic for the three case studies that comprise Chapters Seven, Eight, and Nine.

In establishing a frame and method based on the notion of violence, it is important to note that the intention is not to replace the term ‘animal cruelty’ with ‘violence’; the mere replacement of one term with another would achieve nothing. Instead, the aim is to facilitate the development of law reform strategies that avoid replicating the power relations that define the field of animal protection law, and to locate points in the field that have the potential to break these relational pathways. It is within this broader socio-political context that the concept of violence is offered as a frame and method.

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Part III describes the concept of violence to be adopted, based on Bourdieu’s notion of symbolic violence. It then briefly pre-empts the analysis that will be undertaken in Chapter Six, and the three case studies, to make links between Bourdieu’s work and the painter Francis Bacon's triptych, *Three Studies for Figures at the Base of a Crucifixion*. The figures of this work evoke the indeterminacy of the human-animal boundary and share compositional aspects with Bourdieu’s notion of field. The triptych form conveys the scale of analysis adopted for each case study, a point which will be expanded upon in Chapter Six.

Part IV focuses on Giorgio Agamben’s notion of the ‘anthropological machine’ and the human-animal boundary. The anthropological machine is used to reconfigure the classificatory dynamics that take place at the human-animal boundary within animal protection as an area of criminal law and to identify the status of animal cruelty defendants within these dynamics. It is in this vein that, in its deployment of the concept of violence, the thesis situates the interests of animals and humans within the animal protection field as interdependent, rather than parallel, realms of inquiry. The anthropological machine will be utilised as a device to articulate this interdependence as it operates within animal protection law. Construing Agamben in this way facilitates the extension of Bourdieu’s concept of field to the circumstances of animal use in the 21st century. It is in this context that we can see Bacon’s triptych as mirroring the approach taken here, and his figures representing the indeterminacy that characterises the human-animal boundary.

The final section of Part IV examines animal protection laws under Germany’s third Reich as a relevant case example of the negotiation of the human-animal boundary within a criminal law framework. It does so for two reasons: firstly, to demonstrate how the criminal law was manipulated to achieve nationalist objectives, and secondly, and more specifically, the story suggests the ways that the nexus between capitalism and criminal law goes beyond the protection of private property, to the manipulation of moral virtues and sentiments in the service of larger ideological goals.

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Part II    BACKGROUND

A   Violence and the Work of Words

Words in papers, words in books
Words on TV, words for crooks
Words of comfort, words of peace
Words to make the fighting cease
Words to tell you what to do
Words are working hard for you

Tom Tom Club, 1981

The proposal to adopt the concept of violence as a catalyst for an examination of Australia's animal protection regime arose from the author's reflections following the completion of a critique of Martha Nussbaum's 'capabilities approach for non-human species'. The capabilities approach for non-human species offers a set of political principles which are expressed as ten core entitlements. Nussbaum, a philosopher and ethicist, argued that her approach deems non-human species primary subjects of justice, and thereby goes beyond the limitations of utilitarianism and rights theory and their political shortcomings. Her approach has attracted a great deal of commentary. In the author's analysis, the capabilities

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approach for non-human species is a type of preference utilitarianism.  

This conclusion notwithstanding, a consideration of Nussbaum’s work raised the question as to whether there was a concept that could effectively cut across the utilitarian-rights theory divide. Violence seemed to have potential. Its key strength is that, unlike animal welfare, animal rights, or animal cruelty, it is not a speciesist concept. Violence does not, by definition, assume a separation between humans and other animals.

In identifying violence as a non-speciesist concept, the perspective developed here does not assume that animals perpetrate violence. Although an animal might dominate, maim or kill members of its own or other species, it seems highly speculative to assert that animals participate in violence as it is conceptualised within human society, or to argue that other animals share the layers of meaning that violence conveys between humans. It might be helpful (though admittedly anthropomorphic) to think of this as a form of cultural relativism. Complex animal societies do exist, but we cannot extrapolate from this that the law that prevails in ‘so-called animal societies’ is the same as that which humans understand as law.  

Lastly, when it comes to the capacity to inflict pain and suffering on animals, in the modern world humans are virtually always more powerful than other animals. Contemporary animal protection theorists have put forward the abolition of slavery, the attainment of women’s rights, and citizenship as exemplars for thinking through the case for animal rights or interests. It is easy to agree with the spirit of these arguments and to support their intent. However, it is unclear as to whether such a reliance on what appear to be obvious analogies entails the risk that the resulting arguments will carry with them certain assumptions that

6 McEwan, above n 4, 89; Singer, Reply to Martha Nussbaum, above n 4.


8 See for example, Steven M Wise, Rattling the Cage: Towards Legal Rights for Animals (Perseus Books, 2000).

9 See for example, Peter Singer, Animal Liberation (Pimlico, 2nd ed, 1995 [first published 1975]) 1-6.

undermine their explanatory force.\textsuperscript{11} For example, although in the past women and slaves had the status of property, our society has never made a \textit{habit} of eating them! Perhaps the exception to this taboo was at sea, where for many centuries, in dire circumstances, cannibalism was a customary practice.\textsuperscript{12} In the common law world the illegality of cannibalism was confirmed in \textit{R v Dudley and Stephens}.\textsuperscript{13}

Overall, the stark difference in cultural practice and belief regarding the consumability of animals and the taboo against humans eating other humans suggests that, in some ways, the analogies mentioned above may be ‘beside the point’.\textsuperscript{14} In addition, these arguments tend to focus on how animals are similar to humans, rather than what humans do and their responsibilities towards other sentient beings. Adopting the concept of violence to understand the pain and suffering inflicted on animals by humans is an attempt to place the onus on the perpetrators to take responsibility.\textsuperscript{15} The issue then becomes focused on what humans do rather than what animals are. Beyond accepting sentience as the threshold, this avoids the need to develop similarity arguments to support law reform.

\begin{itemize}
  \item \textsuperscript{12} A W Brian Simpson, \textit{Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which it Gave Rise} (University of Chicago Press, 1984) 121. Simpson states that ‘[s]o normal was cannibalism that on some occasions survivors found it appropriate to take pains to volunteer denial that cannibalism had occurred; suspicion of this practice among starving castaways was a routine reaction’ (emphasis in original).
  \item \textsuperscript{13} (1884) 14 QBD 273. See Simon Bronitt and Bernadette McSherry, \textit{Principles of Criminal Law} (Thomson Reuters, 3rd ed, 2010) 367. In that case two defendants were charged with murder for killing and eating a young man with whom they were lost at sea. They were starving at the time and pleaded that the act was done out of necessity. They were initially sentenced to death, however, the sentence was commuted to six months’ imprisonment. See also Alan Norrie, \textit{Crime, Reason and History: A Critical Introduction to Criminal Law} (Cambridge University Press, 3rd ed, 2014) 203-5.
  \item \textsuperscript{14} Cora Diamond, ‘Eating Meat and Eating People’ in Cass R Sunstein and Martha C Nussbaum (eds), \textit{Animal Rights: Current Debates and Future Directions} (Oxford University Press, 2004) 93, 95.
\end{itemize}
This thesis employs the reflections noted above, regarding the welfare-rights divide, to critically explore the cruelty-welfare opposition that sits at the centre of animal protection as a field of criminal law. To avoid replicating the cruelty-welfare divide, the analytical concept applied must have the capacity to encompass both animal cruelty and animal welfare, and to engage with them from an oblique position. In this sense, violence is applied as a destabilising element. To merely replace the term animal cruelty with ‘violence’ would achieve nothing.

Before setting out the frame and method that informs the remainder of the thesis, it is useful to reflect on perhaps the most common and narrow conceptualisation of violence: ‘interpersonal violence’. The following section considers some of the complexities relating to the development of interpersonal violence as a legal category. Some relevant developments related to the meaning of family violence are also considered.

B The Narrow View of Violence

The word ‘violence’ is derived from the Latin violentia, meaning vehemence, or a passionate and uncontrolled force. Violence is commonly defined as ‘the use of force that has been prohibited by law’. As legal geographer, Nicholas Blomley, notes, ‘[l]iberalism tends to locate violence outside law, positing state regulation as that which contains and prevents an anomic anarchy’. In addition to the idea of violence constructed as a phenomenon existing outside the law, ‘bodily harm by physical use of force’ is generally regarded as ‘the indispensable point of reference for all analysis of violence’.


The ‘minimalist conception’ referred to above overlooks numerous other important dimensions of injury or harm.\textsuperscript{20} The range of harms or injury sustained by a victim, or the types of conduct on the part of a perpetrator which may amount to ‘interpersonal violence’, are topics of ongoing debate and periodic revision.\textsuperscript{21} Within Australian criminal law, violence between humans is encapsulated within a series of offences against the person. At common law, assault is defined as an ‘act which … cause[s] a person to apprehend immediate and unlawful personal violence … and the actual intended use of unlawful force to another person without his [or her] consent’.\textsuperscript{22}

Individual bodily harm is an important aspect of violence between humans and towards animals. However, the idea that violence can be confined to ‘bodily’ harm in its literal sense no longer reflects the state of the criminal law, which now recognises certain mental harms that may be sustained as a result of assault.\textsuperscript{23} Mental harm alone may also amount to cruelty to an animal.\textsuperscript{24} In addition to an expansion in the recognition of mental harms, the extent of physical injury to which an adult human may consent is a key issue driving the development of the common law in relation to many non-fatal offences against the person.\textsuperscript{25}

In addition to violence as it is conceived within offences against the person, in Australia, recent amendments to the \textit{Family Law Act 1975} (Cth) extended the...
meaning of ‘family violence’ to include several non-physical forms: emotional and economic abuse and any ‘other behaviour’ on the part of a person which ‘coerces or controls a member of the person’s family’. It is possible that some forms of violence may not be recognised as such by the victim or perpetrator. For example, within the context of the family, certain forms of discipline may have been passed down from forbears and appear ‘normal’, ‘natural’ or ‘necessary’ to members of the family. Other complexities involved in defining violence include the question of whether force is an essential element of violence, and the role of intention in crimes of violence.

While the meaning of ‘interpersonal violence’ shifts over time, there is the danger that an overly-inclusive concept of violence will render the term meaningless. For example, one problem associated with defining violence in terms of violation of ‘rights’ is that as the concept of rights expands, the concept of violence becomes increasingly nebulous. In this sense, it may be more useful to think of violence according to a continuum, ‘from direct physical assault to symbolic violence and routine everyday violence, including chronic, historically-embedded structural violence’.

### C Developing a Broader Perspective on Violence

Generally, academic debates about the meaning of violence revolve around its utility as an analytical concept: too broad a conceptualisation for a particular field

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26 Sections 4AB(1), 4AB(2)(g)(i). See the Australian Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114, 1 November 2010) [5.166] for the background to these amendments.

27 *Family Law Act 1975* (Cth) s 4AB(1).

28 The common law allows parents to use ‘reasonable and moderate force to chastise their children’; *R v Terry* [1955] VLR 114. Bronitt and McSherry, above n 13, 588.

29 Bufacchi, above n 16.

30 de Haan, above n 19; Bufacchi, above n 16.


of inquiry or research question undermines explanatory power.\textsuperscript{33} It is probable that it is this methodological concern that has led to the development of an array of conceptualisations that emphasise different forms of violence: youth violence, sports violence,\textsuperscript{34} workplace violence, domestic violence, gang violence, structural violence and symbolic violence, to name but a few.\textsuperscript{35} It seems virtually impossible to capture or examine violence in its myriad contexts according to a single generic concept. These alternative conceptualisations contest the narrow and orthodox meaning of violence as unlawful physical force.

Despite the diversity of conceptualisations of violence, it is possible to settle on the idea that each, in some way or another, seeks to identify harms that arise from abuses of power, whether that abuse is physical, psychological, institutional, or hidden within the ‘natural’ order of social life. The breadth of contexts in which the concept might be put to work is reflected in philosopher Newton Garver’s proposal that ‘a successful account of violence’ must clarify that violence:

1. ‘Is a matter of degree;
2. Can be social or institutional as well as personal;
3. Can be psychological as well as physical;
4. Has moral implications when it is social that are radically different from those that it has when it is personal;
5. Can be legal as well as illegal;
6. Needs, when it is social, to be discussed in conjunction with law and justice; and
7. Can in principle be excused, however personally abhorrent one may find it’.\textsuperscript{36}

It is in the context of this proposal that Garver argues that ‘a lie is a real violation ... like any manipulative behaviour, it is an attempt to exclude me from participating...

\textsuperscript{33}Walter Bryce Gallie, ‘Essentially Contested Concepts’ (1956) 56 Proceedings of the Aristotelian Society 167, 220; See also de Haan, above n 19, 35.

\textsuperscript{34}See for example, Kevin Young, Sport, Violence and Society (Routledge, 2012).

\textsuperscript{35}de Haan notes many forms including youth violence, workplace violence, domestic violence, gang violence, structural violence and symbolic violence. de Haan, above n 19, 28.

\textsuperscript{36}Newton Garver, ‘How to Think about Violence’ (Book Review) (January/February, 1972) The Humanist, 32, 39; See also de Haan, above n 19, 34; Blomley, above n 36, 121.
in some matter in which I have an interest; that is, it denies me standing as a person'.

Garver's observation raises the question of the connection between dishonesty and violence against animals, demonstrating these violations as not only injuring animals, but going to the core of democratic values and the constitutional order.

In order to test the central hypothesis, it is necessary to establish a framework that takes Garver's observations into account. What is required is a conceptualisation of violence in a socio-political context, that can equally support and facilitate the development of law reform strategies based on recognised legal principle. As such, animal protection law must be open to interpretation as a semi-autonomous field, and some practical analytical tools are required.

The remainder of this chapter is dedicated to developing those tools. Part III establishes an analytical frame based on Bourdieu's notions of symbolic violence and field. Part IV draws on Giorgio Agamben's notion of the anthropological machine to extend Bourdieu's tools for the analysis of a field.

Bringing Bourdieu and Agamben together means that there are two levels of methodology. Firstly, there is the broader frame, defined by Bourdieu's notion of symbolic violence. This broad frame is discussed in this chapter and will be applied in Chapter Six, in which Australia's animal protection law is configured as a Bourdieusian field. Chapter Six is followed by three case studies. Each case study focuses on a separate point of articulation and scale, with each linked to the larger

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38 Bourdieu theorises the law as a 'juridical field'. An instrumentalist view of the law and jurisprudence poses the law as merely as an instrument of dominant interests, as 'direct reflections of existing social power relations'. The formalist view assumes the law and the legal profession as autonomous. Bourdieu acknowledges the law as an 'autonomous ... social universe' though seeks to integrate an understanding of the social basis for that autonomy. Pierre Bourdieu, 'The Force of Law: Towards a Sociology of the Juridical Field' (1987) 38 The Hastings Law Journal 805, 814-5 (emphasis added).


41 Aganben, above n 2.
frame. These points of articulation are identified by reference to the agents that appeared in the animal cruelty case law review that was the subject of Chapter Four. The three case studies in Chapters Seven, Eight and Nine are united by their links to the larger frame, as it is the notions of symbolic violence and field that provide their underlying logic. The idea of three separate frames united by a larger frame, and the centrality of the human-animal boundary to the analysis, inspired the adoption of Francis Bacon’s *Three Figures* triptych to visually represent the approach developed within this thesis.

**Part III  Symbolic Violence as a Frame for the Study of Animal Protection Law and Policy**

**A  Symbolic Violence**

In a basic sense, symbolic violence can be defined as ‘[t]he violence which is exercised upon individuals in a symbolic, rather than a physical way’. 42 Although Bourdieu initially developed the idea of symbolic violence in the early 1970s, within the context of a small-scale society, 43 the concept became a central feature of his theory as it evolved over the next quarter of a century. 44 In its application to the state, Bourdieu elaborated on Max Weber’s *locus classicus*: a state constitutes a human community that successfully claims ‘the monopoly of the legitimate use of physical force within a given territory ... [with] [t]he state as ‘the sole source of the ‘right’ to use violence’. 45 Bourdieu extended Weber’s definition to include not only...

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physical violence, but legitimate symbolic violence as well.\textsuperscript{46}

Symbolic violence refers to the circumstances of domination in which relations of power are reproduced via symbolic means. In essence, this involves the process by which the world and all the things in it are evaluated according to the worldview and interests of the dominant group. Symbolic dimensions of the reproduction of power relations not only obfuscate these relations of power, they allow those relations to be misrecognised as legitimate, what comes to be experienced as self-evident.

For Bourdieu, acts of domination, even those based on naked force, always have a symbolic dimension.\textsuperscript{47} Following this, acts of submission are acts of knowledge or recognition.\textsuperscript{48} In Bourdieu’s view the dynamic of domination noted above generated cognitive ‘structures’ that ‘can be applied to all things of the world, and in particular to social structures’.\textsuperscript{49} Nonetheless, these ‘structuring structures’ are historically constituted and can be traced to their social genesis.\textsuperscript{50}

Gender relations can be considered the paradigmatic instance of domination as symbolic violence,\textsuperscript{51} in which, Bourdieu asserts, the fundamental ‘structures of a male vision of the world become taken for granted’.\textsuperscript{52} According to Bourdieu, the case of gender domination shows that ‘symbolic violence accomplishes itself through


\textsuperscript{48} Ibid.

\textsuperscript{49} Ibid.

\textsuperscript{50} Ibid.


\textsuperscript{52} Bourdieu and Wacquant, ‘The Chicago Workshop’, above n 46, 171.
an act of cognition and of misrecognition that lies beyond–or beneath–the controls of consciousness and will’ (emphasis in original).\textsuperscript{53} It is on this basis that Bourdieu rejects rational actor theory,\textsuperscript{54} and the ‘scholastic opposition between coercion and consent’.\textsuperscript{55} While social agents may strategise, they do so within the limits of the structures of domination, which include the forms of symbolic power an agent has available to deploy in such strategies.\textsuperscript{56}

Bourdieu\textsuperscript{3}usian references to acts of ‘cognition’ and ‘consciousness’ suggest that \textit{habitus} ought to be confined in its use to the individual subject or to biological human beings. However, as Ringer notes, the notion of participant or agent within a field takes into account individuals or collectives.\textsuperscript{57} Hence, the concept of \textit{habitus} can be extended to consider the cognitive structures or will of artificial persons, such as corporations. This has implications for the arguments and the conclusions to follow, for example, in relation to notions of corporate culpability, criminality, and intention. The observations made above form the basis for Bourdieu’s concept of \textit{habitus} and inform its use in this work. \textit{Habitus} in the context of the animal protection field will be discussed in more detail in Chapter Six.

Symbolic violence imposes an ordering of the world involving systems of evaluation that work against certain groups and, by implication, favour others.\textsuperscript{58} However, these evaluations are misrecognised as natural, common sense, or a self-evident aspect of the social world.\textsuperscript{59} It is due to this state of misrecognition that individuals or groups that are negatively affected by these evaluations participate in and contribute to the reproduction of the relations of domination that maintain

\textsuperscript{53} Ibid 171-2.


\textsuperscript{55} Bourdieu and Wacquant, ‘The Chicago Workshop’, above n 46, 172.


\textsuperscript{57} Fritz Ringer, ‘The Intellectual Field, Intellectual History, and the Sociology of Knowledge’ (1990) 19(3) \textit{Theory and Society} 269, 270. See also Weininger, above n 46, 141.

\textsuperscript{58} Weininger, above n 46, 141.

\textsuperscript{59} See Bourdieu and Wacquant, ‘The Chicago Workshop’, above n 46, 194-5; Pierre Bourdieu, above n 438; Webb et al, above n 42, 24-6.
the structure of power within a given field. According to Bourdieu, misrecognition is achieved by structural means and, as is central to this thesis, dominant groups maintain their advantage not only as a result of their ‘capacity to control the actions of those they dominate but also by the language through which the subjected comprehend their domination’ (emphasis added). It is Bourdieu’s notion of field that provides a structuring methodological tool for investigating the nature and historical genesis of symbolic violence.

In the field of animal protection law, cruelty-welfare provides an example of a symbolic opposition. Animal cruelty involves a negative evaluation of acts or omissions that cause pain and suffering to animals. Others, who may perpetrate what is objectively the same harm, are evaluated as maintaining lawful standards of ‘animal welfare’, a favourable category. As was discussed in Chapter Three, the cruelty-welfare binary divides the regulatory world of animal protection into two distinct streams. The next section explains Bourdieu’s notion of field and how the cruelty-welfare binary structures the animal protection field.

### B Bourdieu’s Field

A Bourdieusian field is ‘an area of structured, socially patterned activity’ or ‘practice’ with its own logic and history. Animal protection law is proposed as a distinct field. The legislative regime discussed in Chapter Three forms the structure of the field. Agents participate in this field and are positioned in various relations to one another, according to the structure of the field.

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60 John B Thompson, ‘Editor’s Introduction’ in *Language and Symbolic Power* (Gino Raymond and Mathew Adamson trans, Polity Press, 1991) 22-3.


64 Bourdieu and Wacquant, ‘The Chicago Workshop’, above n 46.
Field, doxa, orthodoxy, and heterodoxy are the concepts Bourdieu employed to give insight into the dynamics by which symbolic violence is reproduced. As Bourdieu theorises it, a field is structured by an orthodoxy and a heterodoxy. Like Bacon’s human-animal figures in *Three Studies*, the orthodoxy and the heterodoxy take form against the ‘negative space’ of doxa. The doxic mode refers to circumstances in which ‘the world of tradition is experienced as the “natural world” and taken for granted’. Therefore, within the animal protection field, doxa inheres in humanity’s taken-for-granted use of animals.

Positions within a field tend to be defined in terms of one another; ‘established orthodoxies pre-structure the possibilities of heterodoxy, or at least conventional ones’. It is illuminating to consider the implications of this limitation for the welfare-rights and cruelty-welfare binaries alike.

For animal protection theory, structured by the welfare-rights binary, the animalistic aspects of Bacon’s figures signify the orthodoxy. The orthodoxy, animal welfare, is expressed in the principle that if we are to use animals, we must do so humanely. By contrast, ‘animal rights’ forms the pre-structured limit of conventional heterodoxy. Hence, the humanistic features of Bacon’s figures signify the heterodoxy; animals deserve to be conferred with legal personhood. Each panel in Bacon’s triptych therefore captures the dialectic or indeterminacy of human and animal, person and property (or thing), as legal categories.

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65 Bourdieu, *Outline of a Theory of Practice*, above n 40, 164-8; Ringer, above n 57, 270-1.
68 Ringer speaks of doxa as ‘preconscious’ and ‘implicit’. Ringer, above n 57, 274.
70 McCole, above n 69, 26 n 34; Ringer, above n 57, 270-2.
Within animal protection legal theory, it is possible that the welfare-rights binary limits the forms of discourse (or advocacy) available within the field, as it may impose ‘choices not always logically apparent to those who argue within its range’.\(^{71}\) The positions that structure the animal protection field, therefore, have implications for advocacy as it is currently conceived in terms of ‘welfare-rights’ and ‘cruelty-welfare’.\(^{72}\)

With regard to the cruelty-welfare opposition, again, doxa inheres in humanity's taken-for-granted use of animals. However, animal cruelty becomes heterodoxy, as it signifies the outer limits of what the law is willing to do to recognise an animal's interest in not being harmed by a human. This is consistent with the original constitution of the field, as 19\(^{th}\) century law reformers advocated for animals to be protected from ‘wanton cruelty’.\(^{73}\) Animal cruelty prevention was a position of dissent informed by class-relations, in terms of the forms of animal use that were targeted for reform.\(^{74}\)

Animal welfare appears to promise more than ‘animal cruelty’, in that it suggests positive obligations in the form of a duty of care. However, the codification of animal use industry animal welfare standards, and the emergence of animal welfare science, means that animal welfare becomes the orthodoxy. Indeed, in the circumstances of the 21\(^{st}\) century, it is arguable as to whether animal welfare and doxa are merging. This theme, and Bourdieu’s tools for the analysis of a field, will be discussed in more detail in Chapter Six. Having established the meaning of symbolic violence and field, Part IV explicates how this conceptualisation of violence will be combined with the notion of interdependence.

\(^{71}\) McCole, above n 69, 24-5.


Part IV  VIOLENCE AND INTERDEPENDENCE

A  Violence Against Animals: the Narrow View of Interdependence

Let us begin this Part by considering the facts surrounding the prosecution of a woman who killed her husband after years as a victim of domestic violence.\(^{75}\) In the reportage of this event it was noted that the husband had also been violent toward the family’s pets, having ‘beaten nine family dogs to death’.\(^{76}\) This tragic scenario resonates all too clearly with evidence of a positive correlation between violence perpetrated by humans against other animals and inter-human violence.\(^{77}\) Such correlations invoke the orthodox Christian position\(^ {78}\) and the Kantian view, that ‘[o]ur duties towards animals are merely indirect duties towards humanity’.\(^ {79}\) Kant saw animal nature as analogous to human nature. Thus, in his view, human violence against other animals could so harden ‘the hearts of men’ that they might

\(^{75}\) Tristan Swanwick, ‘Susan Falls Warned Her Husband Would Kill Her, Court Hea\r


\(^{78}\) St Thomas Aquinas proffered the view that humans held obligations to other animals to the extent that cruelty towards animals might lead one to behave with cruelty towards other human beings. David Bourke and Arthur Littledale (eds), Summa Theologiae (Blackfriars, 1969) Vol 29 1a2ae.102.6, 217. See also Richard Wade, ‘Animal Theology and Ethical Concerns’ (2004) 2 Australian Journal of Theology 1, 1.

\(^{79}\) Immanuel Kant, ‘Morality According to Prof. Kant: Mrongovius’s Second Set of Lecture Notes (Selections)’ in Paul Guyer and Allen W Wood (eds), Lectures on Ethics (Cambridge University Press, 1997) 212.; See also Tom Regan and Peter Singer (eds), Animal Rights and Human Obligations (Prentice Hall, 1976) 122-3. The assertion that the case referred to reflects the Kantian view is based on the definition of family violence in the Family Law Act 1975 (Cth) s 4AB(2)(f), which refers to harm to an animal as an example of a behaviour intended to cause a family member to experience fear.
become predisposed to treating fellow humans in a similar fashion. In contemporary criminological theory this view is reflected in ‘the progression thesis’, which proposes a causal connection between human violence towards animals perpetrated early in the life span and violence against human beings perpetrated in adulthood.

The notion that individuals who are violent towards animals are more likely to be violent towards other humans may contain an important insight relevant to this project. Yet, would animal protection law and policy be more effective if it moved towards a broader view of violence than one that focused on individual force and responsibility? Is it possible to move beyond the idea of interdependence that posits violence between humans and human violence against animals as something confined to the family home or the domestic sphere? To challenge these narrow ideas of responsibility and interdependence, it is necessary to critically examine how violence against domesticated animals is conceived in Australia’s criminal justice system, and the Nation’s broader animal welfare framework.

In the animal protection field, the interests of humans and those of animals are arbitrated within a single legal structure. In this respect, they are not separate or parallel realms of inquiry. It is for this reason that this thesis approaches the interests of animals and humans as interdependent. This may constitute a ‘similarity argument’ turned counter-clockwise. It aims to identify the pathways by which humans are de-humanised, and to locate points at which the interests of animals and those of humans come into closest proximity, based on their relative disempowerment within the field of power. As ‘violence’ is a non-speciesist term, it offers the opportunity to foreground the interests of humans and other animals as interdependent. The idea of bringing violence and the notion of interdependence

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80 Kant, Lectures on Ethics, above n 69, 212. Although such a connection may exist, the thesis lacks a strong evidence base. For a critique of the progression thesis and related studies see Beirne, Confronting Animal Abuse, above n 51, 165.

together was inspired by the Buddhist concept of *pratityasamutpada*. In *The Tibetan Book of Living and Dying*, Sogyal Rinpoche says:

> All things, when seen and understood in their true relation, are not independent but *interdependent* with all other things. The Buddha compared the universe to a vast net woven of a countless variety of brilliant jewels, each with a countless number of facets. Each jewel reflects in itself every other jewel in the net and is, in fact, one with every other jewel (emphasis added).

For the purposes of this thesis, the notion of the anthropological machine and the human-animal boundary provide the relevant point of interdependence. The anthropological machine is a metaphor for the processes by which humanity maintains the category of ‘the human’. The workings of this machine involve the ongoing negotiation of what it is to be human in opposition to the animal, based on a range of qualities and behaviours which are evaluated to properly dwell inside or beyond ‘the human’. Agamben sees philosophy and science as servants of the machine, in both its pre-modern and modern (post-Darwinian) form. In the earlier, or pre-modern version, the inside was ‘obtained by the inclusion of an outside’; the ‘non-man’ was ‘produced by the humanisation of the animal’. The modern version of the machine involves ‘an outside produced through the exclusion of an inside’: the inhuman is produced by animalising the human. Those who are biologically human are excluded from their humanness by an evaluation that identifies the animal inside them.

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82 In McEwan, above n 4, the author proposed an ethical framework for animal protection based on Buddhist ethics, inspired by Maria Vanden Eynde, ‘Reflection on Martha Nussbaum’s Work on Compassion from a Buddhist Perspective’ (2004) 11 *The Journal of Buddhist Ethics* 46.

83 Patrick Gaffney and Andrew Harvey (eds), *The Tibetan Book of Living and Dying* (Harper Collins, 1993) 37. See also, Maria Vanden Eynde, above n 95, 46.

84 Agamben, *The Open*, above n 2.

85 Ibid 36-7.

86 Kelly Oliver, ‘Stopping the Anthropological Machine’ (2007) (2) *PhaenEx* 2 1, 11.

87 Ibid.

88 Agamben, *The Open*, above n 2, 37.
Within animal protection as an area of criminal law, the arbitration of the interests of humans and those of animals presents a unique and tangible example of the negotiation of the human-animal boundary. Indeed, it is probable that criminal law is the only area of law which directly arbitrates the interests of humans against those of animals, as individual sentient beings. The negotiation of the human-animal boundary is the starting point for understanding how ‘animal welfare’ and ‘animal cruelty’ are entangled in a process by which animal protection law simultaneously attends to two tasks: structuring and maintaining hierarchies within humanity (via the categorising of who is cruel to animals and who is not), and the direct arbitration of human interests as against the animal in the application of animal cruelty law.

Humans share sentience with many other species, and the semantic division between ‘human’ and ‘animal’ is artificial. For Aristotle, humans were ‘political animals’. However, it is the division between human and animal that is constitutive of what it is to be human, along with the rights and dignity that inhere in that status. For example, it is common for murderers who engage in brutal forms of killing to be referred to as ‘animals’. Those who are gluttonous, messy or unclean are targets for the soubriquet ‘pig’. At certain dark points in history dehumanising practices have been mobilised as instruments of genocide. Most infamous in the modern era is the propaganda of the Third Reich, which portrayed Jewish people as rats, rendering them a form of vermin and thus killable, and beyond the realm of moral consideration. Rwanda provides another example of this phenomenon. In 1994, a media campaign by the private radio station, Radio Television Libre des Mille Collines, incited Hutus to kill Tutsis, calling for a ‘final


90 In psychological literature this is known as ‘infra-humanisation’. See for example, Nick Haslam et al, ‘Attributing and Denying Humanness to Others’ (2009) 19(1) European Review of Social Psychology 55, 57.

war’ to ‘exterminate the cockroaches’.92

Similarly, Australia’s history is marked by a racism which has positioned the indigenous population on the human-animal border. Dehumanising strategies were used to justify the ad-hoc slaughter of Aborigines by state agents and ‘settlers’.93 A racist discourse which deploys dehumanising practices against Aboriginal and Torres Strait Islander peoples remains evident in contemporary Australia. For example, in May 2013, aboriginal footballer Adam Goodes was called a ‘monkey’ by a young female spectator during an Australian Football League match. The event prompted a public outcry in Australia,94 and attracted international media coverage.95

B The Anthropological Machine and the ‘Double Internal Inconsistency’

Having introduced the concept of the anthropological machine, the discussion now turns to reconfigure the relational and classificatory dynamics that take place at the human-animal boundary, as they play out in animal protection as an area of criminal law. This is examined according to what O’Sullivan calls the ‘external inconsistency’ and the ‘internal inconsistency’.96


93 Examples put forward by historian Henry Reynolds include a letter to the Cairns Post dating from the late 19th century stating ‘[a] little “black-birding” appears to be necessary, if the limbs of the law do not look sharp and have some fun with themselves, the selector will be out skirmishing when “long-pig” will probably be plentiful’. One missionary, by the name of Threlkeld, stated ‘to shoot them dead would be no more a moral evil, than the destroying of rats by poison’. Henry Reynolds, Frontier: Aborigines, Settlers and Land (Allen and Unwin, 1987) 50, 105.


The external inconsistency refers to the ‘inconsistency in the way nonhuman animals are treated in relation to humans’. It points to the separation between humans and other animals and the ‘negative discriminatory treatment’ of nonhuman animals. Many animal protection scholars challenge the external inconsistency, arguing that ‘there is no single, coherent, morally relevant characteristic or capacity that all humans share but which no animal also possesses’. For example, Peter Singer’s preference utilitarianism is directed at the external inconsistency.

On a societal scale, the external inconsistency arises as a result of the attitudes and practices by which the use of animals, especially animals bred and killed for food and research, is justified on the basis of moral claims. These claims assume that humans are inherently more worthy than other species. As McEwan and Skandakumar note, ‘[a]lthough contestable, it is conventional to justify these forms of animal use by tying them to questions of life and death for the human species.’ Animal use for non-essential purposes such as entertainment, sport, or luxury items has a relatively weaker moral claim and is increasingly contested. However, despite challenges by the animal protection movement, such as in relation to the cruelty involved in whipping racehorses, these latter forms of animal use continue to enjoy social legitimacy. A key example of this in Australia is

97 Ibid 5.
98 Ibid.
100 O'Sullivan, above n 96, 13-4.
102 Ibid.
the Melbourne Cup’s status as a key cultural event on the yearly calendar.\textsuperscript{104}

O’Sullivan’s \textit{internal} inconsistency refers to ‘an inconsistency in the way that nonhuman animals are treated in relation to other nonhuman animals’.\textsuperscript{105} It points to discriminatory standards of legal protection afforded to domesticated, or ‘captive’ animals\textsuperscript{106} depending on the setting in which they are held. As a result of the internal inconsistency, companion animals are relatively humanised.\textsuperscript{107} By contrast, ‘economic animals’\textsuperscript{108} are often subjected to rationalised practices and thereby variously ‘de-sentieneced’ into economic units or things.

In reproducing this internal inconsistency, the animal protection field maintains a hierarchy within the world of domesticated animals. By contrast, the \textit{external} inconsistency points to the separation between humans and other animals and humanity’s negative discriminatory treatment of animals. However, an important, though perhaps overlooked, aspect of the \textit{external} inconsistency is that it assumes that all humans are equal, that all have the same status under the law. Yet, as has be expounded in previous chapters, in the animal protection field, animal cruelty is not an offence that has general application. In this area, all legal persons are not equal under the law. It follows that there is a third form of inconsistency, embedded within the external inconsistency. The author will refer to this as the ‘double internal inconsistency’.

The double internal inconsistency aligns with Agamben’s notion of the anthropological machine.\textsuperscript{109} Like the internal inconsistency which impacts upon

\begin{footnotesize}
\begin{enumerate}
\item[104] John O’Hara, \textit{The Melbourne Cup and Two-Up: Egalitarianism and Gambling} (Macarthur Institute of Higher Education [n.d.]).
\item[105] O’Sullivan above n 96, 5.
\item[106] Ibid.
\item[107] Ibid.
\item[108] Ibid.
\item[109] It also resonates with the logic of sovereignty and the state of exception as Agamben poses it in \textit{Homo Sacer}. \textit{Homo sacer} refers to the status of the human who is not sacrificed, but whose killing would not result in a charge of murder. In the logic of sovereignty, \textit{homo sacer} is the result of a double move in the exercise of sovereign power. In the first move, the biological human is drawn out of nature and into the juridical realm, as a legal person. In the second move, the state of exception, the juridical person is re-animalised. Thus, the ‘state of exception' refers to the point at
\end{enumerate}
\end{footnotesize}
animals, the *double* internal inconsistency arises from the operation of the necessity test in animal protection, as an area of criminal law. However, the ‘double internal inconsistency’ refers to the process by which *humans* (rather than animals) are categorised via the necessity test as more or less human based on the attribute of economic rationality and their relative position vis-à-vis animal use industries that fall within the operation of the compliance-based regulatory model. The *internal* inconsistency, which affects animals, is interdependent with the ‘double internal inconsistency’ that impacts on humans.

This thesis identifies the operation of the anthropological machine as arising on the application of the necessity test in animal cruelty matters. In the context of judicial interpretation of what constitutes animal cruelty, the attribute by which humans are dehumanised or animalised is economic ‘irrationality’. The necessity test for animal cruelty asks whether pain and suffering is ‘proportionate to the object’ and that object is economic. Hence, it is the values and machinations of capitalism, the ‘self’ constituted as having a mind towards profit, by which animal cruelty gathers its meaning and which operates as an indicium of humanness. The identification of the ‘double internal inconsistency’ opens to an understanding of how the status quo is reproduced through the maintenance of hierarchy between groups of humans. The reproduction of this hierarchy has profound implications for the continuation of human-perpetrated violence against animals. These three forms of negotiation at the human-animal boundary are summarised in Table 2.1, below.

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111 *Ford v Wiley* (1889) 23 QBD 203.
**Table 5.1**

*The Human–Animal Boundary in the Animal Protection Field.*

<table>
<thead>
<tr>
<th>Category Inclusion: More Human</th>
<th>Category of Exclusion: More Animal</th>
<th>Form of Inconsistency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Biological human</td>
<td>Non-human animals</td>
<td>External inconsistency (concerning sentience)</td>
</tr>
<tr>
<td>Companion animals</td>
<td>Economic animals</td>
<td>Internal inconsistency(^{112}) (concerning the division between companion and economic animals)</td>
</tr>
<tr>
<td><em>Homo economicus</em> Rational humans</td>
<td>Humans who are non-rational: animal cruelty</td>
<td>Legal individualism: double internal inconsistency embedded in the common law test for animal cruelty based on the attribute of (economic) rationality</td>
</tr>
</tbody>
</table>

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**C The Human-Animal Boundary and the Law**

The discussion that follows develops the idea of the human-animal boundary as it is negotiated within a legal framework, by examining a seminal moment of renegotiation, under the Third Reich in Nazi Germany. It highlights aspects of animal protection law as it was enacted and amended under the Third Reich, as part of the process by which Jews were marginalised and dehumanised, on the basis of the offence of animal cruelty. Hence, the case is an example of the operation of the *double* internal inconsistency, and illustrates how a nationalist rhetoric of concern for certain animals was manipulated to disenfranchise and subsequently condone genocide against Jews (and other non-Aryans), in the interests of Aryan racial purity. In Hitler’s view, non-Aryans were ‘subhuman’ and ought to be ‘considered lower than domestic animals’.\(^{113}\) The final part of the discussion considers the implications of the issues raised for the application of the concept of violence to subsequent case studies drawn from Australia’s animal

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\(^{112}\) O’Sullivan, above n 96.

Animal Protection Law under the Third Reich

The establishment of Animal Protection laws in Nazi Germany saw a different kind of rupturing of the human-animal divide, with catastrophic results. The ideological shifts which culminated in the rise of German National Socialism in the 20th century drew upon 19th century romanticism. In its fullness, Nazi ideology revolved around four major themes:

1. Reverence for Animals: certain animals were regarded as ‘moral if not sacred beings’. Vegetarianism symbolised the vision of a future, purified, Germany;

2. Man as Beast: praise for the notion of ‘man as predator’, as a way man could ‘rediscover his instincts and with that his honesty’;

3. Holistic Attitudes: synthesis was exalted against analysis, ‘unity and wholeness against disintegration and atomism, and Volk legend against scientific truth’; and

4. Biological Purity: the claimed pure blood of the Aryan was cast against that of the impure non-Aryan. In this reformulated scale of nature Jews were ranked the lowest, as close to ‘pure ape’.

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114 These themes are those identified by Arluke and Sax, ‘Understanding Nazi Animal Protection’, above n 113, 10-4. See also Charles Patterson, Eternal Treblinka: Our Treatment of Animals and the Holocaust (Lantern Books, 2002).


While nationalist propaganda portrayed Jews as vermin and apes, the Aryan was expected to emulate attributes of ‘superior animals’, for example, the obedience and faithfulness of the conspicuously Aryan pet or the ‘strength, fearlessness [and] aggressiveness’ of beasts of prey. Germans were encouraged to avow a type of ‘animality’. These ideas formed the backdrop for the Third Reich’s animal protection legislative regime.

The summary that follows relies on Boria Sax and Arluke and Sax’s analysis of the Third Reich’s approach to animal protection. In addition to the overarching statute, the purported object of which was ‘to awaken and strengthen compassion as one of the highest moral values of the German people’, numerous regulatory measures were enacted between 1933 and 1943. These included a ban on ritual slaughter and on animal experimentation. Although the laws were strict on paper, exceptions were made, for example, in relation to animal experimentation. Reflecting the ‘technocratic spirit’ of the larger political order, the legislation was detailed and drafted with the weight of medical

121 Sax, Animals in the Third Reich, above n 91, 54; Savage, above n 91.
122 Joachim Fest, The Face of the Third Reich (Pantheon, 1970) 120, 293, cited in Arluke and Sax, above n 113, 10.
123 Arluke and Sax, Understanding Nazi Animal Protection, above n 113, 11.
124 Throughout Animals in the Third Reich, Sax consistently refers to Clemens Giese and Waldemar Kahler, Das Deutsche Tierschutzrecht: Bestimmungen zum Schutze der Tiere (Duncker and Humbolt, 1944). Clemens Giese and Waldemar Kahler were members of the Ministry of the Interior. They were responsible for drafting the legislative text. Luc Ferry, A New Ecological Order (Carol Volk trans, University Chicago Press, 1996) 91.
125 Arluke and Sax, Understanding Nazi Animal Protection, above n 113.
128 Sax, Animals in the Third Reich, above n 91, 110.
129 Ibid 111-2.
130 Ibid.
131 Ibid 110.
authority. Legislative text avoided explicitly referring to Jews, even in the sections establishing bans on ritual slaughter, as this would have potentially offended the German constitutional guarantee of freedom of religion.

The *Law on the Slaughter of Animals*, enacted in April 1933, required animals to be stunned before slaughter. The general *Law on Animal Protection* was passed in November 1933. Hermann Göring, as chairman of the Prussian ministry, set down the jurisprudential rationale for the regime’s approach to animal protection in a radio address in August 1933. He stated that ‘to the German, animals are not merely creatures in the organic sense, but creatures who live their own lives and who are endowed with perspective facilities, who feel pain and experience joy and prove to be faithful and attached’. Further, he noted that past regimes, ‘under the influence of foreign conceptions of justice and a strange comprehension of law’ had considered animals as ‘a dead thing under the law’. He was, of course, referring to animals’ status as property.

The *Law on Animal Protection* set a maximum penalty of two and a half years imprisonment plus a fine for any person who ‘needlessly’ tormented or handled an animal ‘in a rough way’. An amendment to the *Law on Animal Protection*,

134 (Germany) 21 April 1933, RGBL 1, 203, listed in Sax, *Animals in the Third Reich*, above n 91, 181.
135 (Germany) 24 November 1933, RGBL 1, 987, listed in Sax, *Animals in the Third Reich*, above n 91, 181. An expanded version of this law, passed on 23 May 1938, is reproduced in Sax, *Animals in the Third Reich*, above n 91, 175-9.
136 Ibid.
138 Göring, above n 137, 70-1, quoted in Sax, *Animals in the Third Reich*, above n 91, 111. Göring’s speech related to a law prohibiting vivisection, though the same justification cut across the suite of laws that followed.
139 (Germany) 24 November 1933, RGBL 1, 987.
made in 1938, provided that rough treatment of an animal was that which corresponded to ‘an unfeeling state of mind’.\footnote{\textit{Sax, Animals in the Third Reich}, above n 91, 112 quoting Giese and Kahler, above n 140, 20, 24, 227.} The focus therefore changed from the objective harm sustained by the animal to what the treatment ‘supposedly revealed about the perpetrator’.\footnote{Ibid.} As Nazi ideology posed Jewish people as unfeeling, according to Sax, this elaboration ‘could be used as a pretext to class somebody as racially polluted’.\footnote{\textit{Sina Najafi and Kathleen Kete, ’Beastly Agendas: An Interview with Kathleen Kete’ (2001) 4 Cabinet [1] <http://cabinetmagazine.org/issues/4/KathleenKete.php>.
} From the perspective of criminal law, this suggests that the mental element of the offence was satisfied solely on the basis of ethnic status.

The identification of a particular human attribute or disposition such as ‘an unfeeling mind’ and ‘rough way’ as satisfying the element of the offence has parallels with how the offence of animal cruelty operates in contemporary Australia. In particular, if the word ‘necessary’ indicates that the pain, suffering or injury caused to an animal by a human is only cruelty if its objective is irrational, then the common law test, as it is applied in Australia, also pertains to a particular human attribute. Furthermore, this attribute is of a different quality to the presence of mens rea in any of its forms. This assertion will be developed and examined in greater depth in Chapter Eight.

\textit{(a) \quad Indeterminacy at the Human-Animal Boundary}

The circumstances discussed above illustrate the indeterminacy that characterises the human-animal boundary. Furthermore, they indicate that renegotiations of the human-animal boundary do not necessarily travel in one direction alone, that is, towards greater compassion towards humans and animals alike, nor are they dependent on a particular political colour.\footnote{(Germany) 24 November 1933, RGBL 1, 987.} In the case of the Third Reich, animal protection was used to meet the objectives of a totalitarian regime.
The Third Reich's concerns and law reform relating to animal protection formed part of an authoritarian regime which deliberately marginalised the Jewish population. Animal protection laws were a technical instrument to achieve a set of political objectives: 'nothing but the command of the ruler'. Nonetheless, however racist and indirectly discriminatory these animal protection laws were in practice, they had the appearance of application to the general population and thus ostensibly satisfied the principle of equality. Nazi ideology focused on compassion towards certain animals. In Sax's account, despite their technocratic spirit, the Third Reich's animal protection laws emerged from a mix of conflicting and paradoxical ideals of humaneness and nationalism.

Although the contemporary animal protection movement in Western societies is generally associated with left-leaning liberalism, the case of the Third Reich provides an instructive and chilling counterpoint. It shows the contradictions of political ideology: the seed of the ‘radical’ dwelling in the conservative, and the conservative in the radical. This dialectic is evident in recent developments in Europe where, for example, animal protection activists in Germany relied on ‘xenophobic’ sentiments towards Muslims and the public outcry that followed ‘The Slaughter Decision’ in order to garner public support for amendments to recognise animal welfare within the German constitution. At the other extreme,

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147 Sax, Animals in the Third Reich, above n 91, 110.


150 Evans, above n 148, 237; Grundgestz für Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany] arts 74, 20. <http://www.gesetze-im-internet.de/englsch_gg/englsch_gg.html#GGengl_000P81>; For a comparable example from the US on law reform efforts towards the enactment of an animal

Criminalising acts of trespass to property in terms of ‘terrorism’, where the aim is solely to obtain video footage or other evidence of unlawful cruelty, suggests Australia as increasingly authoritarian in its approach to civil disobedience.

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Part V  CONCLUSION

This chapter explicated the rationale for adopting the concept of violence as an analytical frame for the study of animal protection law and policy. The approach adopted is based on Bourdieu’s concepts of symbolic violence and ‘field’. In Part III, the concept of symbolic violence and its methodological counterpart, ‘field’, were discussed. As part of this, consideration was given to how, in the context of symbolic violence, the cruelty-welfare opposition structures the animal protection field. The frame adopted is consistent with Garver’s observation that a ‘successful account of violence’ must clarify that violence can be ‘social or institutional as well as physical’.

In Part IV the approach noted above was augmented by the addition of a method informed by Giorgio Agamben’s anthropological machine and the human-animal boundary. The method focuses on violence against animals, interdependency and the human-animal boundary. As background, the narrow view of the connection between violence against animals and inter-human violence, which focuses on ‘the progression thesis’, was discussed. A broader perspective on the connections between violence against animals and inter-human violence was developed according to what the author refers to as the ‘double internal inconsistency’. It is

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153 Garver, ‘How to Think about Violence’, above n 36, 39.
on this basis that the perspective developed within this thesis is situated at the intersection between the interests of animals and those of humans. This forms the analytical entry point for the case studies to be examined.

Posing the interests of humans and other animals as interdependent within the animal protection field stands in contrast to analyses which, *a priori*, assume the study of the interests of humans and animals are parallel but separate realms of inquiry. Lastly, in presenting the renegotiation of the human-animal boundary that occurred within animal protection laws under the Third Reich, Part IV foreshadowed the ways that the notion of interdependence will be utilised in the later case studies. The scene is now set for Chapter Six, in which Australia's animal protection law will be analysed as a Bourdieusian field.
CHAPTER 6  AUSTRALIA’S ANIMAL PROTECTION FRAMEWORK AS A BOURDIEUSIAN FIELD

The violence of sensation is opposed to the violence of the represented (the sensational, the cliché) ... cruelty is not what one believes it to be, and depends less and less on what is represented.

Gilles Deleuze

Part I INTRODUCTION

The aim of this chapter is to analyse Australia’s animal protection framework as a Bourdieusian field. The objective is to understand the structure of the field, the structure of relations between positions on the field, and how these relations are historically constituted and can be traced to their social genesis.

The analysis will demonstrate how animal protection, as an area of criminal law, is structured according to class relations as they emerged with modern capitalism. Further, it will be argued that this differentiation continues to structure and reproduce the animal protection field according to the concepts of animal cruelty and animal welfare. The connections between the criminal law, capitalism, and class, as they play out within the animal protection field, form the backdrop for the cases studies that follow in chapters Seven, Eight, and Nine.

Bourdieu’s notion of class structure embraces occupational divisions of labour, which, in their entirety, form a system. This distinguishes Bourdieu’s approach from the classical Marxist perspective, in which class positions are defined according to their ‘relationship to the ownership of/and or control over the means


of production’. From the Bourdieusian perspective, these divisions are manifest in class-based social relations and classificatory struggles for authority over what constitutes ‘legitimate culture’; they have economic and symbolic dimensions. Within the animal protection field, moral sentiments regarding violence against animals reflect, and are indeed, constitutive of these relations.

The discussion that follows is a preliminary study, in that it takes up several, though not all, of Bourdieu’s concepts as method. The concept of ‘field’ and the related terms doxa, orthodoxy, heterodoxy were introduced and discussed in Chapter Five. Part II explains Bourdieu’s method for analysing a field. Part III examines the animal protection field against ‘the field of power’. For animal protection, this field of power is taken to be the relationship between capitalism and the criminal law. Part IV explains the structure of the positions occupied by agents who compete for legitimate authority within the animal protection field. Part V examines habitus as it relates to the animal protection field. The chapter concludes with a discussion of the method by which the case studies were selected and how the case studies align with the Bourdieusian framework.

Part II  ANALYSING THE FIELD: BOURDIEU’S METHOD

In an interview with sociologist and collaborator Loïc Wacquant, Bourdieu defined field as:

a network or a configuration, of objective relations, between positions objectively defined, in their existence and in the determinations they impose upon their occupants, agents or institutions, by their present and potential situation (situs) in the structure of the distribution of species of power (or

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5 Weininger, above n 3, 126.

6 Bourdieu and Wacquant, The Chicago Workshop’ above n 2, 104.

7 Ibid.

capital) whose possession commands access to the specific profits that are at stake in the field, as well as by their objective relation to other positions.\(^9\)

Bourdieu noted that to ‘think in terms of field is to think relationally’ (emphasis in original).\(^10\) By encouraging us to think relationally, Bourdieu intended to draw our attention not only to the manner in which agents on a field were positioned, but how each position relates to the others. Power is distributed, generated and flows through this relationality (by this logic the dominant can only maintain dominance by virtue of the constellation character of the field: this maintains the status quo). For example, and to foreshadow the arguments prosecuted in this chapter, while in reality there may be a substantive overlap between animal cruelty and animal welfare, animal cruelty gains its meaning by virtue of its contrast with idea of animal welfare. We use animals, but one type of animal use is humane, that is, it goes by the name of animal welfare. *A fortiori*, forms of use that are not humane constitute animal cruelty. It also follows that agents or groups who assert legitimate authority over the term ‘animal welfare’ are able to access both the benefits of animal use for economic profit and the moral legitimacy that the notion of animal welfare confers.

The following discussion explains ‘field’ as an analytic device, and the way that it will be applied in this chapter. For Bourdieu, the analysis of a field involves three ‘internally connected moments’.\(^11\) The first moment comprises a consideration of the position of the field vis-à-vis the field of power.\(^12\) To meet this moment, Part III explores the relationship between the criminal law and capitalism.\(^13\) Edward

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\(^10\) Ibid.


\(^12\) Bourdieu and Wacquant, ‘The Chicago Workshop’, above n 2, 104.

Palmer Thompson’s case study of the enactment of the Black Act in late 18th century England will be used as an archetype for this relationship. The discussion makes connections between the structures and *habitus* that characterise the contemporary animal protection field and those Thompson describes under the Black Act. In this sense, the animal protection field provides a case study of how this relationship has been maintained and reproduced into the modern day.

Bourdieu’s second moment requires an examination of the ‘objective structures’ of the relations between the positions occupied by the agents or institutions who compete for legitimate authority within the field of inquiry. To meet this moment Part IV maps and examines these structures and relations within the animal protection field. In Bourdieu’s view, the structure of a field cannot be grasped without a historical analysis of its constitution. The aim of a historical analysis is to avoid what Bourdieu refers to as ‘genesis amnesia’. Genesis amnesia concerns a conjuncture, between *habitus*, practice, and the objective structures that define a field. It involves the *habitus* or practice as ‘history turned into nature’ and thus history denied. Bourdieu elaborates: “[t]he unconscious’ is never anything other than a forgetting of history which history itself produces by incorporating the objective structures it produces in the second natures of *habitus*.

Following this, Part IV examines how a new sensibility and concern for animals that emerged in England during the 18th and 19th centuries was translated into a legislative scheme. It explores how this moral sentiment and the administration of animal protection legislation mirrored and maintained existing class boundaries.

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14 Thompson, above n 13.
18 Ibid.
The divisions that structure the animal protection field and the role of animal protection in legitimising emerging middle class interests are also discussed. With regard to competitions for legitimate authority, Part IV considers how ‘animal welfare’ has become a term of legitimisation for animal use industries. It does so against the backdrop of the development of animal welfare science since the late 1970s. To facilitate the argument on this point, the question is considered in the light of the view espoused by Australian legal historian Philip Jamieson, that the protection afforded to animals via animal protection legislation advanced during the late 20th century.20

Bourdieu’s third moment involves analysing the *habitus* of agents, the system of dispositions they have acquired by internalizing a determinate type of social and economic conditions and which find, in a trajectory within the field under consideration, a more or less favourable opportunity to become actualised. Part V explores *habitus* in the context of the contemporary animal protection field. It examines the role and positions of the participants identified in Chapter Four. These include the RSPCA, as primary animal protection law enforcement agency, other non-government animal welfare organisations, animal protection advocates, and defendants.

*Habitus* refers to the ‘socially constituted’ disposition from which we act, the largely unconscious and embodied way by which we reckon the world and the tacit principles by which we classify and direct our actions as social agents.21 It is in this sense that as agents, we act in taken-for-granted ways and may not know what it is that we are doing.22 Conditions for the actualisation of our aspirations may be more, or less, favourable.23 *Habitus* therefore emphasises practice and the


generative or creative capacity of the agent acting in the world. The combination of opportunity and practice contains the potential and capacity for social change and conversely, its limits. *Habitus* can be used to refer individual agents or collectivities. In the following discussion agents are considered as groups in that they are positioned in relation to one another in specific ways within the field. Further, as the animal protection field is also an area of law, it is assumed to be relatively deterministic and thus the capacity for change is limited. To say that the field is determined, is to indicate that, as a field of law, it operates on the basis of positivism. In examining *habitus*, reference is made to Alan Norrie’s arguments regarding the relationship between legal individualism and authoritarianism, as this relationship has developed under the influence of neoliberalism.

**Part III  ANIMAL PROTECTION AND THE FIELD OF POWER**

**A  E. P. Thompson: Criminal Law, Capitalism and the Rule of Law**

As noted above, Bourdieu’s first moment in the analysis of a field requires that the position of the field of inquiry be considered vis-à-vis the field of power. For the purposes of this case study, meeting the first moment involves developing a perspective in which animal protection is understood as a sub-theme within a larger narrative, that is, the criminal law’s relationship with capitalism. On the relationship between the criminal law and capitalism, Edward Palmer Thompson’s study of the origins of the Black Act presents a case, par excellence. Indeed the enactment of the Black Act might be considered the constituting moment for the

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25 Weininger, above n 3, 119, 141.


29 Thompson, above n 13.
relationship between capitalism and the criminal law for the modern era. Although Thompson’s study concerns emerging capitalism under the ‘Old Corruption’ of the 18th century’s Whig oligarchy, the case presents an archetype for the objectifying structures which continue to shape the relationship between criminal law and capitalism into the 21st century. In this latter respect, arguably, Thompson’s study establishes a field in the Bourdieusian style.30 Although Thompson deploys a different lexicon, there is nothing in his approach to social and legal history that is inconsistent with Bourdieu’s notion of habitus, as embedded and expressed in practice, and the institution of law as an objective structure defining a given field.31

The proposal that Thompson’s study stands as an archetype needs qualification, particularly with regard to two salient differences between the circumstances of the 18th century and any attempt to examine a modern field of criminal law. The most obvious difference is that the nature of capitalism has altered radically over the intervening centuries. Under neoliberalism, contemporary capitalism is global and the interests of multi-national corporations shape regulatory schemes within and across nations.32 By contrast, the capitalism Thompson describes is in a transitional stage in which it remains subordinate to the power of the monarch (if not parliamentary sovereignty).

A second key difference is the division formed by the penal reforms of the early 19th century,33 which fused Bentham’s utilitarian vision with the ideology of humanist liberalism.34 These reforms marked a departure from criminal law as

30 Wacquant and Bourdieu recognise the affinities between Bourdieu’s work and E. P. Thompson’s historical studies; Bourdieu and Wacquant, ‘The Chicago Workshop’, above n 2, 91-2. Also see Thompson, above n 13, 203.

31 Bourdieu and Wacquant, ‘The Chicago Workshop’, above n 2, 95-7; Diane Austin-Broos makes a similar point with regard to Marx and Bourdieu, explaining that there was really only one difference between Marx’s observation that ‘consciousness can never be anything other than conscious existence … actual life process’ and Bourdieu’s ‘habitus’. Diane Austin-Broos, quoting Marx and Engel (1970) 47 in Diane Austin-Broos, ‘Capitalism as Culture, and Economy’ (2009) 20 The Australian Journal of Anthropology 301 306. For Marx, Austin-Broos observes, ‘production’ was ‘integral to these life forms that tend to vary with major changes in the way that we produce and consume’.

32 See for example the Australia-US Free Trade Agreement.

33 Norrie, Crime, Reason and History, above n 13, 20.

34 Ibid 20-8.
servant of absolutist rule, with its regime of terror and mercy, to criminal law in its modern form, with its emphasis on deterrence and individual justice.

These discontinuities notwithstanding, while the machinations of Old Corruption were visible, bloody and unapologetic one might conjecture a bloodless, rational and invisible New Corruption. In the context of the democratic state and capitalism as it evolves under neoliberalism, this New Corruption lies not so much in dishonest acts on the part of individuals (although these are certainly a feature), but in a set of socio-political circumstances characterised by:

1. The existence of a class of economic elites whose lifestyle and concerns are untethered from the project of social good which defined 'the old welfare state';
2. A foreclosed oppositional public sphere;
3. Following on from point two, a diminution in the role of the middle-class dissent. The RSPCA is a prime example of this phenomenon, whereby a policy issue which grew out of middle class dissent was absorbed into the state's regulatory regime.

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35 Hay, above n 13, 17-8.
36 Norrie, Crime, Reason and History, above n 13, 20-3.
37 See Bourdieu, who states 'because the pre-capitalist economy cannot count on the implacable, hidden violence of objective mechanisms, it resorts simultaneously to forms of domination which may strike the modern reader as more primitive, more brutal, more barbarous' (emphasis in original). Bourdieu, Outline of a Theory of Practice, above n 17, 191.
40 Lea, above n 38, 8; Dryzek above n 39, 119.
4. A corporate sphere that is shielded from demands for transparency by claims of privacy,\textsuperscript{41} and which co-opts dissenting narratives into its corporate rhetoric (this latter point was discussed in Chapter Two, with regard to the concept of ‘animal welfare’.

5. A criminal justice system committed to retributive concepts of criminal behavior, stressing individual responsibility, or ‘responsibilisation’;\textsuperscript{42} and

6. An ‘underclass’ ‘whose relationship to government’ is one of ‘welfare dependency’ and whose life circumstances are ‘not conducive to any kind of public association and action’\textsuperscript{43}

It is in such a setting that the rule of law can be viewed as internally skewed towards corporate interests and, in this instance, animal use industries. And it is against this background that Thompson’s definition of the rule of law will be relied upon as a standard for the remainder of the thesis.

In \textit{Force of Law},\textsuperscript{44} Bourdieu points to Thompson as a type of Marxist who believes:

\begin{quote}
they are breaking with economism\textsuperscript{45} when, in order to restore to the law its full historical efficacy, they simply content themselves with asserting that it is ‘deeply imbricated within the very basis of productive relations’.\textsuperscript{46} This concern with situating law at a deep level of historical forces once again makes it impossible to
\end{quote}

\footnotesize
\textsuperscript{41} See for example, recent debates in Australia about the introduction of ‘ag-gag laws’. The term ‘ag-gag laws’ refers to ‘a variety of laws which seek to prevent individuals recording or documenting the operations of commercial agricultural facilities’. Voiceless: the animal protection institute, \textit{2014 Animal Law Lecture Series Ag-gag: The Bid to Silence Animal Advocates: Legal FAQs} (Voiceless: the animal protection institute, 28 April 2014); Voiceless and Barristers Animal Welfare Panel Limited, \textit{Joint Submission on ALRC Review of Serious Invasions of Privacy in the Digital Era} (19 December 2013).

\textsuperscript{42} Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above 27, 15.

\textsuperscript{43} Dryzek, above n 39, 126; See for example, John Lea, above n 38, on new forms of social exclusion.

\textsuperscript{44} Bourdieu, ‘Force of Law’, above n 26.

\textsuperscript{45} ‘Economism’ refers to a tendency within Marxist political practice to emphasize economic determination so completely that other social elements—particularly ideological and political—are simply neglected as irrelevant.’ Bourdieu, ‘Force of Law’, above n 26, 815 n 14.

\textsuperscript{46} Ibid 815 n 15. Here, Bourdieu quotes E. P. Thompson, \textit{Whigs and Hunters: The Origin of The Black Act} (1975) (publisher not noted in the original) 261, as an example of this tendency within Marxist scholarship.
conceive concretely the specific social universe in which law is produced and in
which it exercises its power.\textsuperscript{47}

In quoting Thompson's analysis of the law as 'deeply imbricated within the very
basis of productive relations\textsuperscript{48} Bourdieu criticises Thompson as blindly adhering
to the axioms of structuralist Marxism. This judgement seems unjustified as
Thompson's defence of the rule of law is at the core of his repudiation of Marxist-
structuralist critique.\textsuperscript{49} For Thompson, in essence, the rule of law was simply that
legal rules be applied equally with the aim of limiting 'ruling power'.\textsuperscript{50} In this view,
law maintains its 'especial character', that is, its legitimacy, through the application
of 'logical criteria with reference to standards of universality and equity', in other
words, by adhering to the principles of legality and equality.\textsuperscript{51} Thompson declared
the rule of law an 'unqualified human good'\textsuperscript{52} though points us to some of
contradictions inherent in a commitment to the rule of law.\textsuperscript{53} Under the Black Act,
these included the capacity of the dominant (propertied) classes to manipulate the
law in order to redefine property rights according to their own ends, yet
simultaneously be bound by and subject to that law. Douglas Hay explains that the
legalistic exchanges between judges and counsel in the criminal courts of 18\textsuperscript{th}
century England demonstrate that:

those administering and using the laws submitted to its rules. 'The law thereby
became something more that the creature of the ruling class – it became a power
with its own claims, higher than those of the prosecutor, lawyers and even the

\textsuperscript{47} Bourdieu, 'Force of Law', above n 26, 815.

\textsuperscript{48} Thompson, above n 13, 204.

\textsuperscript{49} Ibid 203.

\textsuperscript{50} Ibid 204-5; See Daniel H Cole, 'An Unqualified Human Good': E. P. Thompson and the Rule of

\textsuperscript{51} Thompson, above n 13, 205. E. P. Thompson sets out his conception of the rule of law in
these terms in Thompson, above n 10, 202-10. Alan Norrie also adopts this definition of the
rule of law. Alan Norrie, Crime Reason and History, above n 13, 10-11.

\textsuperscript{52} Thompson, above n 13, 208.

\textsuperscript{53} Ibid 206-8.
Thompson’s perspective is echoed in Alan Norrie’s question as to how the law generates ‘conflicting views from within its own practice’ and his proposition that the answer to this question ‘must reject that the law is (in principle) rational and just, but equally rejects the view that it is wholly irrational’. 55

To critique aspects of the rule of law or identify it as skewed in the direction of certain (corporate) interests is not to ‘throw the baby out with the bath water’. However, there is a counter-risk; aspects of the argument being developed in this thesis, that highlight that the lack of general application of the offence of animal cruelty structures and maintains hierarchies between groups within humanity will be misconstrued as exculpating defendants who, on the evidence, deserve conviction and punishment. On this latter point, Thompson’s musings as to the significance of studying a field in which the harm done might pale in the light of large scale atrocities are relevant here as well. 56 A critic might ask, what is the point of drawing attention to unfairness within animal protection law as it pertains to humans – it is negligible when compared with the scale of pain and suffering experienced by animals at the hands of humans. To clarify, the aim is to make a larger point about the way the criminal law mediates aspects of capitalism and class in ways that have implications for our status as ‘fully human’ and how this process of classification among humans contributes to the perpetuation of large scale violence against animals. In particular, why is it that we are willing to allow an animal’s interests to trump a human’s, in effect to renegotiate the human-animal boundary, only in cases in which the human is marginalised from the economy proper?

There is some familial resemblance here to Thompson’s observations that investigating the ‘story of a few lost common rights’ might be seen as ‘concern with trivia’. 57 Similarly, ‘so what’ if individuals who are cruel to animals are prosecuted; this is right and just. And it is right, but it is only just if all those who cause equal

54 Hay, above n 13, 33. This is consistent with Bourdieu’s view of the juridical field.
56 Thompson, above n 13, 202.
57 Ibid.
harm are also held culpable, and this is not the case. Hence, this nexus between class, capitalism and criminality opens to an understanding of violence against animals that goes beyond (or behind) the heterodoxy of animal rights theory. It is able to illuminate the field in a way which encourages a reflective approach to advocacy and casts the interests of animals and those of humans as entwined and interdependent.58

B The Origins of the Black Act

England’s Black Act was enacted in May 172359 and repealed in 1823 ‘after prolonged resistance’.60 It was during this period that individual property rights were established61 and retributive forms of justice were de-riguer.62 Another feature of the period was its peculiar form of authoritarianism wrought under the rule of Robert Walpole (1676-1745). Although at this point the absolutism of the monarch had been abolished, it continued within the criminal law under Walpole’s watch and the Whig oligarchy.63 Thompson describes political life in the 1720s as having ‘something of the sick quality of the ‘banana republic’’.64 It is worth noting here, in passing, that this focus on retributive justice and on the rigorous protection of property rights (though here in the form of enclosure) is consistent with the trends Norrie identifies within the criminal justice system under neoliberalism.65 Norrie’s arguments will be considered in more depth later, as to their implications for the notion of habitus.

59 9 George I, c 22; Thompson, above n 13, 213.
60 Thompson, above n 13, 191.
61 Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law, above n 27, 19.
62 Thompson, above n 13, 2.
63 Norrie, Crime, Reason and History, above n 13, 20.
64 Thompson, above n 13, 153.
65 Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 27.
The Black Act expanded and vigorously protected the property rights of the ascendant Hanoverian Whigs.\textsuperscript{66} It redefined property relations and in doing so criminalised feudal rights pertaining to access to common lands.\textsuperscript{67} The Black Act made it an offence for a person to go about at night with his or her face blackened, as this signified a person’s status as poacher.\textsuperscript{68} It revoked traditional hunting rights and provided for capital punishment for those caught hunting red or fallow deer, hares, rabbits or catching fish in enclosed parks or forests in Windsor and Hampshire.\textsuperscript{69} Until then, these rights had enabled peasants to subsist outside of an emerging labour market.\textsuperscript{70} Where an accused failed to surrender him or herself, following a series of public proclamations, he or she became a ‘proclaimed man’.\textsuperscript{71} Persons of this status could be found guilty and sentenced to death without trial.\textsuperscript{72}

Like the animal protection debates of today, social conflict centred on a reconfiguring of property rights.\textsuperscript{73} Importantly, Thompson points out that this was not a conflict in binary terms of property, supported by law, and non-property.\textsuperscript{74} Rather it involved ‘alternative definitions of property rights’, with members of each group affected, landowner, cottager, forest official, and foresters, relying upon

\textsuperscript{66} Thompson, above n 13, 2.

\textsuperscript{67} The Black Act reconfigured private property rights between land owners and peasants, in relation to access to animals and natural resources, such as wood. Establishing new land boundaries and hunting rights also established animals on newly enclosed land as property, and it was these ownership rights that formed the basis for the offence of poaching. Cf O’Sullivan who cites the Black Act as one of several pieces of legislation ‘contributing to a social climate in which the practice of legislating human-animal relations for the benefit of the animals, began to assume an air of legitimacy’. Siobhan O’Sullivan, \textit{Animals, Equality and Democracy} (Palgrave MacMillan, 2011) 147.

\textsuperscript{68} Thompson, above n 13, 1.


\textsuperscript{70} Thompson above n 13, 35-6; Brown et al, above n 69, 59.

\textsuperscript{71} Thompson above n 13, 133-4.

\textsuperscript{72} Thompson, above n 13, 1; The executive exceptionalism which gave rise to the Black Act and by which persons were subjected to capital punishment without trial is consistent with the status of \textit{homo sacer}. Giorgio Agamben, \textit{Homo Sacer: Sovereign Power and Bare Life} (Daniel Heller-Roazen trans, Stanford University Press, 1998) 47 [trans of: \textit{Homo Sacer. Il Potere Sovrano e la Nuda Vita} (first published 1995)].

\textsuperscript{73} Thompson, above n 13, 203.

\textsuperscript{74} Ibid 204-5.
the law to assert his or her perceived rights.\textsuperscript{75} As such, all parties, in their own way, contributed to the law's legitimacy.

In effect, the Black Act created two types of criminals: the individual offender as poacher, and the ‘Black’ as a type of rowdy political activist. For example, Thompson notes ‘[t]hese Blacks are not quite ... social bandits, and they are not quite agrarian rebels, but they share something of both characters’.\textsuperscript{76} It was in this context that the Black Act was passed as an ‘exceptional measure, brought into existence by a sudden emergency’.\textsuperscript{77} However, Thompson reports that he was unable to find substantive evidence of any emergency.\textsuperscript{78} This call to exceptionalism resonates with aspects of the contemporary animal protection debate in which animal protection activists are posed as terrorists.\textsuperscript{79}

The preceding discussion has explored the case of the Black Act as an exemplar for the relationship between the criminal law, capitalism, and class. There is a structural similarity (rather than a similarity in intention) between the Blacks and some contemporary forms of animal protection activism. Both trespass upon private property, one taking and the other attempting to liberate animals, or at least expose animal cruelty. It is a parallel that was noted by Lord Jane CJ in \textit{R v Ghosh}.\textsuperscript{80}

Robin Hood or those ardent anti-vivisectionists who remove animals from laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest.\textsuperscript{81}

\textsuperscript{75} Ibid 204.

\textsuperscript{76} Thompson, above n 13, 35-6.

\textsuperscript{77} Ibid 2-3.

\textsuperscript{78} Ibid 3, 147.


\textsuperscript{80} \textit{R v Ghosh} [1982] 2 All ER 689.

\textsuperscript{81} Ibid 696 (Lord Jane CJ).
Part IV develops the analysis above by examining the structure of the field, the positions occupied by agents, and how those agents vie for legitimate authority.

**Part IV**  
**THE STRUCTURE OF RELATIONS BETWEEN POSITIONS ON THE ANIMAL PROTECTION FIELD**

**A  Animal Protection as a Field of Criminal Law**

Bourdieu's second moment requires an examination of the 'objective structures' of the relations between the positions occupied by the agents or institutions who compete for legitimate authority within the field of inquiry. In the case of animal protection, as a field of criminal law, meeting Bourdieu's second moment requires an examination of anti-cruelty laws, including their historical development. The issue of competition for legitimacy authority will be examined by reference to the concept of animal welfare, and its codification and use in the legitimation of large-scale animal use industries.

The world's first statutes aimed at protecting animals from cruelty were enacted in the mid-17th century.\(^82\) The *Act Against Plowing by the Tayle (Ireland, 1635)* was enacted in English dominated Ireland.\(^83\) It prohibited pulling wool off sheep and the attaching of ploughs to horses' tails.\(^84\) The second law was enacted in 1641, in the Massachusetts Bay Colony.\(^85\) The Puritans of the Massachusetts Bay Colony included Liberty 92 in their first legal code, 'The Body of Liberties'. Liberty 92 held that 'No man shall exercise any Tyranny or Crueltie towards any brute Creature

\(^{82}\) Piers Beirne states that the English Act of 1822 was 'preceded by three other legislative devices'. The earliest of these laws was the *Act Against Plowing by the Tayle and Pulling the Wool off Living Sheep* (Ireland, 1635). Piers Beirne, *Confronting Animal Abuse: Law, Criminology and Human-Animal Relationships* (Rowman and Littlefield, 2009) 11. There were also earlier legal measures in England such as the Puritans Protectorate Ordinance of 1654. Keith Thomas, *Man and the Natural World: Changing Attitudes in England 1500 -1800* (Penguin Books, 1983) 157-8.

\(^{83}\) *An Act against Plowing by the Tayle, and pulling the Wool off living Sheep* 10 & 11 Chas 1c. 35 (Ireland); Beirne, *Confronting Animal Abuse*, above n 82, 27-33.

\(^{84}\) Beirne, *Confronting Animal Abuse*, above n 82, 21.

\(^{85}\) Ibid, 11.
which are usuallie kept for man’s use’.\textsuperscript{86} Another statute of note was that enacted in Maine (US) in 1821. It forbade intentional cruelty to horses, sheep or cattle.\textsuperscript{87}

It was almost two centuries after the \textit{Act Against Plowing by the Tayle} was enacted in Ireland that \textit{An Act to Prevent the Cruel and Improper Treatment of Cattle}\textsuperscript{88} (\textit{Ill-Treatment of Cattle Act}) passed both houses of English parliament, receiving Royal Assent in June 1822.\textsuperscript{89} Richard Martin, MP for Galway, introduced the Bill to parliament and the \textit{Ill-Treatment of Cattle Act} came to be known as \textit{Martin’s Act}.\textsuperscript{90} Under \textit{Martin’s Act}\textsuperscript{91} the court was empowered to penalise those guilty of acts of animal cruelty by fine of up to five pounds or by imprisonment to a maximum of three months.\textsuperscript{92} It was an offence for a person to ‘wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer or other cattle’;\textsuperscript{93} ‘bull-baiting and beating beasts of burden’ were condemned.\textsuperscript{94} Several laws followed,\textsuperscript{95} further ‘restricting baiting, allowing vivisection with a licence, banning the use of dogs and pit ponies to haul loads; protecting songbirds, strays

\begin{itemize}
\item \textsuperscript{87} Beirne, \textit{Confronting Animal Abuse}, above n 82, 11; Steven M Wise maintains that the first anti-cruelty statute in the US was enacted in Maine in 1821 Me Laws Ch iv, sec 7 (1821). Steven M Wise, \textit{Rattling the Cage: Towards Legal Rights for Animals} (Perseus Books, 2000) 43-4, n 29.
\item \textsuperscript{88} 3 George IV, c 71 1822 in \textit{Statutes of the United Kingdom of Great Britain and Ireland}.
\item \textsuperscript{89} Mike Radford, \textit{Animal Welfare Law in Britain: Regulation and Responsibility and Responsibility} (Oxford University Press, 2001) 39.
\item \textsuperscript{90} 3 George IV, c 71 1822. Martin was assisted by Thomas Erskine in the House of Lords. Ibid.
\item \textsuperscript{91} 3 George IV, c 71 1822.
\item \textsuperscript{92} Giles Legood, ‘Ethics and the History of Animal Welfare’ in Giles Legood (ed), \textit{Veterinary Ethics} (Continuum, 2000) 17, 25.
\item \textsuperscript{93} Malcolm Caulfield, \textit{Handbook of Australian Animal Cruelty Law} (Animals Australia, 2008) 4 n 9 quoting \textit{Martin’s Act}; Legood, above n 92, 25.
\item \textsuperscript{95} For example, the \textit{Cruelty to Animals Act 1835} (UK) 5 & 6 Will, 4, c 59.
\end{itemize}
In Australia, early animal protection provisions were based on English law and principally contained in Police Acts. However, there are earlier examples of specific laws intended to prevent certain practices in the Australian colonies. For example, in May 1790 Robert Ross, commandant of Norfolk Island, became aware that some of his subjects were cutting the eggs out of live petrels in order to eat the eggs. Ross and his council amended the law, forbidding ‘distroying the Birds there Cruely and Wantenly’. However, as Brent Salter explains, most of the prosecutions in the criminal courts concerning animals during the period 1788-1823 focused on the loss suffered by the owner. Prior to federation, Van Diemen’s Land (now Tasmania) was the first colony to introduce anti-cruelty legislation, in 1837. With the exception of South Australia, other colonies enacted anti-cruelty legislation in the 1850s. Most jurisdictions substantially revised their animal protection statutes in the early and again in the late 20th century.

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96 Salt, above n 94, 6.


98 Bonyhady, above n 97, 31.

99 Fidlon and R J Ryan, above n 97; 136; Bonyhady, above n 97, 31, n 58;


102 Emmerson, above n 101, 8.

The enactment of animal protection legislation established animal protection as a distinct field of law. It was one significant reform within the wider project of liberalism which took into its breadth the abolition of slavery, reforms to child labour conditions, and the incremental emancipation of women. However, there was a tension between the expansive liberalism which culminated in animal protection legislation and the liberal individualism that favoured the economic interests of property owners, especially those of the emergent middle classes.

While humanity’s circle of moral concern was gradually expanding, the middle classes faced a ‘crime problem’ in that various forms of property were vulnerable to theft. The expansion of society’s concern for its vulnerable (which included animals) conflicted with concern for the maintenance of social order and the protection of private property. These conflicting ideologies and motivations became embedded within and moulded the notion of legal individualism at the centre of animal protection as a field of criminal law in ways which have indirect, although important, implications for violence against animals.

In giving force and form to Benthamite sentiment the animal protection field ruptured law’s *doxa*; before this point domestic animals were of interest to the law

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105 The first enactment was *An Act for the Better Prevention of Cruelty to Animals 1837 (Imp)* 8 Will IV, c 3 in Van Diemen’s Land (now Tasmania). See Jamieson, ‘Duty and the Beast’, above n 20, 239.

106 *Slavery Abolition Act 1833 (Imp)* 3 & 4 Will 4 c 73.


108 Ibid 49.


110 Norrie, *Crime, Reason and History*, above n 10, 22.


solely as property.\textsuperscript{113} However, as will be discussed in more detail below, during the late 20\textsuperscript{th} century animal welfare standards were codified for the benefit and protection of animal use industries.

For Bentham it was sentience, rather than species membership, which formed the basis of moral worth.\textsuperscript{114} Bentham’s view on the moral regard humanity ought to offer other animals is encapsulated in his oft quoted footnote: ‘the question is not, Can they reason? nor, Can they talk? but, Can they suffer?’\textsuperscript{115} However, utilitarianism is not, as a matter of first principle, concerned with conferring animals with a right to life. Bentham did not oppose the use of animals and this too is evident in the same footnote in which he states ‘[t]he death they suffer in our hands commonly is, and always may be, a speedier, and by that means a less painful one, than that which would await them in the inevitable course of nature’.\textsuperscript{116} It was this view that formed the logic of the animal protection field.

\textbf{B \hspace{1cm} Animal Protection and Class Boundaries}

The moral sentiment that developed towards animals during the 18\textsuperscript{th} and 19\textsuperscript{th} centuries took shape amongst immense social conflict and rapid urban growth.\textsuperscript{117} Changes in industrial practices meant that working animals began to be phased out of many work settings.\textsuperscript{118} Social discomfort with the killing of animals resulted in

\textsuperscript{113} For a discussion of prosecutions relating the crimes of bestiality, stealing animals, and killing animals, in the early Australian colony see Salter, above n 100.


\textsuperscript{116} Ibid. The following text follows the quote above: ‘[i]f they being eaten were all, there is very good reason why we should be suffered to eat such of them as we like to eat: we are the better for it, and they are never the worse. They have none of those long-protracted anticipations of future misery which we have.’

\textsuperscript{117} See for example, O’Sullivan, above n 67, 142-58.

slaughterhouses being removed from public view.\textsuperscript{119} Pet ownership set down ‘the psychological foundations’ for the attitude that certain animals ‘were entitled to moral consideration’.\textsuperscript{120} Such changes in attitudes towards animals also found support in evolutionary theory, which emphasized the biological similarities between humans and other species.\textsuperscript{121}

Moral concern for animals arose from two key sources; well-to-do townspeople, who tended to think of animals as pets,\textsuperscript{122} and ‘educated country clergymen’.\textsuperscript{123} These sentiments were generally confined to ‘the professional middle classes’.\textsuperscript{124} The class privilege associated with hunting made the aristocracy resistant to such sentiment.\textsuperscript{125} Similar tensions were apparent in colonial Australia. Louisa Meredith, an early animal protection crusader in Tasmania, saw cruelty as a type of ‘moral pestilence’ and was opposed to killing animals for sport.\textsuperscript{126} The Tasmanian Society for the Prevention of Cruelty to Animals was founded in July 1878.\textsuperscript{127} As one of the Society’s founders Meredith confronted the question of whether the Society would lobby to put an end to hunting and coursing.\textsuperscript{128} The Society’s President, Governor Sir Fredrick Weld, cautioned against adopting ‘extreme positions’.\textsuperscript{129} As ‘an old sportsman’ and patron of several clubs, Weld ‘refused to countenance any criticism

\textsuperscript{119}Armstrong and Botzler, above n 114, 5; Thomas, above n 118, 110-19.

\textsuperscript{120}Armstrong and Botzler, above n 114, 4.


\textsuperscript{122}Kete, above n 118, 27; Thomas, above n 118, 181-2; Armstrong and Botzler, above n 114, 4-5; Richard D Ryder, Animal Revolution: Changing Attitudes towards Speciesism (Basil Blackwell, 1989) 318.

\textsuperscript{123}Thomas, above n 118, 182; Bonyhady, above n 93, 131.

\textsuperscript{124}Thomas, above n 118, 183.

\textsuperscript{125}Ibid 183-4.

\textsuperscript{126}Bonyhady, above n 97, 131.

\textsuperscript{127}Petrow, above n 103, 69.

\textsuperscript{128}Bonyhady, above n 97, 155.

\textsuperscript{129}Bonyhady, above n 97, 155 n 80.
of hunting'. Similarly, Kete notes that in England, the RSPCA left alone foxhunting ’by the professional and landed classes’.

In England, while the concern with being rid of the aristocracy’s recreational pursuits formed one aspect of the reform agenda, advocacy against cruel sports was also part of a crusade to elevate ‘standards of public order’ and engender more industrious habits among the ‘new working class’. Animal cruelty was described as a vice of the ‘illiterate’ and ‘vulgar’ and was identified with deviance. By contrast, kindness to animals indicated ‘full and responsible acceptance of the obligations of society’. The animal protection cause came to be associated with English virtue and a ‘canon of humanity’. In colonial Australia the establishment of animal protection societies in the 19th century formed part of a ‘civilising mission’ among the antipodean middle-class.

In the longer term, class boundaries were adhered to, if not rhetorically, then in the prosecutorial patterns of the SPCA (later the RSPCA). The ‘lower classes’ were ‘already implicitly defined as cruel and in need of discipline’. This bias was recognised by utilitarian philosopher John Stuart Mill when, in 1868, he declined the Vice-Presidency of the English SPCA because its operations were ‘limited to the offences committed by the uninfluential classes of society’. Statutory penalties

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130 Ibid.
131 Kete, above n 118, 27.
132 Thomas, above n 118, 185; Radford, Animal Welfare Law in Britain, above n 89, 57.
133 Thomas, above n 118, 186 n 25, quoting William Baker, Peregrinations (1770) 225.
135 Ibid 132.
136 Ibid 130.
138 Ritvo, above n 134, 133.
139 Thomas, above n 118, 186 n 28, quoting Francis E Mineka and Dwight N Lindley (eds), The Later Letters of John Stuart Mill (1972) iii.
reiterated that the purpose of animal protection laws was not to ‘discourage affluent malefactors’,\textsuperscript{140} with penalties little more than of nuisance value to the ‘moderately prosperous’.\textsuperscript{141} Yet, prosecution reports were ‘full of poor offenders’ imprisoned because they were unable to pay a minor fine.\textsuperscript{142}

The emphasis on virtue meant that animal protection could operate as a mechanism of social marginalisation, whereby a violation was both sinful and, at least ‘in a rhetorical sense’, excluded transgressors from the national community.\textsuperscript{143} By the end of the 19\textsuperscript{th} century England’s RSPCA had become preoccupied with respectability,\textsuperscript{144} a shift that was also evident in Australia into the 20\textsuperscript{th} century.\textsuperscript{145} In both its English and Australian interpretations, and despite the narrowness of the legal protections provided to animals, both the aristocracy (or its Australian equivalent) and lower classes, though for different reasons, remained uncommitted to the sentiments expressed by the new regime.\textsuperscript{146}

\textsuperscript{140} Ritvo, above n 134, 137.

\textsuperscript{141} Ibid 136.


\textsuperscript{143} Ritvo, above n 134, 130.

\textsuperscript{144} Caulfield, above n 93, 172; Ritvo, above n 134, 130. Radford notes that the objectives of the newly formed SPCA (1824) included ‘the mitigation of suffering and the promotion and expansion of the practice of humanity towards the inferior classes of animated beings’. Radford, Animal Welfare Law in Britain, above n 89, 41; O’Sullivan, above n 67, 150.

\textsuperscript{145} Petrow, above n 103; Regarding the RSPCA and respectability during the 20\textsuperscript{th} century, see for example, Simon Smith, ‘Constance May Bienvenu: From Animal Welfare Activist to Vexatious Litigant’ (2007) 11 Legal History 31.

\textsuperscript{146} Hay notes that ‘in 18\textsuperscript{th} century England the phrase ‘the ruling class’ was in general use in studies of the era, though it was not defined precisely (it was not solely a Marxist term). However, those who ‘controlled the criminal law’ were the ‘monarchy, aristocracy, gentry and, to a lesser extent, the great merchants’. Hay, above n 13, 61.
Part of the impetus for the establishment of the Society for the Prevention of Cruelty to Animals (SPCA) in London in 1824 was to close the enforcement gap.\textsuperscript{147} Enforcement of animal protection laws was problematic from the outset due to a lack of resources. London’s metropolitan police force was yet to be established and prosecutions were usually commenced by individuals.\textsuperscript{148} The SPCA relied on private funds to employ inspectors ‘to oversee the London markets and slaughterhouses’ and to initiate prosecutions.\textsuperscript{149} Richard Martin reportedly expressed doubt as to whether the SPCA should ‘stand forward as a prosecuting society’.\textsuperscript{150} The SPCA became the RSPCA in 1840 under the patronage of Queen Victoria.\textsuperscript{151} In Australia, concern about the welfare of horses led to the formation of the RSPCA Victoria in 1871.\textsuperscript{152} Other states followed, with the Northern Territory the last to form an RSPCA branch in 1965.

Richard Martin’s early doubts about the role of the RSPCA as prosecutor were prescient. In Australia, the organisation’s limitations have been thrown into relief by the ethical challenges that characterise the era of intensive farming.

Contemporary circumstances place the RSPCA in a precarious position. As a private charity, the RSPCA must meet the challenge of generating adequate income

\textsuperscript{147} Annabel Markham, ‘Animal Cruelty Sentencing in Australia and New Zealand’ in Peter Sankoff, Steven White and Celeste Black (eds), \textit{Animal Law in Australasia} (Federation Press, 2\textsuperscript{nd} ed, 2013) 208, 209; Radford, \textit{Animal Welfare in Britain}, above n 89, 47; Ritvo, above n 134, 146; Ryder, above n 122, 89; Petrow, above n 103, 64; See also Hilda Kean, \textit{Animal Rights: Political and Social Change in Britain Since 1800} (Reaktion, 1998) 31-8.

\textsuperscript{148} Radford, \textit{Animal Welfare in Britain}, above n 89, 40.

\textsuperscript{149} Markham, above n 147, 210.


\textsuperscript{151} Ryder, above n 122, 92.

to fund cruelty prosecutions.\textsuperscript{153} A very small percentage of the RSPCA’s income comes from the Commonwealth, State or Territory governments. For example, Deborah Cao has noted that for the 2007-08 financial year the RSPCA ‘received the equivalent of two per cent of its annual income from Commonwealth, State and Territory Governments’.\textsuperscript{154} This lack of funding means that the agency is heavily reliant on private donations and the support of pro bono lawyers.\textsuperscript{155} The RSPCA’s animal cruelty ‘prosecution-conviction to investigation ratio is low’,\textsuperscript{156} at less than 1.0 percent.\textsuperscript{157} This low rate reflects a reluctance to initiate prosecutions unless there is a high probability that charges will be upheld.\textsuperscript{158} The preparation of cases may also be thwarted by a lack of procedural expertise relating to gathering evidence,\textsuperscript{159} taking case notes,\textsuperscript{160} and maintaining confidentiality. For example, Caulfield provides commentary on the RSPCA (SA)’s management of a complaint


\textsuperscript{155} Ellis, above n 154, 39, 45; Wagman and Liebman, above n 86, 175; Duffield, above n 153.

\textsuperscript{156} 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 \textit{Federal Law Review} 347, 354; Markham, above n 147, 211.

\textsuperscript{157} The figure of less than 1.0 percent is based on data reported in Royal Society for the Prevention of Cruelty to Animals Australia, RSPCA Australia, \textit{RSPCA Australia National Statistics 2011-2012}. Markham, above n 143, 211 n 17; The proportion of complaints leading to prosecutions is similar in New Zealand. Peter Sankoff, ‘Five Years of the “New” Animal Welfare Regime: Lessons Learned from New Zealand’s Decision to Modernise its Animal Welfare Legislation’ (2005) 11 (3) \textit{Animal Law} 7, 30.

\textsuperscript{158} Gullone and Clarke, above n 152, 311. Cao, above n 154, 140 citing Annabel Markham, ‘Animal Cruelty Sentencing in Australia and New Zealand’ in Peter Sankoff and Steven White (eds), \textit{Animal Law In Australasia} (Federation Press, 2\textsuperscript{nd} ed, 2009) 289; White, above n 156, 354.

\textsuperscript{159} Markham notes a lack of legal training for investigators and prosecutors. Markham, above n 147, 211.

\textsuperscript{160} Ellis, above n 154, 23 n 79, quoting NSW Parliamentary Debates, Legislative Assembly, 9 November 2005, 19387 (Sandra Nori) ‘The Animal Cruelty Taskforce found no guarantee that ... fingerprints would be taken or a notation made on their criminal record where the investigation had been carried out without police involvement’.
into Ludvigsen Family Farms in which an RSPCA (SA) inspector ‘had possibly given Mr Ludvigsen a chance to substitute the subject pig with another one’. In addition, the standard of briefs prepared by the RSPCA have been called into question as one reason for an apparent gap between sentences imposed and maximum penalties.

Limited funding constrains the scope of inspectorate functions. This constraint is evident in the public relations media for one of the RSPCA’s yearly fund-raising events, ‘Cupcake Day’. The webpage for this event entitled, ‘[h]ow your cupcakes can change lives’, advises that raising $200 will keep ‘an RSPCA Inspector on the road fighting cruelty’. The RSPCA does not have the financial resources to commence animal cruelty prosecutions against larger scale animal use businesses; this is one reason that its activities focus on companion animals. As was evident in the case law review in Chapter Four, animal cruelty defendants are generally people living in disadvantaged circumstances on the peripheries of cities or in rural areas. Overall, the position of the RSPCA within the structure of the animal protection field means that it continues to reproduce the patterns of prosecution that characterised its functions during the 19th century. It is within this context that the participation of lawyers who provide pro bono legal services in cruelty prosecutions against individual defendants unavoidably reiterates the narrow meaning of animal cruelty. It therefore contributes to reproducing the structure of, and dominant power relations within, the field.

It is highly unusual to see criminal law enforcement the responsibility of a private charity. Traditionally it is the state that prosecutes criminal offences. Under

161 Caulfield, above n 93, 225;
162 Geysen et al, above n 104, 58.
163 White, above n 156, 353.
165 The equivalent to Australia’s RSPCA has inspectorate and prosecutorial powers in the UK. Radford, Animal Welfare Law in Britain, above n 89, 363; in Canada, Wagman and Liebman above n 86, 156-8; in New Zealand: Duffield, above n 153, and Sankoff, above n 157.
166 Ellis, above n 154, 22; Graeme McEwen, Animal Law: Principles and Frontiers (2011) 33; Wagman and Liebman, above n 86, 175; Duffield, above n 153, 6.
the welfare-liberal model of the state ‘crime was a violation of a public norm’. The state, as representative of the public will, was therefore the injured party. In addition, ‘the power and resources of the State as prosecutor are much greater than those of the individual accused’. The RSPCA’s status as a charity reiterates its relative ‘David and Goliath’ relationship against well-resourced, corporate animal-use business concerns.

A chronic lack of resources for enforcement and the risk that conflicts of interest will arise within the agency’s relationships with animal use industry groups have led some animal protection advocates to question the RSPCA’s legitimacy as lead animal protection law enforcement agency. The agency's ethical challenges are accentuated by the fact that it also faces allegations of conflicts of interest by animal use industry representatives. For example, in October 2013, the Western Australian parliament debated the RSPCA’s opposition to the live export trade. Mr Rick Mazza, Shooters and Fishers party representative and Member of the Legislative Council, moved a motion calling for an investigation into ‘whether the RSPCA was transforming from an animal welfare society into an animal rights activist’.

The animal protection field, as constituted in the early 19th century, was informed by the moral philosophy of animal welfare. However, as a legislative scheme, the concept of animal welfare was reconfigured according to the class relations and the emphasis on the protection of property rights that were influencing the

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167 Norrie, Citizenship, Authoritarianism and the Changing Shape of the Criminal Law, above n 27, 25.
168 Ibid 25.
169 R v Carroll (2002) 213 CLR 635, 643 (Gleeson CJ and Hayne J); McEwen, above n 166, 33.
170 Markham, above n 147, 210–11; Wagman and Liebman, above n 86, 175. For similar criticisms of the role of New Zealand’s SPCA see Sankoff, above n 157, and Duffield above n 153, 21-5.
evolution of the criminal law during that period. These two agendas have come together in complex and contradictory ways and are the source of the inconsistencies that characterise animal protection as a field of criminal law. Class relations and class-based attitudes towards certain practices directed the prosecutorial efforts of the RSPCA and, from the outset, were a deciding factor in whether or not a human inflicted harm sustained by an animal was categorised as cruel and thus criminal. Therefore, as a basis for a criminal offence, the phrase ‘animal cruelty’ has never had an objective meaning, nor has a finding of cruelty relied merely upon the extent of harm or injury sustained by the animal victim. Rather, it reflects a participant’s position (vis-à-vis other participants) within the field. The next and final part of Part IV discusses how the dynamic identified above has been reproduced and consolidated through developments relating to animal welfare science.

C The Animal Protection Field and Legitimate Authority

Within the contemporary Australian animal protection field claims for legitimacy centre on the notion that humanity’s attitudes towards other animals are undergoing a significant shift for ‘the better’. Nowadays ‘everyone’, including animal use industries, is ‘in favour of animal welfare’. The source of this advancement is generally seen to be Benthamite utilitarian philosophy, grounded in the concept of sentience. For example, legal historian Phillip Jamieson has argued that revisions to Australian animal protection legislation made during the late 20th century represented a move back towards the ‘benevolent philosophies of 18th century pre-industrial England’ a morality more closely aligned with Jeremy Bentham’s utilitarianism.

Jamieson’s assertion of a positive shift in attitudes towards animals during the late

173 Thomas, above n 118, 181.


20th century seems reasonable when contrasted against the raw fact that, for example, in early 19th century England ‘the routine abuse of animals was widespread and largely uncontested’. Yet, is also possible to see this in another way, that the more things have changed the more they have stayed the same. While many Australians consider their companion animals to be family members, ‘routine’ practices that constitute prima facie ‘abuse’ or cruelty to animals in commercial animal use industries are largely accepted, either explicitly or on the basis of ignorance. Further, this ‘abuse’ continues unabated despite the best efforts of Australia’s robust and increasingly sophisticated animal protection movement. If there has been such a shift in community sentiment, improvements in legal protections have been negligible. What is more likely, in line with Thomas’s view, is that there is an underlying consistency within humanity’s moral sentiment towards animals across time. However, the social settings in which such sentiment is permitted is subject to periodic redefinition. For example, while animal protection laws focused on agricultural animals during the


178 Radford, Animal Welfare Law in Britain, above n 89, 19; See also Ritvo, above n 134, 126; O’Sullivan, above n 67, 151.


182 In Australia, Animals Australia appears to lead Australia’s animal protection movement. The organisation has the capacity to undertake complex undercover investigations. See for example, Animals Australia, Indonesian Live Export Investigation on Four Corners Damming (n. d.) <http://www.banliveexport.com/features/live-export-investigation-on-four-corners.php>.

183 Thomas, above n 118, 153.

184 Ibid 150.
19th century, the focus has gradually shifted to companion animals.\(^{185}\)

The late 20th century revision Jamieson argued for relies on a morality ‘consistent with the demands of the social welfare state’ and an increasing subjugation ‘of governance of economic utility to the demands of conscience’.\(^{186}\) Yet the story surrounding the enactment of animal protection laws is an ambivalent one. On the one hand it asserted a new sense of the meaning of humanity's God-given dominion over other animals as a ‘trust’,\(^{187}\) and on the other, it was concerned with the maintenance of public order and the social discipline of ‘the labouring poor’.\(^{188}\) Public discourse during the Victorian era indicates that attitudes regarding the ‘inhumanity’ of animal cruelty had two aims: ‘to rescue animal victims and to suppress dangerous elements of human society’.\(^{189}\) In many respects, the SPCA represented a ‘middle-class campaign to civilise the lower orders’.\(^{190}\)

From this perspective, the claim that things are improving for animals in the contemporary era involves a form of genesis amnesia;\(^{191}\) either as a ‘forgetting’ of the complex social agenda which motivated the enactment of animal welfare legislation, or a disregard for the possibility of a historical continuity between those concerns and today’s animal protection agenda. This raises the question of whether arguments for effective animal protection laws can ever avoid participating in an agenda of social discipline of the economically excluded and socially disenfranchised. It appears that this divisiveness is inherent in the structure of the animal protection field. Finally, Jamieson’s reference to the

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\(^{185}\) In the Australian context, O'Sullivan explains the shift in focus of moral sentiment that has occurred over the past two centuries, from agricultural animals to companion animals, in terms of visibility. O'Sullivan, above n 67.


\(^{187}\) Radford, *Animal Welfare Law in Britain*, above n 89, 35-6 quoting Lord Erskine, Parliamentary Debates vol 14 cols 553 and 559-60 (15 May 1809). This was also evident in late 20th century Australian parliamentary debates. See for example, *Tasmanian Legislative Council Parliamentary Debates*, 24-26 September 1985, 2078 (Mr Miller) cited in Jamieson, ‘Duty and the Beast’, above n 20, 254 n 134. See also Thomas, above n 118, 162.


\(^{189}\) Ritvo, above n 134, 131.

\(^{190}\) Thomas, above n 118, 186.

\(^{191}\) Bourdieu, *Outline of a Theory of Practice*, above n 17, 79.
demands of the ‘social welfare state’ is at odds with the circumstances of the law in 21st century, which sees an increasing ‘stress on a neo-liberal conception of individual legal subjectivity’ and ‘on the authoritarianism latent in the liberal state and its law’.192

With regard to Jamieson’s claim of a subjugation ‘of governance of economic utility to the demands of conscience’, concern with the treatment of animals in the late 20th and early 21st centuries must be understood against the backdrop of the work of Ruth Harrison193 and Peter Singer194 during the 1960-70s, vis-à-vis the emergence of animal welfare science and the introduction of industry codes of practice for the welfare of animals. Harrison, and Singer, alerted the public to the large scale harm to animals associated with industrialised, intensive farming.195 For example, Ruth Harrison quoting a UK report on compliance with codes of practice published in the early 1970s: ‘in the case where pigs were kept in darkness … we found no evidence of any pain or distress to the pigs’.196 Another example: ‘calves were unable to turn around after the 6th or 7th week of life, and in their last two or three weeks of life many of them also had difficulty in grooming. We found no evidence of pain or distress attributable to these restrictions’.197 It is from the work of Singer and Harrison that the contemporary animal protection

194 Peter Singer, Animal Liberation (Pimlico, 2nd ed, 1995 [first published 1975]).
197 Ibid.
movement takes its political cues and philosophical reference points.¹⁹⁸

It was only a few years after the publication of Singer's *Animal Liberation*¹⁹⁹ that animal use industries in Australia began to develop codes of practice for the welfare of agricultural animals. The motivation to develop these standards reflected the expansion of the global market for meat and livestock, the need to meet World Organisation for Animal Health's (OIE) standards,²⁰⁰ and the increasing industrialisation and intensification of agricultural systems.²⁰¹ The OIE's recently published *Terrestrial Animal Health Code* reflects this intensification, defining ‘space allowance’ as 'the measure of the floor area and height allocated per individual or body weight of animals'.²⁰² The OIE²⁰³ animal welfare standards have gained wide recognition and legitimacy amongst the Organisation's 187 member states,²⁰⁴ with the World Trade Organization (WTO) citing the OIE as the

¹⁹⁸ Martha Nussbaum and Cass Sunstein identify Stanley Godlovitch et al (eds), *Animals, Men and Morals: An Enquiry into the Maltreatment of Non-humans* (Taplinger, 1971) as the starting point for modern philosophical scholarship in the area. Cass R Sunstein and Martha C Nussbaum, 'Bibliographic Essay' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 321; Alex Bruce states that Peter Singer is the 'intellectual pioneer of the welfarist position'. Bruce, above n 97, 49. As is generally recognised, Singer was elaborating on Jeremy Bentham's principle of equal consideration.


²⁰¹ For example '[b]etween 1970-71 and 2002-03 the number of Australian pig producers fell by an astounding 94 per cent'. Yet, production ' increased by 130 per cent over the same period'. Voiceless, *From Paddocks to Prisons: Pigs in New South Wales, Australia Current Practices Future Directions* (Voiceless, December 2005) 3.

authoritative organisation for animal health.\textsuperscript{205}

Animal welfare science has developed against the background of growing public concern about animal welfare in intensive farming. Animal welfare science’s claim of legitimate authority was affirmed perhaps in the early 1990s, when the professionals working in the area agreed that ‘animal welfare was measurable’ and hence a ‘scientific concept’.\textsuperscript{206}

The arguments made above should be read in the light of a recent meta-analysis of animal welfare science research, which found publication bias in animal welfare science literature, dependent on the source of funding.\textsuperscript{207} Where ‘new treatments’ likely to ‘incur the risk of increased cost to industry in implementation and conceivably on-going use as well ... [the] authors of industry-funded research tended to be more negative’.\textsuperscript{208} By contrast, authors of charity-funded research made more positive findings about the welfare state of animals in ‘new treatments’, when these were compared with ‘conventional’ or ‘no treatments’.\textsuperscript{209}

Although the bias was evident on both sides of the animal use industry–animal protection advocacy divide, the resources available to fund research by industry far outweigh the potential impact of that funded by charities such as the RSPCA. As Donaldson and Kymlicka have noted, ‘animal welfare science is largely funded by corporate interests or by government departments that have a mandate to defend


\textsuperscript{208} Ibid 947.

\textsuperscript{209} Ibid 957.
and promote the agricultural sector’. The findings of the meta-analysis, conducted by van der Schot and Phillips, strongly suggest animal welfare science as an active participant in the legitimisation of intensive animal use industries.

Jamieson’s assertion that late 20th century revisions of animal cruelty legislation reflect a return to the moral sentiments proffered by Bentham pales against the enormous numbers of animals raised in intensive farming systems and evidence of animal welfare science bias. Furthermore, since the mid-1980s, the conscience of the welfare state on which Jamieson relies has been substantially eroded by the more impersonal forces of the market under neoliberalism. As such, a feasible counter-thesis to Jamieson’s is that our preoccupation with the moral worth of companion animals, evidenced by the focus of prosecutorial activity under animal protection legislation points, albeit obliquely, to conflicts around class, criminality and the criminal law.

Part V

HABITUS AND THE ANIMAL PROTECTION FIELD

A Reactivating Habitus

Although Bourdieu’s concept of habitus had a significant influence on 20th century anthropology, sociology and related disciplines, it is a complex notion and has generated an extensive body of secondary literature. It is beyond the scope of

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211 van der Schot and Phillips, above n 207; Harrison, Ethical Issues in Intensive Farming, above n 196, 183.


this project to review these critiques exhaustively. Overall, commentators point to the concept’s ‘vagueness’, 215 ‘conceptual density’, 216 its versatility, 217 and its alleged contradictions, as symptomatic of the conflicting strands within Bourdieu’s thought. 218 In light of this, defining habitus for the purpose of analysing the animal protection field presents challenges.

As part of his defence of habitus, Bourdieu implored his critics to attend not so much to theoretical definitions, of which there are many versions and interpretations, 219 but instead to how the concept is applied as required by the task at hand. 220 Brubaker notes Bourdieu’s many definitions of habitus, concluding that the concept intends to convey ‘a certain theoretical posture’, a ‘sociological disposition’ or ‘way of looking at the world’. 221 This interpretation is supported by Bourdieu’s view that the researcher must ‘reactivate’ habitus according to the specific field of inquiry. 222 As a preliminary matter, and to provide the necessary empiricism to the reactivation of habitus to be discussed, the next section identifies the key participants in the animal protection field.

1 Identifying Participants on the Animal Protection Field

Previous parts of this chapter have discussed aspects of the role that some of the more obvious participants play on the animal protection field: the RSPCA, animal use industries, and animal cruelty defendants featured in Parts III and IV. However, in order to establish adequate theoretical anchoring for the case studies to follow

215 Brubaker, above n 214, 45.
216 Lizardo above n 16, 378.
217 Brubaker, above n 214, 45; Bourdieu and Wacquant, ‘The Chicago Workshop’, above n 2, 95.
218 Burawoy, above n 214; King, above n 214, 417; Wacquant, ‘The Structure and Logic of Bourdieu's Sociology’, above n 16, 23 n 41.
219 Brubaker, above n 214, 26; Bourdieu and Wacquant, ‘The Chicago Workshop’, above n 2, 95.
221 Brubaker, above n 214, 26.
in Chapters Seven, Eight, and Nine, it is necessary to identify the participants by a more systematic method.

The case law review presented in Chapter Four offers an opportunity to do so. From the judgments located for the purposes of the case law review, seven key participants can be identified:

1. State and territory branches of the RSPCA: the RSPCA’s frequent appearances in the judgments is consistent with the organisation’s role as lead law enforcement agency for animal cruelty;
2. The Director of Public Prosecutions (DPP): the DPP appeared in cases where animal cruelty occurred in the context of intimate partner violence\(^{223}\) and in cases of intentional aggravated cruelty;\(^{224}\)
3. State departments with responsibilities for animal welfare: this was prominent in cases relating to dog breeding and animal hoarding;
4. Individual defendants charged with cruelty against an individual animal, or several animals, in domestic settings;
5. Animal protection organisations as parties in civil actions related to allegations or concerns regarding potential animal cruelty;
6. Whistleblowers: the *Ludvigsen* case note\(^{225}\) highlighted the role that employee whistleblowers played in alerting authorities and providing evidence that eventually substantiated a prosecution; and
7. Corporations as defendants to animal cruelty charges.\(^{226}\)

In addition to these participants, the notion of symbolic violence and its companion, misrecognition, requires that one be cognisant as to significant absences or silences on the field: are there agents who have failed to appear? In this regard, its relevant to recall the paucity of publicly available data on animal

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\(^{223}\) *R v Zegura* [2006] NSWCCA 230 (3 August 2006)


\(^{225}\) *RSPCA v Ludvigsen* (unreported, Magistrates Court of South Australia, Magistrate Fahey M, 7 September 2007).

\(^{226}\) *Department of Local Government and Regional Development v Emanuel Exports Pty Ltd* (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008) (‘*Al Kuwait Case*’) and *RSPCA v Ludvigsen* (unreported, Magistrates Court of South Australia, Magistrate Fahey M, 7 September 2007).
cruelty complaints or prosecutions within Australia’s racing industry discussed in Chapter Three. Given recent media revelations of widespread animal cruelty, including live-baiting in the greyhound racing industry (these emerged some time after the case law review was completed), the absence of judgments relating to greyhound racing becomes conspicuous. It is an inconsistency that warrants further examination. Having identified the relevant participants, the discussion progresses to reactivate *habitus*.

2   Two Reactivations of Habitus

In this section *habitus* is reactivated in two ways. They represent an attempt to differentiate participants who are able to exercise relative power in shaping the field, and those who hold little power in this regard, though find themselves participants nonetheless.

The first use of *habitus* aims to accommodate a paradox involved in thinking with *habitus* within the animal protection field. As any field of law is relatively determined, how is it possible to avoid reaching deterministic conclusions or focusing on how *habitus* constrains rather than facilitates social change (in this case extensive legal reform)? In delineating animal protection as a field of law, defined by the reach of its legislative instruments, one must accept the law on its own terms: its claim of autonomy, its assumptions and its positivism. Not to do so would make coherent legal analysis impossible.

In these formal terms the law is locked within and unable to transcend its classificatory binaries (person and property, guilty and innocent, domestic and

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wild, strict liability and mens rea offences, etc.). These limits echo Bourdieu’s conclusions regarding the limits of dissent within the juridical field and thus, by implication, the limits of transformation available within the field of law. In this way, any given field of law shares the deterministic character of structuralism, which Bourdieu sought to overcome with his notion of habitus.\(^{229}\)

In the case of the law it is necessary to acknowledge this determinism and the way it affects the concept of habitus. Rather than a habitus which assumes an intersubjective relationship with other individuals in a relatively undifferentiated society such as Bourdieu’s exemplar of the Kabyle in Algeria, we find collectivities negotiating (and shaping) structure. Although this does not exclude the possibility of strategising or transformation, it does alert us to the idea that strategies aimed at transformation may need to be reflexive.\(^{230}\) In summary, it is necessary to acknowledge the determinism implicit within the animal protection field and the limits to its transformative potential. Further, these limits come concomitant with an acceptance of the law as an ‘unqualified human good’.\(^{231}\) Having said this, it is possible to stretch any identified potential to its limits.

\(^{229}\) Pierre Bourdieu In Other Words, above n 21, 13. Bourdieu used the term ‘agent’; he preferred this to ‘subject’ as the latter ‘carried baggage from the history on consciousness’. Bourdieu states ‘I wanted to ... reintroduce agents that Lévi-Strauss and the structuralists ... tended to abolish, making them into simple epiphenomena of structure. And I mean agents, not subjects’. Bourdieu, In Other Words, above n 21, 9. Although Bourdieu shared theoretical orientations with Michel Foucault, his focus on ‘the agent’ marks a key point of difference in their respective approaches to the study of power. Cronin argues that ‘Bourdieu avoids the problems that beset Foucault’s theory of disciplinary power by according a central explanatory role to a ... conception of the subject’ that is simultaneously ‘embodied and socially constituted’. Cronin, above n 8, 56. Perhaps Cronin may have been more accurate by stating ‘conception of the agent’. Cf Lizardo who refers to Bourdieu’s work as falling within the parameters of a ‘neo-structuralist reconstruction of classic structuralism’. Omar Lizardo, above n 16, 380. Bourdieu is also seen as a ‘generative structuralist’, with habitus in this context the ‘cognitive structure capable of producing and sustaining institutional action’. Lizardo, above n 16, 380.

\(^{230}\) In Bourdieu’s thought, reflexivity refers to ‘the systematic exploration’ of the ‘unthought categories of thought which delimit the thinkable and predetermine the thought’. Wacquant, ‘The Structure and Logic of Bourdieu’s Sociology’, above n 16, 40 quoting Pierre Bourdieu, Lecon sur la lecon (Editions de Minuit, 1982) 10, translated as ‘Lecture on the Lecture’ in Bourdieu, In Other Words, above n 21.

\(^{231}\) Thompson, above n 13, 208.
Following this, the first use of *habitus* pertains to groups or organisations who hold relative power or have a voice in saying what the law ‘is’.\(^\text{232}\) For example, animal use industries participate in and virtually control the development and content of MCOPWA. The RSPCA, as lead prosecutor, selects cases to which it will devote its prosecutorial resources. Some lawyers provide pro bono services for animal cruelty prosecutions. With these acts these agents shape the field. There is also lobbying to ensure animal cruelty is ‘taken seriously’, mainly through calls for tougher sentencing, a law reform agenda in which lawyers actively participate.\(^\text{233}\) How do these agents reproduce the status quo? Do some or all of them know what they are doing?

The second use of *habitus* emphasises those who carry the effect of the status quo, that is, animal cruelty defendants and those others who enter the field with the aim of disrupting the status quo. With regard to animal cruelty defendants, *habitus* has the potential to carry the argument in two directions. Firstly, there is the notion that ‘animal cruelty’ is nothing more than an expression of a certain *habitus*, one of malicious or uncivilised individuals. However tempting, accepting this premise requires that one accept the narrow meaning of animal cruelty and thereby participate in a ‘misrecognition’ as to the wider nature of violence towards domesticated animals. Bourdieu refers to *misrecognition* as ‘the fact of recognising a violence which is wielded precisely inasmuch as one does not perceive it as such’ (emphasis in original).\(^\text{234}\) For Burawoy, misrecognition is ‘constituted through a deeply implanted *habitus* at least partially independent of the particular social relations into which an individual is inserted’ (emphasis in original).\(^\text{235}\)

The second direction that the argument might take is one which leads us to see the defendants as actors within this field, though their participation is qualitatively different from the other agents mentioned above. It is defendants who most

\(^{232}\) The notion of a participant or agent within a field takes into account individuals or collectives. For example, Ringer states that participants may be individuals, groups, schools or academic disciplines. Ringer, above n 58, 270.


\(^{234}\) Bourdieu and Wacquant, ‘The Chicago Workshop’, above n 2, 168.

\(^{235}\) Burawoy, above n 214, 192.
obviously bump up against the structure of the law. Some, through appeal, protest their status as criminals. Like those commoners of 18th century England, these criminals advocate for themselves and their perceived rights through legal means. Their pleadings and appeals reinforce the legitimacy of the field’s status quo.

The trajectory of defendants within this field more closely approximates what one might tentatively call Bourdieu’s ‘classical’ notion of *habitus*, which foregrounds the individual in action, and assumes a form of inter-subjective interrelating with other individuals within the field. However, within the animal protection field the ‘person’ with whom defendants interact is the ‘legal individual’ who arguably embodies and expresses a *habitus* for the purposes of the law. This individual has attributes, or ‘non-attributes’, for example, he (or she) has no explicit social context. To develop this notion of *habitus* it is helpful to bring into play some of Alan Norrie’s arguments about the relationship between legal individualism and authoritarianism, as it is shaped by the criminal law across time.

In the drift away from the post-war consensus, the authoritarianism within legal individualism has become more apparent, as evidenced in developments in the criminal law since the 1970s. Norrie identifies three trends within the modern criminal justice system emerging at the interface between the individual and state power:

1. A growing emphasis on retributive concepts of criminal behaviour, stressing individual responsibility, or ‘responsibilisation’;
2. A growing emphasis on notions of dangerousness involving new categories of offenders such as ‘terrorists’;

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238 In using this term Norrie emphasises the ‘increased reliance on the formal legal invocation of individual responsibility’ and distinguishes his use of the term from others, citing David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 124. According to Norrie, Garland uses the term in a Foucauldian manner, emphasising the notion of ‘governmentality’ and ‘individuals policing themselves and their environment’. Norrie, Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 27, 15 n 5.
3. A tendency towards expanding regulation which includes new forms of control such as preventative orders.\textsuperscript{240}

These trends impact upon two groups categorised as criminal within the animal protection field, though from different directions. First and most obvious are defendants prosecuted on animal cruelty charges. The other arises from proposals to categorise animal activists as ‘terrorists’ when they trespass on the property of large scale animal use enterprises.\textsuperscript{241} In Australia there is debate relating to proposals for the introduction of ‘ag-gag’ laws. ‘Ag-gag laws’ aim to ‘prevent individuals recording or documenting the operations of commercial agricultural facilities’.\textsuperscript{242} Within the animal cruelty case law review presented in Chapter Four, animal protection advocates appeared in three guises. Firstly, an animal protection organisation appeared seeking standing to apply for an injunction against an animal culling operation.\textsuperscript{243} The second appearance was as a respondent in a civil action for trespass in which the question to the court was whether video footage obtained by activists was held on constructive trust for the enterprise owner.\textsuperscript{244} The third type of ‘animal protection advocate’ was employee whistleblowers. In this case the events eventually led to an animal cruelty prosecution commenced by the RSPCA. However, the whistleblowers’ complaints were initially dismissed and it was only after intervention by Animal Liberation (SA) that the RSPCA (SA)

\textsuperscript{239} On the neoliberal state and dangerousness see also John Pratt, \textit{Governing the Dangerous: Dangerousness, Law and Social Change} (Federation Press, 1997).

\textsuperscript{240} Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 27, 15.


\textsuperscript{243} \textit{Animal Liberation v Dept of Environment and Conservation} [2007] NSWSC 221. There was also the case of Australian Wool Innovation Limited \textit{v Newkirk} [2005] FCA, which concerned action taken by Australia Wool Innovation (AWI) against, among others, People for the Ethical Treatment of Animals. AWI argued that by alerting potential international wool buyers that the wool was sourced from animals who had been subjected to mulesing, PETA had contravened the \textit{Trade Practices Act 1974 (Cth)} ss 45, 45DB. See Caulfield, above n 93, 218.

\textsuperscript{244} \textit{Windridge Farm Pty Ltd v Grassi} [2010] NSWSC 335;
responded to the situation. These appearances confirm the status of (non-lawyer) advocates (across the spectrum from moderate through to the radical) as agents within the animal protection field in Bourdieu’s terms.

Both animal protection advocates and animal cruelty defendants are subject to constructions of dangerousness; the latter in terms of pathological dangerousness and the former, as politically dangerous. With regard to those charged with animal cruelty, a growing preference for retributive justice is apparent in calls for tougher sentencing. In the event that ‘ag-laws’ were enacted there is a possibility that animal activists would become vulnerable to the imposition of preventative justice measures. Lastly, although not necessarily falling within the criminal justice system, whistleblowers are also seen as dangerous to corporate interests and commonly experience a range of adverse effects as a result of their efforts.

The three case studies that complete the thesis focus on those participants who inhabit relatively less powerful positions within the field. In the next section the rationale for each case study is discussed in detail.

B Three Case Studies as a Triptych

The aim of the case studies in Chapters Seven, Eight, and Nine is to illuminate points on the animal protection field where it may be possible to break the relational power dynamics that maintain the status quo, and to either develop law proposals on each point, or at least shed light on why effective law reform is particularly difficult to achieve. In line with the theoretical approach outlined in

245 RSPCA v Ludvigsen (unreported, Magistrates Court of South Australia, Magistrate Fahey, 7 September 2007).


Chapter Five, the method for case study selection operationalised the idea of interdependence. It involved locating the points within the field at which humans were most marginalised. These were construed as points at which human interests were in closest proximity to, or intersected with, those of animals.

The idea that it is where humans are most dehumanised or powerless in a given field that we will find renegotiations of the human-animal boundary comes from Agamben’s notion of the anthropological machine249 and O’Sullivan’s ‘internal inconsistency’.250 The author has developed these ideas to identify the ‘double internal inconsistency’ which arises from the operation of the necessity test in animal protection, as an area of criminal law. It refers to the process by which humans (rather than animals) are categorised, via the necessity test, as more or less human, based on the attribute of economic rationality and their relative position vis-à-vis animal use industries that fall within the operation of the compliance-based regulatory model.

However, as became evident from the field analysis discussed in previous parts of this chapter, from the explication of habitus, and from the identification of participants within the field, the anthropological machine is also in operation in other ways within the animal protection field. In particular, we see that, along with animal cruelty defendants, animal protection advocates who act as whistleblowers inhabit a marginalised position. They are constructed as dangerous and thus a threat to the status quo. Further, based on the facts in Ludvigsen,251 it is likely that employees take particular risks with their livelihoods when they blow the whistle on behalf of animals, and are likely to be the most marginalised form of whistleblower.

249 It also resonates with the logic of sovereignty and the state of exception as Agamben poses it in Homo Sacer. Homo sacer refers to the status of the human who is not sacrificed, but whose killing would not result in a charge of murder. In the logic of sovereignty, homo sacer is the result of a double move in the exercise of sovereign power. In the first move, the biological human is drawn out of nature and into the juridical realm, as a legal person. In the second move, the state of exception, the juridical person is re-animalised. Thus, the ‘state of exception’ refers to the point at which ‘the state of nature and law, outside and inside pass through one another’. Giorgio Agamben, above n 71, 28 and 47.

250 O’Sullivan, above n 67.

251 RSPCA v Ludvigsen (unreported, Magistrates Court of South Australia, Magistrate Fahey, 7 September 2007).
Lastly, with regard to the logic of the case study selection, there was the need to attend to any silences. The silence in relation to the greyhound racing industry was conspicuous and therefore offered a suitable case study. Interestingly, if the animal protection field is raised to a higher level of generality, to a field characterised by animal use industries in Australia, it is possible to extend the idea of the anthropological machine, the human-animal boundary, and the idea of the ‘double internal inconsistency’ to the circumstances of the greyhound racing industry in Australia. This aspect of the argument will be developed within the case study itself.

In summary, the choice of case studies represents an attempt to operationalise the notion of the ‘double internal inconsistency’ in ways that are either directly or indirectly related to the necessity test, and thus to the cruelty-welfare opposition. Each case study is framed by a concept of violence that conveys the scale of inquiry.

In the next section, each case study is discussed as it relates to the logic of the field and how it reflects a particular scale of violence. The first case study takes whistleblowing as an attempt to rupture symbolic violence, and the second case study, which focuses on the offence of animal cruelty, examines the cruelty-welfare opposition at the scale of interpersonal violence, or what the author refers to as ‘individuated violence’. The third case study examines the greyhound racing industry through the lens of structural violence. Symbolic violence and interpersonal violence have been examined in detail previously. As a result, the sections below on whistleblowing and the offence of animal cruelty are quite brief. The section on the third case study, which deals with the greyhound racing industry, is more detailed. It introduces the concept of structural violence, overviews some relevant critique of the concept and discusses how it is will be used in Chapter Nine.

Overall, the arrangement of the case studies as a triptych is intended to convey the idea that attempts to rupture ‘symbolic violence’, ‘interpersonal’ or ‘individuated’ violence, and ‘structural violence’ are interdependent phenomena; they convey different perspectives or facets of a field defined by symbolic violence.
In Bourdieusian terms, whistleblowing can be understood as an attempt to rupture the symbolic violence maintained by the cruelty-welfare opposition. In effect, whistleblowers dispute the legitimate authority of animal use industries’ use of ‘animal welfare’. They also expose failures of self-regulation which, as discussed in Chapter Three, turns on the basis of the cruelty-welfare opposition. For these reasons, it is the idea of symbolic violence, discussed in detail in Chapter Five, that provides the frame for this case study. Although these employee whistleblowers were identified within the animal protection field, their activities raise broader questions about corporate fraud and the need to support and strengthen the role of whistleblower in order to protect key democratic values, especially transparency. As a result, the law reform strategy generated by this case study goes beyond animal protection legislation to a proposal for the introduction of a False Claims regime, based on the US model.

Frame Two: The Offence of Animal Cruelty

The scale of the inquiry for the second case study concerns the offence of animal cruelty. Therefore, it is framed by the idea of ‘individuated violence’, in that it takes individual responsibility in criminal law as the basis of analysis. The concept of individuated violence assumes interpersonal violence as defining the scale of inquiry, that is, violence perpetrated by an individual against another individual. Animal protection laws take the individual animal as the victim, based on the realisation of an interest. The author has expanded the notions of individual responsibility and harm that lie at the heart of interpersonal violence to include other sentient beings. The broader notion of ‘individuated violence’ refers to instances of individual humans perpetrating violence towards other individual sentient beings, whether the victim is human or a member of another species.

The case study attempts to gain deeper insight into the reproduction of the cruelty-welfare opposition by focusing the analysis on animal cruelty as an offence structured by the division of mens rea, or strict liability. It is this division that sits at the heart of the animal cruelty-animal welfare opposition that perpetuates the reproduction of the broader animal protection field. Having identified the scale of inquiry as individuated violence, it is also the case that the case study
demonstrates how existing socio-political differentiation is integrated into the objective fault test. Lastly, the case study reveals how, where the state responds to animal protection advocacy by enacting a new, serious animal cruelty offence, as occurred in Queensland in 2014, it simultaneously legitimises violence against animals perpetrated by corporations as a mere regulatory offence, of strict liability, and thus ‘not criminal in any real sense’. By deepening the divide between subjective fault and strict liability, agents become more securely locked into their positions within the animal protection field.

3 Frame Three: The Greyhound Racing Industry and Structural Violence

The final case study brings the structure and power dynamics that characterise the animal protection field to a higher level of generality, with the aim of assessing the potential and limits of law reform relating to animal use industries in Australia. It adopts the New South Wales greyhound racing industry as a case example, framed by the concept of structural violence.

Structural violence refers to violence that is exerted indirectly, ‘systematically’ or is ‘inherent in the social order’. Unsurprisingly, the concept has been criticised for being too broad. For example, Loïc Wacquant argues that it ‘conflates full-fledged domination with mere social disparity and then collapses forms of violence that need to be differentiated, such as physical, economic, political, and symbolic variants or those wielded by state, market, and other social entities’. However, it is possible to apply the concept of structural violence with considerable specificity and avoid the conflation against which Wacquant cautions.

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Medical anthropologist Paul Farmer demonstrates this, and offers a method. He asks ‘[h]ow might we discern the nature of structural violence and explore its contribution to human suffering? Can we devise an analytic model, one with explanatory and predictive power?’ Farmer argues that it is imperative to examine various social axes in order to discern ‘a political economy of brutality’. Further, to ‘tally body counts correctly requires epidemiology, forensic and clinical medicine, and demography’.

Farmer draws on the techniques and methods of public health to trace a socio-political causal pathway for the transmission of Human Immunodeficiency Virus (HIV) and other infectious diseases in Haiti, and for human rights violations such as torture. The concept has also been used in relation to Australian Aboriginal issues. Farmer’s objective is to clarify where responsibility might lie beyond the individual.

Farmer’s method involves taking an incident of bodily harm, injury or death as a starting point for an investigation into the bias or prejudices that lie in relevant systems. This makes the end-point injury intelligible in a way that maps causation across or within particular institutional systems. In the context in which it is deployed here, structural violence is applied as method.

The capacity to identify and trace instances of structural violence using Framer’s method challenges Galtung’s view that structural violence is ‘silent, it does not show – it is essentially static’.

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257 Ibid.
259 Farmer, ‘On Suffering and Structural Violence’, above n 256, 263.
260 Ibid 274.
structures or systems, its manifestations, expressed or embodied in adverse events, in pain, suffering and death, are all around us; it does ‘show’ and it is recognisable. We can identify the symptoms of structural violence and trace their source. However, to take the HIV infection transmission example, it is not necessary to argue that structural violence will be misrecognised as inter-personal violence because of the personalised nature of transmission.263

In Farmer’s example, the infected person and transmitter of HIV is a married man, who, in turn, infects the young woman. Although the relationship transgresses norms, the young woman’s parents accept the arrangement because they are desperately poor and have no alternative options to secure their daughter’s future.264 In the context of the young woman’s infection, she is instrumentalised by her lover, as their relationship is defined by multiple inequities. Indeed, the structure and dynamics of the relationship reflect the gender politics that fuel HIV transmission in the Caribbean.265

In considering the application of structural violence to animal protection, Farmer’s mention of the need to ‘tally body counts’ evokes media revelations of the mass killing of greyhounds as ‘wastage’ for the racing industry.266 Previously, the author has analysed the regulatory system and governance practices within Australia’s greyhound racing industry as a form of structural violence, which sees thousands of greyhounds killed each year as end-point victims.267

263 Cf Wadiwel, who argues that ‘a strategy of ‘seeing’ violence in a ‘material’ sense … appears to miss the nature of institutional violence’…. [b]ecause our knowledge systems do not allow us to see this as violence’. Dinesh Joseph Wadiwel, War Against Animals (Brill Rodopi, 2015) 32-3.


265 See for example, Avert, HIV and AIDS in the Carribean <http://www.avert.org/professionals/hiv-around-world/caribbean>.

266 See for example, ABC TV, ‘Making a Killing’, Four Corners, 18 February, 2015 (Caro Meldrum-Hanna and Sam Clark) <http://www.abc.net.au/4corners/stories/2015/02/16/4178920.htm>.

More recently, Wadiwel has deployed Galtung’s typology of interpersonal and structural violence to support a thesis that humanity is waging a war against animals.\(^{268}\) Wadiwel’s approach resonates with the framework developed in this thesis. However, it has fundamental differences in terms of its assumptions and methodology. First, the broad theoretical frame adopted here is symbolic violence. Second, Wadiwel’s notion of epistemic violence assumes the ‘other’ to be ‘the animal’, as a biologically defined entity.\(^{269}\) In the Bourdieusian influenced analysis pursued in this thesis, symbolic violence underwrites the domination of groups of humans over other groups of humans, via animal cruelty law. It assumes the ‘animalising’ of humans within animal protection as interdependent with violence against animals. Therefore, it attempts to remedy a misrecognition, to demonstrate that the structure of the animal protection field operates against certain animals and certain humans simultaneously. It is this dynamic that underlies continued violence against animals. By contrast, proposing a ‘war against animals’ assumes, \textit{a priori}, a separation between humans and other species, and thereby risks reifying a form of hostile anthropocentrism. The framework proposed in this thesis foregrounds interdependence rather than separation.

\textbf{Part VI \hspace{1cm} CONCLUSION}

This chapter analysed animal protection as a Bourdieusian field. It presented a perspective that highlighted the connections between the criminal law, capitalism, and class, and the implications of this dynamic for violence against animals.

Part II explained Bourdieu’s method for the analysis of a field as constituting three moments. Following this, Part III examined the animal protection field against ‘the field of power’.\(^{270}\) For animal protection, this field of power was taken to be the relationship between capitalism and the criminal law.\(^{271}\) Part III examined the

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\(^{268}\) Wadiwel above n 263, 31-4.

\(^{269}\) Ibid 34.

\(^{270}\) Ibid 104.

\(^{271}\) Ibid.
emergence of a new sensibility and concern for animals in England during the 18th and 19th centuries and the translation of this sentiment into a legislative scheme.\textsuperscript{272} It highlighted how these moral sentiments and the administration of animal protection legislation mirrored and maintained existing class boundaries.

Part IV explained the structure of the positions occupied by agents who compete for legitimate authority within the animal protection field. This involved an examination of how the moral sentiments that inhere in the concepts of ‘animal cruelty’ and ‘animal welfare’ are the subject of a classificatory struggle. The codification of animal welfare standards, and the establishment of animal welfare science, represent the ‘objectification’ of the cruelty-welfare division\textsuperscript{273} and thus the symbolic opposition that reproduces the field as a form of symbolic violence.

Part V discussed \textit{habitus} in the context of the animal protection field. It identified and explored the position and nature of those agents who, on the basis of the structure of the field, have the least power.\textsuperscript{274} The case law review was utilised to identify the key participants in this area of law, based on their appearance in the judgments. Identifying these participants prepared the way for the case studies.

The chapter concluded with a discussion of the method by which the case studies that follow in Chapters Seven, Eight, and Nine were selected and how the case studies align with the Bourdieusian framework. The case studies develop the theme of interdependence in that they explore points of intersection between these classificatory dynamics as they impact on humans and animals within this field.

Overall, the discussion demonstrated that the inconsistencies applying to sentient animals, by which certain animals are treated differently from others depending on

\textsuperscript{272} Salter, above n 100, 36. Bentham was the most revered of many writers on this topic during the 18th and 19th centuries. Others included Humphry Primatt, \textit{A Dissertation on the Duty of Mercy and Sin of Cruelty to Brute Animals} [first published 1776] (<https://archive.org/details/adissertationon00primgoog>), John Lawrence, \textit{A Philosophical and Practical Treatise on Horses and on Moral Duties of Man Towards Brute Creation} (Oxford University, 1802) (<https://archive.org/details/aphilosophicala03lawrgoog>), and Thomas Young, \textit{An Essay on Humanity to Animals} (Cambridge University Press, 1798).

\textsuperscript{273} Weininger, above n 3, 145-6.

\textsuperscript{274} Norrie, \textit{Crime, Reason and History}, above n 13.
the setting, applies equally to humans within the animal protection field. Furthermore, these two forms of inconsistency are interconnected. They provide a pathway by which violence between humans and against animals can be understood as interdependent. Both have their genesis in the social conflict and relations of class and commerce that originally shaped animal protection as a modern form of criminal law.275

275 Ibid 10; Douglas Hay argues that during the 18th century, through the use of pardon, the courts became ‘a selective instrument of class justice’, yet simultaneously proclaimed the law’s incorruptible impartiality’. Hay, above n 13, 17, 48.
CHAPTER 7 CASE STUDY ONE: EMPLOYEE

WHISTLEBLOWERS RUPTURING SYMBOLIC VIOLENCE

Part I INTRODUCTION

The emergence of whistleblowing aimed at exposing violence against animals in animal use industry settings seems a predictable outcome of public frustration with the status quo. In Bourdieusian terms whistleblowing can be understood as a rupturing of the symbolic violence that maintains things as they are. However, although a whistleblower may expose wrongdoing on the part of an organisation or corporation it is generally the whistleblower, rather than the corporation, who experiences a range of adverse outcomes for his or her efforts.1

The fact that whistleblowers are often rendered ‘pariahs’,2 and ‘permanently tainted as employees’,3 suggests that within the whistleblower-corporation dynamic there is a renegotiation of the human-animal boundary at work, reminiscent of Agamben’s anthropological machine. For example, the idea of being animalised is apparent in an article in which whistleblowers referred to


3 Braithwaite, Regulatory Capitalism, above n 1, 68.
themselves as ‘the ferrets’. It is the taint or stigma, the illegitimacy that the whistleblower bears, that re-establishes the status quo in favour of organisations or corporations. Rather than stigma, this case study adopts the concept of legitimacy, defined as ‘an attribute conferred on an organisation by external parties’ or stakeholders, ‘that are affected by the organisation’s operations’. The case law review presented in Chapter Four identified two cases involving whistleblowing in the interests of animal protection: *Windridge Farm v Grassi* (‘Windridge’) and *RSPCA v Ludvigsen* (‘Ludvigsen’). The role of whistleblowing arising from trespass, as considered in *Windridge*, has gained the attention of the Australian media and provoked some scholarly inquiry, especially in the context of proposed ‘ag-gag’ laws. However, making disclosures or gathering evidence by trespass may not be the best strategy to improve industry accountability as it entails significant risks. First, the evidence obtained may be inadmissible. In

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4 Ruth Williams, ‘Warning: Blowing the Whistle could Mess up Your Life’, above n 1. Ferret is a derogatory term. See for example, Stephen Young, ‘Let us Now Praise Famous Ferrets’ 16 April 1987 *New Scientist* 53.


8 [2010] NSWSC 335.

9 (unreported, Magistrates Court of South Australia, Magistrate Fahey, 7 September 2007).


12 The right to exclude others from one’s private property is a fundamental common law right. *Coco v The Queen* (1994) CLR 427, 435 (Mason CJ, Brennan, Gaudron and McHugh JJ).

13 *Bunning v Cross* (1978) 141 CLR 54; Uniform Evidence Acts s 138. See for example, *Evidence Act 1995* (Cth) s 138(1) ‘[e]vidence that was obtained: (a) improperly or in contravention of an Australian law, or (b) in consequence of an impropriety or of a contravention of an Australian law, is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained’. Most Australian jurisdictions mirror the Uniform
addition, the unlawfulness of the activity tends to estrange the animal protection movement from wider community norms. By contrast, whistleblowing on the part of employees working in intensive animal use settings has yet to be fully considered as a strategy to improve accountability in animal use industries in Australia.

It is against this background that this chapter adopts Australia’s pork industry as a case study to propose the introduction of a False Claims regime in Australia to better protect internal whistleblowers working in animal use industries. The proposal draws on the United States’ federal False Claims Act (US FCA). Under the US FCA, when a corporation knowingly submits false claims on the government and a person, usually an employee, discovers this fraud, *qui tam* provisions allow that person to file an action against the corporation, on behalf of the government. This is called a *qui tam* action. Under the federal US *False Claims Act* a *qui tam* action can be brought by anyone who has knowledge of fraud on the government. The processes involved in a *qui tam* action will be explained in Part III.

Part II of this chapter uses Ludvigsen as case example of whistleblowing in Australia’s pork industry in order to provide the context for the proposal that private sector whistleblowers working in animal use industries require better protection. Part III analyses whistleblower protections in Australia with reference to four models: anti-retaliation, structural approaches, media or public whistleblowing, and rewards such as that provided by *qui tam* provisions. The rationale for the introduction of *qui tam* provisions includes consideration of the

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15 §§ 3729(a)(1)(A) and (B) sets forth FCA liability for any person who knowingly submits a false claim to the government or causes another to submit a false claim to the government or knowingly make a false record or statement to get a false claim paid by the government. See also Faunce et al, ‘Recovering Fraudulent Claims for Australian Federal Expenditure on Pharmaceutical and Medical Devices’ (2010) 18 *Journal of Law and Medicine* 302, 303. A person ‘may bring a civil action for a violation of section 3729 for the person and the United States government’ *False Claims Act* 31 U.S.C. §§ 3730(b)(1).

16 (unreported, Magistrates Court of South Australia, Magistrate Fahey, 7 September 2007).

role that ‘pragmatic legitimacy’ \(^{18}\) plays in the trajectory of employee whistleblowers.\(^{19}\) Part IV proposes a False Claims regime, concentrating on how _qui tam_ provisions might strengthen whistleblower protection for employees working in animal use industries. It argues that the scope of ‘fraud on the government’ be extended to encompass circumstances involving multiple or ongoing breaches of Model Codes of Practice for the Welfare of Animals (MCOPWA) (and other relevant legislative instruments). In the following proposal such events would trigger the operation of _qui tam_ provisions. Expanding the notion of fraud in this manner is consistent with the developments under the US _FCA_ in which the impact of false claims actions has ‘gone far beyond’ financial recovery, to include the prevention of various social and environmental harms. Lewis and colleagues noted that in the US ‘whistleblowers have been responsible for ... the repair or cancellation of nuclear power facilities that were accidents waiting to happen owing to the substitution of automobile junkyard metal for nuclear grade steel; and exposure of 440 billion gallons of leaked radiation from the US nuclear waste site that had been concealed’.\(^{20}\) In addition, as ‘false claims’ or ‘fraud on the government’ relates to matters of public interest, it is necessary to establish animal protection as a matter of public interest.

**Part II**  
**BACKGROUND**

**A Whistleblowers and Animal Use Industries: Examples From Australia’s Pork Industry**

As mentioned above, in _Windridge\(^{21}\)_ animal protection activists trespassed onto land leased by a piggery to obtain video footage and subsequently became the respondents in a civil action commenced by Windridge Farm. In _Ludvigsen\(^{22}\)_ employee whistleblowers alerted the RSPCA (SA) to cruelty against animals in a


\(^{19}\) Ibid; Sawyer et al, _Necessary Illegitimacy of the Whistleblower_, above n 1.

\(^{20}\) Lewis et al, _The Key to Protection_, above n 1, 355 n 13.

\(^{21}\) [2010] NSWSC 335.

\(^{22}\) (unreported, Magistrates Court of South Australia, Magistrate Fahey, 7 September 2007).
piggery located in South Australia.\(^{23}\) In the absence of other publicly-available information (and the court transcript) the case summary that follows relies on the description of events as they were related to the South Australian parliament by Mark Parnell, Member of Legislative Council,\(^ {24}\) and discussions of the case published by lawyer Malcolm Caulfield.\(^ {25}\)

1. *Case Examples: Ludvigsen\(^ {26}\) and The Westpork Case*

(a) *Ludvigsen\(^ {27}\)*

On 4 January 2007 Jason Shaw, a manager of one of Ludvigsen Family Pty Ltd piggery sites made a complaint to the RSPCA (SA) that he had witnessed acts of animal cruelty. The RSPCA (SA) assessed his complaint as ‘vague’ and ‘general’, made an assumption that it was being made by a disgruntled employee, and chose not to act.\(^ {28}\) Malcolm Caulfield met with the complainant and other employees. They ‘provided evidence of failures to properly provide for animal welfare’ at the piggery.\(^ {29}\) Mr Shaw was ‘sacked’ by Greg Ludvigsen (the company's principal) after Shaw raised animal welfare concerns.\(^ {30}\)

On the 12th February 2007, another employee, Colin Bugg, who worked at a different Ludvigsen farm made a complaint to the RSPCA (SA) regarding a sick pig. Mr Bugg alleged that ‘the management had failed to act on the condition of a sick pregnant sow over a period of seven days’; this was a complaint regarding a failure

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\(^{23}\) South Australia, *Parliamentary Debates*, Legislative Council, 14 March 2007, 1629 (Mark Parnell).

\(^{24}\) Ibid 1628-32.


\(^{26}\) (unreported, Magistrates Court of South Australia, Magistrate Fahey, 7 September 2007).

\(^{27}\) Ibid.


to alleviate suffering. The pig was ‘unable to stand, had skin peeling off her body, had pressure sores, and had lost a great deal of weight’. Mr Bugg alleged that he was told by the RSPCA (SA) officer that his complaint would be dealt with confidentially. However, the RSPCA (SA) contacted Ludvigsen’s director regarding the situation and in doing so ‘almost certainly’ alerted the director to the complainant’s identity. Two days after the complaint Mr Ludvigsen dismissed Mr Bugg, advising him that in making the complaint to the RSPCA (SA) Bugg had been ‘disloyal’.

With the permission of an employee, Animal Liberation (SA) attended the piggery, obtained video footage, and lodged a complaint with the RSPCA (SA). In this case, the RSPCA (SA) responded immediately, and on inspection of the premises found three pig carcasses. This formed the basis of the prosecution against Greg Ludvigsen, the piggery’s director, on charges of cruelty relating to a failure to take reasonable steps to alleviate pain. One expert witness, a pathologist, related that the pigs should have been euthanased weeks before the date of the complaint. The Magistrate found that the pigs had been in significant distress and that ‘although the acts were not deliberate, they were cruel’ and ‘something to be deplored’. Mitigating factors taken into account during sentencing included the defendant’s ‘ill-health, business pressures, and the fact that he had taken steps to employ a vet surgeon’. Ludvigsen pleaded guilty. He was fined $1500 and

31 Ibid.
32 Ibid.
33 Ibid 1631.
35 Ibid.
37 The defendant was charged under the *Prevention of Cruelty to Animals Act 1985* (SA) s 13(1).
40 Ibid.
ordered to pay the RSPCA’s costs of $1300.'

The circumstances described above led Member of Parliament (SA) Mark Parnell to call for an independent investigation of the employee’s dismissal and RSPCA (SA)’s management of the complaint. In his address to South Australia’s Legislative Council Mr Parnell noted that:

any worker who wants to do the right thing and report animal cruelty is not going to be adequately protected – and it would be a disaster for the farm animals of this state if the only people who are aware of their predicament are unable to come forward.

As Mr Parnell’s comment indicates, internal whistleblowers are uniquely placed in that they generally possess information that the wider community does not.

As a consequence of the Ludvigsen case the Prevention of Cruelty to Animals Act 1985 (SA) was amended to include a whistleblower provision. The provision protects whistleblowers from victimisation, an example of the anti-retaliation approach which will be discussed in further detail in Part III. In summary, Ludvigsen illustrates the many barriers employee whistleblowers face when they attempt to protect animals.

41 Caulfield, Handbook of Australian Animal Cruelty Law, above n 25, 228 citing ‘personal communication from Animal Liberation (SA), 7 September 2007’.

42 South Australia, Parliamentary Debates, Legislative Council, 14 March 2007, 1629 (Mark Parnell).

43 Ibid 1632; Caulfield, Handbook of Australian Animal Cruelty Law, above n 25, 226; Australian Securities and Investments Commission, Submission No 45—Supplementary Submission to Senate Inquiry, Senate Standing Committees on Economics, Senate Inquiry into the Performance of Australian Securities and Investments Commission, October 2013, 136.


45 Section 43B.

46 Dworkin and Brown, The Money or the Media, above n 17, 656-7.

47 (unreported, Magistrates Court of South Australia, Magistrate Fahey, 7 September 2007).
The Westpork Case

Although the events in *Ludvigsen* took place in 2007, allegations of animal cruelty in intensive pig farms continue. In 2012, Westpork, one of Australia’s largest pork producers, was prosecuted under the *Animal Welfare Act 2002* (WA). Westpork was fined $225 000 for cruelty to pigs. A Westpork piggery was raided by police in 2007 after an employee alerted the authorities to the appalling conditions.

A total of 30 charges were laid: ten charges each for Westpork, its general manager Neil Ferguson, and one other employee. However, the prosecuting authority (Department of Agriculture and Food Western Australia) dropped the charges against Mr Ferguson and the other employee, proceeding only with the charges against the company. At the time the charges were laid, Mr Ferguson held a position on the Board of Australian Pork Limited and Pork Training WA. According to Humane Society International (Australia), calls for Mr Ferguson to be stood down from these positions were refused.

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54 Humane Society International (Australia), above n 49; ABC News, ‘Calls for Pig Farmer to Stand Down Rejected Terry Redman, Agriculture Minister’, 10 February 2011.
Whistleblower research literature has generally accepted that whistleblowers suffer as a result of blowing the whistle.\(^5^5\) However, there is debate as to the nature and prevalence of this suffering.\(^5^6\) Indeed, maintaining a ‘suffering whistleblower’ stereotype may dissuade potential whistleblowers from disclosing observed wrongdoing.\(^5^7\) A recent review of the literature concluded that ‘while some whistleblowers suffer, most do not’.\(^5^8\) Yet, there are individual whistleblower characteristics that consistently predict retaliation.\(^5^9\) These are associated with ‘position and power in the workplace’.\(^6^0\) Employment that is ‘precarious’ including part-time, casual or employment based on contract, newer employees, lower-level workers’ and employees who are ‘under financial pressure’ are more likely to experience reprisal when they blow the whistle.\(^6^1\) By contrast, more senior employees, those with ‘stronger tenure and better pay are less likely to face retaliation for exposing wrongdoing’.\(^6^2\) As has been noted above, in the context of intensive animal use industries, it is employees who are working with animals that are ‘often the only persons who know the conditions of the animals and are in a position to report cruel practices’.\(^6^3\) Generally, those workers also sit at the lower levels of the employee hierarchy. Given these structural factors, and in light of the experience of the employees in Ludvigsen,\(^6^4\) for the purpose of this case study it will be assumed that front-line whistleblowers working in intensive animal use

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\(^5^6\) Ibid 230.

\(^5^7\) Ibid.

\(^5^8\) Ibid 247.

\(^5^9\) Ibid 237

\(^6^0\) Ibid.

\(^6^1\) Ibid.

\(^6^2\) Ibid.


\(^6^4\) (unreported, Magistrates Court of South Australia, Magistrate Fahey, 7 September 2007).
industries often do suffer as a result of blowing the whistle.

**Part III  WHISTLEBLOWER PROTECTIONS IN AUSTRALIA**

In general, whistleblowing refers to circumstances in which either a current or former member of an organisation makes a disclosure of ‘illegal, immoral or illegitimate practices under the control of their employers to persons that may be able to effect action’. Although the term does not have a common legal definition, it encompasses persons who make public interest disclosures and covers ‘employers, managers, organisational leaders, regulators, and disclosures to the public’ such as those made to the media. Australia’s key whistleblower protection legislation is presented below, in Table 7.1.

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68 Ibid.

69 Ibid.
Table 7.1

*Overview of Australian Whistleblower Protection Legislation.*

<table>
<thead>
<tr>
<th>Public Sector</th>
<th>Officials</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Public Interest Disclosure Act 2013 (Cth) ss 69, 70</em></td>
<td>Public officials, Commonwealth contractors and their employees reporting a broad range of conduct.</td>
</tr>
<tr>
<td><em>Public Interest Disclosure Act 2012 (ACT) s 10</em></td>
<td>Anyone disclosing public sector wrongdoing</td>
</tr>
<tr>
<td><em>Protected Disclosures Act 1994 (NSW) s 4A</em></td>
<td>Public officials disclosing public sector wrongdoing</td>
</tr>
<tr>
<td><em>Public Interest Disclosure Act 2008 (NT) s 7</em></td>
<td>Public officers disclosing public sector wrongdoing</td>
</tr>
<tr>
<td><em>Whistleblowers Protection Act 1993 (SA) s 5(1)</em></td>
<td>Anyone disclosing public and private sector wrongdoing</td>
</tr>
<tr>
<td><em>Public Interest Disclosure Act 2010 (Qld) s 19</em></td>
<td>Anyone disclosing public sector wrongdoing</td>
</tr>
<tr>
<td><em>Public Interest Disclosures Act 2002 (Tas) ss 4, 6</em></td>
<td>Public officers disclosing improper conduct or detrimental action; contractors</td>
</tr>
<tr>
<td><em>Whistleblowers Protection Act 2001 (Vic) s 5</em></td>
<td>Anyone disclosing public sector wrongdoing</td>
</tr>
<tr>
<td><em>Public Interest Disclosure Act 2003 (WA) s 5</em></td>
<td>Anyone disclosing public sector wrongdoing</td>
</tr>
<tr>
<td><em>Corporations Act 2001 (Cth) Part 9.4AAA s 1317AA (1)(a)</em></td>
<td>(i) Company officers, (ii) employees or, (iii) a person who has a contract for the supply of services or goods to a company, or (iv) an employee of a person who has a contract for the supply of services or goods to a company</td>
</tr>
</tbody>
</table>

The question of how to best protect whistleblowers in Australia’s public and private sectors is the subject of ongoing debate, however, it is beyond the scope of this case study to survey all of the issues. This discussion reflects on the models of whistleblower protection that have been drawn upon to date in order to set the scene for the argument that incentives, of the type provided under the US *FCA,*

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70 See for example, The Treasury, Commonwealth of Australia, ‘*Improving Protections for Corporate Whistleblowers: Options Paper*’ (Commonwealth of Australia, 2009) and Senate Economics References Committee (Parliament of Australia), *Performance of the Australian Securities and Investments Commission* (June 2014); Brown, *Towards Ideal Whistleblowing Legislation,* above n 44, 7.
would appropriately innovate the patchy whistleblower protections available to employees working in Australia’s private sector.  

At present, Australia’s approach to whistleblower protection draws on three models: anti-retaliation, structural approaches, and media or public whistleblowing. Anti-retaliation mechanisms aim to protect whistleblowers from victimisation. Structural approaches focus on internal procedures and the management of disclosures. Early public sector whistleblower laws, enacted in the 1990s, relied on anti-retaliation mechanisms together with some structural protection. More recent reforms have given increasing statutory recognition to disclosures to the media as a ‘part of best practice whistleblowing laws, at least for the public sector’.

Although there is variability, the general view is that whistleblowers often experience adverse outcomes as a result of blowing the whistle. Faunce notes that ‘[m]ost whistleblowers never work in the same industry again, [sic] lose

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72 Dworkin and Brown, ‘The Money or the Media’, above n 17; Brown, ‘Towards Ideal Whistleblowing Legislation’, above n 44.

73 Dworkin and Brown, ‘The Money or the Media’, above n 17, 656-7.

74 Ibid 691.


76 Dworkin and Brown, ‘The Money or the Media’, above n 17, 694.


mortgages’; there are also negative impacts on the whistleblower’s family.\textsuperscript{79} Indeed, the assumption that fear of reprisal was the ‘primary disincentive to employee disclosure of wrongdoing’ proved to be a major influence in the adoption of an anti-retaliation model.\textsuperscript{80} These laws targeted the public sector and aimed to remove legal barriers to disclosure, prohibit retaliation or reprisal,\textsuperscript{81} and provide for compensation for victimisation by way of civil and criminal remedies.\textsuperscript{82} By 2010 all states had provisions for criminal and civil remedies in place.\textsuperscript{83} Available remedies now include damages awarded on the basis of the tort of victimisation and, in some states, restitution on the basis of discrimination.\textsuperscript{84} The tort of victimisation is a creature of statute. It provides the right to sue for damages in general courts for detrimental action taken in retaliation for having made a disclosure under the relevant legislation.\textsuperscript{85}

Overall, to date, the anti-retaliation model in both public sector whistleblower legislation and under the \textit{Corporations Act 2001} (Cth) have proven to be a ‘substantial failure’\textsuperscript{86} and of ‘little practical benefit to aggrieved whistleblowers’.\textsuperscript{87}

\textsuperscript{79} Faunce, \textit{Qui Tam}, above n 78, 10; Senate Economics References Committee, \textit{Performance of the Australian Securities and Investments Commission}, above n 70, 222.

\textsuperscript{80} Dworkin and Brown, ‘The Money or the Media’, above n 17, 683; See for example, \textit{Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990} (Qld).

\textsuperscript{81} \textit{Public InterestDisclosure Act 2013} (Cth) ss 9, 13.

\textsuperscript{82} Dworkin and Brown, ‘The Money or the Media’, above n 17, 684.

\textsuperscript{83} Ibid.

\textsuperscript{84} Dworkin and Brown, ‘The Money or the Media’, above n 17, 684. \textit{Whistleblowers Protection Act 1993} (SA) s 9(2)(b); \textit{Public Interest Disclosure Act 2003} (WA) s 15(4); \textit{Public Interest Disclosure Act 2010} (Qld) s 44.

\textsuperscript{85} Ibid. \textit{Public Interest Disclosure Act 1994} (NSW) s 20A; \textit{Whistleblowers Protection Act 1993} (SA) s 9(2)(a); \textit{Public Interest Disclosure Act 2010} (Qld) ss 40-43; \textit{Public Interest Disclosure Act 2012} (ACT) s 41; \textit{Public Interest Disclosures Acts 2002} (Tas) s 20(2); \textit{Whistleblowers Protection Act 2001} (Vic) s 19(2); \textit{Public Interest Disclosure Act 2003} (WA) s 15(1); Brown, ‘Towards Ideal Whistleblowing Legislation’, above n 44, 17 n 33-4.

\textsuperscript{86} See Dworkin and Brown, ‘The Money or the Media’, above n 17, 656, 690, in the context of the \textit{Corporations Act 2001} (Cth) provisions. One criticism made of Part 9.4AAA is that it does not reference workplace relations and industrial relations systems legislation. Dworkin and Brown argue that these are the ‘most relevant avenues for seeking organisational justice’. Dworkin and Brown, ‘The Money or the Media’, above n 17, 690.
Despite these shortcomings, it is clear that retaliation measures provide the minimum threshold for whistleblower protection.

Measures based on a structural approach have proven more effective than anti-retaliation measures.\(^8_8\) These focus on internal procedures and involve ensuring an effective means of disclosure, that disclosures are responded to, and the whistleblower receives support and protection.\(^8_9\) In addition, recent reforms in Australia have seen public sector whistleblowing to the media obtain some protection under statute.\(^9_0\)

Neither public nor private sector whistleblower legislation in Australia make provision for rewards. Rewards or *qui tam* approaches will be discussed in Section Two after some general points about whistleblower protections for private sector employees have been made.

In Australia, most whistleblower legislation relates to the public sector.\(^9_1\) Notwithstanding The shortcomings noted above, whistleblower protections for the

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\(^8_8\) Dworkin and Brown, ‘The Money or the Media’, above n 17, 691.

\(^8_9\) Ibid. See for example, *Public Interest Disclosure Act 2010* (Qld) ss 27, 28, 60; *Public Interest Disclosure Act 2012* (ACT) s 33; *Public Interest Disclosure Act 2013* (Cth).

\(^9_0\) Dworkin and Brown, ‘The Money or the Media’, above n 17, 694; New South Wales was the first to do so: *Public Interest Disclosure Act 1994* (NSW) s 19. The ACT (*Public Interest Disclosure Act 2012* (ACT) s 27), Queensland (*Public Interest Disclosure Act 2010* (Qld) s 20), and Western Australia (*Public Interest Disclosure Act 2003* (WA) s 7A) followed suit, with the ACT the first to permit, in certain circumstances, a whistleblower going public without first making an internal or regulatory disclosure. *Public Interest Disclosure Act 2012* (ACT) s 27. The *Public Interest Disclosure Act 2013* (Cth) also provides for external disclosure in certain circumstances: *Public Interest Disclosure Act 2013* (Cth) ss 25, 26. See also Dworkin and Brown, ‘The Money or the Media’, above n 17, 697-8; Lewis et al,’The Key to Protection’, above n 1, 364.

\(^9_1\) Lewis et al, ‘The Key to Protection’, above n 1, 364.
Australian public sector are relatively strong.\textsuperscript{92} With the enactment of the \textit{Public Disclosure Act 2013} (Cth)\textsuperscript{93} whistleblower protection rules became fairly comprehensive for the Australian public sector.\textsuperscript{94} However, the comprehensiveness of the regime ought not to be confused with its effectiveness. For example, Lewis and colleagues cite the case of Queensland nurse and whistleblower Toni Hoffman as illustrative of the inaccessibility and underutilisation of statutory remedies.\textsuperscript{95}

\section{Whistleblower Protections for the Private Sector}

The \textit{Public Disclosure Act 2013} (Cth) does not apply to private sector employees to which this proposal is aimed. Protections for private sector employees are considerably weaker than for the public sector.\textsuperscript{96} For example, a recent report assessing whistleblower regimes in ‘Group of 20’ countries concluded that whistleblower protection in Australia’s private sector was ‘not at all comprehensive’.\textsuperscript{97}

The primary whistleblower provisions for the private sector are contained in Part 9.4AAA of the \textit{Corporations Act 2001} (Cth) (‘the Act’). Disclosure under Part 9.4AAA requires that the whistleblower act in good faith and have reasonable grounds to suspect a contravention of the Act.\textsuperscript{98} According to Lewis and colleagues, these protections are ‘widely accepted as poorly framed and irrelevant to the day-to-day

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\textsuperscript{92} Simon Wolfe et al, \textit{Whistle Blower Protection Laws in G20 Countries: Priorities for Action} (Final Report, September 2014); Brown, ‘Towards Ideal Whistleblowing Legislation’, above n 44.

\textsuperscript{93} Brown, ‘Towards Ideal Whistleblowing Legislation’, above n 44.

\textsuperscript{94} Ibid.

\textsuperscript{95} Lewis et al, ‘The Key to Protection’, above n 1, 365-6

\textsuperscript{96} Wolfe et al, above n 92, 25; Lewis et al, ‘The Key to Protection’, above n 1, 364.


\textsuperscript{98} Section 1317AA(1) [a] disclosure of information by a person who (d) has reasonable grounds to suspect that the information indicates that: (i) the company has, or may have, contravened a provision of the Corporations legislation; or (ii) an officer or employee of the company has, or may have, contravened a provision of the Corporations legislation; and (e) the discloser makes the disclosure in good faith. Note that ‘under section 1405, the reference to a provision of the Corporations legislation includes a reference to a corresponding provision of the old corporations legislation of the States and Territories’.\textsuperscript{15}
practice of companies'.

In 2014 Part 9.4AAA was reviewed as part of a federal Senate Economics References Committee Inquiry (the Inquiry) into the Australian Securities and Investment Commission’s (ASIC) operations. The Inquiry identified a range of weaknesses in the current regime, including:

- A lack of provision for anonymous disclosure,
- That the current protections do not extend to disclosures to the media or other third parties,
- There is no requirement for internal whistleblower systems; and
- The compensation provisions are 'limited and vague'.

With regard to the models discussed in relation to the public sector, these weaknesses demonstrate that private sector whistleblower protections are wanting on all fronts. First, although the Act provides for anti-retaliation measures, ASIC’s powers to act on behalf of whistleblowers are limited. For example, ASIC cannot ‘commence court proceedings on a whistleblower’s behalf'. Generally, the

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99 Lewis et al, 'The Key to Protection', above n 1, 367.


101 Corporations Act 2001 (Cth) ss 1317AA(1)(d)–(e).


103 Senate Economics References Committee, Performance of the Australian Securities and Investments Commission, above n 70, [14.72].

104 Ibid [4.82] n 77 citing A. J. Brown, Submission 343, 7; Corporations Act 2001 (Cth) s 1317AD ‘If (a) a person (the person in contravention) contravenes subsection 1317AC(1), (2) or (3); and (b) a person (the victim) suffers damage because of the contravention; the person in contravention is liable to compensate the victim for the damage'.

whistleblower will be left to enforce her rights herself under Part 9.4AAA.\textsuperscript{106} Second, the lack of requirement for internal whistleblower systems means that the structural approach is virtually non-existent in the private sector.\textsuperscript{107} Third, Part 9.4AAA does not provide any protection for disclosures to the media or other third parties.\textsuperscript{108} In addition, those who seek a remedy under general law, breach of contract, or negligence face substantial costs and delays.\textsuperscript{109} Lastly, although anti-discrimination laws offer protection against victimisation, they are rarely used. In general, they are ‘poorly enforced and attract low compensation awards’.\textsuperscript{110}

It is clear that the whistleblower protections afforded to private sector employees are substantially inadequate. However, there is a strong likelihood that even if the forms of protections offered to the public sector were extended to the private sector, employee whistleblowers would continue to suffer reprisals, and the various other negative outcomes associated with whistleblowing. That the current system shifts an undue burden onto the whistleblower rather than onto the wrongdoer also presents a structural inequity. Lastly, anti-retaliation measures, structural approaches, and provisions for public disclosure fail to repair the whistleblower’s ‘pragmatic legitimacy’.\textsuperscript{111} In the following discussion it will be argued that the repair of pragmatic legitimacy is central to the whistleblowers fate. It will also be argued that the US \textit{FCA} has valuable deterrence effects,\textsuperscript{112} which are not apparent, or at least have not been identified as a strength, in Australia’s

\begin{thebibliography}{111}
\bibitem{107} Dworkin and Brown, ‘The Money or the Media’, above n 17, 693.
\bibitem{108} The Senate, Economics References Committee, \textit{Performance of the Australian Securities and Investments Commission}, above n 70, [14.37]-[14.40].
\bibitem{109} Lewis et al, ‘The Key to Protection’, above n 1, 368.
\bibitem{110} Ibid 369.
\bibitem{111} Sawyer et al, \textit{Necessary Illegitimacy of the Whistleblower}, above n 1. This repair is reflected in the words of the \textit{FCA}, which, with regard to retaliation states that the whistleblower is entitled to ‘all relief necessary to make him or her ‘whole’. § 31 USC 3730(h); See also Faunce et al, ‘Because They Have Evidence: Globalizing Financial Incentives for Corporate Fraud Whistleblowers’ in A. J. Brown, David Lewis, Richard E Moberly and Wim Vandekerckhove (eds), \textit{International Handbook on Whistleblowing Research} (Elgar Online, 2014) 381, 398.
\bibitem{112} Faunce et al, \textit{Because They Have Evidence}, above n 111, 383, 388, 395-6; Saywer, \textit{Lincoln’s Law}, above n 75.
\end{thebibliography}
current whistleblower regime for the private sector. These points will be expanded upon after the key features of the US FCA regime have been outlined. The discussion will then consider the case of Australia’s pork industry with two aims: identifying how the notion of ‘fraud on the government’ might encompass multiple or ongoing breaches of MCOPWA, and establishing animal protection as a matter of public interest.

2 Incentivised Protections for Private Sector Whistleblowers: the US False Claims Act

The US FCA reflects an old common law concept allowing ‘individuals who had information relevant to crimes to initiate a suit on behalf of the King’.113 If the action was successful the individual/s providing that information would be financially rewarded by the state, under a doctrine commonly abbreviated to qui tam.114 The doctrine took statutory form in 13th century England, although later fell into disuse.115 The US FCA was enacted in 1863, although the value of qui tam only came into its own following amendments made in 1986 which:

- Increased incentives for whistleblowers;
- Guaranteed compensation for whistleblowers, except in some circumstances;
- Introduced protection for whistleblowers; and
- Trebled the penalties for fraud.116

The US FCA allows civil recovery ‘for false claims made against the government’.117 ‘False claims’ refer to circumstances in which corporations knowingly submit false claims to the government for the purpose of financial gain. ‘Fraud on the

113 Faunce et al, Because They Have Evidence, above n 111, 382; Faunce, Qui Tam, above n 78, 3.
114 Ibid. The doctrine is described fully by the Latin maxim qui tam pro domino rege quam pro seipso.
115 Braithwaite, above n 1, 66.
116 Sawyer, Lincoln’s Law, above n 75, 11.
117 §§ 3729(a)(1)(A) and (B) set forth FCA liability for any person who knowingly submits a false claim to the government or causes another to submit a false claim to the government or knowingly makes a false record or statement to get a false claim paid by the government; Also see Faunce et al, Recovering Fraudulent Claims, above n 15, 302, 303.
government’ often concerns false claims made on government subsidies, for example in the pharmaceutical industry, or ‘negative’ false claims in which an entity that owes the government money will avoid paying, such as in cases of tax evasion.

Where a person, usually an employee, discovers fraud 

qui tam provisions allow that person to bring a civil action for a violation of the US FCA for the US government. The person bringing the action is referred to as a ‘relator’. The relator must engage a “no-win no-fee’ legal firm to represent him or her. The firm then presents the case to the relevant law enforcement agency. The action is filed, under seal, and a written disclosure is provided to the Department of Justice ‘or the local state US attorney’. During this period, the prosecuting authority assesses ‘the probative value of the evidence before accepting or declining the matter’.

The seal is lifted after 60 days and it is at this point that the complaint is presented to the defendant. If the relevant authority proceeds with the action it joins the action alongside the whistleblower, against the corporation in question. If the action is successful, the whistleblower is entitled to between 15-25 per cent of any damages awarded and is protected from retaliation. If the authority decides not to proceed, the whistleblower has the option of continuing the action

119 See, for example, John Braithwaite, ‘Flipping Markets to Virtue with Qui Tam and Restorative Justice’ (2013) 38 Accounting, Organisations and Society 458.
120 § 3730 (b)(1).
121 Faunce et al, ‘Because They Have Evidence’, above n 111, 383.
122 § 3730 (b)(2) ‘all the information the person possesses shall be served on the Government pursuant to Rule 4(d) (4) of the Federal Rules of Civil Procedure. See also Faunce et al, Recovering Fraudulent Claims, above n 15, 303.
123 Faunce et al, ‘Because They Have Evidence’, above n 111, 384.
124 Ibid 393.
125 31 USC § 3730 (b)(2); See also Faunce et al, ‘Because They Have Evidence’, above n 111, 384.
126 31 USC § 3730(d)(2).
127 Faunce et al, ‘Because They Have Evidence’, above n 111, 384.
independently. In these circumstances, if successful, the whistleblower is entitled to 25-30 per cent of the quantum awarded. There are qualifications. For example, the action cannot be based on ‘already publicly disclosed allegations of transactions in a criminal, civil or administrative hearing’. Furthermore, the person must be the ‘original source’ of the information.

Until recently, the introduction of reward-based incentives or *qui tam* provisions have been considered inconsistent with Australia’s ‘anti-dobbing’ culture. Other concerns include that providing incentives to blow the whistle may lead to the legal system being ‘overwhelmed with trouble-makers fabricating claims for financial gain’. However, this view appears to be shifting. Several witnesses to the 2014 Inquiry into ASIC’s operations raised the introduction of rewards or other monetary incentives for corporate whistleblowers as a matter for consideration. The Inquiry committee was of the view that reward-based or *qui tam* provisions seem to ‘improve rates of whistleblowing’ and ‘by extension the detection of corporate misconduct’. It recommended that reward-based incentives or *qui tam* provisions be considered as part of a broader review of Part

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128 31 USC § 3730 (c)(3).
129 31 USC § 3730(d)(1).
130 31 USC § 3730(e)(4)(A); See also Faunce et al, *Recovering Fraudulent Claims*, above n 15, 304.
131 31 USC § 3730(e)(4)(B).
132 For example, according to Grabosky, cultural inhibitions in Australia against informing or ‘dobbing-in’ one’s fellow citizen were strong, though may be breaking down. Paul Grabosky, ‘Australian Regulatory Enforcement in Comparative Perspective’ in Paul Grabosky and John Braithwaite (eds), *Business Regulation and Australia’s Future* (Australia Institute of Criminology, Canberra 1993) 9, 17; Wim Vandekerckhove et al, ‘Understandings of Whistleblowing; Dilemmas of Societal Culture’ in A. J. Brown, David Lewis, Richard E Moberly and Wim Vandekerckhove (eds), *International Handbook on Whistleblowing Research* (Elgar Online, 2014) 37, 41; Smith, ‘Whistleblowers and Suffering’, above n 55, 243.
133 Faunce et al, ‘Because They Have Evidence’, above n 111, 386.
It is likely that this shift in attitude evident in Australia has been influenced by the success of *qui tam* actions initiated by whistleblowers under the US *FCA*.\(^{138}\)

### 3  *Qui Tam and the Pragmatic Legitimacy of the Whistleblower*

Sawyer and colleagues argue that the ‘[o]nly effective whistleblowing legislation is that which ‘directly repairs the whistleblower’s pragmatic legitimacy’.\(^{139}\) Unlike anti-retaliation and structural models of whistleblower protection, the US *FCA* is the only form of protection that repairs a whistleblower’s ‘pragmatic legitimacy’.\(^{140}\) Unlike the majority of whistleblowers, those in the United States who receive the backing of the Department of Justice in *qui tam* actions ‘often survive and succeed’.\(^{141}\)

To understand the reason why *qui tam* actions have this effect it is necessary to briefly discuss the role of legitimacy in organisational culture. In this context, legitimacy is an ‘attribute conferred on an organisation by those external parties\(^{142}\) or stakeholders\(^{143}\) ‘that are affected by the organisation’s operations’.\(^{144}\) Broadly speaking, stakeholders are individuals or entities that either have the power to affect an organisation or are affected by its actions.\(^{145}\) The relationship between organisations and their stakeholders involves stakeholders conferring legitimacy on organisations, and organisations having to balance how they might like to behave against the expectations of their legitimacy-conferring stakeholders.

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\(^{137}\) Ibid [14.116].


\(^{139}\) Sawyer, *The Necessary Illegitimacy of the Whistleblower*, above n 1, 102.

\(^{140}\) Ibid 101.

\(^{141}\) Ibid 91.

\(^{142}\) Ibid 87.


\(^{144}\) Sawyer et al, *The Necessary Illegitimacy of the Whistleblower*, above n 1, 87.

\(^{145}\) Ibid.
stakeholders.\footnote{146} Legitimacy has various dimensions: moral, cognitive and pragmatic.\footnote{147} Moral legitimacy is ‘judged on whether the conferring entities believe that an organisation’s activities are ‘the right thing to do’ within a set of accepted social norms’.\footnote{148} Cognitive legitimacy ‘relies on the provision of what conferring entities believe are plausible explanations for the organisation’s activities’.\footnote{149} This proposal concentrates on pragmatic legitimacy as it is this form of legitimacy that is pivotal to whistleblower outcomes.

Pragmatic legitimacy relies on the ‘self-interest of conferring entities’\footnote{150} and has two dimensions, both of which apply to organisations and individual whistleblowers. For the organisation, in this case a corporation, the bestowal of pragmatic legitimacy is maintained with other entities through:

1. Exchanges which increase the expected value of the other entity;
2. Through the joint influence of the organisation and the other entity; and
3. On the basis of shared values.\footnote{151}

An individual employee's pragmatic legitimacy is bestowed and maintained in a similar way and the other entities may be individuals or an organisation. As Sawyer and colleagues explain ‘[w]hen an organisation retaliates against a whistleblower, they destroy the whistleblower’s pragmatic legitimacy by destroying their ability to exchange, influence and share values with others’.\footnote{152}

When whistleblowers make disclosures their position shifts from that of an employee to one of stakeholder or conferring entity. However the organisation

\footnote{146}{Ibid.}
\footnote{147}{Ibid.}
\footnote{148}{Sawyer et al, The Necessary Illegitimacy of the Whistleblower, above n 1, 87-8.}
\footnote{149}{Ibid 88.}
\footnote{150}{Ibid.}
\footnote{151}{Ibid 89.}
\footnote{152}{Ibid.}
does not recognise the whistleblower as a stakeholder. Without the support of others to substantiate their legitimacy whistleblowers do not have the power to influence the organisation. Now in the position of stakeholder, the whistleblower's legitimacy becomes negatively correlated with that of the organisation, and it is that which determines the whistleblower's credibility. Retaliation, demotion and loss of authority diminish the whistleblower’s pragmatic legitimacy. Qui tam actions counteract this dynamic; the government becomes a conferring entity, and bestows both moral and pragmatic legitimacy on the whistleblower. It is this which, in large part, repairs the whistleblower’s legitimacy.

Part IV  DISCUSSION

The preceding discussion demonstrated that whistleblower protections for employees working in the private sector are substantially inadequate. Further, the forms of protections currently in place for the public sector have been shown to be underutilised and largely ineffective. It is likely that they would remain ineffective were they translated for the private sector. It has also been argued that qui tam actions repair the whistleblower’s pragmatic legitimacy and that this is a determinative factor in a whistleblower’s fate. Before going on to consider the case study, it is worth noting another strength of the US FCA: qui tam provisions appear to have ‘a substantial deterrent effect on potential wrongdoers’. Perhaps one of the key reasons for this deterrent effect is the uncertainty that whistleblowers (empowered under a False Claims regime) introduce into the

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154 Ibid.
155 Ibid 98.
156 Ibid 89.
158 Ibid.
159 Ibid 85.
160 Faunce et al, 'Because They Have Evidence', above n 111, 396.
regulatory environment.\textsuperscript{161} Under the usual compliance model wrongdoers operate with certainty as to the given points of regulatory intervention, and know ‘who to avoid’.\textsuperscript{162} However, as Sawyer observes:

> [t]he uncertainty of who may blow the whistle reverses the regulatory game. In the presence of whistleblowers or potential whistleblowers, miscreants are uncertain as to who to avoid and ... how to avoid them. Whistleblowing randomizes the regulatory balance sheet.\textsuperscript{163}

In offering partnership and legitimacy to the whistleblower, the US FCA is likely to heighten the level of uncertainty faced by potential corporate fraudsters. The reasons outlined above form the basis for the argument that a federal FCA regime is a more appropriate reform option than one which focuses on strengthening the existing whistleblower mechanisms available in Australia.

The assertion that multiple or ongoing breaches to MCOPWA on the part of animal use industries might constitute false claims requires conceptual work. Two foundational criteria need to be met. The first is to establish animal protection as a matter of public interest. The second is to demonstrate how such breaches might fall within the meaning of ‘fraud on the government’. The following section the case of Australia’s pork industry, to demonstrate how these criteria might be satisfied.

\textit{A \ Animal Protection Regulation in Australia’s Pork Industry}

\textbf{1 \ Australian Pork Limited, Animal Protection, and Corporate Governance}

\textbf{(a) \ Animal Protection in the Pork Industry as a Matter of Public Interest}

Australian pork accounts for 2.1 per cent of national farm production.\textsuperscript{164} Over the last 40 years production methods in the pork industry have intensified, reflecting

\textsuperscript{161} Kim Sawyer, \textit{The Independent Regulator} (2016) 63.

\textsuperscript{162} Ibid.

\textsuperscript{163} Ibid.

the growth of factory farming. For example, ‘between 1970-71 and 2002-03 the number of Australian pig farmers fell by 94 per cent’.\textsuperscript{165} However, output grew by 130 per cent.\textsuperscript{166}

\textit{Australian Pork Limited} (APL) is the peak body for Australia’s pork industry. The Australian government is a major investor in the Australian pork industry and funds APL, by matching levy-funded research and development expenditure.\textsuperscript{167} As APL notes, the Australian public ‘rightly’ has ‘an acute interest in the returns on that investment for the Australian taxpayer’.\textsuperscript{168} Hence, in the context of APL’s role as a spokesperson for industry members, APL acknowledges a public interest in its business activities. Further, APL’s business activities centre on breeding, raising, killing, and selling pigs. On the topic of corporate governance, APL states that it ‘places a lot of importance on working towards a positive regulatory environment by assisting industry with important social issues, in particular food safety, product integrity and animal welfare’.\textsuperscript{169} Further, one of the issues the APL is likely to face in the future is ‘increasing consumer demand for product intangibles’,\textsuperscript{170} including ‘origin of product, environmental footprint, animal treatment practices and processes’.\textsuperscript{171} Various ethical and moral dimensions are implicit in these intangibles. For instance, the phrase ‘animal treatment practices’ can be construed as including both consumer interest in animal treatment practices and an interest that animals have in the way that they are treated by humans. Indeed, it is the self-interest an animal has in not being harmed that forms the moral and jurisprudential basis for anti-cruelty legislation. From APL’s statements it is

\begin{footnotesize}
\begin{itemize}
\item[166] Ibid.
\item[168] Ibid. The funding conditions are outlined in the APL Statutory Funding Agreement.
\item[171] Ibid.
\end{itemize}
\end{footnotesize}
reasonable to construe employee whistleblowing in the interests of animal protection as disclosures made in the public interest. In addition, the APL recognises that it has both social responsibilities in relation to animal protection and that there is public interest that resides within its sphere of governance.

(b) The Conflicted Nature of Australia’s Pork Industry’s Regulatory Model and Fraud on the Government

Regulation of animal welfare in the Australian pork industry falls within the compliance stream described in Chapters One and Three. Australian Pork Limited, as the industry’s peak body, established the Australian Pork Industry Quality Assurance program (APIQ) in 1997.\(^{172}\) Participation in this auditing system is voluntary for APL members, and farmers are relied upon to do a yearly self-audit. There would be pig farming enterprises that do not undertake audits, either because they are not members of APL or, they are members, though choose to not participate. In April 2014, the proportion of the sow herd covered by the APIQ program was 88.8 per cent, but the number of sow sites was 34 per cent.\(^{173}\) For those who opt in, according to the APL, APIQ provides a ‘framework and standards by which Australian pig producers can demonstrate they are responsible farmers who care for their animals, the environment and their customers, by following safe and sustainable practices.’\(^{174}\)

Australian Pork Limited owns and is the managing agent for APIQ.\(^{175}\) Management of APIQ includes an APIQ panel. The APIQ panel’s functions include making ‘decisions regarding producer and auditor issues of non-compliance to APIQ’.\(^{176}\)


\(^{173}\) ACIL Allen Consulting, Performance Review of APL, above 170, 10.


\(^{175}\) Ibid.

APIQ standards reflect the *MCOPWA: Pigs* it would appear that non-compliance with APIQ may also amount to a breach of *MCOPWA: Pigs*. As was discussed in Chapter Three, in general, compliance with MCOPWA provides a defence or an exemption to an animal cruelty offence under state and territory anti-cruelty legislation, a breach potentially amounts to a prima facie animal cruelty offence. As what amounts to animal cruelty is a question to be tested on the evidence, this possibility could be raised by breaches to mandatory or voluntary practices under the *MCOPWA: Pigs*. The APIQ Panel receives ‘concerns’ about audit outcomes and related issues. It directs an appeal, incident investigation, and review process. The APIQ Panel’s decisions are final.

The author could not locate information clarifying at what point the APIQ Panel, which appears to exercise quasi-tribunal powers, refers non-compliance on to prosecuting authorities. In addition, it is not clear as to the statutory basis for the APIQ Panel’s power to hear appeals or direct investigations, especially given that investigative matters potentially involve the collection of evidence that may support an eventual prosecution. Overall, the APIQ program and APIQ Panel establishes a closed regulatory system. The fact that APL owns APIQ, the lack of appeal mechanisms (on behalf of those harmed by breaches: that is, pigs), and an apparent lack of referral mechanisms to law enforcement authorities where there is evidence of ongoing breaches to MCOPWA, suggest an inherent conflict of interest within this regulatory system. Lastly, it is arguable as to whether compliance with public laws such as state and territory animal protection legislation would form an implied term of government funding agreements to

177 Ibid.
179 Section 34A of the *Prevention of Cruelty to Animals Act 1979* (NSW) provides neither a defence nor an exemption to a charge of animal cruelty. However, in practice, it is likely that the section operates as a defacto defence provision.
180 Ibid.
182 Ibid.
animal use industries or peak bodies such as the APL. Therefore, ongoing or multiple breaches of MCOPWA could be construed as a breach of that implied term.

The current definition of fraud on the government relates only to financial loss. However, in *United States v. Neifert-White*\(^{183}\) the court noted that the US *FCA* ‘was intended to reach all types of fraud, without any qualification, that might result in financial loss to the Government’\(^ {184}\).

This broad definition could have applied, for example, to the financial costs the federal government faced following the live export exposé in 2011.\(^ {185}\) To meet the ‘might result in financial loss to the Government’ requirement, it is conceivable that future research could develop case study estimates of the indirect costs to government that flow from significant breaches of animal protection standards associated with industry fraud.

It is relevant to note that the supply of sub-standard animals to Union army purchasers during America’s Civil War was one of the fraudulent trading practices that prompted the enactment of the US *FCA* in 1863.\(^ {186}\) This idea of ‘supply to government’ could reach back to include the ongoing condition of animals where they are bred, raised and killed by industries which enjoy substantial and direct federal government funding.

Overall, the conflicts of interest built into this regulatory system emphasise the need for industry employees, those who have insider information, to be protected when they choose to make disclosures in the interests of animal protection and in the public interest.

\(^{183}\) (1968) 390 US 228, 232.

\(^{184}\) Ibid. See also Faunce et al, ‘Because They Have Evidence’, above n 111, 382.


\(^{186}\) Faunce, *Qui Tam*, above n 78.
Specific Issues in the Introduction of a False Claims Regime in Australia

(a) The Requirement of Knowledge

The US FCA requires knowledge of the fraud be proved. It defines ‘knowing’ and ‘knowingly’ to mean that a person with respect to information:

- Has actual knowledge of the information; 188
- Acts in deliberate ignorance of the truth or falsity of the information; 189 or
- Acts in reckless disregard of the truth or falsity of the information. 190

These terms do not require proof of specific intent to defraud. 191

As has been noted, the pork industry is required to abide by public laws, including state and territory animal protection statute. Where, in the presence of federal government funding, ongoing breaches to MCOPWA occur and the pork industry supplies information which indicates or assumes otherwise, it could be understood as operating in reckless disregard of the truth or falsity of that information.

(b) Enforcement and Penalties

Were a FCA (Cth) enacted it may adopt the US approach to prosecution in which prosecutorial powers would lie with the Attorney General’s Department (or in some cases, the Director of Public Prosecution). Given criticisms of the Commonwealth Department of Agriculture as being too close a friend of industry, 192 and the potential conflicts of interest it faces as a prosecuting

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187 § 3729(b).
188 § 3729(b)(1)(A)(i).
189 § 3729(b)(1)(A)(ii).
190 § 3729(b)(1)(A)(iii).
191 § 3729(b)(1)(B).
authority, implementation of this option raises the question as to the need for an independent statutory body with the necessary investigative and prosecutorial powers. There have been moves to establish a federal Independent Office of Animal Welfare in the past. In 2013, Senator Adam Bandt introduced a Bill into Australia’s federal parliament for this purpose. However, the Bill lapsed at dissolution on 5 August 2013, with the change of federal government. It is conceivable that an Independent Office of Animal Welfare with an incumbent Inspector General could have powers under a FCA (Cth).

Where there is evidence of ongoing or multiple breaches of MCOPWA, suggesting a reckless disregard of regulatory standards, an action under a FCA (Cth) seems appropriate. On this point, the circumstances of the Westpork prosecution involved widespread, multiple breaches of the MCOPWA: Pigs and would potentially fall within the intent of the envisaged qui tam provisions.

An action of this type may have provided a feasible alternative to the Westpork prosecution in which the charges made against the general manager under the Animal Welfare Act 2002 (WA) were dropped. A major advantage would be the opportunity to protect and compensate the whistleblower in question. It would also begin to shift the regulatory environment towards uncertainty for potential fraudsters and thereby contribute to broader deterrence objectives.

As will be discussed in Chapter Eight, there is a need to develop what Clough calls a ‘realist model of corporate criminal culpability’. Civil penalties and punitive remedies, combined with whistleblower compensation built into the system, are


195 Ibid.

196 Ibid.

197 Humane Society International (Australia), above n 49.

steps in this direction. They more clearly position the corporation as the wrongdoer and militate against the blame-shifting and stigma that de-legitimates the whistleblower. They also have the advantage of avoiding the costs, delays and evidential and procedural complexities involved in a criminal prosecution. Lastly, they do some work in establishing corporate culpability for breaches of animal welfare standards in a way that offers an alternative causal pathway to the orthodox approach to animal cruelty.

The imposition of civil penalties and remedies sits in the mid-level of the regulatory enforcement pyramid discussed in Chapters One and Three and fills a significant gap between persuasion and criminal prosecution. Although Westpork was subjected to a substantial criminal penalty under the Animal Welfare Act 2002 (WA), as explained earlier, the charges against Mr Ferguson were dropped. The fines imposed on the corporation do not abrogate the need to find senior officers, such as Mr Ferguson, accountable.

(c) Whistleblower Compensation Funds

The introduction of a FCA (Cth) would require a source of whistleblower compensation funds, and it is possible that such funds could be industry specific. Procedures for whistleblower payment could draw on the US approach to fraud recovery. For example, the US Sarbanes Oxley Act 2002 provides that civil penalties paid by companies or directors for securities law violations are added to a disgorgement fund, commonly known as a ‘fair fund’. The fund is drawn on to compensate victims, though could be adapted to compensate whistleblowers in Australia. Another option would be to establish a fidelity fund. Under this option, APL members would be required to contribute to an industry fidelity fund, calculated on the basis of yearly turnover. For the pork industry this contribution might be estimated at 0.2 per cent of turnover, based on the number of pigs sold per annum. The money contributed would be held on trust, much like the legal practitioners’ fidelity fund. The penalties and incentives could be lower than those under the US FCA, though not so low as to dilute the deterrence effect and fraud.

199 15 USC § 7201 (2002). The purpose of the Sarbanes Oxley Act is to ‘protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes’.

recovery.\textsuperscript{201}

\textit{(d) Relationship to Australian Competition and Consumer Commission’s Jurisdiction}

The introduction of \textit{qui tam} provisions under a \textit{FCA} (Cth) would provide an additional avenue to complaints made to the Australian Competition and Consumer Commission (ACCC). Generally, and to date, actions commenced by the ACCC go to the issue of product labelling.\textsuperscript{202} With regard to animal product labelling, some prosecutions by the ACCC have relied on evidence obtained by trespass.\textsuperscript{203} It is possible that an expanded fraud on the government action could see a decrease in the number of misrepresentation and misleading conduct cases brought to the ACCC and, by implication, reduce the need for trespass to obtain evidence. Further, an expanded notion of fraud on the government moves the underpinning jurisprudential basis from one based on consumer rights, to one which combines the public interest with the direct interests of animals.

\textbf{Part V} \hfill \textbf{Conclusion}

This chapter has argued that whistleblowers have a potentially important role to play in protecting animals in animal use industries. It positioned the interests of whistleblowers as interdependent with those of animals. The application of this method identified the potential for innovation within the animal protection field and an opportunity to explore a law reform option which simultaneously empowers whistleblowers and strengthens animal protection. The strengthening

\textsuperscript{201} Sawyer, \textit{Lincoln’s Law}, above n 75, 32.

\textsuperscript{202} \textit{Competition and Consumer Act 2010} (Cth) s 2. Cases related to product labelling include \textit{Australian Competition and Consumer Commission v Pepe’s Ducks Pty Ltd} [2013] \textit{FCA} 570 which concerned the veracity of claims that certain ducks lived in ‘open range’ conditions and were ‘grown nature’s way’; \textit{Australian Competition and Consumer Commission v Luv-a-Duck Pty Ltd} [2013] \textit{FCA} 1136 concerned the claim that certain ducks were ‘grown and grain fed’; \textit{Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4)} [2013] \textit{FCA} 665 related to the company’s suggestions that their animals were ‘free range’; \textit{Australian Competition and Consumer Commission v C.I. and Co Pty Ltd} [2010] \textit{FCA} 1511 regarded labelling eggs as ‘free range’. Voiceless and Barristers Animal Welfare Panel Limited, \textit{Joint Submission on ALRC Review of Serious Invasions of Privacy in the Digital Era} (19 December 2013) 19.

\textsuperscript{203} \textit{Competition and Consumer Commission v Pepe’s Ducks Pty Ltd} [2013] \textit{FCA} 570; \textit{Australian Competition and Consumer Commission v Luv-a-Duck Pty Ltd} [2013] \textit{FCA} 1136; \textit{Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4)} [2013] \textit{FCA} 665.
of animal protection would arise not only as a result of whistleblower disclosures, but by the impact that a FCA (Cth) would have on the regulatory environment. It would move from one which favours the corporation to one which introduces uncertainty and thereby reduces the corporation's power relative to that of the whistleblower. Part II illustrated the difficulties faced by whistleblowers working in animal use industries when they blow the whistle in the interests of animal protection. Part III identified gaps in Australia's whistleblower protections in the private sector. The relationship between negative outcomes for the whistleblower and the whistleblower's pragmatic legitimacy was explained. It was argued that in order to adequately protect whistleblowers, and the institution of whistleblowing, it is necessary to restore the whistleblower's pragmatic legitimacy. Further, unlike other mechanisms, a False Claims scheme, with its qui tam provisions is the most effective way to achieve this outcome.

Under the US FCA a range of corporations have been subjected to heavy fines and/or have agreed to civil settlements. One notable example is a case in which subsidiary companies of parent company Pfizer were alleged to be committing fraud in the form of off-label promotion and kick-backs. The company was penalised with a US $1.3 billion criminal fine and a civil settlement of US$1 billion (a total recovery of $2.3 billion). The proposal for qui tam provisions to be introduced for the private sector in Australia is consistent with the recommendations of the 2014 Senate Inquiry into ASIC's operations and recent scholarly work on private sector whistleblower rules.

Set against the arguments made above, qui tam provisions can be understood as operating at an important intersection: between violence perpetrated by humans against animals and a form of corporate violence in which employees are punished for taking risky acts of conscience in the interests of animal protection.

204 Faunce et al, 'Recovering Fraudulent Claims', above n 15.
205 Ibid 308.
206 Braithwaite, Regulatory Capitalism, above n 1; Senate Economics References Committee, Performance of the Australian Securities and Investments Commission, above n 70; Faunce et al, 'Recovering Fraudulent Claims', above n 15; Braithwaite, 'Flipping Markets to Virtue', above n 119; Dworkin and Brown, 'The Money or the Media', above n 17.
Employees who blow the whistle in the interests of animal protection tie their interests to those of animals. They are marginalised and rendered outsiders.\(^\text{208}\) In these ways the plight of the whistleblower and that of animals become interdependent. \textit{Qui tam} actions can be understood as counteracting the force of corporate violence in two ways. Firstly, they validate the whistleblower’s act of conscience by providing her an entitlement to a percentage of the civil damages awarded. Secondly, where the relevant law enforcement agency joins with the whistleblower in a \textit{qui tam} action the partnership thus formed restores the whistleblower’s ‘pragmatic legitimacy’.\(^\text{209}\) Hence, the core of the argument for a False Claims regime is the need to empower and validate whistleblowers. Further, the incentive, reward and partnership model realised by a False Claims approach serves a normative function. It validates the important role that the institution of whistleblowing plays in meeting the industry accountability standards required for a robust democracy.\(^\text{210}\)

Chapter Eight presents the second of three case studies, which is framed by the idea of individuated violence. It undertakes a doctrinal examination of the offence of animal cruelty in order to demonstrate how calls for higher maximum penalties and tougher sentencing for animal cruelty offences play into trends emerging as part of the criminal justice system’s drift towards authoritarian governance under neoliberalism.\(^\text{211}\)

\(^{208}\) Sawyer, \textit{The Partnership Called Whistleblowing}, above n 1, 3.

\(^{209}\) Sawyer et al, \textit{Necessary Illegitimacy of the Whistleblower}, above n 1, 89; See also, Sawyer, \textit{The Partnership Called Whistleblowing}, above n 1, 3.

\(^{210}\) Lewis et al, ‘Whistleblowing, its Importance’, above n 65, 1.

CHAPTER 8  CASE STUDY TWO: JURIDICAL

INDIVIDUALISM AND THE OFFENCE OF ANIMAL CRUELTY

It is a mistake to give the word 'cruelty' a meaning of merciless bloodshed and disinterested gratuitous pursuit of physical suffering ... [c]ruelty is above all lucid, a kind of rigid control and submission to necessity.

Antonin Artaud

Part I  INTRODUCTION

This case study is framed by the idea of individuated violence in that it takes individual responsibility in criminal law as the basis of analysis. Its purpose is to demonstrate how one strand of Australia’s animal protection movement, ‘calls for higher maximum penalties and tougher sentencing for animal cruelty offences’, plays into trends emerging as part of the criminal justice system’s drift towards authoritarian governance under neoliberalism since the 1970s. There is a general support for tougher sentencing in the Australian literature. For example, Markham states that ‘increased penalties and a wider range of criminal sanctions are a ... signal from governments that animal cruelty must be taken more seriously ... [t]he experience of those in the field ... is that these reforms have not resulted in


significant change in sentence levels and that moderate fines remain the norm’.³

The following discussion draws on Alan Norrie’s work on legal individualism and the criminal law⁴ in order to trace how it is that the animal protection movement, widely understood as pursuing a social justice agenda, comes to contribute to the project of neoliberalism; a story of an unfolding political and legal antimony. This somewhat counterintuitive story is structured by the tensions between civil and political citizenship that have emerged under neoliberalism, alongside the dismantling of social citizenship during the same period.⁵ The chapter expounds how it is that, by relying on retributive philosophies of punishment based on individual responsibility and intentionality,⁶ animal protection advocates stabilise private corporations’ claim to perpetrate violence against animals in the name of civil citizenship.⁷

In calling to take ‘animal cruelty seriously’ by increasing maximum penalties and tougher sentencing, advocates push the criminal law towards a requirement of a subjective fault element to establish guilt. It is via this increased emphasis on intentionality and psychological dangerousness that the meaning of ‘animal cruelty’ maintains its narrow definition, related to individual blameworthiness in the domestic sphere, rather than to the violence perpetrated against animals ‘at arm’s length’ in the context of intensive animal use industries.


⁵ Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2.

⁶ Ibid 22.

⁷ Ibid.
The chapter proceeds as follows. Part II outlines aspects of Alan Norrie’s arguments regarding legal individualism, the criminal law, and authoritarianism with reference to T H Marshall’s theory of citizenship and Peter Ramsay’s analysis of ‘the responsible subject as citizen’. These ideas will provide the basis for analysing the dynamics that inform calls to ‘take animal cruelty seriously’ by increasing maximum penalties and imposing heavier sentences on individual offenders.

Part III sets out some of the historical background to the development of strict liability offences in 19th century England. It highlights the ideological dimensions of strict liability, especially its role in minimising perceptions of criminality relating to offences perpetrated by factory employers. The role of mens rea in the offence of animal cruelty is examined in order to demonstrate how existing socio-political differentiation is integrated into the objective fault test. The final section of Part III considers animal cruelty as an offence of mens rea in the light of the events which, in 2014, culminated in the introduction of a ‘serious animal cruelty’ offence into the Criminal Code (Qld). It demonstrates how, in the context of neoliberal Australia, advocacy that relies on notions of psychological dangerousness to increase penalties for animal cruelty offences plays into and stabilises the legitimacy of corporate violence against animals by animal use industries.

**Part II BACKGROUND**

**A Legal Individualism and the Criminal Law Under Neoliberalism**

In Norrie’s account, moves on the part of the state towards authoritarian governance will be marked by shifts in the opposition that lies at the base of legal

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9 Ibid 42.

10 Section 242.
individualism, that between individual freedom and state power. Furthermore, these shifts can be analysed according to two axes: the ‘psychological’ and the ‘political’. As the work of the law involves mediating the structures and relations that constitute the social order, while simultaneously arbitrating the rights of individual persons, the law's basic unit, the juridical individual, embodies a tension that expresses this dual task. Modern criminal law doctrine attempts to reconcile this tension by excluding consideration of the social conditions in which individual responsibility is made morally intelligible. In general, motive is quarantined from the question of intention. It is worth noting that motive does have some role to play as a defence in criminal law. For example, the motive for a defendant's act is considered as part of the defence of necessity, and self-defence, in various offences against the person. In these cases the defendant must discharge an evidentiary burden. Therefore, motive, considered in the context of a defence, can be distinguished from considerations of motive in relation to proving intention.

In summary, although the individual freedom granted by liberalism is expressive, it is not without tension. The law, as an institution, must mediate between the rights of individuals and the necessities of the state. This tension is reflected in the way that motive is handled in criminal law, where it is considered in contexts such as necessity and self-defence, but not in contexts such as proving intention.

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11 Norrie, 'Citizenship, Authoritarianism and the Changing Shape of the Criminal Law', above n 2, 25.
13 Norrie, 'Citizenship, Authoritarianism and the Changing Shape of the Criminal Law', above n 2.
14 Ibid 16-7; Norrie notes that psychological individualism has a repressive function which screens out moral or political narratives of action. Norrie, Crime, Reason and History, above n 4, 366.
15 Norrie, Crime, Reason and History, above n 4, 43-4.
16 Re A (Children) [2000] EWCA Civ 254.
19 Ibid.
is contained and subject to coordination by the state according to the need for social control. It is in these ways that individual responsibility in criminal law gathers its ideological force. Individual responsibility is the legal form by which particular interests are represented as universal and general, yet the law ignores the conditions of social inequity in which those interests are realised or exercised.

Essentially, Norrie’s argument has two parts. The first part develops a perspective on the psychological aspects of legal individualism through the lens of T H Marshall’s three elements of citizenship: social, civil and political. Throughout time, each element of citizenship becomes reconfigured in relation to others, according to the political context of a particular historical moment. As such, Marshall’s typology provides a window through which it is possible to understand how legal individualism embodies and expresses the character and changes in the prevailing political order over time. The second part of Norrie’s argument draws on Franz Neumann’s earlier treatise on law and authoritarianism to offer insight into how authoritarianism is expressed in modern law. It is now necessary to explain how neoliberal authoritarianism works through the notion of individual freedom within Australia’s animal protection field.

1 Legal Individualism, Citizenship and Authoritarianism

T H Marshall defined civil, political and social citizenship in the following way.

Civil citizenship came into existence in England in the 18th century and

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21 Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2, 18.
22 Ramsay, above n 8; Norrie, Crime, Reason and History, above n 4.
24 Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2.
27 Ibid 10.
comprised ‘the rights necessary for individual freedom’, including liberty of the person, freedom of speech and property ownership. Civil citizenship is linked to economic freedoms and rights related to private property. Its institution is the courts of justice. Civil citizenship therefore forms the basis for considering criminal justice. However, civil citizenship alone was not enough to establish the ‘free individual subject’ of the criminal law. This has required that civil citizenship be combined with political citizenship.

In Marshall’s typology, ‘political citizenship’ relates to ‘the right to participate in the exercise of political power’ and is institutionally associated with parliament and local government. For Norrie, ‘political’ refers to the ‘contradiction between individual freedom and state power’ that lies within the ‘law’s individualist core’. These interpretations are consistent in that it is through political citizenship that the rights and freedoms of civil citizenship coalesce in the ‘responsible individual’, that abstract entity at the core of modern criminal law. Individual responsibility forms the rationale for criminal punishment, according to the physical and fault elements of an offence. It is also the conceptual basis for what we might call the ‘subjectivist turn’ in criminal law doctrine. On this point, Norrie notes a time lag: whereas political rights began to be articulated towards the close of the 19th and

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28 Ibid 8.

29 Ibid 10-1; Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2, 19.


31 Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2, 19.

32 Ibid.

33 Marshall, ‘Citizenship and Social Class’, above n 23, 8; Ramsay, above n 8, 40.

34 Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2, 19 n 17.


36 Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2, 16, 19.

37 Also see Ramsay, above n 8.
into the 20th century, subjectivism came to dominate criminal law doctrine from the 1950s onwards. This time lag can be explained by the fact that fault, considered without reference to social context, became essential to doctrine only when political citizenship, in the form of political rights, had been universalised, post WWII.

Political and civil citizenship underlie offences of individual responsibility, and by extension, inform the fault categories of those offences. In contrast, social citizenship socialises responsibility, forming the basis for the rise of strict liability offences which, in their absolute form, do not have a fault element. Social citizenship emerged during the late 19th century and addressed the limitations of formal equality guaranteed by civil and political citizenship. It ushered in the rise of regulatory criminal laws, aimed at mitigating risks and maintaining basic standards of health and food safety, working conditions, sanitation and other basic social goods associated with the welfare state. Largely, regulatory criminal laws apply to commercial and industrial settings in which the actor responsible for foreseeing and minimising risk is an ‘entrepreneur or a corporation’. In socialising risk, risk management becomes a business cost, and contributes to the provision of basic living conditions across civil society. Social citizenship also set

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38Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2, 20; Ramsay, above n 8, 41
39Ramsay, above n 8, 47.
40Ibid 47-8. Ramsay refers to the establishment of the welfare state in the UK and the civil rights movement in the US. In Australia it would be appropriate to look to the 1967 Referendum and voting rights for Aboriginal and Torres Strait Islander peoples as comparable criteria, noting also the emergence of the contemporary animal rights movement in the 1970s as an extension of the social citizenship agenda to animals.
41Ramsay, above n 8, 33-4; Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2, 20.
42Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2, 20.
45Ramsay, above n 8, 49.
46Ibid.
standards of social and economic welfare into penal measures. However, Ramsay notes that ‘the criminal law which socialises risk by strict liability also has an ideological aspect’. The ideological dimensions of strict liability and mens rea offences for animal protection will be discussed in more detail below, after having made a few points about authoritarianism.

Norrie examines the shifts within these three facets of citizenship in terms of how they have reconfigured legal individualism and criminal justice policy across time. From post-WWII until the 1970s social, political and civic citizenship formed a constellation in which the political was subordinate to the social. Neoliberalism has changed that dynamic. A renewed emphasis on civil citizenship has come at a cost to social citizenship. The law now attends more actively to the protection of economic freedoms and property rights in preference to the legal individual in a broader social context. Here, political citizenship plays a complex, contradictory role. On the one hand, it supports the protection of the individual’s private economic rights. On the other hand, political liberty is a challenge to neoliberalism’s pursuit of economic liberty and ‘the discipline of the market’.

According to Norrie, in the movement away from the post-war consensus and its social democratic agenda, the authoritarianism hitherto latent within legal individualism has become more evident. Today, authoritarianism is not expressed in the raw force and state intervention that characterised the autocratic regimes of the early 20th century. Rather, it is through the paradoxes inherent in the idea of individual freedom translated into the form of individual responsibility, and the changing dynamics between civil, political and social citizenship, that

48 Ramsay, above n 8, 51.
49 Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2, 21.
50 Ibid 22.
51 Ibid.
52 Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2, 29.
neoliberal authoritarianism finds its path. Since the 1970s, this is reflected in the growing emphasis within the criminal justice system on (among other things) retributive concepts of criminal behaviour, stressing individual responsibility, or ‘responsibilisation’, and notions of dangerousness. As it has developed under neoliberalism, individual freedom justifies punishment retributively, though at the same time supporting economic freedoms. The relationship between punishment and economic freedom is germane to an analysis of the animal protection field.

In its aim to acknowledge legal interests for animals, animal protection challenges neoliberalism as one part of a broader social justice movement, through the exercise of political citizenship. Yet, in doing so it relies upon and extends those notions of welfare associated with social citizenship. At the same time, political and civil citizenship pull in the opposite direction, to uphold the notion that all have equal rights to protect and exploit private property, as a right and an individual freedom. Animals’ status as property therefore is subjected to the pull of political citizenship in two opposing ways, illustrating the tension to which Norrie refers.

Under neoliberalism, civil and political citizenship have come together to form a type of faction against social citizenship and the legitimacy that social citizenship lends to the social justice agenda. Paradoxically, while social citizenship can be seen as underpinning political action in support of animal protection, it is also the aspect of citizenship that generates strict liability offences (whereas taking animal cruelty seriously is increasingly associated with punishing individual persons, and with intention). Moreover, and as previously noted, strict liability attempts to protect agreed public values. It is here that the claim for humaneness to be extended to animals is limited, to the extent that such a claim reflects human

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54 Ibid 22. See also David Harvey, A Brief History of Neoliberalism (Oxford University Press, 2005) 79.

55 In using this term Norrie emphasises the ‘increased reliance on the formal legal invocation of individual responsibility’. He distinguishes his use of the term from others, citing David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (Oxford University Press, 2001) 124 who uses it a Foucauldian manner, emphasising the notion of ‘governmentality’ and ‘individuals policing themselves and their environment’. Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2, 15 n 5.

56 Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2, 14.

57 Norrie, Crime, Reason and History, above n 4, 366.
concerns about animals, as an agreed (or contested) public value, rather than animals being recognised as having moral worth in and of themselves. Social citizenship therefore contains an inherent limitation in what it can achieve for animal protection. The other issue to note is that, if it is accepted that the majority of individual animal cruelty offenders come from relatively disadvantaged social and economic conditions and that social citizenship supports the integration of social and economic welfare objectives into penal policy, it is social citizenship which supports leniency in sentencing. Thus, animals and animal cruelty offenders both rely on and vie for the social good offered by social citizenship. It follows that moves to strengthen the protection offered to animals are in conflict with the social welfare ideas that support less retributive approaches to criminal punishment. It is through the politicisation of this conflict that calls for increased penalties and tougher sentencing come to fulfil an ideological function, contributing to authoritarian notions of criminal justice and unwittingly protecting intensive animal use industries from the stigma associated with criminality.

In summary, Marshall’s typology is useful for understanding the socio-political forces that work through different aspects of citizenship and how these have, and can influence criminal law doctrine and notions of blameworthiness over time. Civil and political citizenship, with their combined focus on individual freedom, support liability as arising from willed action on the part of a defendant, and thus the need to prove mens rea. In contrast, social citizenship supports liability as arising from the actor failing to uphold his or her duty to avoid causing or risking harm. Part III examines the doctrinal structure of animal cruelty in Australia with the aim of identifying the ideological dimensions of the offence and considering the implications this has for animal protection advocacy.

Part III    THE DOCTRINAL STRUCTURE OF ANIMAL CRUELTY IN AUSTRALIA

In Australian state and territories, the offence of animal cruelty has two forms: general and aggravated. However, it is important to note that these forms do not conform to a distinct division between strict liability and those offences which

58 See for example Ramsay, above n 8.
59 Ibid 50.
60 Ibid.
require proof of a mental element. In *Bell v Gunter,*\(^6^1\) Dowd J found animal cruelty to be an offence of strict liability in both its general and aggravated forms.\(^6^2\) In Australia, there is uncertainty as to whether there are three categories of criminal liability, ‘strict’ liability being the third in addition to absolute liability, and *mens rea* offences.\(^6^3\) Within the Australian common law, the availability of the *Proudman v Dayman*\(^6^4\) excuse of mistake of fact distinguishes strict liability from offences of absolute liability. It is because strict and absolute liability offences do not have a prima facie fault element that they are sometimes both referred to as offences of strict liability.\(^6^5\) As noted in Chapter Three, in some Australian jurisdictions the aggravated form of animal cruelty has an explicit fault element and in others it does not. Given these complex questions of categorisation, in the following discussion animal cruelty will be discussed as an offence of either strict liability or involving *mens rea,* rather than general or aggravated. The aim is to achieve optimum consistency in the consideration of criminal law principles.

\(^6^1\) (unreported, Supreme Court of New South Wales, Dowd J, 24 October 1997).

\(^6^2\) The case concerned an aggravated animal cruelty offence under the *Prevention of Cruelty to Animals Act 1979* (NSW) s 6(1). *Bell v Gunter* (unreported, Supreme Court of New South Wales, Dowd J, 24 October 1997) was approved by the Court of Appeal in *Fleet v District Court of NSW* [1999] NSWCA 363 [48] (Mason P, Priestley and Handley JJ); *Bell v Gunter* was followed in *Pearson v Janlin Circuses Pty Ltd* [2002] NSWSC 1118 (25 November 2002) [7]-[8] (Windeyer J). Any case law of precedent value on this point has considered the NSW statute in which the aggravated form of animal cruelty does not have an explicit fault element.


\(^6^4\) [1941] 67 CLR 536. In *Bell v Gunter,* Dowd J referred to the second category identified by Gibb CJ in *He Kaw Teh v The Queen* (1985) 157 CLR 523, 533-4. The *Criminal Code* (Cth) adopts a three tier classification. Section 6.1(1)(a) defines strict liability offences as those where (a) there are no fault elements for any of the physical elements of the offence; and (b) the defence of mistake of fact under section 9.2 is available. Section 6.2(1) defines absolute liability offences as those in which (a) there are no fault elements for any of the physical elements of the offence; and (b) the defence of mistake of fact under section 9.2 is unavailable.

A  Strict Liability and the Ambiguity of Animal Use Industry ‘Crime’

In the UK, strict or ‘objective’ [absolute] liability offences account for ‘the majority of more serious offences’\(^{66}\) and ‘the large majority of all offences’.\(^{67}\) It is highly likely that this pattern with respect to strict liability offences also prevails in Australia.\(^{68}\) Such indicators contradict the idea that, as doctrinal categories, strict liability and mens rea offences ‘reflect actual level of ‘fault’ and ‘responsibility’ in law enforcement’.\(^{69}\) They also stand in contrast to the presumption, for both common law and statutory offences, that mens rea in the sense of guilty intention or as knowledge, will be an element of an offence if it is one of a serious kind.\(^{70}\) In orthodox criminal law doctrine and relative to offences requiring mens rea, strict liability offences are ‘marginalised as peripheral instances of crime’.\(^{71}\) While empirical research may point to the contrary, it seems that legal principle relating to the scale of blameworthiness, and public perceptions of criminality and moral reprehensibility, rely upon the absence or presence of mens rea. Stephen alludes to this as an unresolved (or insoluble) matter when he notes that although mens rea is ‘sometimes said to be the fundamental maxim of the whole criminal law ... [it] not only looks more instructive than it really is, but suggests fallacies that it does

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\(^{68}\) Brown et al, above n 18, 11.

\(^{69}\) The Australian Law Reform Commission has noted, with regard to federal regulatory offences, ‘an assumption’ that ‘strict or absolute’ liability offences ‘are usual reserved for minor offences’. Australian Law Reform Commission, *Principled Regulation: Civil and Administrative Penalties in Australia in Australian Federal Regulation* (Report 95, 2002) [4.32]; Brown et al, above n 19, 11.

\(^{70}\) The presumption is displaced by unambiguous statutory language to the contrary. *He Kow Teh v The Queen* (1985) 157 CLR 523, 535 (Gibbs CJ).

not precisely state.\textsuperscript{72}

The idea that \textit{mens rea} is required to prove guilt has its genesis in Roman law and in canon law.\textsuperscript{73} In England, Edward Coke’s \textit{Third Part of the Institutes},\textsuperscript{74} is cited as authority for the maxim \textit{et actus reus non facit reum nisi mens sit rea}:\textsuperscript{75} an act does not make a defendant guilty without a guilty mind.\textsuperscript{76} Under the influence of Christian cosmology, \textit{mens rea} or ‘evil intent’, although a vague term, ‘marked the beginning of a moral \textit{mens rea} concept in criminal law’.\textsuperscript{77} During the 19\textsuperscript{th} century the mental element, based on Christian notions of evil and malice, transitioned into subjective psychological ideas of intention and recklessness.\textsuperscript{78}

Adding some historical perspective as to the milieu in which strict liability developed helps to explain the contemporary disjuncture between practice, perception and legal principle outlined above. It demonstrates how, in industrial settings, employer criminality has been minimised.\textsuperscript{79} Therefore crime in these settings stands in contrast to the culpability of the everyday individual offender with a guilty mind. This distinction divides the animal protection field, potentially undermining animal protection advocacy efforts.

\begin{itemize}
\item \textsuperscript{72} James Fitzjames Stephen, \textit{A History of Criminal Law of England: Volume Two} (Hien Online Legal Classics [first published 1883]) 94-5; See also Eugen J Chesney, ‘Concept of Mens Rea in the Criminal Law’ (1939) 29(5) \textit{Journal of Law and Criminology} 627, 664.
\item \textsuperscript{73} Chesney, above n 72, 630-2.
\item \textsuperscript{74} \textit{The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes} (E and R Brooke, 1797) \url{http://www.constitution.org/18th/coke3rd1797/coke3rd1797_001-050.pdf}.
\item \textsuperscript{75} The principle appears in Coke’s \textit{Third Part of the Institutes} as ‘et actus non facit reum nisi mens sit rea’. Coke, above n 74, 6. See also Stephen, \textit{A History of Criminal Law of England}, above n 73, 94; Chesney, above n 72, 630-2; Bronitt and McSherry, above n 66, 170.
\item \textsuperscript{76} \textit{Haughton v Smith} [1975] AC 476, 491-2 (Lord Halisham).
\item \textsuperscript{77} Chesney, above n 72, 632.
\item \textsuperscript{78} Bronitt and McSherry, above n 66, 90 n 50; Eugen J Chesney notes that ‘[i]n tracing the development of \textit{mens rea} in the criminal law it is difficult to escape the fact that mental intent as a necessity for criminality has been a variable. It seems to have varied directly with the ideals and objectives of criminal justice’. Chesney above n 72, 643.
\end{itemize}
The development of strict liability offences in England during the 19th century marked a shift away from classical retributive notions of punishment, in which the aim was to ensure that the convicted individual received her or his ‘just deserts’ on the basis of blameworthiness, rather than deterrence objectives.\textsuperscript{80} Social citizenship generated strict liability in the interests of public welfare, and strict liability offences focused on outcomes rather than blame.\textsuperscript{81}

While welfare objectives formed part of the agenda, it is also the case that as a doctrinal category, strict liability emerged in response to the needs of capitalism.\textsuperscript{82} For example, one impetus for the enactment of England’s Factories Acts in the early 19th century\textsuperscript{83} was to achieve consistency in the labour conditions within factories owned by large employers, and those in smaller enterprises.\textsuperscript{84} This notwithstanding, the most significant forms of factory crime were already embedded in ‘the structure, organisation and ideology of the productive processes’.\textsuperscript{85} The approach to enforcement taken by factory inspectors became pivotal to subsequent understandings of industry or corporate criminality and blameworthiness.

Breaches of the Factories Acts were widespread.\textsuperscript{86} Inspectors were friends of industry and employer advisers.\textsuperscript{87} Rather than prosecute at first instance, they emphasised persuasion.\textsuperscript{88} Prosecution became a measure of last resort for cases of

\begin{itemize}
  \item \textsuperscript{80} Norrie, \textit{Crime, Reason and History}, above n 4, 344.
  \item \textsuperscript{81} Ibid.
  \item \textsuperscript{82} Ibid 106.
  \item \textsuperscript{83} The Factory Act of 1833: 3 & 4 Will. IV c103; The Factory Act of 1844: 7 & 8 Vict c. 15.
  \item \textsuperscript{84} Carson, ‘The Institutionalisation of Ambiguity’, above n 79, 142.
  \item \textsuperscript{85} Ibid 162.
  \item \textsuperscript{86} Norrie, \textit{Crime, Reason and History}, above n 4, 107.
\end{itemize}
protracted violation of the Act.\textsuperscript{89} Employers were also able to shift responsibility for breaches to the Act onto employees and therefore ‘deny any criminal guilt on their part while continuing to profit from factory crime’.\textsuperscript{90} More relevant is the fact that the rules of \textit{mens rea} allowed employers to avoid prosecution as employers were once removed from actual violations of the Act.\textsuperscript{91} Yet, in their enforcement role, inspectors came to integrate \textit{mens rea} as a consideration in the exercise of their prosecutorial powers.\textsuperscript{92} However, in the face of the difficulties in proving \textit{mens rea} in the courtroom, inspectors lobbied for culpability to be strict, with a defence of due diligence available.\textsuperscript{93} This was achieved in the Factory Act of 1844.\textsuperscript{94} The effect was to remove ‘moral culpability from the public adjudication of the routine crimes of factory employers’.\textsuperscript{95} This, Carson argues, institutionalised an ambiguity as to the status of industry crime.\textsuperscript{96} Convictions against employers or corporations for strict liability offences could therefore operate ‘under the veil which is not criminal in any real sense’.\textsuperscript{97} Overall, those who offended the values associated with civil citizenship, in particular the legitimate pursuit of economic freedom, came to be positioned as the real criminals. By contrast, those who upheld such freedoms have come to stand at the moral centre of neoliberalism.\textsuperscript{98}

The discretions and ambiguity that characterized enforcement patterns for factory crime in 19\textsuperscript{th} century England is reflected in Australia’s contemporary animal


\textsuperscript{90} Carson, The Institutionalisation of Ambiguity’, above n 79, 160.


\textsuperscript{92} Carson, ‘The Institutionalisation of Ambiguity’, above n 79, 163.

\textsuperscript{93} Ibid 164-5.


\textsuperscript{95} Carson, ‘The Institutionalisation of Ambiguity’, above n 79, 142, 164-5.


\textsuperscript{98} Ramsay above n 8, 51.
protection field. Regulation of animal use industries takes the form of a compliance model that relies on education, persuasion and self-regulation, with prosecution kept as a last resort. As discussed in Chapters One and Three, in Australia, the approach takes the form of the tiered 'Braithwaite model': prevention, detection, and response.99

**B Animal Cruelty and Mens Rea**

In Marshall's typology, a finding of guilt on the basis of a subjective fault element is simultaneously a repudiation of the defendant's civil citizenship status.100 Mens rea has as its basis the individual freedom that is central to civil citizenship. This is relevant to the animal protection field in three ways. First, statutory language may include a subjective mental element indicated by the words ‘intention’ or ‘recklessness’.101 This applies to the aggravated form of animal cruelty in some state and territory anti-cruelty statute,102 and to the offence of ‘serious animal cruelty’ in NSW103 and Queensland.104 The second way that mens rea is relevant relates to the status of animal cruelty as a strict liability offence. While the courts have confirmed that animal cruelty is an offence of strict liability (that is, no mens rea element need be proved), statutory words such as ‘unnecessary’ and ‘unjustifiable’ indicate that the provision imports the objective fault test formulated in *Ford v Wiley*.105

Third, mens rea is relevant to those provisions to which, arguably, the common law necessity test does not apply. In these instances, the presumption of mens rea must

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99 See, for example, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 35-40.
100 Ramsay, above n 8, 51.
103 *Crimes Act 1900* (NSW) s 530.
104 *Criminal Code* (Qld) s 242.
105 (1889) 23 QBD 203.
be considered, particularly where the offence increases on the scale of seriousness, reflected in higher maximum penalties and the likelihood that a conviction will bring with it a term of imprisonment. The next section explores animal cruelty in its strict liability form, which imports the objective standard introduced in *Ford v Wiley*. That standard is, 'what the state of mind of a reasonable person would have been' had they 'found themselves in the accused’s position'. The form of the offence which has an explicit fault element, as intention or recklessness, will then be discussed in the light of recent amendments to the *Criminal Code* (Qld).

1. **Animal Cruelty, Strict Liability and the Objective Test**

Animal cruelty in its strict liability form lies in the grey area between the subjective intentionality of individualised responsibility, and socialised responsibility. An analysis of the structure of this offence allows us to explore the ideological and relational dimensions of strict liability and subjective fault offences within the animal protection field. An examination of the strict liability form of animal cruelty reveals how it is that animal protection, as a field of criminal law, embodies a ‘prior process of socio-political differentiation’. Integration of this differentiation occurs by way of the common law ‘necessity’ test. Norrie argues that in criminal offences, intention is designed to avoid open and contentious moral and political issues and thereby optimise adherence to a de-contextualised model of individual responsibility. Intention or subjective fault is artificially

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106 In *He Kaw Teh v The Queen* (1985) 157 CLR 523 the court confirmed that, in the absence of clear statutory wording to the contrary, the courts begin by presuming that proof of *mens rea* is required: 539 (Gibbs CJ), 575 (Brennan J). See also, Norrie, *Crime, Reason and History*, above n 4, 109-13, Brown et al, above n 18, 9-12.

107 Norrie explains that in the UK, there have been several cases in which the general principle has not been applied consistently: *R v Howells* [1977] 1 QB 614, 625 (Browne LJ), *B (A Minor) v DPP* [2000] 2 AC 428, and *Deyemi and Edwards* [2008] Cr App R 25 166. Norrie, *Crime, Reason and History*, above n 4, 116.

108 (1889) 23 QBD 203.

109 Brown et al, above n 18, 343.

110 Ramsay, above n 8, 42.

separated from motive\textsuperscript{112} because the latter introduces questions of substantitive moral evaluation into the question of individual responsibility.\textsuperscript{113} In the case of animal cruelty in its strict liability form we have an inversion of this rule which, nonetheless, proves Norrie’s point.

The ‘necessity test’ \textit{includes} rather than \textit{excludes} motive, to justify a particular view of the social, economic and moral order, that the intensive use of animals, including for sport is ‘necessary’. The test excludes other views on this point. The test asks whether the purpose of the animal use was legitimate. The second limb of the test asks whether the pain and suffering inflicted was reasonably proportionate to that object. Proportionality relates to the use of force, although here it applies to the \textit{rational} use of force to meet a business objective. This distinguishes proportionality from its use in, for example, the defence of provocation.\textsuperscript{114} The second limb of the test assumes that the ‘legal individual’ in question is a rational actor who weighs up the benefits and disadvantages of the act and makes a choice on this basis. Moreover, it requires that the arbiter take into account the defendant’s motive, that is, the force which induced intention and action.\textsuperscript{115} This requires that attention be paid to the defendant’s state of mind at the time of the offence. Indeed, a finding of guilt rests on this question, as the necessity test assumes a particular state of mind, a type of ‘rationality’ which must be negativized for the act or omission to amount to animal cruelty. In this way, the offence of cruelty operates in a similar fashion to the offence of common assault in which intention (rather than the harm sustained by the victim) is at the core of culpability.\textsuperscript{116}

\begin{flushleft}
\textsuperscript{112} See \textit{Hyam v DPP} [1975] AC 55, 73 (Halisham L).

\textsuperscript{113} Norrie, \textit{Crime, Reason and History}, above n 4, 36.

\textsuperscript{114} Where proportionality relates to the use of force in a circumstance of apprehension of threat or actual violence to the person.

\textsuperscript{115} Norrie, \textit{Crime, Reason and History}, above n 4, 43.

\end{flushleft}
In addition to a renewed stress on individual responsibility, Norrie notes a growing emphasis on notions of dangerousness within the criminal justice system since the 1970s.\textsuperscript{117} This emphasis is evident within the animal protection field. Recent advocacy for higher maximum penalties and tougher sentencing for animal cruelty offences emphasises psychological dangerousness, in the context of individualistic notions of criminal responsibility. A prime example of this is the public discourse relating to the introduction of the indictable offence of ‘serious animal cruelty’ into the \textit{Criminal Code} (Qld) in 2014.\textsuperscript{118} The mental element of the offence requires ‘intention’\textsuperscript{119} and has a maximum penalty of seven years’ imprisonment.

1 \hspace{1em} \textit{Background to Calls for Increased Penalties and Tougher Sentencing}

In the early 2000s, lawyer Katrina Sharman argued that leniency in sentencing under Australian animal protection statute might ‘come back to bite us’.\textsuperscript{120} It was Sharman’s article which, perhaps for the first time in Australia, raised animal cruelty as a crime which deserved serious consideration in relation to sentencing and criminal law policy. Over the ensuing decade, the need to ‘take animal-cruelty seriously’, by increasing maximum penalties and imposing tougher sentences, has come to form a distinct theme running through criticism of Australia’s approach to

\textsuperscript{117} Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’, above n 2, 14.

\textsuperscript{118} Section 242(2) provides for such injury to be deemed lawful where it is authorised, justified or excused by (a) the \textit{Animal Care and Protection Act 2001} (Qld) or (b) another law, other than section 458 of the \textit{Criminal Code} (Qld). Hence, a practice may be lawful although it may cause serious injury defined as the loss of a distinct part or an organ of the body. Section 242 (3)(a) or (b) a bodily injury of such a nature that, if left untreated, would endanger, or be likely to endanger life. Section 242 (3)(b)(i) or cause, or be likely to cause, permanent injury to health Section 242 (3)(b)(ii). There were also amendments to the \textit{Animal Care and Protection Act 2001} (Qld), which doubled the maximum fine for animal cruelty to $220 000 and increased the maximum term of imprisonment from two to three years.

\textsuperscript{119} \textit{Criminal Code} (Qld) s 242.

animal protection. In fact, one Queensland-based legal advocacy group has adopted as its moniker *Brisbane Lawyers Educating and Advocating for Tougher Sentencing* (BLEATS). The maximum penalties for animal cruelty across all jurisdictions are summarised in Table 8.1. Most of the maximum penalties shown in Table 8.1 relate to the specific offence of aggravated cruelty. However, as the *Animal Care and Protection Act 2001* (Qld) and the *Animal Welfare Act 2002* (WA) do not have an aggravated form of animal cruelty, the general offence is included. Table 8.1 also includes the maximum penalties for the offence of ‘serious animal’ cruelty in NSW and Queensland. For a summary of all animal cruelty provisions, in all state and territories, see Appendix C.

Table 8.1

<table>
<thead>
<tr>
<th>Statute</th>
<th>Provision</th>
<th>Maximum penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Animal Welfare Act 1992</em> (ACT)</td>
<td>S 7A(1)(a) cruelty and (b) death and (c) intends or reckless (2) (a) cruelty and (b) serious injury (c) intends or reckless.</td>
<td>200 penalty units, imprisonment for 2 years, or both.</td>
</tr>
<tr>
<td><em>Prevention of Cruelty to Animals Act 1979</em> (NSW)</td>
<td>S 6 aggravated and S 4(3): contravenes s 5(3) in a way which results in: (a) death, deformity or serious disablement of the animal, or (b) so severely injured, so diseased or in such a physical condition - cruel to keep alive.</td>
<td>1,000 penalty units in the case of a corporation; 200 penalty units (PU) or imprisonment for 2 years, or both, for an individual.</td>
</tr>
<tr>
<td><em>Animal Welfare Act 1999</em></td>
<td>S 10(1)(a) cruelty and (b) serious</td>
<td>200 penalty units or imprisonment for 2</td>
</tr>
</tbody>
</table>


123 *Crimes Act 1900* (NSW) s 530.

124 *Criminal Code* (Qld) s 242.

125 See also, *Crimes Act 1900* (NSW) s 530.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Provision</th>
<th>Maximum penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>(NT)</td>
<td>harm or death, and (c) intends to kill or seriously harm.</td>
<td>years or both.</td>
</tr>
<tr>
<td>Animal Care and Protection Act 2001 (Qld)</td>
<td>S 18(1) A person must not be cruel to an animal.</td>
<td>2000 penalty units or 3 years’ imprisonment.(^{126})</td>
</tr>
<tr>
<td>Prevention of Cruelty to Animals Act 1985 (SA)</td>
<td>S 13(1)(a) ill-treats and (b) causes death of, or serious harm; and (c) intends to cause, or reckless about causing death or serious harm.</td>
<td>$50 000 or imprisonment for 4 years.</td>
</tr>
<tr>
<td>Animal Welfare Act 1993 (Tas)</td>
<td>S 9 A person must not do any act, or omit to do any duty, referred to in section 8 which results in the death or serious disablement of an animal.</td>
<td>S 9(a) body corporate, a fine not exceeding 1,000 PU; or (b) a natural person, a fine not exceeding 200 PU or imprisonment for a term not exceeding 18 months, or both.</td>
</tr>
<tr>
<td>Prevention of Cruelty to Animals Act 1986 (Vic)</td>
<td>S 10(1) death or serious disablement. (Does not mention mens rea requirement)</td>
<td>Person: 492 penalty units or imprisonment for 2 yrs.; body corporate: 1200 penalty units. (2) guilty of an offence under s 10 (1) may be liable to the penalty for that offence in addition to or instead of any other penalty to which the person is liable under s9.</td>
</tr>
<tr>
<td>Animal Welfare Act 2002 (WA)</td>
<td>S 19 A person must not be cruel to an animal.</td>
<td>Min $2000; max $50,000 and imprisonment for 5 years.</td>
</tr>
<tr>
<td>Crimes Act 1900 (NSW)</td>
<td>S 530(1) A person who, with the intention of inflicting severe pain on an animal, ‘tortures, beats or commits any other serious act of cruelty on an animal’, and ‘kills or seriously injures or causes prolonged suffering to the animal.</td>
<td>Max penalty: 5 years’ imprisonment.</td>
</tr>
<tr>
<td>Criminal Code 1899 (Qld)(^{127})</td>
<td>S 242(1) A person who, with the intention of inflicting severe pain or suffering, unlawfully kills, or causes serious injury or prolonged suffering to, an animal commits a crime.</td>
<td>Maximum penalty: 7 years’ imprisonment.</td>
</tr>
</tbody>
</table>

2 **Animal Cruelty and Psychological Dangerousness**

There are two main propositions driving community calls for higher penalties and tougher sentencing for animal cruelty offenders. The first proposition is that animal cruelty offenders are dangerous because animal cruelty is an indicator of a

\(^{126}\) Penalties and Sentencing Act 1999 (Qld) s 5(1). The value of a penalty unit is $110.00.

\(^{127}\) The Criminal Code (Qld) was amended in August 2014 by the Criminal Law Amendment Act 2014 (Qld) s 27, which introduced the indictable offence of ‘serious animal cruelty’. See also, Steven White, 'New Animal Cruelty Offence' (2012) 37(1) Alternative Law Journal 64.
generalised propensity for violence: humans who are violent towards animals are also violent towards other humans. This dangerousness is psychological in nature, expressed in voluntary and intentional injury to the vulnerable: human or animal. Accordingly, animal cruelty conveys a lack of moral sensitivity, a callousness which goes beyond the bounds of civility and thus deserves criminal censure. Advocates tend to draw attention to horrific acts of egregious violence against animals as demonstrating the need for this type of reform.\textsuperscript{128} An example, taken from the BLEATS website:

Jeffrey Lionel Dahmer: Dahmer began collecting road kill and other dead animals to dissect at age 10. He soon graduated to catching and killing his own animals, which he would skin before soaking their bones in acid and mounting their heads on stakes behind, his house. He was later charged with, and convicted on, 16 counts of first-degree murder.\textsuperscript{129}

Advocacy about the asserted link between animal cruelty and other forms of violence generally centres on what is known as ‘the progression thesis’ which proposes a causative link between violence against animals and later violence between humans.\textsuperscript{130}

Research on the connections between inter-human violence and that perpetrated by individual humans against animals often takes the domestic realm or gaol populations as its subject of inquiry.\textsuperscript{131} Many of the published studies have come


\textsuperscript{130} Piers Beirne, \textit{Confronting Animal Abuse: Law, Criminology and Human-Animal Relationships} (Rowman and Littlefield, 2009) 168 n 6 (footnote 6 contains an extensive list of studies on the progression thesis); Arluke, above n 129, 56-7.

\textsuperscript{131} Ibid, 175-7.
out of the US. A positive correlation has been demonstrated in the context of family violence and child abuse. While the interconnections between violence against animals and between humans may be many and varied, to date, research has not established a causative link between animal cruelty in early life and later violence against humans. Much of the evidence put forward in support of the progression thesis relies on data collected retrospectively. One approach adopted has been to survey convicted criminals regarding any history of cruelty against animals. Animal cruelty is often clustered together with other morally abhorrent crimes such as paedophilia and rape, thereby accentuating the dangerousness of the perpetrator. Research findings referred to on the BLEATS website provides one example: ‘[i]n 1986 researchers examined the histories of 21 convicted rapists and 43 convicted paedophiles and found that 48 per cent of the former, and 30 per cent of the latter, were cruel to animals when they were children’.

It is against the background noted above that leniency in sentencing and punishment is seen as reflecting a disregard for the asserted correlations between


134 Beirne, Confronting Animal Abuse, above n 130, 168.


the intentional abuse of animals and a variety of other anti-social behaviours.\textsuperscript{138} It is beyond the scope of this work to synthesise what is now a substantial body of literature in the area. With regard to the existence of a causative or predictive link, study results have been mixed,\textsuperscript{139} and problems in methodological design have been noted.\textsuperscript{140} A review of studies on animal abuse, family violence and child wellbeing, conducted by Australian scholar Samara McPhedran,\textsuperscript{141} concluded that animal cruelty and family violence are linked ‘primarily because they occur disproportionately in the same households, where different forms of family violence tend to co-exist’.\textsuperscript{142} It may be that the ‘home environment’ appears to be a stronger predictor for the development of inter-personal violence than animal cruelty.\textsuperscript{143} Hence, the link between violence against animals and towards humans might be generalised to the idea that violent environments are a risk for all inhabitant sentient beings. In summary, with regard to a causative link, substantial work remains to be done to validate the progression thesis.

The second proposition underlying calls for tougher penalties and sentencing concerns the status of the animal as victim. Some argue that leniency in sentencing reinforces animals’ status as property.\textsuperscript{144} As legal personhood, the basis for victimhood in law, remains out of reach, harsher punishment and tougher sentences are an alternative and indirect mechanism by which animal victimhood can be recognised. The core message underpinning this argument is that sentencing for animal cruelty offences would be better placed within the context of

\begin{footnotesize}
\begin{enumerate}
\item Sharman, above n 120.
\item Arluke above n 129, 56-7;
\item Beirne above n 130.
\item McPhedran, above n 133, 41.
\item Ibid 49. Beirne, above n 130, 170; McPhedran’s conclusion on this point is echoed by Eleonora Gullone, ‘A Lifespan Perspective on Human Aggression’ in Andrew Linzey (ed), \textit{The Link Between Animal Abuse and Human Violence} (Sussex Academic Press, 2009) 38, 55.
\item McPhedran, above n 133, 50.
\end{enumerate}
\end{footnotesize}
the sentencing principles applying to offences against the person.  

The factors outlined above were evident in the discourse surrounding the introduction of a serious animal cruelty offence into the Criminal Code (Qld), and related amendments to the Animal Care and Protection Act 2001 (Qld). There was a focus on dangerous individuals and egregious instances of animal cruelty, and the assertion that animal cruelty is a precursor for later violence against humans. The momentum for the amendment to the Criminal Code (Qld) began in early 2011 when several e-petitions were tabled in the Queensland parliament. A combined ministerial media statement noted that a new provision was to be inserted into the Criminal Code (Qld). According to the parliamentary background research paper, the reasons for this amendment were threefold. First, there was a ‘spate of cruel attacks on animals’, with mention of high profile cases involving Elf, the Shetland pony, Sticky, the puppy, and a stockman who had flogged a mare. The second rationale was the ‘link between animal abuse and serious crimes against people’. The relevant minister stated that ‘animal cruelty was often a precursor to serious crimes against people’, noting that research undertaken by the FBI had ‘shown that 45% of homicides are committed by perpetrators with a history of cruelty to animals’. Third, the background paper cited the ‘link between animal


146 E-Petitions No. 1600-10, No. 1631-11, No. 1647-11 and No. 1672-11. Longworth, above n 129, 2.

147 Longworth, above n 128, 2.


149 A man super-glued the eyes of his four month old Cavalier King Charles Spaniel and beat him.

150 Longworth, above n 128, 2.

151 Ibid 3.

152 Ibid.
abuse and domestic violence’. The legal advocacy organisation BLEATS was instrumental in achieving this reform. In his second reading speech, the then Attorney General of Queensland stated:

I would like to thank RSPCA Queensland, Brisbane Lawyers Educating and Advocating for Tougher Sentences (BLEATS) and others in the community for the support expressed for the new offence of serious animal cruelty that the Bill will introduce into the Criminal Code. This new offence will target those persons who intentionally inflict severe pain and suffering on an animal. This type of offending is abhorrent and cruel, and this new offence sends a very strong message that such behaviour will not be tolerated. Some concerns were expressed to the committee by the Queensland Law Society about the impact that the new offence may have on legitimate farming and veterinary activities and also the appropriateness of RSPCA Queensland’s role in enforcing the new serious animal cruelty offence.

I can confirm that the new offence is directed at a narrow cohort of offenders who intentionally torture animals. A person will not be liable if their conduct is authorised, justified or excused under the Animal Care and Protection Act 2001 or another law other than section 458 of the Criminal Code. For example, part 6 of the Animal Care and Protection Act provides a number of exceptions to offences.

D Discussion: Issues Arising From the Case Study

It seems counterintuitive that, in the context of known widespread violence against animals in intensive animal industries, key advocacy groups such as the RSPCA (Qld) and BLEATS came together with such clarity of purpose to pursue reforms that will impact on a miniscule population of offenders. Overall, Queensland’s new serious animal cruelty offence is unlikely to make any impact on the prevalence of violence against animals, even that perpetrated by the ‘animal torturers’ to whom it is directed. The advocacy and process of law reform did, however, provide a useful rhetorical narrative for the government of the day. By enacting this provision, the Queensland state government seized the opportunity

153 Ibid, quoting Anna Bligh MP, the Premier of Queensland and Paul Lucas MP, the Deputy Premier and Attorney-General, Joint Ministerial Media Statement 14 March 2011.

154 Longworth, above n 128, 3.

to portray itself as ‘taking animal cruelty seriously’ while explicitly protecting the interests of ‘legitimate farming’.\textsuperscript{156}

In penal theory, one of the aims of increasing maximum penalties, and handing down a heavy penalty to an individual offender, is to warn to the broader community and to thereby satisfy a general deterrence objective.\textsuperscript{157} General deterrence refers to the way that ‘the threat of punishment may deter the public at large from committing criminal acts’.\textsuperscript{158}

Heavy penalties also aim to meet specific deterrence objectives, by encouraging an offender to avoid committing criminal acts (or omissions) in the future.\textsuperscript{159} Recognising the animal as a victim of violence also raises the question of individual retribution. From this perspective, the offender deserves punishment for the pain and suffering caused to the victim. Finally, harsher punishments may serve to communicate the wrongness of animal cruelty, building public consensus on this point,\textsuperscript{160} and communicating a moral directive to convicted and potential offenders.

The orthodox rationale outlined above does not take into account the lack of evidence that tougher sentences alone have any impact on recidivism.\textsuperscript{161} Also, it does not consider evidence that certainty of apprehension has a stronger deterrent effect than ‘severity of the subsequent legal consequences’.\textsuperscript{162} Perhaps, in this

\begin{itemize}
\item \textsuperscript{156} Ibid.
\item \textsuperscript{161} See for example, Ritchie above n 157, 2, 22.
\end{itemize}
sense, what is required is increased commitment to consistent and effective enforcement rather than additional offences and increasingly draconian penalties.

Studies have demonstrated that public opinion about sentencing is largely built on misconceptions about crime and sentencing.\footnote{Karen Gelb, \textit{More Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing} (Sentencing Advisory Council, 2008) 7; Julian V Roberts, 'Public Opinion and Sentencing Policy' in Sue Rex and Michael Tonry (eds), \textit{Reform and Punishment: The Future of Sentencing} (Willan Publishing, 2002) 18, 25-6.} For example, ‘[w]hen people are provided with the information similar to that considered by a judge ... they would impose a similar or lower even lower sentence’ than that handed down by a judge.\footnote{Smart Justice, ‘Public Opinion and Sentencing’ (Victoria Law Foundation, 2010) 1 <www.smartjustice.org.au>; Austin Lovegrove, ‘Public Opinion, Sentencing and Leniency: An Empirical Study Involving Judges Consulting the Community’ (2007) \textit{Criminal Law Review} 769, 776. See also, Warner and Davis's study, which found that 'jurors, as informed members of the public, reach similar sentencing decisions as judges much more often than the populist view of public opinion suggests’. Kate Warner and Julia Davis, 'Using Jurors to Explore Public Attitudes to Sentencing' (2012) 52 \textit{British Journal of Criminology} 93, 107.} Evidence also indicates that harsher sentences are unlikely to improve public confidence in the courts or to change public attitudes to sentencing,\footnote{Smart Justice, above n 164, 1.} undermining the argument that tougher sentencing has the potential to build public consensus. Overall, the message from sentencing research is what is needed is better, more accessible information about sentencing and criminal justice policies.\footnote{Ibid; Roberts et al, \textit{Penal Populism}, above n 160.}

In the Queensland case, advocacy was supported, if not led, by the RSPCA (Qld) and BLEATS; both organisations have expertise in animal protection. While individualised intentional violence against animals is morally indefensible and abhorrent, the advocacy approach discussed above appears to have implicitly accepted the broad defence for animal use industries built into the offence, as mentioned in the Minister's second reading speech.\footnote{Section 242(2).} Overall, the story lends gravitas to Andrew Ashworth’s conclusion that the criminal law today is 'largely dependent on the fortunes of successive governments, on campaigns in the mass...
media, on the activities of various pressure groups, and so forth’.\textsuperscript{168}

Current patterns of enforcement and prosecution indicate that harsher penalties impact on socially excluded populations such as the mentally ill or those who have spent their formative years in the violent family or institutional environments mentioned earlier. Further, any deterrence effect may be substantially diluted as those affected may not have much regard for the law or its punishments, however harsh they may be.\textsuperscript{169} Where they focus on individual blameworthiness, arguments for harsher penalties turn a blind eye to the realities of the social order and the correlations between conviction and punishment, and social and economic disadvantage.\textsuperscript{170} What they do achieve is a deeper division between animal cruelty as an intentional act, and violations of animal protection legislation by industry as ‘not criminal in any real sense’.\textsuperscript{171} This outcome surely goes against the heart and soul of Australia’s animal protection movement.

**Part IV** **Conclusion**

This case study has explored ‘individuated violence’ within the animal protection field, with reference to the doctrinal structure of animal cruelty as a criminal offence. T H Marshall’s theory of citizenship served as a useful analytic tool to clarify some of the tensions and contradictions that come into play within Australia’s contemporary animal protection field and the changing nature of the criminal law under neoliberalism. Alan Norrie’s work provided an understanding of how the dynamics of citizenship are expressed through the legal individual and how modern authoritarianism finds its path through the notion of individual freedom.

This case study has demonstrated the influence of neoliberalism on the criminal law within the animal protection field. Carson’s study of the Factories Acts assisted in demonstrating the historical logic that underlies the split between mens rea offences and strict liability within the criminal law. It also assisted in clarifying the

\textsuperscript{168} Ashworth, above n 66, 226.

\textsuperscript{169} Norrie, *Crime, Reason and History*, above n 4.

\textsuperscript{170} Ramsay above n 8, 42.

\textsuperscript{171} Ramsay, above n 8.
processes by which the criminal liability of employers, in industrial settings, came to be minimised. There appears to be a distinct continuity between those 19th century employers and regulatory approach applying to corporations today.

The intention of this case study was to explore aspects of animal protection law reform advocacy, with the aim of identifying the potential for a more reflective and strategic approach. The case study demonstrated that animal protection advocates may engage in law reform in ways that are ultimately counterproductive to the movement’s broader objectives. Focusing on individual responsibility, intentionality, and psychological dangerousness perpetuates the orthodox, narrow and legalistic conceptualisation of animal cruelty as an act perpetrated by the ‘ideal offender’ (as a malicious, predatory individual).172 Despite the understandable abhorrence that animal cruelty elicits in the community, harsher penalties for individuals may not be ‘the best way’ of dealing with the issue. Such initiatives may prove to be merely ‘symbolic’.173 Based on the findings of this case study, it seems that avoiding advocacy aimed at individual blameworthiness, and instead pursuing a law reform agenda aimed at expanding corporate culpability, offers the best pathway to broadening the scope of animal protection and effectively challenging violence against animals in animal use industries.


CHAPTER 9  THE GREYHOUND RACING INDUSTRY
AND STRUCTURAL VIOLENCE

I. INTRODUCTION

In proposing that violence offers a useful alternative analytical framework to the cruelty-welfare binary, it has been asserted that the main strength of the concept of violence is that it allows violence between humans, and that against animals, to be analysed as interdependent. This chapter tests this hypothesis using the frame of structural violence. It adopts the NSW greyhound racing industry as a case study.

There are several reasons for focusing on the greyhound racing industry. The industry was conspicuously absent in the case law review presented in Chapter Four. However, media revelations of widespread animal cruelty, including live-baiting,¹ and the allegations of corruption that have come to plague the greyhound racing industry over recent years indicate that this absence is significant and deserves examination.² In 2013, the Parliament of New South Wales commenced a


Select Committee inquiry into the NSW greyhound racing industry. Further media revelations of animal cruelty and alleged corruption, in early 2015, prompted the commencement of inquiries in New South Wales, Queensland, Victoria, and Tasmania. In NSW, the findings of a Special Commission of Inquiry are due in June 2016. Animal protection advocacy has had a significant role in bringing the greyhound racing industry to account. As it stands, NSW’s greyhound racing industry faces significant reform, including the possibility of disestablishment.

Examining the greyhound racing industry on the brink of what is likely to be

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3 Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Parliament of New South Wales, Greyhound Racing in New South Wales: First Report (March 2014); Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Parliament of New South Wales, Greyhound Racing in New South Wales: Second Report (October 2014).


8 In Tasmania, a Joint Select Committee on Greyhound Racing in Tasmania is in progress with findings to Parliament due in March 2016, [http://www.parliament.tas.gov.au/ctee/Joint/Greyhound.htm](http://www.parliament.tas.gov.au/ctee/Joint/Greyhound.htm). No reports or recommendations were available on the Committee website on 29 June 2016.


11 The possibility of the industry being closed down was raised by Stephen Rushton SC, Counsel assisting the Commissioner, in his opening address. Special Commission of Inquiry into the Greyhound Racing Industry in New South Wales, Opening Address (28 September 2015) 55. Calls for the industry to be phased out also featured in the 2013 Select Committee Inquiry. Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report, above n 3, 27, citing Submission 380, Joint Industry Submission, 98-9.
significant regulatory reform presents an opportunity to use the concept of structural violence with a particular objective, that is, to explore what these circumstances augur about the transformative potential within the animal protection field. Structural violence was introduced in Chapter Six, and the possible problems in applying the concept were outlined. These centred on the concept's vagueness and potential to 'conflated full-fledged domination with mere social disparity and then collapse forms of violence that need to be differentiated'.\textsuperscript{12} However, it was also noted that it is possible to imbue the concept with adequate specificity by taking a case study approach, as has been adopted by medical anthropologist, Paul Farmer. As Farmer acknowledges the influence of Bourdieu on his work, his approach coheres with the broader theoretical framework adopted within this thesis.\textsuperscript{13} Further, as Farmer's aim is to illuminate the 'politics of suffering', his approach is well-suited to the question of violence against animals.\textsuperscript{14}

Farmer's method for understanding structural violence begins with the identification of what the author refers to as an 'index case' of suffering, injury or death, for example, the death of a young woman in rural Haiti, from Human Immunodeficiency Virus (HIV).\textsuperscript{15} His method is to explain 'modal' instances of suffering by embedding 'individual biography' into a 'larger matrix of culture, history and political-economy'\textsuperscript{16} and analysing the individual story through a range of socio-political axes. In Farmer's main field site of rural Haiti these axes include gender, class, poverty, and colonial power.\textsuperscript{17} In the case of the young woman, her suffering and untimely death is an embodied expression of a culturally


\textsuperscript{14} Ibid 279.

\textsuperscript{15} Ibid 279.

\textsuperscript{16} Ibid 272.

\textsuperscript{17} Ibid 274. For an example of this approach used in the context of violence in remote Indigenous Australia, see Diane Austin-Broos, 'Quarantining Violence: How Anthropology Does It' in Jon Altman and Melinda Hinkson (eds), Culture Crisis: Anthropology and Politics in Aboriginal Australia (University of New South Wales Press, 2010) 136.
and historically specific form of structural violence.\textsuperscript{18} Similarly, this chapter situates greyhounds as end-point victims in a form of structural violence within the greyhound racing industry. It is estimated that the greyhound racing industry in Australia kills between 13 000 and 17 000 greyhounds every year.\textsuperscript{19}

Farmer’s portrayal is one of the relentless reproduction of the socio-political conditions that maintain the status quo. It offers little hope for change. Farmer acknowledges this when he states ‘I acknowledge the influence of Bourdieu, who has contributed enormously to the debate on structure and agency ... [t]hat a supple and fundamentally non-deterministic model of agency would have such a deterministic - and - pessimistic "feel" is largely a reflection of my topic, suffering, and my fieldwork site’.\textsuperscript{20}

By contrast, the formal scrutiny the greyhound racing industry currently faces brings with it the potential for substantive change, which may see the cessation of large-scale killing of greyhounds each year. Hence, rather than focus on the reproduction of the status quo, this case study steps into the space of potentiality. It extends the concept of structural violence to explore the factors driving change, and equally, the limits of that change. To this end, it brings together two axes relevant to the greyhound racing industry. The first axis is the socio-political differentiation that characterises the animal protection field, which also, it will be proposed, characterises the larger field of animal use industries in Australia. The second axis relates to the cultural practices by which companion animals are being conferred with entitlements or interests in contemporary Australia.

In these circumstances the notion of interdependency refers to the meeting point between these two axes, that is, how violence against animals within the greyhound industry intersects with the dynamics of animal use industries writ large. Therefore, the arguments that follow sit at an uncomfortable nexus, one

\textsuperscript{18} Farmer, above n 13.

\textsuperscript{19} In 2011 Alexandra McEwan and Krishna Skandakumar estimated that between 13 000 and 17 000 greyhounds were killed each year. Alexandra McEwan and Krishna Skandakumar, ‘The Welfare of Greyhounds in Australian Racing: Has the Industry Run its Course?’(2011) 5 Australian Animal Protection Law Journal 53. This figure was confirmed in the 2015 New South Wales Special Commission of Inquiry into the Greyhound Racing Industry in New South Wales, Transcript of Proceedings (Sydney, 28 September 2015) P 43-5.

\textsuperscript{20} Farmer, above n 13, 281 n 4.
which acknowledges greyhounds as ultimate victims, though proposes other power differentials at work within a broader animal use industry field, by which the greyhound racing industry inhabits a marginalised position.21 The aim is not to exonerate the greyhound industry but rather to understand the dynamics of the field and thus the politics of violence against animals. Exploring these factors may illuminate the barriers to law reform in other animal use industries.

The chapter proceeds as follows. Part II provides the relevant historical context via a brief discussion of the development of greyhound racing and the NSW greyhound racing industry's regulatory structure. Part III demonstrates how it is that the greyhound racing industry can be considered as the animal cruelty defendant 'writ large'. Consistent with the arguments made in Chapter Eight, this raises the possibility that society's pursuit of the stereotypical animal cruelty offender, (in this case the greyhound industry) may inadvertently stabilise the legitimacy of other animal use industries.

The examination of the greyhound racing industry in Part III brings together and develops arguments made in previous chapters. Chapter Six noted the class dynamics that shaped the original structure of the animal protection field. Of particular relevance to the following analysis is the class privilege associated with hunting, which led to this aristocratic form of recreation being exempted from the animal protection field. As was also noted in Chapter Six, the traditional rural class relationships of England were translated into the Australian colony.22 It is perhaps for these reasons that, as was noted in Chapter Three, unlike many other animal-

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21 From a US perspective, Thayer notes that 'the battle to end cockfighting is about cruelty but that the 'subtext is social class' because participants in the activity are 'easy groups to pick on' such as Hispanics and rural, working class whites'. Gwyneth Anne Thayer, Going to the Dogs: Greyhound Racing, Animal Activism and American Popular Culture (University Press of Kansas, 2013) 145, quoting Hal Herzog, Some We Love, Some We Hate, Some We Eat (Harper Perennial, 2010) 171.

use industries, the racing industry came to self-regulate\textsuperscript{23} under state and territory industry-specific legislation.\textsuperscript{24} This form of self-regulation may also go some way to explaining the absence of judgments concerning the racing industry (in any of its three codes: horse, harness, and greyhound racing) in the case law review presented in Chapter Four.

Under their respective legislative regimes, horse and greyhound racing have enjoyed virtual autonomy with regard to the development and implementation of animal welfare standards and governance of state and territory racing rules. Further, given the historical points raised above, it is likely that this regulatory autonomy has a significant degree of historical continuity with the class dynamics that have informed the structure of the animal protection field. As the greyhound racing industry has its origins in hunting and coursing, it is likely that its associations with horse racing, as a recreational pursuit of the gentry, initially placed it beyond the reach of animal protection legislation and shielded it from challenge.\textsuperscript{25} The autonomy enjoyed by the NSW greyhound racing industry was clear in evidence given to the 2013 Select Committee on Greyhound Racing in NSW (2013 NSW Select Committee) by Mr Landa. Mr Landa was appointed Integrity Auditor for Greyhound Racing NSW (GRNSW) in 2011, though he resigned in 2012. Mr Landa stated that the industry was ‘without regulation’.\textsuperscript{26} ‘Other than the Police, with evidence of criminal activity, there is no body that people in the industry can go to with their concerns to have them … properly investigated.’\textsuperscript{27}

\textsuperscript{23} Self-regulation encompasses an array of regulatory arrangements which vary according to the type and level of state involvement, the ‘formality with which those arrangements are established and enforced, the extent to which the self-regulatory body exerts exclusive or monopoly control over the regulated activity and the level at which behaviour is regulated’. Bronwen Morgan and Karen Yeung, An Introduction to Law and Regulation: Text and Materials (Cambridge University Press, 2007) 93.

\textsuperscript{24} Racing Act 1999 (ACT); Greyhound Racing Act 2009 (NSW); Racing and Betting Act 2011 (NT); Racing Act 2002 (Qld); Racing Regulation Act 2004 (Tas); Racing Act 1958 (Vic); Western Australian Greyhound Racing Association Act 1981 (WA).

\textsuperscript{25} Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report, above n 3, 63. The Racing Act 2009 (NSW) is subject to a statutory review every five years. Racing Act 2009 (NSW) s 49.

\textsuperscript{26} Evidence to Legislative Council (NSW), Select Committee on Greyhound Racing in NSW, Parliament of New South Wales, Sydney, 6 Feb 2014, 19-20 (Paul Landa).

\textsuperscript{27} Ibid.
Cast against the greyhound industry as offender, Part IV focuses on the plight of the greyhound. It begins by presenting the status quo for the greyhound as a life of suffering, and one that is often brutally cut short. As the 2015 NSW Special Commission is yet to publish its findings, these issues will be contextualised by the findings of the 2013 NSW Select Committee.28 Having established the status quo, the discussion progresses to consider the greyhound’s current transition from a working class, working dog to a companion animal with the ‘member of the family’ status enjoyed by other canines across middle Australia.29 This time of fluidity and change provides the basis for a speculative argument regarding how entitlements are conferred upon animals in contemporary Australia. The idea that the greyhound, as a breed of domestic dog, is emerging as a type of ‘animal-person’ will be examined according to the indicia identified by anthropologist Meyer Fortes in his classic essay ‘The Category of the Person’.30

II. BACKGROUND

A. The Greyhound Racing Industry

1 The Transition From Coursing to Greyhound Racing

Contemporary greyhound racing grew out of the sport of coursing, a form of hunting in which dogs pursue a game animal by sight, rather than scent.31 In England, coursing was associated with noblemen and membership in coursing associations was limited.32 Thayer defines coursing as ‘a competition between two greyhounds as they chase the same prey, usually jackrabbits or other small but

28 Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report, above n 3; Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: Second Report, above n 3.


31 Anne Rolins, All About the Greyhound (Rigby, 1982) 16.

32 Rolins, above n 31, 18; Thayer, Going to the Dogs, above n 21, 22-6.
fleet-footed quarry'.

Australia’s first coursing meeting took place in Naracoorte, South Australia, in 1867. A wallaby was used as a lure. Live hares were introduced into public coursing meetings in 1873. Early coursing practices demonstrated a callous disregard for the suffering of the dogs involved. Many dogs were maimed or killed as a result of coursing over the flint-hard Australian terrain. Dogs were made to course in the ‘rain, hail and snow’. On other occasions they suffered from heat stroke or died of exhaustion. Coursing grew into a popular recreational activity in the Australian colony, ranked third behind horse racing and cricket. However, its popularity waned in the late 19th century.

In the early 20th century coursing developed into ‘Plumpton coursing’ and gradually transformed into commercial greyhound racing. In the late 1920s, Owen Smith commercialised greyhound racing in the United States by establishing the first racing track. Each dog was placed into a box at the start of the track and enticed to chase an artificial lure, known as a ‘tin hare’. Greyhound racing gained

33 Thayer, Going to the Dogs, above n 21, 4.
34 Rolins, above n 31, 19; McEwan and Skandakumar, above n 19, 55.
35 Rolins, above n 31, 19; McEwan and Skandakumar, above n 19.
36 Rolins, above n 31, 20.
37 Ibid.
38 Ibid.
40 Ibid 21.
42 ‘Plumpton coursing’ involved ‘restricting the size of the competition paddock by fencing it in and conducting ‘artificial coursing’ in an enclosure’. Rolins, above n 32, 20. See also Noel Jackling and Doug Royal, ‘Greyhound Coursing of Live and Tin Hares at Albury’ (2014) 85(2) Victorian Historical Journal 321, 323.
43 Paul Tracey, ‘Going to the Dogs! Labor and “Tin Hare” Racing’ (1998) 2 The Hummer 10; McEwan and Skandakumar, above n 19, 55.
44 Tracey, above n 43, 10; McEwan and Skandakumar, above n 19, 55.
patronage and racetrack practices changed. The first race meet using a tin hare in Australia was held in May 1927 at the Epping Racecourse (Harold Park), Sydney.

2 Greyhound Racing in NSW

The late 20th century saw a sharp decline in greyhound racing across the globe. From a US perspective, Thayer states that ‘[t]he end of the twentieth century inaugurated a period of aggressive criticism of the dog-racing industry, an assault from which the sport has never recovered’. Australia is one of eight countries in which commercial greyhound racing remains lawful. New South Wales has the largest greyhound industry in Australia, and the majority of racing tracks are also located in New South Wales.

Greyhound Racing NSW (GRNSW) is the industry peak body and a body corporate. The organisation’s functions are set out in the Greyhound Racing Act 2009 (NSW). These are to control, supervise and regulate greyhound racing, and promote and develop the welfare of the greyhound racing industry in the State. Greyhound Racing NSW operates as an independent board. With the enactment of the Greyhound Racing Act 2009 (NSW) GRNSW became responsible for the commercial

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45 McEwan and Skandakumar, , above n 19, 55.
46 Jackling and Royal, above n 42, 331; O’Hara, A Mug’s Game, above n 42, 186.
47 McEwan and Skandakumar, above n 19, 56.
48 Thayer, Going to the Dogs, above n 21, 19.
49 Special Commission of Inquiry into the Greyhound Racing Industry in New South Wales, Opening Address (28 September 2015) 4.
50 McEwan and Skandakumar, above n 19, 53.
51 Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report, above n 3, 17.
52 Greyhound Racing Act 2009 (NSW) s 9(2). ‘Dedicated greyhound racing legislation commenced with the Greyhound Racing Control Board Act 1985 (NSW).’ Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report, above n 3, 11.
53 Greyhound Racing Act 2009 (NSW) s 6.
and regulatory aspects of the greyhound racing industry.\textsuperscript{54} Previously, under the \textit{Greyhound Racing Act 2002} (NSW), these responsibilities had been split. Greyhound Racing NSW was responsible for commercial operations. The Greyhound Racing Authority, and then the Greyhound and Harness Racing Regulatory Authority, was responsible for regulatory oversight.\textsuperscript{55} Having set out the basic historical and regulatory context, the discussion turns to explore the intersection between violence against animals within the greyhound racing industry and the characteristics of greyhound racing industry within a larger animal use industry field.

\textbf{Part II \hspace{1em} THE GREYHOUND INDUSTRY AS THE ANIMAL CRUELTY DEFENDANT WRIT LARGE}

In proposing a broader field comprising animal use industries in Australia, this section applies the arguments that have been developed in previous chapters regarding the participants within the animal protection field, at a higher level of generality. Chapter Seven considered the role of whistleblowers in animal protection. Chapter Eight examined the differing impact of calls for tougher sentencing on individual, as opposed to corporate, animal cruelty offenders. Here, it is argued that the greyhound racing industry inhabits an analogous position to individual animal cruelty defendants, within the larger field of power. (Therefore, this aspect of the arguments that follow is made by analogy. However, it is not a cross-species analogy.)

Horse and greyhound racing are industries that use animals for sport and recreation; both are forms of gambling that put animals in competition as the basis of the betting incident. In this context, the meaning of ‘sport’ takes the colour of ‘gambling’ as form of gaming, and gaming as a form of recreation. As a form of gambling, racing can be distinguished from animal use for entertainment, such as


\textsuperscript{55} Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, \textit{Greyhound Racing in New South Wales: First Report}, above n 3, 11 n 16, citing ‘Submission 382, Greyhound Racing NSW, 6’.
in circuses or zoos and aquaria.\textsuperscript{56}

Bringing the analysis to a higher level of generality raises two matters. First, in going beyond the animal protection field as an area of criminal law, the question becomes one of the legitimacy of various forms of animal use within society. This requires engagement with utilitarian theory and the principles of moral philosophy by which certain forms of animal use maintain their legitimacy while others may become vulnerable to challenge. Second, to maintain coherence with the arguments made in previous chapters, it is necessary to demonstrate how the greyhound racing industry mirrors the \textit{habitus} and position of individuals who are relatively disempowered within the animal protection field.

The greyhound racing industry reflects the position of individual animal cruelty defendants in three ways. First, as demonstrated in previous chapters and in general, individual animal cruelty defendants fall foul of the necessity test as the harm they cause animals does not fulfil a legitimate economic objective. Second, as discussed in Chapter Six, the animal protection field is constructed according to class dynamics. Those who inhabit the least powerful positions within the field according to this criterion are more likely to be brought to account. Third, the greyhound racing industry kills dogs. As an area of criminal law the animal protection field focuses on dogs as companion animals.

With regard to legitimate economic objectives, the scrutiny applied to the greyhound racing industry can be construed as the application of the necessity test, applied at a societal, rather than individual, level. As was demonstrated in Chapter Four, it is rare that animal use industries enter the court system and are subjected to the necessity test. However, as was noted in Chapter Eight, the application of the necessity test centres on whether any harm caused to an animal was proportionate to an economically \textit{rational} object. As was also noted in Chapter Eight, the test embeds socio-political differentiation into the meaning of animal cruelty, which turns on a defendant’s financial management and the position of the defendant within the field. One of the reasons the greyhound racing industry currently faces

\textsuperscript{56} Walkden-Brown discusses animal use in rodeos, circuses, zoos and aquaria, and film and theatre, though not the racing industry. This suggests that racing forms a different category of animal use for recreation. Racing tends to be considered as animal use for ‘sport’. Jackson Walkden-Brown, ‘Animals and Entertainment’ in Peter Sankoff, Steven White and Celeste Black (eds), \textit{Animal Law in Australasia} (Federation Press, 2\textsuperscript{nd} ed, 2013) 129.
scrutiny is its strained financial circumstances, amidst allegations of ‘industry mismanagement’. For example, the 2013 NSW Select Committee Inquiry’s first-listed term of reference was to inquire into and report on ‘[t]he economic viability of the greyhound racing industry in New South Wales’. The Committee heard that the industry ‘is not viable in the short to medium term and is not sustainable in the long term’.

Second, the socio-political differentiation referred to above intersects in a particular way with the class dynamics that informed the original structure of the animal protection field, and by corollary, the logic of utilitarianism. As was outlined in Chapter Two, on the utilitarian scale, moral claims to use animals for entertainment and sport are weaker than those that pose animal use as necessary, such as breeding and killing animals for meat. It follows that industries which use animals for entertainment and sport will be more vulnerable to challenge. As for the use of animals within the racing industry as a form of recreation and sport, greyhound racing sits in an inferior class position to horse racing; greyhound racing is a working-class form of gambling and recreation. According to submissions made the 2013 NSW Select Committee, the greyhound racing industry subsidises the fortunes of its wealthier and more glamorous cousin. For example, a joint greyhound racing industry submission to the 2013 NSW Select Committee argued that ‘since the establishment of the inter-code agreement’ between the greyhound, harness and racing codes, ‘the greyhound industry has essentially


58 Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report, above n 3, iv.

59 ‘There is little private sector investment in the industry in NSW, because of the poor returns.’ Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report, above n 3, 16.

60 Bourdieu notes that the playing of games is still present in the English word ‘sport’. Pierre Bourdieu, ‘Sport and Social Class’ (1978) 17(6) Social Science Information 819, 822. Essentially, the ‘sport’ of racing is a form of gaming that uses animals for the purposes of betting.

61 O’Hara, A Mug’s Game, above n 41.
subsidised the other two racing codes by almost $154 million’. 62 This relationship can be traced back to the earliest days of the Australian colony.

The new colonial society recreated traditional British rural society and the new gentry ‘adopted the horse racing and gaming values of the aristocracy’.63 Although attracted to betting for disparate reasons, the colonial gentry and the lower classes both held the view that gaming and betting were legitimate pursuits.64 This common ground on the issue of gambling harks back to Chapter Six. There, it was noted that, in 19th century England, neither the aristocracy nor the lower classes adhered to the moral sentiments that led to the enactment of animal welfare legislation in 1822. Both liked to bet and both, apparently, held little concern for the welfare of animals. In Britain, there was what O’Hara describes as ‘an intimate relationship between the gentry and the lower orders in which the gentry provided patronage and the opportunity for betting’.65

In the genealogy of animal use in sports, greyhound racing most obviously has its genesis in coursing, though also in the fairs and festival days of 18th century England, at which betting on animal sports was a feature.66 These contests or ‘games’ often involved ‘throwing at the cocks’ (involving competitors paying to throw a stone at a cock ‘which was tied by a short cord to a stake about twenty yards away’), horse racing, and contests between men, such as pugilism.67 Members of the gentry owned most of the fighting cocks and took an entrepreneurial role in proceedings.68


63 O’Hara, Getting a Stake, above n 22, 41.

64 Ibid 41-4.

65 O’Hara, A Mug’s Game, above n 41, 4.

66 O’Hara, Getting a Stake, above n 22, 43-4.

67 Ibid 43-4.

68 O’Hara, A Mug’s Game, above n 41, 5.
In the early Australian colony, these traditions were integrated into Governor Macquarie’s recreation policy. In Sydney, Hyde Park was marked out as a racecourse and horse race meetings became part of a program of annual recreations. These events were to be held annually, as a point of leisure that was part of a larger design of social control of the 'lower orders'.

Despite these origins, there are conflicting narratives as to whether greyhound racing in its modern commercial form was always associated with the working class. Coursing using hares ‘was patronised by the middle and upper classes’, and the lower classes participated in rabbit coursing which was held in urban arenas. There is evidence that during the 1920s and 1930s greyhound racing, under lights at night, was considered a ‘novel, sophisticated entertainment’. Madden argues that during the 1920s and 1930s greyhound racing drew a wealthy crowd and enjoyed the patronage of the professional classes. In this view, greyhound racing did not have the status of a working class emblem ‘until some decades into organised greyhound racing’. However, this portrayal is at odds with political events that indicate that greyhound racing was considered a working class form of recreation by the late 1920s. For example, in 1927 the Bavin government in NSW banned tin hare coursing after sunset. According to Jackling and Royal, Labor politician Jack Lang saw this as ‘an attack on the working class’. When Lang was re-elected in 1930, the Finance (Greyhound Racing) Taxation Act 1931 (NSW) was amended to allow betting at night at coursing events. Perhaps the situation in Australia shared the complexities that were evident in Britain during this period.

69 O’Hara, Getting a Stake, above n 22, 49.
70 Ibid 50.
71 Ibid 51-2.
72 Working Dog Alliance, above n 1, 18.
73 Madden, ‘Imagining the Greyhound’, above n 29, 507; See also Thayer, above n 21, 122; Mike Huggins, “Everybody’s Going to the Dogs”? The Middle Classes and Greyhound Racing in Britain between the Wars’ (2007) 34(1) Journal of Sport History 401, 402.
74 Madden, ‘Imagining the Greyhound’, above n 29.
75 Ibid 507.
76 Jackling and Royal, above n 42, 321, 331.
77 Ibid, 331.
As Huggins explains, ‘greyhound racing attracted strong opposition from some sections of the British middle class’ between the first and second world wars, ‘an opposition that continued after World War II ... other sections of the middle class lent it equally strong support’.  

Putting aside the question of whether greyhound racing enjoyed patronage across classes during the 1920s and 1930s, by the mid-20th century it has lost its glamour and attendances had fallen. Its status today as ‘the racing industry for the working class’ was noted in the Greyhound Action Group’s submission to the 2013 NSW Select Committee Inquiry. Some of the reasons for this traditional association include ‘a much lower cost of participation than the two other racing codes, and being able to be undertaken by hobbyists from their suburban backyards’. These stereotypical features of the hobbyist were captured in the Australian 1997 film The Castle. The film’s protagonist Dale Kerrigan’s ‘working class credentials’ were ‘established by his fringe suburban residence, his occupation as a tow-truck driver, and the fact that he races greyhounds for recreation’.

In summary, according to mainstream social norms, the racing industry has a relatively weaker moral claim on the use of animals than animal use industries in which it is assumed that animal use is necessary. For the greyhound racing industry, its inferior class position accentuates this weakness. As a result, it sits on the outer margin of the moral continuum of animal use for sport and recreation. Hence, in terms of its social licence and moral claim, it sits at the outer margin of animal use industries as a whole. Further, the position of greyhound racing mirrors that of the lower orders in 19th century England, whose use of animals for gaming

78 Huggins, above n 73, 402.
79 Madden, ‘Imagining the Greyhound’, above n 29, 507.
80 Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report, above n 3, 7-8, quoting Submission 1, Greyhound Action Group, 4.
81 Ibid.
82 The Castle (Directed by Rob Sitch, Working Dogs Production, 1997).
83 Madden, ‘Imagining the Greyhound’, above n 29, 510.
and leisure was the focus of law reform in the interests of animal protection. Another pertinent similarity is that gambling, in the forms enjoyed by the rough poor, drew the ire of 19th century middle class reformers whose mission was to civilise, and bring the virtue of industry, to the lower orders.

Against the background of the factors discussed above, greyhound racing can be considered a contemporary manifestation of the gaming mentality that underpinned cock-fighting and dog-fighting in the 19th century. As such, the scrutiny the industry faces today evidences some historical continuity with the dynamic that drove the constituting order of the animal protection field. According to this logic, it is no surprise that we see the greyhound racing industry targeted for law reform.

The final way that the greyhound industry mirrors the circumstances of the defendants who appeared in Chapter Four is that it harms dogs, rather than another species. This is consistent with the focus on companion animals within the animal protection field as an area of criminal law. Having noted this consistency, Part IV examines the social conditions in which dogs' interests might trump those of a particular group of humans.

Part III    THE GREYHOUND: FROM COMMODITY TO ANIMAL-PERSON?

Having established the greyhound industry as the animal cruelty defendant writ large, the following discussion explores the circumstances in which the interests of the dog-victim may trump those of humans. It is divided into three sections. Section One presents the status quo. It demonstrates that, for the vast majority of greyhounds bred for the racing industry, life is generally short and involves particular forms of suffering at each stage of life. Section Two discusses the status of pets as members of the 21st century Australian family, and a transition in play by which greyhounds bred for the racing industry are rescued, adopted, and subsequently begin a new life as companion animals.84 In addition to the number

of dogs killed each year, it has been the brutal methods of killing and evidence of mass dog graves that has shocked Australians and stirred momentum for law reform.\textsuperscript{85}

It is with these points in mind that the discussion questions how it is that animal interests or entitlements are emerging in contemporary Australia. More specifically, it places the recent shift in attitudes towards greyhounds in the context of broader cultural attitudes about companion animals as members of the family. It asks the question ‘Have dogs attained the status of a type of ‘animal person’? It responds to this question in the light of Fortes’ indicia for personhood, and suggests Fortes’ analysis as a ‘candidate universal’ for these indicia.

\textit{A The Life of a Greyhound as One of Suffering}

Of the many welfare issues that impact on greyhounds bred for the racing industry, over-breeding is the most significant, as it leads to the slaughter of an estimated 13 000 - 17 000 dogs per year.\textsuperscript{86} The NSW industry accounts for approximately 3000 greyhound deaths per year.\textsuperscript{87} Greyhounds are killed at several points of their life span. The justification for this killing is that they are ‘surplus’ to industry

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\item \textsuperscript{87} ABC Radio National, ‘The Quick and the Dead’, \textit{Background Briefing}, 11 November 2012 (Timothy McDonald) <http://www.abc.net.au/radionational/programs/backgroundbriefing/2012-11-11/4355398>; McEwan, “The Unbearable Lightness of Being a Greyhound".
\end{itemize}
requirements. Killing for this reason is often referred to as ‘wastage’, a term that reiterates the commodity status of greyhounds in the racing industry. The market for the use of greyhounds in research, as a live export ‘commodity’ and for teaching in veterinary schools, has emerged in the context of this ongoing over-breeding of dogs.

Welfare problems arise at every stage of a greyhound’s life. Ninety per cent (90%) of pregnancies are achieved through surgical artificial insemination. No limit is placed on the number of litters bred, nor the number of litters per female. The drowning of unwanted puppies is reportedly a common practice.

As small pups greyhounds are kept in open paddocks. They socialise with other

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88 See Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report, above n 3, 98-9, 102-3, 109. Alex Bruce, Animal Law in Australia: An Integrated Approach (LexisNexis Butterworths, 2012) 183; O’Sullivan, above n 10, 90. The Working Dog Alliance defines wastage as ‘the number of individual animals bred for a purpose who are subsequently discarded from the industry. For racing greyhounds, ‘wastage’ can be used to refer to the number of dogs bred for the purpose of racing that are then discarded (euthanased) for a number of different reasons that may include: failing to become racers, being excess to a participant’s needs, or being unable to be re-homed, whether due to behaviour, physical, training or injury reasons’. Working Dog Alliance, above n 1, 3.

89 See for example, Working Dog Alliance, above n 1, 8.


93 McEwan and Skandakumar, above n 19.

94 Evidence to Select Committee on Greyhound Racing in NSW, Legislative Council, New South Wales Parliament, Sydney, 6 February 2014, 34, 40 (Dr Cunnington) in Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Report of Proceedings, (Sydney, 6 February 2014).

95 Friends of the Hound Inc, Submission 362 to New South Wales Select Committee, Inquiry into Greyhound Racing in New South Wales, 5 November 2013, 3; Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report, above n 3, 99 n 34.

96 Greyhound Rescue, Submission 384 to New South Wales Select Committee, Inquiry into Greyhound Racing in New South Wales, 5 November 2013, 5; Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report, above n 3, 101 n 390.
greyhounds though have little contact with humans. As a result they ‘lack experience in being handled, or coping with noise and activity’. As they grow older, they are kennelled and are often ‘shut in their sleeping quarters with little environmental enrichment’. Being kennelled is a ‘extremely stressful experience’. The dogs’ mental suffering is expressed as fear. Fear compromises welfare and is a factor in dogs being euthanased.

Some dogs are killed as they do not run fast enough to qualify for racing. Those that do begin racing may sustain injuries on the track. For example, for the period 23 September 2013 to 23 October 2013 GRNSW stewards’ reports recorded 175 injuries. Treating injuries is often expensive and is another factor contributing to the high euthanasia rates in the industry.

Finally, many dogs are killed on ‘retirement’ from the racing industry. Veterinarian Dr Zammit explained a particularly bleak example of one form of euthanasia procedure to the 2013 Select Committee:

[t]hese dogs are about to be euthanased anyway. They are anaesthetised, blood is taken, and then the anaesthetic process continues to euthanasia. They are not harmed in any way. It worries me that there seems to be a movement that we should not take blood from these dogs. At least the dog’s death means something

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97 Evidence to Select Committee on Greyhound Racing in NSW, Legislative Council, New South Wales Parliament, Sydney, 6 February 2014, 35 (Dr Cunnington) in Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Report of Proceedings (Sydney, 6 February 2014).

98 Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report, above n 3, 102.

99 Evidence to Select Committee on Greyhound Racing in NSW, Legislative Council New South Wales Parliament, Sydney, 6 February 2014, 35 (Dr Cunnington), above n 97.

100 Ibid.

101 Ibid.

102 Ibid.

103 RSPCA Australia Submission 339 to Select Committee on Greyhound Racing in NSW, Legislative Council Parliament of New South Wales (6 November 2013) 5. See also Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report, above n 3, 104.

104 Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Greyhound Racing in New South Wales: First Report, above n 3, 104.
because that blood can save the life of another dog. The dog’s dignity is never taken away from them and they never suffer any pain from it. I just want to make mention of it because it keeps coming up.  

An alternative view to Dr Zammit’s is that killing a healthy dog to treat another, sick dog is the manifest apogee of the greyhound’s commodity status. Dr Zammit’s apparent need to ensure that a greyhound’s death in this manner ‘means something’ will be explored in more depth after having made points regarding the status of pets in Australia and the greyhound’s transition to companion animal.

B A Second Chance: the Greyhound’s Transition to Companion Animal

1 Pets as Members of the Australian Family

Australia has one of the highest rates of pet ownership in the world and the nation’s ‘pet industry is estimated to be worth $8.0 billion annually’. Nearly 40 per cent of households own a dog and there are an estimated 4.2 million pet dogs in Australia. This translates to around one dog for every five people.

In 2013 Animal Health Alliance surveyed 1734 Australians on a range of aspects of pet ownership, finding that almost 90 per cent of the pet owners surveyed ‘regarded their dog or cat as part of the family’. Some respondents admitted that

105 Evidence to Select Committee on Greyhound Racing in NSW, Legislative Council New South Wales Parliament, Penrith, 15 November 2013, 78 (Dr Robert Zammit) in Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Report of Proceedings (Penrith, 5 November 2013).


107 Ibid.

108 The sample included pet and non-pet owners.

they treated their pet better than human family members.\textsuperscript{110} Consistent with this finding, pet owners prioritise ‘spending on their pets as they would a member of their immediate family’.\textsuperscript{111}

It is against this standard of care and regard that the recent public outrage at the treatment of greyhounds might be best understood. The growth of racing industry-endorsed greyhound adoption programs over the last decade has seen greyhounds who would otherwise be euthanased taking their place as members of adoptive families. However, adoption programs have the capacity to assist only a small percentage of the number of greyhounds needing re-homing. In 2008, as the time of Judge Lewis’s report on integrity in the Victorian greyhound industry, it was estimated that adoption ‘saved the lives’ of around 4 - 5 per cent of the total number of animals in need of re-homing.\textsuperscript{112} However, increasing community awareness of the thousands of greyhounds killed every year has seen a growth in the demand for rescued greyhounds.\textsuperscript{113} Adopting a greyhound saves the dog from the possibility of a brutal death. As veterinarian Ted Humphries explains:

[i]f we don't humanely euthanase [sic] them, then they'll often inhumanely euthanase [sic] them by shooting, hanging, gassing, drowning — any manner of alternative methods can be used if these people get desperate. I think hammers occasionally have been incriminated as being a way of

\textsuperscript{110} Kate Letheren and Kerri-Anne Kuhn, ‘Pets Join the Family, and Business is Booming’, \textit{The Conversation} (online), 25 December 2013 <https://theconversation.com/pets-join-the-family-and-business-is-booming-20655>

\textsuperscript{111} Animal Health Alliance, above n 106, 5 <www.animalhealth alliance.org>.


destroying an animal. I’ve not only heard about it; I’ve firsthand experience of it.  

The crescendo of concern for racing greyhounds is reflected in changes in the RSPCA’s position on the issue. In 2011 the RSPCA expressed various concerns about the welfare of dogs in the racing industry. By 2015, the RSPCA had joined calls for the greyhound racing industry to be phased out. When set against the ‘member of the family’ norm, there is little doubt that media revelations of brutal killing and mass graves were a significant factor in mobilising the campaign for greyhounds to be protected from the range of harms outlined above.

The theme emerging from this greyhound case study lies in the notion, conveyed in Dr Zammit’s justification of euthanasia, that a dog’s death must ‘mean something’; it cannot be for nothing. As members of our families, our pet dogs have entitlements not only to a good life, as reflected in our attitudes regarding their status and our spending patterns, but also to a ‘good death’. Killing by the methods mentioned by Dr Humphries does not amount to a good death. The outrage about the killing of greyhounds related not only to the number of dogs killed but, as was also the case in the UK and the US, the evidence of mass graves: these graves

114 Timothy McDonald, Greyhounds Killed if they don’t Perform, November 9 2012, ABC Radio AM, <http://www.abc.net.au/am/content/2012/s3629114.htm>.


118 See Thayer, Going to the Dogs, above n 21, 136-7.
suggest dogs being treated as undifferentiated bodies at the point of death. However, importantly, the case of the greyhound also indicates that ‘humane euthanasia’, in and of itself, does not amount to a ‘good death’. It is not a good death because it fails to signify that the subject dog’s life was worth something. Hence, it can be argued that, for many dog owners, there are two elements of a good death for a companion animal: humane euthanasia at the end of the animal’s life span and some form of funeral rite or burial. The desire to mark the death of a companion animal symbolically is evident in the growth of pet burial services: ‘Pets in Peace’,\textsuperscript{119} and ‘Pets at Peace’\textsuperscript{120} are representative examples.

In summary, in contemporary Australia, companion animal dogs have two entitlements: a good life and a good death. A good death is not just painless (or lawful), it also involves some form of signification of the status of the dog as a, now deceased, member of the family. It is against the backdrop of these observations that the discussion turns to consider Fortes’ indicia of personhood. The discussion compares Fortes’ analysis of the Tallensi notion of the person with dogs as companion animals in Australia; the aim is to identify what might be universal markers for ‘animal personhood’. The ‘animal personhood’ to be considered is cultural and does not refer to established legal rights. However, it does involve entitlements that, in the case of greyhounds, prompted broad community action, and a legal and political response. Therefore, the present greyhound case may strengthen the hypothesis of what it is that confers animal personhood. The idea that the conditions of the conferral of personhood may be universal is suggested by Fortes when he states ‘I would maintain that the notion of the person in the Maussian sense [his study is based on Mauss] is intrinsic to the very nature and structure of human society and human social behaviour everywhere’\textsuperscript{121}


\textsuperscript{121} Fortes, ‘The Category of the Person’, above n 30, 253.
Meyer Fortes’ essay, ‘The Category of the Person’ was first published in 1971.\(^{122}\) It aims to understand why, for the Zibuing clan of the Tallensi, Ghana ‘in some contexts and some situations a crocodile from a special place’ is a person.\(^{123}\) Fortes’ inquiry was provoked by a ‘ritual crisis’\(^{124}\) that followed the ‘wanton’ killing of a crocodile who dwelt at a sacred pool.\(^{125}\) For the Tallensi, these crocodiles are the ‘incarnation of important clan ancestors’.\(^{126}\) Killing one of them is ‘like killing a person’.\(^{127}\)

The Tallensi do not consider all crocodiles to be persons. Crocodiles, ‘in their animal mode of existence in the wild, are not persons’;\(^{128}\) they can be fished and eaten during the dry season.\(^{129}\) It is only those crocodiles that live near a particular sacred pool and are associated with the clan, and whose ‘dead elders rise up again’ in these crocodiles, that are invested with personhood.\(^{130}\) Although considered a person, a murdered crocodile would not be described as a human.\(^{131}\) On the ethnographic data, Fortes concludes that the critical difference between humans and animals is that ‘animals have no genealogies’.\(^{132}\) The incorporation of dogs into Australian families forms a point of divergence from the Tallensi example, as dogs

\(^{122}\) Meyer Fortes, ‘On the Concept of the Person among the Tallensi’ in G Dieterlen (ed), *La Notion de Personne en Afrique Noire* (du Centre National de la Recherche Scientifique, 1971) 283.

\(^{123}\) Fortes, ‘The Category of the Person’, above n 30, 249.

\(^{124}\) Ibid 248.

\(^{125}\) Ibid 249.

\(^{126}\) Ibid 248-9.

\(^{127}\) Ibid 249.

\(^{128}\) Ibid 256.

\(^{129}\) Ibid 249.

\(^{130}\) Ibid 256.

\(^{131}\) Ibid 254.

\(^{132}\) Ibid 255.
gain a form of genealogy by virtue of their family membership. By contrast, while
sacred crocodiles are considered quasi-domesticated, the Tallensi do not live
with them!

The example invites comparison with the status of dogs in Australia. As a species,
dogs do not have specific entitlements. Under animal protection legislation all
sentient animals have an entitlement to be protected against cruelty. However, this
is not a specific entitlement for dogs. Putting aside the significance of the dingo in
Aboriginal culture, Australia’s native (wild) dog, the dingo is, from time to time,
subjected to culling operations by state agencies. By contrast, dogs who are part
of the family and therefore live in association with a human clan, have been
‘humanised’, and therefore invested with a form of personhood.

In the case of the Tallensi, the specific question of the ‘rising up of dead elders’ is
one of a different cosmological order and which does not have any obvious cross-
cultural resonance with contemporary Australia. It is beyond the bounds of this
analysis to speculate as to the cosmological dimensions that might apply to
companion animals in contemporary Australia. Nonetheless, the other features
identified above are adequate for the cross-cultural comparison to hold.

Fortes’ paper opens with a divination session, attended by elders and some
younger men. The aim of the session is to determine ‘what sins of omission and
commission on the part of the clan had brought down this calamity on them’. In
its juridical nature, and its aim to allocate responsibility or blame for the death of a
special animal (and animal-person), the scene evokes the ambience and object of
the current inquiries into the greyhound racing industry, or even a criminal court.
Fortes used these events as a starting point to explore, after Mauss, how society
‘creates, defines and indeed imposes the distinctive signs and indices that

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133 Ibid 257.

134 See for example, Deborah Bird Rose, Dingo Makes us Human: Life and Land in an Australian

135 See for example, Benjamin Allen, ‘Culling is no Danger to the Future of Dingoes on Fraser Island’, The Conversation (online), 13 April 2015


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characterise, and the moral and jural capacities and qualities that constitute the *personne morale*’ (emphasis in original).  

The discussion in the previous section established that dogs, as companion animals, have attained a type of ‘animal-personhood’. To this the author adds the claim that this status is manifest, not in a right to life, but in the symbolism and practices that accompany a companion dog’s death. It is the dog’s death that truly conveys its status as an animal-person. Until recently, greyhounds had an entitlement to humane euthanasia, but not to a good death. This illustrates the paradox to which Fortes’ refers:  

[i]t is, paradoxically, in the circumstances and the ritual interpretation of an individual’s death, and the obsequies accorded to him, that the personhood he attained in life is retrospectively validated. The sacred crocodiles of Zibuing are known to be some kind of persons because they must be buried as, and receive obsequies like those of human persons.  

It is perhaps only at the time of death that the question of whether dogs are a type of ‘animal-person’ can be answered. Here, it is not possible to speculate on whether a companion dog ‘is slain by the ancestors’ and the author does not claim that dogs have ‘full personhood’. The pivotal point is that a good death is just as much a part of companion animal’s entitlements as is the entitlement to a good life. A ‘good life’ refers to being a member of the family. A ‘good death’ refers to one which results from humane euthanasia, at the end of the life span, and which is marked symbolically by other family members.  

The symbolism that accompanies these procedures and observances can be distinguished from those that accompany ritual slaughter as the body of the animal is buried or cremated, not consumed. Like Australians, the Tallensi do not

137 Ibid.
138 Ibid 262
139 See for example, Alex Bruce, ‘Do Sacred Cows Make the Best Hamburgers: The Legal Regulation of the Religious Slaughter of Animals’ (2011) 34(1) University of New South Wales Law Journal 351.
eat animals associated with their clan. However, with regard to the dog, one could speculate whether, in dire circumstances in the Australian remote bush, a person might kill and eat a dingo. Continuing the cross-cultural comparison, it is unlikely that such an event would constitute a form of cannibalism, as the dingo may be treated like the wild crocodiles who can be fished and eaten in the dry season.

This brings us to consider the right to a good death in the light of the right to life. Animal rights theory argues that sentient animals ought to be granted an inalienable right to life for their property status to be dismantled. (Yet, recall Mr Fleet who, in Chapter Four, refused to euthanase his sick old dog and was convicted of an animal cruelty offence.) This raises a problem: by conferring animals a right to life we deny them their entitlement to a good death. We lose the capacity to kindly, compassionately and mercifully kill them when they are old and in a state of suffering.

This point brings us back to the thesis prologue, and Tereza nursing her sick old dog in the field. Tereza’s creator, Milan Kundera observes, ‘dogs do not have many advantages over people, but one of them is extremely important: euthanasia is not forbidden by law in their case; animals have the right to a merciful death.’

The question of the right to a good death is one that humanity is grappling with for itself. In Australia, it is a debate taking place in the context of an ageing population. An increasing incidence and prevalence of dementia and other forms of infirmity means that our elders lose their personhood before their body has been granted leave to rest in peace. Do we want the same for animals, or would an absolute right to life bring with it other forms of violence of which we are unable to perceive the shape?

140 Fortes, ‘The Category of the Person’, above n 30, 256. Australian Aboriginal and Torres Strait Islanders people may hunt and consume animals that are the incarnation of clan ancestors. However, a consideration of the cultural beliefs and practices that pertain to traditional Indigenous Australian cultures is beyond the scope of this analysis.

141 Milan Kundera, The Unbearable Lightness of Being (Faber and Faber, 1984) 299.
Part IV CONCLUSION

This chapter brought together themes from previous chapters within the frame of structural violence. It adopted NSW’s greyhound racing industry as a case study. The chapter extended the concept of structural violence to explore the factors driving change, and equally, the limits of that change. To this end, it traced two axes relevant to the greyhound racing industry. The first axis was the socio-political differentiation that characterises the animal protection field, which also, it was proposed, characterises the larger field of animal use industries in Australia. The second axis was the cultural practices by which companion animals are being conferred with entitlements or interests in contemporary Australia.

With regard to the greyhound racing industry the discussion demonstrated that it is the objectifying structures set by utilitarian concepts along with the class dynamics which informed the original structure of the animal protection field, that set the potential and limits for change. In providing a working-class form of sport and recreation, the greyhound racing industry mirrors the activities, and structural position, of the lower orders in 19th century England, whose use of animals for gaming and leisure became the focus of law reform, in the interests of animal protection. This gives some insight as to why it is that we see the greyhound racing industry under attack today. Although this development may seem random or organic, it follows a discernible pattern when it is analysed against the field in Bourdieu’s terms. Further, it is precisely in this way that, as agents, in Bourdieu’s terms, we do not know what we are doing. This finding does not augur well for the potential to affect law reform in other forms of animal use that are supported by, or in which there are, a substantial group of elite interests. A relevant example is the embedded nature of horse racing in Australian culture, which has hitherto made horse racing relatively impervious to animal protection advocacy.

Lastly, with regard to greyhounds, Part IV examined the greyhound’s transition from a working dog to a companion animal. It was argued that, as recognised members of the family, companion animal dogs have attained the status of ‘animal-person’. This status provides dogs with two entitlements: a good life and a good

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death. This claim was examined in the light of Fortes' analysis of the category of the person. The aim was to identify how entitlements are conferred upon animals in contemporary Australia. Finally, the entitlement to a good death was considered in the light of the right to life, the central pillar of animal rights theory. It was concluded that, with regard to dogs (and other companion animals) conferral of an inalienable right to life would deny the entitlement to a good death. This would likely result in forms of violence (by omission) that, as a society, we seem ill-equipped to clearly envisage or understand. Dogs deserve their entitlement to a good death. For the future, it is important to ponder the findings of this case study, as a potential candidate universal, and its implications for humanity's capacity to extend what a good death is for other animals. It likely that providing non-companion sentient animals with a good death, would require that humans cease eating other animals' flesh.
CHAPTER 10 CONCLUSION

A The Central Thesis

This thesis tested the proposition that the concept of violence provides a useful alternative frame for the study of animal protection law and policy. While it acknowledged that animal welfare and animal cruelty may be important and useful as individual concepts, it explored the idea that the cruelty-welfare opposition reproduces the structural dynamics of power within the animal protection field, and thus supports a form of symbolic violence.1 The intractability of the status quo suggests that a new analytical pathway is needed. However, the central thesis question raised a methodological issue: how to deploy violence as an analytical concept for the study of animal protection law and policy.

The response to the thesis question was developed using a cross-disciplinary method. It developed and applied a set of methodological tools based on Pierre Bourdieu’s method for the analysis of a ‘field’2 and his concept of ‘habitus’.3 Australia’s animal protection regime was reconfigured as a Bourdieusian field. Habitus was reactivated within this field in a way that drew on political philosopher Giorgio Agamben’s notion of the anthropological machine,4 and Alan Norrie’s arguments about legal individualism under the influence of


In establishing a frame and method based on the notion of violence, the intention was not to replace the term ‘animal cruelty’ with ‘violence’. Instead, the aim was to facilitate the development of law reform strategies that avoid replicating the power relations that define the field of animal protection law, and to locate points in the field that have the potential to break those relational pathways. It is within this broader socio-political context that the concept of violence was offered as a frame and method.

**B Developing the Hypothesis**

The hypothesis was developed according to two inter-related themes. Deciding whether the cruelty-welfare binary was a form of symbolic violence was intrinsic to the determination of whether violence might provide an alternative analytical lens. Chapter Two discussed some of the problems related to the use of the terms ‘animal welfare’ and ‘animal cruelty’, and provided the rationale for proposing violence as an alternative analytical concept. It also reviewed the use of the concept of violence in animal protection legal theory to ascertain whether there was a suitable framework in existence. The analysis focused on Gary L Francione’s highly influential animal rights position, which adopts the concept of *ahimsa* (non-violence). It concluded that *ahimsa* could not sustain a framework for the study of animal protection law and policy, as it categorically denied reliance on the force of law.

Before considering the concept of violence in any depth, and in preparation for the Bourdieusian analysis of the animal protection field, it was necessary to establish the scope of the inquiry. This was detailed in Chapter Three, which examined Australia’s animal protection framework. It was also important to assess the utility of the current definition of violence against animals as ‘animal cruelty’. The case

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law review and VACA media reports presented in Chapter Four formed the basis for the response to this question. The analysis demonstrated animal cruelty to be an extremely narrow concept, which generally referred to individual offenders either neglecting or perpetrating intentional harm on companion animals, especially dogs. Its apparent inability to reach beyond the domestic realm indicated that the current concept of animal cruelty was unsatisfactory as the foundation for a framework for the study of animal protection law and policy. The case law review also provided an appropriate source of data to identify the key participants in the animal protection field, based on their appearance in the judgments. These participants were discussed in the context of *habitus* in Chapter Six.

After fulfilling its preconditions, the thesis proceeded to theorise violence. In Chapter Five, an analytical framework, based on the concept of violence, was developed. One of the strengths of utilising the concept of violence is that it is not a speciesist term; this provided an opportunity to develop a perspective in which human and animal interests could be investigated as interdependent rather than separate realms of inquiry. It investigated how the status quo within the animal protection field is reproduced through the maintenance of a hierarchy between groups of humans, based on the concept of animal cruelty. The reproduction of this hierarchy is interdependent with the continuation of human-perpetrated violence against animals.

Giorgio Agamben’s notion of the ‘anthropological machine’⁷ and the human-animal boundary were used to reconfigure the classificatory dynamics that take place at the human-animal boundary within animal protection as an area of criminal law and to identify the status of animal cruelty defendants within these dynamics. It is in this vein that, in its deployment of the concept of violence, the thesis situated the interests of animals and humans within the animal protection field as interdependent. Agamben’s notion of the anthropological machine and the human-animal boundary, and the author’s concept of a ‘double internal inconsistency’ provided a methodological tool to identify the relevant points of interdependence as it operates within animal protection law. Construing Agamben in this way facilitated the extension of Bourdieu’s concept of field to the circumstances of

⁷ Agamben, above n 4, 37.
animal use in the 21st century. It is in this context that we can see Francis Bacon’s triptych as mirroring the approach taken, and his figures as representing the indeterminacy that characterises the human-animal boundary.

C Testing the Hypothesis

Chapter Six formed the backdrop for the case studies that followed in Chapters Seven, Eight and Nine. The aim of the case studies was to illuminate points of the animal protection field where it may be possible to break the relational power dynamics that maintain the status quo, and to either develop law proposals on each point, or at least shed light on why effective law reform is particularly difficult to achieve.

The analysis in Chapter Six demonstrated the way animal protection, as an area of criminal law, was originally structured according to class relations as they emerged with modern capitalism. It was argued that this differentiation continues to structure and reproduce the animal protection field. The legislative definitions of animal cruelty and animal welfare, as they operate in the area of animal protection, constitute the objectifying structures for the reproduction of power relations within the field. Thus, the cruelty-welfare binary is a form of symbolic violence.

Chapter Six also provided the rationale for the case studies. It linked the case study selection to the frame of symbolic violence and to the method based on the human-animal boundary and the ‘double internal inconsistency’. The case studies were selected by locating those points at which the interests of the most disempowered participants within the animal protection field came into closest proximity with those of animals. Each case study considered a different aspect of symbolic violence. The conceptualisations of violence, ‘(rupturing) symbolic violence’, ‘individuated violence’ and ‘structural violence’, formed a sub-frame that reflected a particular scale of inquiry. Francis Bacon’s triptych expressed the idea that, although each conceptualisation of violence framed a separate area of legal analysis, the three were interdependent.

As part of the account of violence developed in Chapter Five, the author developed the notion of the ‘double internal inconsistency’, which arises from the operation
of the necessity test in animal protection, as an area of criminal law. It refers to the process by which *humans* (rather than animals) are categorised via the necessity test, as more or less human, based on the attribute of economic rationality and their relative position vis-à-vis animal use industries that fall within the operation of the compliance-based regulatory model. However, as became evident in the field analysis discussed in Chapter Six, from the explication of *habitus*, and from the identification of participants within the field, the anthropological machine is also in operation in other ways within the animal protection field. In particular, we see that, along with animal cruelty defendants, animal protection advocates who act as whistleblowers inhabit a marginalised position. They are constructed as dangerous and thus a threat to the status quo. Further, based on the facts in *Ludvigsen*, it is likely that employees take particular risks with their livelihoods when they blow the whistle on behalf of animals, and are likely to be the most marginalised form of whistleblower.

Lastly, in terms of the logic underlying the case study selection, there was the need to attend to any silences. The silence in relation to the greyhound racing industry was conspicuous, and therefore offered a suitable case study. It was found that if the animal protection field were raised to a higher level of generality, to a field characterised by animal use industries in Australia, it would be possible to extend the idea of the anthropological machine and the human-animal boundary to the circumstances of the greyhound racing industry in Australia.

In summary, Chapter Seven took whistleblowing within Australia’s pork industry in the interests of animal protection as an attempt to rupture symbolic violence. Chapter Eight was framed by the concept of individual responsibility in criminal law, and examined the enactment of a new ‘serious animal cruelty’ offence under the *Criminal Code* (Qld). Chapter Nine adopted the concept of structural violence. It aimed to assess the potential and limits of law reform relating to animal use industries in Australia, using the New South Wales greyhound racing industry as a

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8 *RSPCA v Ludvigsen* (unreported, Magistrates Court of South Australia, Magistrate Fahey, 7 September 2007).

9 Section 242.
D Findings and Implications for Future Research

1 The Concept of Violence as a Framework

Overall, the framework established for the study of violence provided a useful basis for the analysis of case studies relating to Australia’s animal protection field. Bourdieu’s method, his ‘disposition’, informed and was present in each of the case studies. For example, the analysis of the offence of animal cruelty in Chapter Eight made a Bourdieusian point. The strict liability-\textit{mens rea} binary is another dimension of the symbolic violence by which the animal protection field’s status quo is reproduced. The case study demonstrated the socio-political dynamics by which the introduction of a new \textit{mens rea} animal cruelty offence simultaneously legitimised violence against animals perpetrated by animal use industries.\(^{11}\)

Each case study reflected an understanding of violence in its broader socio-political context, according to the meeting points at which the interests of disempowered participants within the animal protection field came into closest proximity with those of animals. Bringing together violence and interdependence, as it pertains to humans and animals, proved a useful methodological strategy. Indeed, without this combination it may have been difficult to locate a theoretically coherent starting point for each case study.

2 Case Studies

The case studies raised a range of future research possibilities. The final section of the thesis identifies the thesis findings and research implications according to each case study. It concludes by emphasising the need for a ‘realist’ model of corporate

\(^{10}\) Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Parliament of New South Wales, \textit{Greyhound Racing in New South Wales: First Report} (March 2014); Legislative Council (NSW) Select Committee on Greyhound Racing in NSW, Parliament of New South Wales, \textit{Greyhound Racing in New South Wales: Second Report} (October 2014).

culpability\(^{12}\) that could be applied in the context of animal protection.

\((a)\) \textit{Case Study One: Whistleblowing in the Interests of Animal Protection}

The case study examined in Chapter Seven identified employee whistleblowing as an important strategy to improve animal protection in intensive animal use settings. However, it found that whistleblowers working in the private sector need better protection, and this includes employees working in intensive animal use industries, such as the Australian pork industry. The analysis identified that the introduction of a federal False Claims statute, providing for \textit{qui tam} actions, may be the best strategy to achieve this objective. The protection afforded under a False Claims approach was preferable for several reasons. Firstly, \textit{qui tam} actions rewarded and thereby validated individual whistleblowers for risky acts of conscience. The partnership between the whistleblower and the relevant government department created through a \textit{qui tam} action also restored the whistleblower’s pragmatic legitimacy and thereby militated against reprisal and victimisation. Secondly, by increasing uncertainty for potential fraudsters, a False Claims regime had important deterrent effects. Lastly, in its contemporary form, \textit{qui tam} has a normative dimension; validating the whistleblower also validates the institution of whistleblowing as central to maintaining industry accountability and the integrity of democratic institutions.

Despite the potentially empowering effect a False Claims regime may have on whistleblowers working in intensive animal use industries, some conceptual work was required to support the argument that breaches of animal welfare standards could amount to ‘fraud on the government’. The case study demonstrated that, in theory, these conditions could be met. Using the pork industry as an example, it was shown that animal protection is a matter of public interest. However, the extended notion of fraud argued for in the case study requires further work. The author submits that future research could contribute to demonstrating that multiple breaches of animal welfare standards could meet the ‘might result in financial loss to the Government’ requirement. This could be achieved by the development of case study estimates of the indirect costs to government that flow

from significant breaches of animal protection standards associated with industry fraud.

As this conclusion is written, the Australian population is embroiled in yet another divisive debate about the animal cruelty involved in the Nation’s live export industry. The export of live animals has become a federal election issue. After the 2011 live export exposé involving Indonesia, the federal government introduced the Exporter Supply Chain Assurance System (ESCAS), an animal welfare audit system. However, ESCAS has significant limits, and over time its capacity has been reduced. In the meantime, there is ongoing evidence of animal suffering in the live export industry of the type that was evident in the Al Kuwait Case. In June 2016, a veterinarian whistleblower disclosed the appalling conditions on live export ships and was subsequently removed from her position. The development of cost estimates, as mentioned above, could support the argument that widespread breaches of animal welfare standards amount to fraud on the government by corporations engaged in the live export trade.

Even without the introduction of a federal False Claims regime, some Australian case law suggests that it would be possible to commence a qui tam action based on

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15 Ibid 303.


17 (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008).

the common law.\textsuperscript{19} Investigating the status of \textit{qui tam} at common law in Australia is another possible research project arising from the case study findings. Animal protection organisations and animal law advocates may be able to work on a collaborative advocacy project with the aim of commencing a \textit{qui tam} action ‘test case’, relying on the common law,\textsuperscript{20} in circumstances such as the widespread breaches of animal welfare standards which occur in the live export industry. These actions would be consistent with the types of ‘frontier’ legal advocacy being pursued by US lawyer and animal protection legal theorist Steven Wise, as was discussed in Chapter One. For example, in 2013, the Nonhuman Rights Project (NhRP) commenced three suits on behalf of three captive chimpanzees, requesting that the court issue a writ of \textit{habeas corpus}. The court refused the writs on the grounds that the chimpanzees were not legal persons. In January 2014 NhRP filed Notices of Appeal in the New York Intermediate Appellate Courts.\textsuperscript{21}

\textbf{(b) Case Study Two: Juridical Individualism and the Offence of Animal Cruelty}

This case study found evidence of the influence of neoliberalism on legal individualism in calls for tougher sentencing for animal cruelty offences, which focused on individual blameworthiness and psychological dangerousness. The introduction of a serious animal cruelty offence in Queensland demonstrated these dynamics and the active participation of lawyers in this law reform agenda. The case study demonstrated that this advocacy effort legitimatised animal use industries. This was made explicit in the Minister’s second reading of the speech and in the drafting of section 242 of the \textit{Criminal Code} (Qld), which provides a broad defence for practices that are ‘authorised, justified or excused by the Animal


\textsuperscript{20} In \textit{Hawkesbury City Council v Foster} (1997) 97 LGERA 12 Mason P cited \textit{Ex parte Pearce} (1844) 1 Legge 189 as authority for the proposition that the \textit{qui tam} action came to the Australian colonies.’ \textit{Commonwealth Bank of Australia v Gargan} (2004) 140 FCR 1, 8 (Hely J).

\textsuperscript{21} \textit{<http://www.nonhumanrightsproject.org/category/courtfilings/>}
The case study had implications for the engagement of lawyers in this law reform agenda. In Bourdieu’s terms, these lawyers laboured under a form of misrecognition. The narrow scope of the offence will impact on a miniscule population of offenders. Overall, the case study demonstrated a lack of insight regarding the structuring and dynamics of power relations within animal protection as a field of criminal law. It indicated that it is better to avoid pursuing animal protection law reform strategies by focusing on individual offenders and individual blameworthiness.  

(c) Case Study Three: The Greyhound Racing Industry and Structural Violence  

This case study demonstrated that society’s engagement in the larger animal protection debate mirrors the dynamics of the animal protection field. It suggested the limits of the possibilities for animal protection law reform. In particular, it was possible to understand the greyhound racing industry as the animal cruelty defendant writ large, in that the greyhound racing industry shares features with the stereotypical individual animal cruelty defendant. This may explain why the greyhound racing industry has become vulnerable to formal scrutiny, while other industries remain out of reach. It also suggests that, given the structure of power relations within contemporary Australian society, it may only be possible to effectively challenge animal use by relatively marginalised groups, within the context of the larger animal use industry field. This demonstrates a historical continuity with the social conditions and economic concerns that informed animal protection law as it was constituted in the early 19th century.  

The other insight gained through this case study related to the conditions under which contemporary Australian society confers animals with entitlements or rights. It implied the limits of law reform aimed at conferring animals with entitlements. It appears that many companion animals already enjoy entitlements and that these are observed and maintained through cultural practices. However, the narrow range of animals to which we offer the entitlement of a good life and a good death does not bode well for our capacity to improve the lives of animals that do not co-  

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22 Section 242(2).
exist with us in the domestic sphere.

**E Overarching Conclusion**

The conclusion that emerged from the case studies was that there was a lack of existing legislative mechanisms by which mainstream animal use industries can be held responsible for violence against animals. This indicates that future research ought to focus on developing what Clough calls a ‘realist model of corporate criminal culpability’.

Developing such a model for application in the context of large scale animal use would form a long-term research agenda, one that could be developed according to two inter-related objectives. The first objective would be to develop a model of corporate criminal responsibility with specific reference to animal protection issues. The second objective would be to develop a better understanding of our society’s tolerance for organisational and corporate dishonesty.

For the reasons that have been outlined throughout this thesis, relating to the problems associated with prosecuting corporations under animal cruelty legislation and an apparent lack of enforcement of such legislation, such a model might move away from an idea of culpability that requires that the prosecution establish cruelty against individual animals as the basis of a criminal charge. In the light of the forms of large scale suffering that are regularly exposed in the media and by animal protection organisations such as Animals Australia, the application of the orthodox criminal concept of causality, and the requirement of proof of cruelty beyond reasonable doubt to *each* animal victim seems anachronistic. It may be possible to develop alternative indicia of harm. The number of animals affected and the objective harm sustained might establish the *actus reus* for a corporation without further requirement of proof of causality; in this sense, absolute liability may, in some circumstances, offer a feasible option. However, in order to achieve the appropriate sense of moral reprehension or censure, of the type usually associated with *mens rea* offences, the punishment would need to take the form of

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23 Clough, above n 12.

a substantial fine, and be imposed within a regulatory environment that increases the level of uncertainty for the potential corporate offender.

The status quo, in which corporations are very occasionally prosecuted under state and territory anti-cruelty legislation and are often able to avoid culpability, indicates that the criminal law is yet to grapple meaningfully with the circumstances of industrialised animal use in the 21st century. A feasible starting point for such engagement might be the model of culpability articulated in the offence of industrial manslaughter set out in sections 49A-49E of the *Crimes Act 1900* (ACT).25 Adopting this statutory form of culpability would avoid the complexities that have arisen in the application of the identification doctrine at common law,26 and the question of how and where to locate criminal responsibility in large, decentralised corporations.27 The ACT industrial manslaughter criminal model, including the creative remedies provisions and the principles of criminal responsibility for corporations and proof of *mens rea* of a corporation in Part 2.5 of the *Criminal Code 2002* (ACT) (similar to those in Part 2.5 of the *Commonwealth Criminal Code*), provide useful starting points for Australian criminal law to expand the definition of animal cruelty crimes to include crimes committed by corporations in animal use industries. However, in the context of Australia’s constitutional federalism, as was seen in the *Al Kuwait Case*28 (discussed in Chapter Four), there is also a need to circumvent the potential for acquittals on the basis of operational inconsistencies.29 Probably the only way to ensure this would be to enact a federal animal welfare statute. Federal animal welfare legislation may also be the appropriate place for animal cruelty offences based on the concept of fault elements as expressed in sections 49A-49E of the *Crimes Act 1900* (ACT), interpreted by Part 2.5 of the *Criminal Code 2002* (ACT), for application to animal use industries, where there is evidence of a culture of non-

25 See also Part 2.5 of the *Criminal Code* (Cth) and the *Criminal Code 2002* (ACT).


28 (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008).

29 *Australian Constitution* s 109.
A ‘realist’ model of corporate culpability for application to animal use industries might, among other things, shift the jurisprudential basis for animal cruelty. Animal cruelty could be reconceptualised as a social harm similar to environmental harms. In this case, the idea of interdependence would move from a frame that assumes interdependence between individual sentient beings, such as that posed by ‘the progression thesis’, to one in which domesticated animals are integrated into our ecological obligations; part of the Great Jurisprudence. As discussed in Chapter One, the Great Jurisprudence has three elements: differentiation, autopoesis (self-making), and communion. Communion refers to the ‘interconnectivity of all aspects of the universe’ and organises all parts of the universe in relation to one another. In this way it emphasises interdependence between species and other parts of the natural world. Utilising holistic ideas in relation to domesticated animals could influence the development of a statutory form of corporate culpability.

Consideration of the second objective begins as a post-script to the analysis presented in Chapter Nine. On 7 July 2016, NSW’s Premier, Mike Baird, announced a ban on greyhound racing in NSW. The decision followed the Government’s consideration of the 2015 Special Commission of Inquiry report, which was tabled in the Parliament of New South Wales on 16 June 2016. Premier Baird cited

30 See also, Part 2.5 of the Criminal Code (Cth) and the Criminal Code 2002 (ACT).


32 Ibid 79.

33 Ibid 80.


35 Michael McHugh, Special Commission of Inquiry into the Greyhound Racing Industry in New South Wales Report (State of NSW, 16 June 2016) Vols 1-4. The Special Commission Report noted that over the past 12 years, in NSW, ‘between 48,891 and 68,448 dogs were killed’ either because they could not run fast enough or they were considered unsuitable for racing. Michael McHugh, Special Commission of Inquiry into the Greyhound Racing Industry in New South Wales Report (State of NSW, 16 June 2016) vol 1, 1.
the ‘slaughter of tens of thousands of healthy dogs whose only crime was not being fast enough’ and ‘widespread illegal and unconscionable activity’ as the major reasons for the decision. The Premier advised that the last greyhound racing meeting in NSW will be held in June 2017. The NSW government has pledged to provide a ‘transition package’ for the 1000 workers directly employed by the industry. At 7 July 2016 there were 6809 registered greyhounds in NSW. There would also be many puppies and young dogs that are too young for registration. One of the risks to be managed in the current circumstances is the possibility of a greyhound ‘genocide’. Dog owners may choose to kill their dogs and litters of puppies, out of anger, retaliation or on the basis that there is no point in raising them. Furthermore, these thousands of greyhounds will vie for a home with many other dogs specifically bred as companion animals. The RSPCA will be responsible for transitioning greyhounds out of the racing industry. Along with adoption, one of the stated options is ‘humane euthanasia’.

The events also serve to highlight the link between dishonesty and animal cruelty. The Commission found:

that GRNSW [Greyhound Racing New South Wales] engaged in conduct knowingly and with the intention of sanitising the information that became available to the public concerning injuries suffered by greyhounds. The motive for the policy was the hope that, by doing so, substantial criticism of the greyhound racing industry in NSW could be avoided.

It is against this background that the second aspect of a future research agenda, implicit in the case studies, is a much-needed analysis of our society’s tolerance for

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36 Pengilly and Robertson, above n 34.
37 Ibid.
38 New South Wales Government Justice, Transition to Closure of the NSW Greyhound Racing Industry: Questions and Answers (July 2016) 1, 2.
40 New South Wales Government Justice, above n 38, 1, 2
corporate dishonesty. Whistleblowers disclose wrongdoing. The reason the greyhound racing industry finds itself under scrutiny largely relates to its lack of transparency and the ongoing allegations of corruption within it. Animal cruelty can be construed as one manifestation of the industry’s lack of integrity. This raises questions such as ‘why it is that we expect honesty and transparency?’ Where do these expectations come from? Are they reasonable?

As was noted in Chapter Five, philosopher Newton Garver considers a lie to be a ‘real violation’.42 It aims to manipulate and thus exclude me from participating in matters ‘in which I have an interest; that is, it denies me standing as a person’.43 Future research could explore the relationship between dishonesty and animal cruelty: what are the legal implications? This research would examine the ethics of honesty as a virtue and its role in our relationships. Dishonesty also forms the basis for corruption as a legal concept44 and various other criminal offences.45 It seems that dishonesty is central to the continuation of violence against animals in terms of the everyday choices people make, as well as choices that are made about the design of industries and systems. Beyond the dishonesty that keeps sub-standard treatment of animals hidden from public view, the ongoing commitment to large scale animal use also requires that we either lie to ourselves or provide cognitive rationalisations that obscure the reality of the treatment of animals by humans at an industry or systemic level. This connection is yet to be examined in the context of the moral, political and legal aspects of animal protection. Just as animals are at our mercy, they also reflect back our capacity for and commitment to integrity.

The framework established within this thesis has potential application to other categories of animals and contexts listed under the Australian Animal Welfare


45 See for example, Criminal Code (Qld) s 518 ‘offences of dishonesty’.
Strategy. It would also suit application in other social justice areas. Moreover, the framework could support the investigation of specific legal questions and develop the idea of *habitus*, informed by Alan’s Norrie’s arguments, for application in other areas of criminal law. For example, a Bourdieusian approach to terrorism that integrates the concept of *habitus* developed in this thesis may expose points at which we are labouring under misrecognitions, and thereby suggest alternative counter-terrorism strategies. Similarly, a cross-disciplinary study might develop our understanding of the *habitus* of young men at risk of political radicalisation. The findings could assist in formulating preventative measures. Questions that bring together ‘the weight of the world’, the burden of structural inequity, and the individual’s capacity for strategising in the hope of actualising meaning, even if that meaning is implosive, seem to invite an analysis informed by Bourdieu. Other related areas for such work could include suicide among young Indigenous Australians, and issues of power related to the exercise of reproductive health rights. All of these questions have major implications for social policy and legal frameworks. They also require our urgent attention if we are to maintain a commitment to the alleviation of suffering of all sentient beings.

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*Wordy Rappinghood* (Tom Tom Club, Universal Publishing Group, 1981) <https://www.youtube.com/watch?v=6Vl1m5FYIao>


APPENDICES

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## Appendix A State and Territory Anti-cruelty Legislation Definition of ‘Animal’

<table>
<thead>
<tr>
<th>Statute</th>
<th>Definition of ‘Animal’</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Animal Welfare Act 1992 (ACT)</em></td>
<td>S 2 refers to the dictionary under which animal means (a) a live member of a vertebrate species, including (i) an amphibian; and (ii) a bird; and (iii) a fish; and (iv) a mammal (other than a human being); and (v) a reptile; or (b) a live cephalopod; or (c) a live crustacean intended for human consumption.</td>
</tr>
<tr>
<td><em>Prevention of Cruelty to Animals Act 1979 (NSW)</em></td>
<td>S 4(1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires: animal means: (a) a member of a vertebrate species including any: (i) amphibian, or (ii) bird, or (iii) fish, or (iv) mammal (other than a human being), or (v) reptile, or (b) a crustacean but only when 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.</td>
</tr>
<tr>
<td><em>Animal Welfare Act 1999 (NT)</em></td>
<td>S 4 animal means: (a) a live member of a vertebrate species including an amphibian, bird, mammal (other than a human being) and reptile; (b) a live fish in captivity or dependent on a person for food; or (c) a live crustacean if it is in or on premises where food is prepared for retail sale, or offered by retail sale, for human consumption.</td>
</tr>
<tr>
<td><em>Animal Care and Protection Act 2001 (Qld)</em></td>
<td>S 11(1) An animal is any of the following— (a) a live member of a vertebrate animal taxon; Examples: an amphibian; a bird; a fish; a mammal, other than a human being; a reptile (b) a live pre-natal or pre-hatched creature as follows if it is in the last half of gestation or development— (i) a mammalian or reptilian foetus; (ii) an avian, mammalian or reptilian pre-hatched young; (c) a live marsupial young;</td>
</tr>
</tbody>
</table>

1 Any emphasis within the table reflects that within the original.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Definition of 'Animal'</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prevention of Cruelty to Animals Act 1985 (SA)</td>
<td>(d) a live invertebrate creature of a species, or a stage of the life cycle of a species, from the class Cephalopoda or Malacostraca prescribed under a regulation for this paragraph. Examples of creatures of the class Cephalopoda — octopi [sic]; squid Examples of creatures of the class Malacostraca: crabs; crayfish; lobsters; prawns (2) However, a human being or human foetus is not an animal.</td>
</tr>
<tr>
<td>Animal Welfare Act 1993 (Tas)</td>
<td>S 3 In this Act, unless the contrary intention appears animal means a member of any species of the sub-phylum vertebrata except (a) a human being; or (b) a fish, and includes any prescribed animal.</td>
</tr>
<tr>
<td>Prevention of Cruelty to Animals Act 1986 (Vic)</td>
<td>No legislative definition</td>
</tr>
<tr>
<td>Animal Welfare Act 2002 (WA)</td>
<td>S 5 animal means (a) a live vertebrate; or(b) a live invertebrate of a prescribed kind, other than a human or a fish as defined in the Fish Resources Management Act 1994 (WA)</td>
</tr>
</tbody>
</table>
### Appendix B State and Territory Anti-cruelty Legislation Legislative Purpose

<table>
<thead>
<tr>
<th>Statute</th>
<th>Legislative purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Prevention of Cruelty to Animals Act 1979</em></td>
<td>S 3 The objects of this Act are: (a) to prevent cruelty to animals, and (b) to promote the welfare of animals by requiring a person in charge of an animal: (i) to provide care for the animal, and (ii) to treat the animal in a humane manner, and (iii) to ensure the welfare of the animal.</td>
</tr>
<tr>
<td><em>Animal Welfare Act 1999 (NT)</em></td>
<td>S 3 The objectives of this Act are (a) to ensure that animals are treated humanely; (b) to prevent cruelty to animals; and (c) to promote community awareness about the welfare of animals.</td>
</tr>
<tr>
<td><em>Animal Care and Protection Act 2001 (Qld)</em></td>
<td>S 3 The purposes of this Act are to do the following—(a) promote the responsible care and use of animals; (b) provide standards for the care and use of animals that—(i) achieve a reasonable balance between the welfare of animals and the interests of persons whose livelihood is dependent on animals; and (ii) allow for the effect of advancements in scientific knowledge about animal biology and changes in community expectations about practices involving animals; (c) protect animals from unjustifiable, unnecessary or unreasonable pain; (d) ensure the use of animals for scientific purposes is accountable, open and responsible.</td>
</tr>
<tr>
<td><em>Prevention of Cruelty to Animals Act 1985</em></td>
<td>An Act for the promotion of animal welfare; and for other purposes. No express purpose provision.</td>
</tr>
<tr>
<td>Statute</td>
<td>Legislative purpose</td>
</tr>
<tr>
<td>--------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Animal Welfare Act 1993 (Tas)</td>
<td>An Act to prevent neglect of, and cruelty to, animals, to ensure the welfare of animals, to repeal the <em>Cruelty to Animals Prevention Act 1925</em> and for related purposes. No express purpose provision.</td>
</tr>
<tr>
<td>Prevention of Cruelty to Animals Act 1986 (Vic)</td>
<td>S 1 The purpose of this Act is to (a) prevent cruelty to animals; and (b) to encourage the considerate treatment of animals; and (c) to improve the level of community awareness about the prevention of cruelty to animals.</td>
</tr>
<tr>
<td>Animal Welfare Act 2002 (WA)</td>
<td>S 3(1) This Act provides for the protection of animals by (a) regulating the people who may use animals for scientific purposes, and the manner in which they may be used; and (b) prohibiting cruelty to, and other inhumane or improper treatment of, animals. (2) This Act intends to—(a) promote and protect the welfare, safety and health of animals; (b) ensure the proper and humane care and management of all animals in accordance with generally accepted standards; and (c) reflect the community’s expectation that people who are in charge of animals will ensure that they are properly treated and cared for.</td>
</tr>
</tbody>
</table>
## Appendix C State and Territory Anti-cruelty Provisions at 27th November 2013

<table>
<thead>
<tr>
<th>Statute</th>
<th>Duty of care</th>
<th>Cruelty provisions</th>
<th>Aggravated cruelty</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Animal Welfare Act 1992 (ACT)</strong></td>
<td>No</td>
<td><strong>S 7</strong> person commits an offence if the person commits an act of cruelty on an animal.</td>
<td><strong>S 7A (1)(a) cruelty and (b) death and (c) intends or reckless (2) (a) cruelty and (b) serious injury (c) intends or reckless</strong></td>
</tr>
<tr>
<td><strong>Prevention of Cruelty to Animals Act 1979 (NSW)</strong></td>
<td>No</td>
<td><strong>S 5 (1)</strong> A person shall not commit an act of cruelty upon an animal. (2) A person in charge of an animal shall not authorise the commission of an act of cruelty upon the animal. (3) A person in charge of an animal shall not fail at any time: (a) to exercise reasonable care, control or supervision of an animal to prevent the commission of an act of cruelty upon the animal, (b) where pain is being inflicted upon the animal, to take such reasonable steps as are necessary to alleviate the pain, or (c) where it is necessary for the animal to be provided with veterinary treatment, whether or not over a period of time, to provide it with that treatment.</td>
<td><strong>S 6 (1)</strong> A person shall not commit an act of aggravated cruelty upon an animal. (2) In any proceedings for an offence against subsection (1), the court may: (a) where it is not satisfied that the person accused of the offence is guilty of the offence, and (b) where it is satisfied that that person is guilty of an offence against section 5 (1), convict that person of an</td>
</tr>
</tbody>
</table>

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**Notes:**


<table>
<thead>
<tr>
<th>Statute</th>
<th>Duty of care</th>
<th>Cruelty provisions</th>
<th>Aggravated cruelty</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>S 3 (2)</strong></td>
<td>For the purposes of this Act, a reference to an act of cruelty committed upon an animal includes a reference to any act or omission as a consequence of which the animal is unreasonably, unnecessarily or unjustifiably: (a) beaten, kicked, killed, wounded, pinioned, mutilated, maimed, abused, tormented, tortured, terrified or infuriated, (b) over-loaded, over-worked, over-driven, over-ridden or over-used, (c) exposed to excessive heat or excessive cold, or (d) inflicted with pain.</td>
<td></td>
<td>offence against section 5 (1).</td>
</tr>
<tr>
<td><strong>S 3 (3)</strong></td>
<td>For the purposes of this Act, a person commits an act of aggravated cruelty upon an animal if the person commits an act of cruelty upon the animal or (being the person in charge of the animal) contravenes section 5 (3) in a way which results in: (a) the death, deformity or serious disablement of the animal, or (b) the animal being so severely injured, so diseased or in such a physical condition that it is cruel to keep it alive. No mens rea here</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

**Animal Welfare Act 1999 (NT)**

S 8 (2) person commits an offence if the person

S 9 (1) A person commits an offence if the person is cruel to an animal. (2) Without limiting subsection (1), a person in charge

S 10 (1) (a) cruelty and (b) serious harm or death, and (c)

---

4 Also Crimes Act 1900 (NSW) s 530 Serious Animal Cruelty.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Duty of care</th>
<th>Cruelty provisions</th>
<th>Aggravated cruelty</th>
</tr>
</thead>
<tbody>
<tr>
<td>breaches the duty of care. (3) Without limiting subsection (2), a person breaches the duty of care if the person fails to take reasonable steps to ensure the animal receives the minimum level of care.</td>
<td>of an animal is <em>cruel</em> to the animal if the person: (a) fails to ensure the animal receives the minimum level of care; and (b) intends to cause harm to the animal. (3) Without limiting subsection (1), a person is <em>cruel</em> to an animal (whether or not the person is in charge of the animal) if the person does any of the following: (a) causes the animal unnecessary suffering; (b) having caused the animal unnecessary suffering (including accidentally), fails to take reasonable action to mitigate the suffering; (c) uses on the animal a device prescribed by the Regulations to be inhumane; (d) subjects the animal to treatment prescribed by the Regulations to be cruel.</td>
<td>intends to kill or seriously harm the animal.</td>
<td>No aggravated offence</td>
</tr>
</tbody>
</table>

*Animal Care and Protection Act 2001 (Qld)*

<table>
<thead>
<tr>
<th>Statute</th>
<th>Duty of care</th>
<th>Cruelty provisions</th>
<th>Aggravated cruelty</th>
</tr>
</thead>
<tbody>
<tr>
<td>S 17 (2) person must not breach the duty of care.</td>
<td></td>
<td>S 18(1) A person must not be cruel to an animal. (2) Without limiting subsection (1), a person is taken to be cruel to an animal if the person does any of the following to the animal— (a) causes it pain that, in the circumstances, is unjustifiable, unnecessary or unreasonable; (b) beats it so as to cause the animal pain; (c) abuses, terrifies, torments or worries it; (d) overdrives, overrides or overworks it; uses on the animal an electrical device prescribed under a regulation; (f) confines or transports it— (i) without appropriate preparation, including, for example, appropriate food, rest, shelter or water; or (ii)</td>
<td>No aggravated offence</td>
</tr>
</tbody>
</table>

5 As in force at 28 August 2013, downloaded 27 November 2013.
6 Current as at 1 November 2013, downloaded 27 November 2013.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Duty of care</th>
<th>Cruelty provisions</th>
<th>Aggravated cruelty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prevention of Cruelty</td>
<td>when it is unfit for the confinement or transport; or (iii) in a way that is inappropriate for the animal’s welfare; or (iv) in an unsuitable container or vehicle; (g) kills it in a way that— (i) is inhumane; or (ii) causes it not to die quickly; or (iii) causes it to die in unreasonable pain; (h) unjustifiably, unnecessarily or unreasonably— (i) injures or wounds it; or (ii) overcrowds or overloads it.</td>
<td>(1) If (a) a person ill treats an animal; (2) A person who ill treats an animal is guilty of an offence. (3) Without limiting the generality of subsection (1) or (2), a person ill treats an animal if the person— (a) intentionally, unreasonably or recklessly causes the animal unnecessary harm; Or (b) being the owner of the animal— (i) fails to provide it with appropriate, and adequate, food, water, living conditions (whether temporary or permanent) or exercise; or (ii) fails to take reasonable steps to mitigate harm suffered by the animal; Or (iii) abandons the animal; or (iv) neglects the animal so as to cause it harm; or (c) having caused the animal harm (not being an animal of which that person is the owner), fails to take reasonable steps to mitigate the harm (d)-(j) examples</td>
<td>(1) (a) ill treats and (b) causes death of, or serious harm; and (c) intends to cause, or reckless about causing death or serious harm.</td>
</tr>
</tbody>
</table>

7 Downloaded 27 November 2013.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Duty of care</th>
<th>Cruelty provisions</th>
<th>Aggravated cruelty</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Animal Welfare Act 1993 (Tas)</em></td>
<td>S 6 Duty of care. A person who has the care or charge of an animal has a duty to take all reasonable measures to ensure the welfare of the animal.</td>
<td>S 8 Cruelty to animals (1) A person must not do any act, or omit to do any duty, which causes or is likely to cause unreasonable and unjustifiable pain or suffering to an animal. (2) Without limiting the generality of subsection (1), a person is guilty of an offence under that subsection if the person – (a) wounds, mutilates, tortures, overrides, overdrives, overworks, abuses, beats, torments or terrifies an animal; or (b) overloads or overcrowds an animal; or (c) drives, conveys, carries or packs an animal in a manner or position or in circumstances that subjects or subject it to unreasonable and unjustifiable pain or suffering; or (d) works, rides, drives or uses an animal when it is unfit for the purpose; or (e) has possession or custody of an animal that is confined, constrained or otherwise unable to provide for itself and fails to provide the animal with appropriate and sufficient food, drink, shelter or exercise; or (f)-(k) other examples</td>
<td>S 9 A person must not do any act, or omit to do any duty, referred to in section 8 which results in the death or serious disablement of an animal. No mens rea here</td>
</tr>
</tbody>
</table>

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8 Downloaded 21 February 2014.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Duty of care</th>
<th>Cruelty provisions</th>
<th>Aggravated cruelty</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Prevention of Cruelty to Animals Act 1986</em> (Vic)(^9)</td>
<td>S (10) (f) ... fails to provide the animal with proper and sufficient food, drink or shelter.</td>
<td>S 9 (1) A person who (a) wounds, mutilates, tortures, overrides, overdrives, overworks, abuses, beats, worries, torments or terrifies an animal; or (b) loads, crowds or confines an animal where the loading, crowding or confinement of the animal causes, or is likely to cause, unreasonable pain or suffering to the animal; Or (c) does or omits to do an act with the result that unreasonable pain or suffering is caused, or is likely to be caused, to an animal; or (d) drives, conveys, carries or packs an animal in a manner or position or in circumstances which subjects or subject, or is likely to subject, it to unnecessary pain or suffering commits an act of cruelty upon that animal. (e)-(l) further examples</td>
<td>S 10 (1) A person who commits an act of cruelty upon any animal which results in the death or serious disablement of the animal commits an act of aggravated cruelty upon that animal and is guilty of an offence and is liable to a penalty of not more (2) A person who is guilty of an offence under subsection (1) may be liable to the penalty for that offence in addition to or instead of any other penalty to which the person is liable under section 9.</td>
</tr>
<tr>
<td><em>Animal Welfare Act 2002</em> (WA)(^10)</td>
<td>No explicit DOC provision</td>
<td>S 19(1) A person must not be cruel to an animal. (2) Without limiting subsection (1) a person, whether or not the person is a...</td>
<td>No aggravated cruelty provision</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Statute</th>
<th>Duty of care</th>
<th>Cruelty provisions</th>
<th>Aggravated cruelty</th>
</tr>
</thead>
<tbody>
<tr>
<td>19 (3) (d) is not provided with proper and sufficient food or water and (e) is not provided with such shelter, shade or other protection from the elements as is reasonably necessary to ensure welfare, safety and health</td>
<td>person in charge of the animal, is cruel to an animal if the person — (a) tortures, mutilates, maliciously beats or wounds, abuses, torments, or otherwise ill-treats, the animal; (b) uses a prescribed inhumane device on the animal; (c) intentionally or recklessly poisons the animal; (d) does any prescribed act to, or in relation to, the animal; Or (e) in any other way causes the animal unnecessary harm. (3) Without limiting subsection (1) a person in charge of an animal is cruel to an animal if the animal — (a) is transported in a way that causes, or is likely to cause, it unnecessary harm; (b) is confined, restrained or caught in a manner that — (i) is prescribed; or (ii) causes, or is likely to cause, it unnecessary harm; (c) is worked, driven, ridden or otherwise used — (i) when it is not fit to be so used or has been over used; or (ii) in a manner that causes, or is likely to cause, it unnecessary harm; (d) is not provided with proper and sufficient food or water; (e) is not provided with such shelter, shade or other protection from the elements as is reasonably necessary to ensure its welfare, safety and health; (f) is abandoned, whether at the place where it is normally kept or elsewhere; (g) is subjected to a prescribed surgical or similar operation, practice or activity; (h) suffers harm which could be alleviated by the taking of reasonable steps; (i) suffers harm as</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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10 As at 01 May 2013, downloaded 27 November 2013.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Duty of care</th>
<th>Cruelty provisions</th>
<th>Aggravated cruelty</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>a result of a prescribed act being carried out on, or in relation to, it; or (j) is, in any other way, caused unnecessary harm.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Appendix D Aggravated Cruelty Flowchart

AGGRAVATED CRUELTY

No Aggravated Offence

Aggravated cruelty with fault element

Animal Welfare Act 1993 (Tas) s 9
Prevention of Cruelty to Animals Act 1979 (NSW) ss 4(3), 6
Prevention of Cruelty to Animals Act 1986 (VIC) s 10

Aggravated cruelty with no explicit fault element

Animal Care and Protection Act 2001 (Qld)
Animal Welfare Act 2002 (WA)

Animal Welfare Act 1999 (NT) s 10(1) ‘intends’
Prevention of Cruelty to Animals Act 1985 (SA) s 13(1) ‘intends’ or ‘reckless’
Animal Welfare Act 1992 (ACT) s 7A(1) ‘intends’ or ‘reckless’
### Appendix E Voiceless Animal Cruelty Alerts (VACA) 1 July 2011 - 30 June 2012

<table>
<thead>
<tr>
<th>Case</th>
<th>Search source</th>
<th>Animal</th>
<th>Location</th>
<th>Issue</th>
<th>Charges/Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Teenage</td>
<td>VACA</td>
<td>cat</td>
<td>Australian Capital Territory</td>
<td>Threw cat from a balcony; act of cruelty causing serious injury</td>
</tr>
<tr>
<td>2</td>
<td>Teenager</td>
<td>VACA</td>
<td>dogs</td>
<td>Canberra, Australian Capital Territory</td>
<td>Killed two dogs (had previously killed 2 other dogs); Aggravated cruelty</td>
</tr>
<tr>
<td>3</td>
<td>‘18 year old man’</td>
<td>VACA</td>
<td>swan</td>
<td>Gunghalin, Australian Capital Territory</td>
<td>Black swan was found dead at Yerrabi Pond in Gunghalin; Charged with aggravated cruelty to an animal causing death.</td>
</tr>
<tr>
<td>4</td>
<td>Dusko Culibrk, 26 years</td>
<td>VACA</td>
<td>3 dogs</td>
<td>Australian Capital Territory</td>
<td>Police found one of the dogs lying dead on the person’s kitchen counter.</td>
</tr>
<tr>
<td>5</td>
<td>Rose Neufeld</td>
<td>VACA</td>
<td>dog</td>
<td>Mt Annan regional Sydney NSW</td>
<td>No details; Charged with killing the female Rottweiler and abusing two other dogs. Cleared of killing the dog but guilty of two counts of animal cruelty after one of the charges was dropped.</td>
</tr>
<tr>
<td>6</td>
<td>Roland Black</td>
<td>VACA</td>
<td>dog</td>
<td>Regional NSW</td>
<td>Bashing puppy to death with a hammer; Cruelty NSW, charge of aggravated animal cruelty was withdrawn and dismissed.</td>
</tr>
<tr>
<td>7</td>
<td>Pauline Marchant</td>
<td></td>
<td>cat</td>
<td>Wauchope</td>
<td>No details; Aggravated cruelty and failing to provide her cat with veterinary treatment.</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th></th>
<th>Name</th>
<th>Date</th>
<th>Animal</th>
<th>Location</th>
<th>Charge</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>Man (61)</td>
<td>24/3/2012</td>
<td>dog</td>
<td>Sydney's inner west</td>
<td>Died after being left in a car</td>
<td>Man to be charged today (24/3/2012)</td>
</tr>
<tr>
<td>9</td>
<td>Regina Goodwin</td>
<td>VACA 7/3/2012</td>
<td>dog</td>
<td>Ulladulla, NSW</td>
<td>No details</td>
<td>Aggravated cruelty; failure to provide veterinary treatment</td>
</tr>
<tr>
<td>10</td>
<td>Paul Travill</td>
<td>VACA 23/2/2012</td>
<td>horse</td>
<td>Lismore area, NSW</td>
<td>No details</td>
<td>Failure to seek veterinary treatment</td>
</tr>
<tr>
<td>11</td>
<td>Norman and Shawn Johnson</td>
<td>VACA 5/2/2012</td>
<td>horse</td>
<td>NSW</td>
<td>Old horse</td>
<td>Failure to provide adequate food; Failing to provide veterinary treatment</td>
</tr>
<tr>
<td>12</td>
<td>Mathew Hodgkins</td>
<td>VACA 14/2/2012</td>
<td>cat</td>
<td>NSW</td>
<td>Killing cat; also on bond for domestic abuse</td>
<td><em>POCTAA (NSW) s 6</em> Aggravated cruelty</td>
</tr>
<tr>
<td>13</td>
<td>P plate driver</td>
<td>VACA 28/1/2012</td>
<td>ducks</td>
<td>Armidale</td>
<td>Been charged with animal cruelty and driving offences after allegedly deliberately running over a group of ducks in northern NSW.</td>
<td>No details</td>
</tr>
<tr>
<td>14</td>
<td>Deborah Kirkman</td>
<td>VACA 26/1/2012</td>
<td>dogs</td>
<td>Blackett, NSW</td>
<td>With three counts of failure to provide proper and sufficient food and two counts of failure to provide exercise to a confined animal</td>
<td>Five charges of animal cruelty</td>
</tr>
<tr>
<td>15</td>
<td>Thomas Edward Clode</td>
<td>VACA 25/1/2012</td>
<td>cat</td>
<td>Newcastle NSW</td>
<td>Killing a neighbour's cat.</td>
<td>Pleased guilty; 200 hrs community service</td>
</tr>
<tr>
<td>16</td>
<td>Neil Kitt</td>
<td>VACA 23/1/2012</td>
<td>dogs</td>
<td>North Parramatta</td>
<td>Two dogs: very underweight, with the ulcerated wounds on their ears due to fly bite.</td>
<td>Two counts of failure to provide proper and sufficient food; Three counts of failure to provide veterinary treatment to his two dogs</td>
</tr>
<tr>
<td></td>
<td>Name</td>
<td>Date</td>
<td>Animals</td>
<td>Location</td>
<td>Details</td>
<td>Charges</td>
</tr>
<tr>
<td>---</td>
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<td>------------------------------------------------------------------------</td>
<td>----------------------------------------------</td>
</tr>
<tr>
<td>17</td>
<td>Kellie Pike</td>
<td>VACA 19/1/2012</td>
<td>2 dogs</td>
<td>Tregear NSW</td>
<td>No details</td>
<td>Four counts of animal cruelty</td>
</tr>
<tr>
<td>18</td>
<td>Tristan Tottenham and Kaye Wilson-Tottenham</td>
<td>VACA 16/1/2012</td>
<td>3 dogs, 4 cats, 2 cockatiels</td>
<td>NSW</td>
<td>18 cats in hutchess and cages with overflowing litter trays and no water.</td>
<td>Failure to provide vet treatment for three dogs and four cats, failing to provide food for a cat, committing an act of cruelty upon three cats and failing to exercise reasonable care to prevent cruelty to two cockatiels.</td>
</tr>
<tr>
<td>19</td>
<td>'a couple'</td>
<td>VACA 22/12/2011</td>
<td>rabbits, dogs, cockatiel, budgie</td>
<td>Riverstone, NSW</td>
<td>Police seized two underweight rabbits and a dog (due to deteriorating health), as well as a sick cockatiel and a dead budgerigar and rabbit.</td>
<td>Six counts of animal cruelty</td>
</tr>
<tr>
<td>20</td>
<td>George Dimitriou</td>
<td>VACA 10/11/2011</td>
<td>dog</td>
<td>St Mary's Sydney NSW</td>
<td>Doberman had demodectic mange and a heavy internal infestation of hookworm.</td>
<td>Convicted, fined for obstructing the RSPCA inspector; $81 court costs</td>
</tr>
<tr>
<td>21</td>
<td>Nathan Deaves</td>
<td>VACA 4/11/2011</td>
<td>dog</td>
<td>Watanobbi NSW</td>
<td>Failing to provide proper and sufficient food and three counts of failing to provide veterinary treatment</td>
<td>Four charges of animal cruelty</td>
</tr>
<tr>
<td>22</td>
<td>'A Reservoir man'</td>
<td>VACA 8/10/2011</td>
<td>puppy</td>
<td>Reservoir NSW</td>
<td>Allegedly abusing a 12-week-old puppy</td>
<td>One count of aggravated cruelty and two counts of animal cruelty.</td>
</tr>
<tr>
<td>23</td>
<td>19 year old male</td>
<td>VACA 12, 13/09/2011</td>
<td>cat</td>
<td>Newcastle, NSW</td>
<td>Phone call to the police that an act of cruelty against a cat had been committed during a party. The police found a cat’s paw in the shed of a normally unoccupied house.</td>
<td>Charged with torturing, beating and seriously injuring an animal, and aggravated animal cruelty.</td>
</tr>
<tr>
<td>No.</td>
<td>Name</td>
<td>Date</td>
<td>Animals/Details</td>
<td>Location</td>
<td>Offence Description</td>
<td>Punishment/RSPCA Costs</td>
</tr>
<tr>
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</tr>
<tr>
<td>24</td>
<td>Roxienna Elizabeth Lord</td>
<td>08/09/11</td>
<td>Two Shar Pei crossbreds and four puppies</td>
<td>Kelso, NSW</td>
<td>Failure to feed or water for a period of three weeks</td>
<td>Pleaded guilty to 13 counts of aggravated animal cruelty, placed on a bond and ordered pay professional costs and expenses of $1550 to the RSPCA</td>
</tr>
<tr>
<td>25</td>
<td>Helen Shepheard</td>
<td>14/3/2012</td>
<td>30 cats</td>
<td>Batemans Bay, NSW</td>
<td>Abuse of 39 cats and other animals that it alleges were found neglected and living in filth at her home.</td>
<td>Multiple charges for neglect</td>
</tr>
<tr>
<td>26</td>
<td>Glenda Long</td>
<td>18/4/2012</td>
<td>horses</td>
<td>Megalong Valley, NSW</td>
<td>Megalong Horse Riding Adventures</td>
<td>Nine offences</td>
</tr>
<tr>
<td>27</td>
<td>Michael Chappell</td>
<td>2/3/2012</td>
<td>dog</td>
<td>Penrith, NSW</td>
<td>Torture, beat and seriously injure, commit act of Aggravated cruelty</td>
<td>Four charges: aggravated cruelty; failure to provide sufficient food</td>
</tr>
<tr>
<td>28</td>
<td>Shane Jason Dean</td>
<td>15/2/2012</td>
<td>25 ponies</td>
<td>Glen Innes, NSW</td>
<td>Death of 25 ponies – lack of ventilation while defendant was transporting them</td>
<td><em>POCTAA (NSW) s 6 aggravated cruelty; two years – non parole six months</em></td>
</tr>
<tr>
<td>29</td>
<td>Phillip Aughey</td>
<td>21/3/2012</td>
<td>two thoroughbred horses</td>
<td>Regional NSW (Tamworth)</td>
<td>No further details</td>
<td>Aggravated cruelty; failure to provide veterinary treatment (later successfully appealed sentence)</td>
</tr>
<tr>
<td>30</td>
<td>Paul Brook &amp; Christopher Coughlin</td>
<td>29/3/2012</td>
<td>sheep</td>
<td>Dubbo, NSW</td>
<td>Entered agriculture college and killed sheep with intent to sell the meat</td>
<td>No details</td>
</tr>
</tbody>
</table>

389
<table>
<thead>
<tr>
<th>No.</th>
<th>Name</th>
<th>Date</th>
<th>Animals/Details</th>
<th>Details</th>
<th>Charges</th>
</tr>
</thead>
<tbody>
<tr>
<td>31</td>
<td>Ralph Leadbeatter</td>
<td>VACA 15/12/11</td>
<td>11 dogs on two properties Bora Ridge and North Casino</td>
<td>No further details</td>
<td>Thirteen charges: 10 counts of failure to provide veterinary treatment, two charges of failure to provide proper and sufficient drink, and one charge of failure to provide adequate shelter. Plead guilty.</td>
</tr>
<tr>
<td>32</td>
<td>Keith Meredith</td>
<td>VACA 15/12/11</td>
<td>horse, dogs, cats Mt Pritchard, NSW</td>
<td>Failure to provide veterinary treatment to a horse, two cats, and 16 bulldogs, and three counts of failure to exercise care to prevent an act of cruelty on two cats and 13 of the bulldogs.</td>
<td>Seven charges of animal cruelty.</td>
</tr>
<tr>
<td>33</td>
<td>Joel Smith, 19</td>
<td>VACA 11/11/2011</td>
<td>lamb Menai High School, South Sydney</td>
<td>“school farm that left a much-loved lamb dead” “terrorising animals” staff found the animals distressed and one of the lambs in pain with a broken leg - euthanased.</td>
<td>Charge: entering a prescribed premises without lawful excuse and animal cruelty.</td>
</tr>
<tr>
<td>34</td>
<td>Graham Chasty</td>
<td>VACA 4/11/2011</td>
<td>five sick and neglected poodles Hunter Valley, NSW</td>
<td>No further details</td>
<td>Convicted of 8 counts; fined $3000. One count of failing to provide proper and sufficient food, six counts of failing to provide veterinary treatment and one count of failing to exercise reasonable care to prevent an act of cruelty.</td>
</tr>
<tr>
<td>#</td>
<td>Name</td>
<td>Date</td>
<td>Animal</td>
<td>Location</td>
<td>Details</td>
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</tr>
<tr>
<td>35</td>
<td>Colin Vella</td>
<td>VACA 9/11/2011</td>
<td>cow</td>
<td>Bringelly (NSW)</td>
<td>Post-mortem confirmed the cow was emaciated because of the failure to give it access to sufficient food. Deep necrotic pressure sores showed the cow had been down on her right side for prolonged periods.</td>
</tr>
<tr>
<td>36</td>
<td>Peter Mark Lorenze</td>
<td>VACA 25/1/2012</td>
<td>dog</td>
<td>Darwin, Northern Territory</td>
<td>Stomped on and kicked his dog after he got a letter in the mail from a mother who claimed the animal bit her young child. He had received similar complaints from Australia Post</td>
</tr>
<tr>
<td>37</td>
<td>Kylie Sawyer</td>
<td>VACA 11/10/2011</td>
<td>dog</td>
<td>Darwin, Northern Territory</td>
<td>Allegedly breached a correction services order imposed for bashing a dog; see VACA 17/9/2011 – she repeatedly bashed a dog against a window until the window smashed.</td>
</tr>
<tr>
<td>38</td>
<td>Scott Maloney</td>
<td>VACA 2/7/2012</td>
<td>dog</td>
<td>Mackay area, Queensland</td>
<td>Threw dog onto the road. Mental health issues</td>
</tr>
<tr>
<td>39</td>
<td>Lloyd Te-Aho</td>
<td>VACA 22/3/2011</td>
<td>dog</td>
<td>Logan, Brisbane</td>
<td>Pitbull puppy</td>
</tr>
<tr>
<td>#</td>
<td>Name</td>
<td>Date</td>
<td>Species</td>
<td>Location</td>
<td>Description</td>
</tr>
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</tr>
<tr>
<td>40</td>
<td>Mathew Flynn</td>
<td>VACA 22/3/2012</td>
<td>dog</td>
<td>Logan, Brisbane</td>
<td>Dog emaciated and had hookworm</td>
</tr>
<tr>
<td>41</td>
<td>Donald Carrington (77)</td>
<td>21/3/2012</td>
<td>cat</td>
<td>Brighton, Brisbane</td>
<td>Trapping his neighbour's cat and drowning it in a wheelie-bin filled with water</td>
</tr>
<tr>
<td>42</td>
<td>Bruin Carlsson</td>
<td>VACA 9/3/2012</td>
<td>dog</td>
<td>Brisbane, Qld</td>
<td>Graffiti artist – sprayed the face of a dog while he was tagging</td>
</tr>
<tr>
<td>43</td>
<td>Bradley Weir</td>
<td>VACA 13/2/2012</td>
<td>dog</td>
<td>Gold Coast, Queensland</td>
<td>Chased after woman, killed her dog and attacked someone who came to her aid. Mental illness</td>
</tr>
<tr>
<td>44</td>
<td>Daniel and Kym Rach</td>
<td>VACA 19/01/12</td>
<td>dog</td>
<td>Queensland</td>
<td>Left an untreated lesion for several months</td>
</tr>
<tr>
<td>45</td>
<td>Pascal Paixao</td>
<td>VACA 13/1/2012</td>
<td>dog</td>
<td>Queensland</td>
<td>Stabbed a dog that wandered into his kitchen then left the animal locked in his home while he went to pick up one of his children</td>
</tr>
<tr>
<td>46</td>
<td>“Brisbane Woman”</td>
<td>VACA 11/11/2011</td>
<td>dog</td>
<td>Brisbane</td>
<td>Throwing a neighbour's dog into a wheelie bin</td>
</tr>
<tr>
<td>47</td>
<td>Anita Howard, 21</td>
<td>VACA 21/10/2011</td>
<td>dog</td>
<td>Cairns, Queensland</td>
<td>Letting her dog's skin condition go untreated and progress to such a state that the RSPCA had to euthanase the dog</td>
</tr>
<tr>
<td>48</td>
<td>Daniel William Bradow</td>
<td>VACA 27/9/2011</td>
<td>cockatiel</td>
<td>Ipswich, Queensland</td>
<td>Seems to have killed a cockatiel in a take away business.</td>
</tr>
<tr>
<td>49</td>
<td>Dart (2012)</td>
<td>VACA</td>
<td>various animals</td>
<td>Queensland</td>
<td>Appealing sentence</td>
</tr>
<tr>
<td>50</td>
<td>Troy McIntosh (30) and Mary Goodwin (28)</td>
<td>VACA 4/8/2012</td>
<td>horses</td>
<td>Ipswich, Queensland</td>
<td>Riding school - starved 6 horses</td>
</tr>
<tr>
<td>51</td>
<td>Two people (no names not mentioned)</td>
<td>VACA 2/4/2012</td>
<td>Three horses</td>
<td>Near Kingaroy, Queensland</td>
<td>Treating horses so poorly; one had to be euthanized</td>
</tr>
<tr>
<td>52</td>
<td>Ruth and Ken Schloss</td>
<td>VACA 5/3/2012</td>
<td>dogs</td>
<td>South Burnett, Queensland</td>
<td>Appeal by Queensland government against sentence and Magistrate error regarding commercial dog breeding</td>
</tr>
<tr>
<td>53</td>
<td>Janice Nieass, 54</td>
<td>VACA 2/11/2011</td>
<td>six Rottweiler puppies</td>
<td>Gympie, Queensland</td>
<td>Breeder docking the tails</td>
</tr>
<tr>
<td>54</td>
<td>Gary Brennan, 58, &amp; Linda Barbara Brennan, 56</td>
<td>VACA 6/10/2011</td>
<td>horses</td>
<td>Ipswich, Queensland</td>
<td>Starving and neglecting five horses and a foal, leaving to perish in a flood</td>
</tr>
<tr>
<td></td>
<td>Name</td>
<td>Date</td>
<td>Animal</td>
<td>Location</td>
<td>Charge / Details</td>
</tr>
<tr>
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</tr>
<tr>
<td>55</td>
<td>Jamie Smart (32)</td>
<td>VACA 27/6/2012</td>
<td>two kittens</td>
<td>Tasmania</td>
<td>Killing two kittens</td>
</tr>
<tr>
<td>56</td>
<td>David Bramich (41)</td>
<td>VACA 2/7/2012</td>
<td>cat</td>
<td>Launceston, Tasmania</td>
<td>Failing to seek veterinary treatment</td>
</tr>
<tr>
<td>57</td>
<td>Jenny Sielhorst 55</td>
<td>VACA 27/6/2012</td>
<td>dog</td>
<td>Deloraine, Tasmania</td>
<td>Animal welfare activist – accused of cruelty – charges dropped</td>
</tr>
<tr>
<td>58</td>
<td>Daniel Patrick Curry, 46</td>
<td>VACA 18/10/2011</td>
<td>puppy</td>
<td>Launceston, Tasmanian</td>
<td>Dragged a puppy along the ground to the vet because it would not walk properly on the leash</td>
</tr>
<tr>
<td>59</td>
<td>‘A Tasmanian man’</td>
<td>VACA 4/10/2011</td>
<td>kittens</td>
<td>Tasmania</td>
<td>Accused of ripping the heads of three kittens</td>
</tr>
<tr>
<td>60</td>
<td>Jason Hope and Erin Scott</td>
<td>VACA</td>
<td>two piglets</td>
<td>Tasmania</td>
<td>Suffocated 2 piglets</td>
</tr>
<tr>
<td>61</td>
<td>“Former Gippsland Farmer”</td>
<td>VACA 20/2/2012</td>
<td>pigs</td>
<td>Gippsland</td>
<td>11 charges of cruelty related to his lack of care of approximately 50 pigs</td>
</tr>
<tr>
<td>Case Number</td>
<td>Date</td>
<td>Species</td>
<td>Location</td>
<td>Details</td>
<td>Result</td>
</tr>
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</tr>
<tr>
<td>62</td>
<td>Dairy farming company (Mountain View Dairy)</td>
<td>two cows</td>
<td>Tasmania</td>
<td>Eye cancer was at an advanced state and both cows had to be euthanased by the RSPCA.</td>
<td>Fined $20,000 for two counts of aggravated cruelty for</td>
</tr>
<tr>
<td>64</td>
<td>Teens</td>
<td>swan</td>
<td>Moonee Pond, Victoria</td>
<td>Killed swan</td>
<td>No further details</td>
</tr>
<tr>
<td>65</td>
<td>Umberto DiFilippo</td>
<td>dog</td>
<td>Campbelfield, Victoria</td>
<td>Tail docking</td>
<td>Fined $14,000 for cruelty</td>
</tr>
<tr>
<td>66</td>
<td>John Black, 72</td>
<td>dog</td>
<td>Weribee, Victoria</td>
<td>“Dog-napping” his neighbour’s dog, driving the dog 17km in the boot of his car to a dam, and throwing it in, following a long running and bitter dispute with his neighbour.</td>
<td>Fined Black $500 without conviction, and ordered him to pay the council’s court costs of almost $1270</td>
</tr>
<tr>
<td>67</td>
<td>‘Bendigo Man’</td>
<td>kitten</td>
<td>Bendigo, Victoria</td>
<td>In an ongoing dispute with neighbours, threatened to harm neighbours’ children before killing their kitten in front of shocked onlookers</td>
<td>Charged with drunkenness, aggravated animal cruelty, criminal damage and threats to kill; bailed</td>
</tr>
<tr>
<td>68</td>
<td>Ms. Watson</td>
<td>dog</td>
<td>Victoria</td>
<td>Found dead at Nillumbik Pound after having been sprayed with capsicum spray and snared with catch poles.</td>
<td>Believes police and rangers over reacted, complaint to Ombudsman</td>
</tr>
<tr>
<td>69</td>
<td>Mark Doran, 45</td>
<td>dog</td>
<td>Geelong, Victoria</td>
<td>Starving his dog, Sheeba</td>
<td>Pleased guilty</td>
</tr>
<tr>
<td>No.</td>
<td>Name</td>
<td>Date</td>
<td>Species</td>
<td>Location</td>
<td>Details</td>
</tr>
<tr>
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</tr>
<tr>
<td>70</td>
<td>Michael Kocsi, 24</td>
<td>VACA 7/12/2011</td>
<td>not stated</td>
<td>Geelong, Victoria</td>
<td>No further details</td>
</tr>
<tr>
<td>71</td>
<td>Joan Stalio, 48</td>
<td>VACA 7/12/2011</td>
<td>not stated</td>
<td>Geelong, Victoria</td>
<td>Failing to provide food and failing to provide veterinary treatment</td>
</tr>
<tr>
<td>72</td>
<td>Margaret Davis, 64</td>
<td>VACA 20/9/2011</td>
<td>Shetland pony</td>
<td>Baxter (Victoria)</td>
<td>Grossly mistreated horse at her home; was in great pain and had become disabled by its grossly overgrown hooves; pony was destroyed by RSPCA inspectors on “humane grounds”.</td>
</tr>
<tr>
<td>73</td>
<td>Five people</td>
<td>VACA</td>
<td>pigs</td>
<td>Gippsland, Victoria</td>
<td>abattoir, not specified</td>
</tr>
<tr>
<td>74</td>
<td>Peta Andrews</td>
<td>VACA 16/3/2012</td>
<td>Varied animals</td>
<td>Bendigo, Victoria</td>
<td>Neglect of dogs, cats, turtles, rabbits and rats</td>
</tr>
<tr>
<td>75</td>
<td>Peta Andrews, 44</td>
<td>VACA 16/3/2012</td>
<td>dogs, cats, turtles, rabbits and rats</td>
<td>Bendigo, Victoria</td>
<td>14 counts of animal cruelty and was found guilty of one charge of assaulting an RSPCA officer during the raid</td>
</tr>
<tr>
<td>76</td>
<td>Gavin O'Sullivan</td>
<td>VACA 18/1/2012</td>
<td>Four sheep</td>
<td>Bendigo, Victoria</td>
<td>Seen to be “severely distressed and disabled” at Bendigo Saleyards; he refused to euthanase them</td>
</tr>
<tr>
<td>77</td>
<td>Bert Cooke</td>
<td>VACA 11/12/2011</td>
<td>48 dogs</td>
<td>Sale, Victoria</td>
<td>Had been locked in a shed for years.</td>
</tr>
<tr>
<td>ID</td>
<td>Name</td>
<td>Date</td>
<td>Animal Species</td>
<td>Location</td>
<td>Details</td>
</tr>
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</tr>
<tr>
<td>78</td>
<td>A Tyntynder farmer</td>
<td>5/10/2011</td>
<td>Tethered Shorthorn cow with advanced eye cancers</td>
<td>Tyntynder, Victoria</td>
<td>A cow with malignant tumours (cancer) of both eyes, for which appropriate care and attention was not provided</td>
</tr>
<tr>
<td>79</td>
<td>Andrew Duff</td>
<td>1/3/2012</td>
<td>Race horse</td>
<td>Warrnambool, Victoria</td>
<td>Moved a horse, which should have been euthanased where it fell.</td>
</tr>
<tr>
<td>80</td>
<td>Peter Avraam</td>
<td>2/2/2012</td>
<td>45 animals: frogs, dragons, python; dogs (allegedly for human consumption), goats</td>
<td>Melbourne Victoria</td>
<td>Illegally kept wildlife and slaughtered goats at a Melbourne property. There were allegations that the man was keeping dogs to sell for human consumption.</td>
</tr>
<tr>
<td>81</td>
<td>5 people - LE Giles abattoir</td>
<td>26/4/2012</td>
<td>abattoir</td>
<td>Gippsland, Victoria</td>
<td>Five people face animal cruelty charges</td>
</tr>
<tr>
<td>82</td>
<td>Christopher Bramwell Holding</td>
<td>2/4/2012</td>
<td>chicken</td>
<td>Western Australia</td>
<td>Killed his partner's chicken – VACA notice appealed his sentence (handed down in 2011)</td>
</tr>
<tr>
<td>Case Number</td>
<td>Name(s)</td>
<td>Date</td>
<td>Animal Type</td>
<td>Location</td>
<td>Details</td>
</tr>
<tr>
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</tr>
<tr>
<td>83</td>
<td>Kerry-Ann Williams</td>
<td>28/3/2012</td>
<td>horse – 15 years old</td>
<td>Hay Point</td>
<td>Failing to provide care for a seriously ill 15 year old horse. Horse was found last year extremely thin with bones showing through its hide.</td>
</tr>
<tr>
<td>84</td>
<td>Geoffrey Fairhurst and Debra Fairhurst</td>
<td>VACA 1/3/2012</td>
<td>kitten</td>
<td>Western Australia</td>
<td>Kitten in poor condition and required removal of an eye.</td>
</tr>
<tr>
<td>85</td>
<td>WA couple</td>
<td>VACA 22/2/2012</td>
<td>kitten</td>
<td>Armdale Western Australia</td>
<td>Mistreated a five-week-old kitten. To appear 20 Feb 2012</td>
</tr>
<tr>
<td>87</td>
<td>Elizabeth Dawn Creed, 50</td>
<td>VACA 23/9/2011</td>
<td>dog</td>
<td>Perth, Western Australia</td>
<td>RSPCA inspector November 2009 dog, Missy, was found covered with stinking sores and scabs on her back, infested with fleas and malnourished. Pleased guilty; fined $2500 and banned from owning a pet for two years.</td>
</tr>
<tr>
<td>88</td>
<td>Name not stated</td>
<td>VACA 09/09/11</td>
<td>cat</td>
<td>Kingsley (Western Australia)</td>
<td>Due to have its front leg amputated today after being snared in an illegal metal-jawed trap. RSPCA investigating</td>
</tr>
<tr>
<td>89</td>
<td>Phillip Carter</td>
<td>VACA 9/8/2012</td>
<td>cattle (number not stated)</td>
<td>Perth Western Australia</td>
<td>Cruelty, insufficient food and neglect. Five counts of cruelty; Fined; order not to possess cattle, suspended sentence.</td>
</tr>
<tr>
<td>90</td>
<td>Katherine King</td>
<td>VACA 7/5/2012</td>
<td>42 animals</td>
<td>Western Australia</td>
<td>No further details. Cruelty and breaching an order.</td>
</tr>
<tr>
<td>91</td>
<td>Two women, one is Katherine King</td>
<td>VACA 19/4/2012</td>
<td>approx 50 dogs</td>
<td>Kalgoorlie Western Australia</td>
<td>50 dogs living in harsh conditions – breeding.</td>
</tr>
<tr>
<td>No.</td>
<td>Name</td>
<td>Date</td>
<td>Species</td>
<td>Location</td>
<td>Details</td>
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</tr>
<tr>
<td>92</td>
<td>Wilson Komene</td>
<td>VAC 29/3/2012</td>
<td>cow</td>
<td>Whangarei District (NZ)</td>
<td>Cow sent to slaughter with a severe case of eye cancer &amp; without a vet cert stating cow was fit to transport</td>
</tr>
<tr>
<td>93</td>
<td>Murray Hansen (trainer)</td>
<td>VACA 6/3/2012</td>
<td>horse</td>
<td>Western Australia</td>
<td>Hit horse with a whip and kicked the gelding when it fell before the start of a race</td>
</tr>
<tr>
<td>94</td>
<td>Geoffrey James Mullins, 72,</td>
<td>VACA 20/10/2011</td>
<td>Sheep and cattle</td>
<td>Waroona, Perth, Western Australia</td>
<td>Breaching a permanent ban from being in charge of ovine (sheep) and bovine (cattle).</td>
</tr>
<tr>
<td>95</td>
<td>Geoffrey James Mullins,</td>
<td>VACA 21/9/2011</td>
<td>sheep and cattle</td>
<td>Waroona, Western Australia</td>
<td>No further details</td>
</tr>
<tr>
<td>96</td>
<td>Murray Hansen</td>
<td>VACA 16/03/2012</td>
<td>horse</td>
<td>Gloucester Park raceway Western Australia</td>
<td>Hit three-year-old pacer Truckers Ramrod with a whip and kicking him when the gelding fell</td>
</tr>
<tr>
<td>97</td>
<td>Brenton Emiel Hettner, 41</td>
<td>VACA 5/12/2011</td>
<td>Cattle</td>
<td>Kojonup, Western Australia</td>
<td>Failing to provide 250 cattle with proper and sufficient food between June 1 and August 4 in 2009</td>
</tr>
<tr>
<td>98</td>
<td>Adam Bowden</td>
<td>VACA 23/3/2012</td>
<td>Dog</td>
<td>Not clear</td>
<td>Vicious attack on a puppy History of violence – assaulting members of public and police officers</td>
</tr>
<tr>
<td>99</td>
<td>Jennifer Ruth Walker</td>
<td>VACA 6/3/2012</td>
<td>cat</td>
<td>Greenfields</td>
<td>Cancer suffering cat – did not take to the vet</td>
</tr>
<tr>
<td>#</td>
<td>Name(s)</td>
<td>DO#</td>
<td>Species</td>
<td>Jurisdiction</td>
<td>Description</td>
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<tr>
<td>100</td>
<td>Ryan Russell Pritchard</td>
<td>VACA 2</td>
<td>dog</td>
<td>Evandale</td>
<td>Failed to take dog to vet appointments after the dog had broken her leg, had 7 puppies</td>
</tr>
<tr>
<td>101</td>
<td>Dr Peter Wright, RSPCA (CEO)</td>
<td>VACA 11</td>
<td>horse</td>
<td>Not stated</td>
<td>Dr Peter Wright, was accused of committing acts of cruelty while performing acts of dentistry to a horse</td>
</tr>
<tr>
<td>102</td>
<td>Rita Shanahan, 52, and her daughter Naomi, 19</td>
<td>VACA 11</td>
<td>dog</td>
<td>Parkdale</td>
<td>Let a dog become infested by fleas and maggots</td>
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<tr>
<td>103</td>
<td>David Wakeling</td>
<td>VACA 2/4/2012</td>
<td>Sheep</td>
<td>Not stated</td>
<td>Fly blown and footrot affected sheep</td>
</tr>
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</table>
## Appendix F Judgments and Case Notes 2002-11 Search Summary

<table>
<thead>
<tr>
<th>Search Source</th>
<th>Case</th>
<th>Animal</th>
<th>Location</th>
<th>Issue</th>
<th>Other relevant information</th>
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</thead>
<tbody>
<tr>
<td>02 – 11</td>
<td><em>R v Zegura</em> [2006] NSWCCA 230 (3 August 2006)</td>
<td>dog</td>
<td>Peakhurst Sydney</td>
<td>Attempted murder of his partner and then killed dog (stabbed)</td>
<td><em>POCTAA</em> (NSW) s 6(1)</td>
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<tr>
<td>LexisNexis AU</td>
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<td>2. 02 -11</td>
<td><em>Fleet v District Court of NSW</em> [2002] NSWCA 25 (26 February 2002)</td>
<td>dog</td>
<td>Seven Hills, Western Sydney</td>
<td>Failure to euthanize dog suffering from a terminal illness</td>
<td><em>POCTAA</em> (NSW) s 6(1) Aggravated cruelty and s 27A failure to provide name and address</td>
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<td>3. 02 -11</td>
<td><em>Fleet v Royal Society for the Prevention of Cruelty to Animals NSW (RSPCA)</em> [2005] NSWSC 926 (14 September 2007)</td>
<td>dog</td>
<td>As above</td>
<td>As above</td>
<td>As above</td>
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<tr>
<td>4. 02 -11</td>
<td><em>Fleet v Royal Society for the Prevention of Cruelty to Animals NSW (RSPCA)</em> [2007] NSWSC 334 (14 April 2007)</td>
<td>dog</td>
<td>As above</td>
<td>As above</td>
<td>As Above</td>
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<td>5. 02 -11</td>
<td><em>Krivoshev v RSPCA Inc</em> [2005] NSWCA 76 (6 April 2005)</td>
<td>horses</td>
<td>Western Sydney</td>
<td>Two horses starving</td>
<td><em>POCTAA</em> (NSW) ss 8, 27</td>
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<td>LexisNexis AU</td>
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<tr>
<td>6. 02 -11</td>
<td><em>Perrett v Williams</em> [2003] NSWSC 381 (9 May 2003);</td>
<td>sheep</td>
<td>Moree/Glen Innes area NSW</td>
<td>Sheep affected by malnutrition or/and parasitism Civil – defendant claimed negligence against rangers/inspectors</td>
<td><em>POCTAA</em> (NSW)</td>
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<td>LexisNexis AU</td>
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<td>7. 02 -11</td>
<td><em>Downey v Boulton</em> (No. 5) [2010] NSWCA 240 (15 September 2010)</td>
<td>cattle</td>
<td>Northern NSW</td>
<td>Civil: judicial review. Challenged the constitution of the NSW District Court and claimed judicial error</td>
<td><em>POCTAA</em> (NSW) ss 4, 5, 6(1), 8(1)</td>
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<tr>
<td>8. 02-11</td>
<td><em>Pearson v Janlin Circuses Pty Ltd</em> [2002] NSWSC 1118 (25 November 2002)</td>
<td>elephant</td>
<td>NSW</td>
<td>Removing elephants from company of another elephant</td>
<td><em>POCTAA</em> (NSW) ss 4(2), 5(2)*</td>
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<tr>
<td>9. 02-11</td>
<td><em>Windridge Farm Pty Ltd v Grassi</em> [2010] NSWSC 335 (19 March 2010)</td>
<td>piggery</td>
<td>NSW</td>
<td>Civil: entry to property; was video footage obtained held on constructive trust</td>
<td>Equitable relief not ordered. General damages awarded to Windridge</td>
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<tr>
<td>10. 02-11</td>
<td><em>Animal Liberation v Dept of Environment and Conservation</em> [2007] NSWSC 221 (8 March 2007)</td>
<td>goats</td>
<td>NSW</td>
<td>Animal Liberation: application for an injunction to prevent planned culling of goat in two national parks</td>
<td>Standing denied</td>
</tr>
<tr>
<td>11. 02-11</td>
<td><em>Robertson v Dept of Primary Industries and Fisheries</em> [2010] QCA 147 (15 June 2010);</td>
<td>105 dogs</td>
<td>Buccan, Queensland</td>
<td>Puppy farm</td>
<td><em>ACPA</em> (Qld) ss 17, 18</td>
</tr>
<tr>
<td></td>
<td></td>
<td>puppy farm</td>
<td></td>
<td>Robertson sought leave to appeal from QDC decision</td>
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<tr>
<td>12. 02-11</td>
<td><em>Robertson v Vlahos</em> [2010] QSC 424 (12 November 2010);</td>
<td>105 dogs</td>
<td>Buccan, Queensland</td>
<td>Claimed $664 000 damages for breach of contract from party who was in possession of dogs when they were seized by RSPCA</td>
<td><em>ACPA</em> (Qld) s 143</td>
</tr>
<tr>
<td></td>
<td></td>
<td>puppy farm</td>
<td></td>
<td></td>
<td>RSPCA seized 105 dogs subsequent to Magistrates order</td>
</tr>
<tr>
<td>13. 02-11</td>
<td><em>Robertson v Hollings (Imagination Television Ltd)</em> [2010] QSC 474 (17 December 2010)</td>
<td>105 dogs</td>
<td>Buccan, Queensland</td>
<td>Claimed breach right to privacy, misfeasance in public office and others: claim dismissed</td>
<td><em>ACPA</em> (Qld) s 17</td>
</tr>
<tr>
<td></td>
<td></td>
<td>puppy farm</td>
<td></td>
<td></td>
<td>RSPCA seized 105 dogs following order</td>
</tr>
<tr>
<td>14. 02-11</td>
<td><em>Dart v Mulherin</em> [2009] QCA 146 (29 May 2009)</td>
<td>dogs, rats,</td>
<td>Queensland</td>
<td>Appeal on constitutional argument: certain provisions of <em>ACPA</em> (Qld) invalid as they authorise employees of a trading corporation to be appointed as inspectors to investigate and enforce compliance with the Act. Dismissed</td>
<td><em>ACPA</em> (Qld) s 17</td>
</tr>
<tr>
<td></td>
<td></td>
<td>mice, guinea</td>
<td></td>
<td></td>
<td>131 charges of cruelty</td>
</tr>
<tr>
<td>Search Source</td>
<td>Case</td>
<td>Animal</td>
<td>Location</td>
<td>Issue</td>
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<tr>
<td>02 -11</td>
<td>Dart v Singer [2010] QCA 75 (30 March 2010)</td>
<td>dogs, rats, mice, guinea pigs and birds</td>
<td>Queensland</td>
<td>Breeding animal for industries</td>
<td>131 charges of cruelty ACPA (Qld) s17</td>
</tr>
<tr>
<td>02 -11</td>
<td>Dart v Singer [2010] QCA 124 (27 May 2010)</td>
<td>dogs, rats, mice, guinea pigs, birds</td>
<td>Queensland</td>
<td>Breeding animal for industries</td>
<td>131 charges of cruelty ACPA (Qld) s17</td>
</tr>
<tr>
<td>02-11</td>
<td>Bond v RSPCA (SA) [2011] SASC 19 (24 February 2011)</td>
<td>dog</td>
<td>South Australia</td>
<td>Stabbed girlfriend's dog following an argument</td>
<td>POCTAA (SA) s 18, s 8</td>
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<tr>
<td>02-11</td>
<td>RSPCA (SA) v O’Loughlan [2007] SASC 113 (3 April 2007)</td>
<td>horse</td>
<td>Kapunda, South Australia</td>
<td>Appeal against Magistrate's dismissal of charge: Appeal refused.</td>
<td>POCTAA (SA) s 13(1)</td>
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<tr>
<td>02-11</td>
<td>RSPCA (SA) v Stojcevski [2002] SASC 39 (15 February 2002)</td>
<td>dog</td>
<td>Port Lincoln, South Australia</td>
<td>Broken leg and failed to obtain veterinarian treatment</td>
<td>ss 3, 13(1), 42</td>
</tr>
<tr>
<td>02-11</td>
<td>Goodwin v RSPCA (SA) [2006] SASC 79 (17 March 2006)</td>
<td>dog</td>
<td>Salisbury, South Australia</td>
<td>Mistreated dog</td>
<td>POCTAA (SA) s 13(1)</td>
</tr>
<tr>
<td>02-11</td>
<td>Foster v RSPCA [2006] SASC 215 (24 July 2006);</td>
<td>15 horses</td>
<td>South Australia</td>
<td>One horse lame and 15 horses poor condition underfed, emaciated; failed to provide supplementary food as ordered</td>
<td>POCTAA (SA) ss 5 (a), 13(1), 29</td>
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<tr>
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<tr>
<td>22. 02-11 LexisNexis AU</td>
<td>Turner v Cole [2005] TASSC 72 (9 August 2005)</td>
<td>two horses</td>
<td>Tasmania</td>
<td>Two horses under s 6 (duty of care) failed to ensure that the horse received veterinary attention.</td>
<td>Omitting duty: serious disablement of an animal, AWA (Tas) s 9; order s 43(1)(d) not to have the possession or care of any more than 20 horses for a period of five years</td>
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<tr>
<td>23. 02-11 LexisNexis AU</td>
<td>Mansbridge v Nichols [2004] VSC530 (17 December 2004)</td>
<td>sheep: flock, and individual sheep found dead.</td>
<td>Hamilton Victoria</td>
<td>Failure to provide veterinary care; failure to provide adequate food drink and shelter, aggravated cruelty</td>
<td>POCTAA (Vic) ss 9(1), 10 (1) (2)</td>
</tr>
<tr>
<td>24. 02-11 LexisNexis AU</td>
<td>Collett v Webb [2011] WASC 13 (10 December 2010);</td>
<td>horse</td>
<td>Western Australia</td>
<td>Defendant used a crossbow or some similar apparatus to shoot a bolt into the horse, causing it severe injury and stress.</td>
<td>AWA (WA) s 19(1)</td>
</tr>
<tr>
<td>27. 02-11 LexisNexis AU</td>
<td>Hunter v RSPCA (WA) [2006] WASC 215 (26 September 2006)</td>
<td>dogs</td>
<td>Western Australia</td>
<td>Defendant breeding dos</td>
<td>AWA (WA) s 143, 42, 44, 60, 72</td>
</tr>
<tr>
<td>28. 02-11 LexisNexis AU</td>
<td>Hunter v RSPCA (WA) [2008] WASC 153 (10 July 2008);</td>
<td>dogs</td>
<td>Western Australia</td>
<td>Seeking a permanent stay of orders which involved the forfeiture of dogs to the State</td>
<td>Vexatious litigant Breeding dogs</td>
</tr>
<tr>
<td>29. 02-11 LexisNexis AU</td>
<td>Hunter v Moore [2008] WADC 99 (13 June 2008);</td>
<td>dogs</td>
<td>Western Australia</td>
<td>application for leave to appeal against the decision Magistrate: dismissed</td>
<td>Vexatious litigant Breeding dogs</td>
</tr>
<tr>
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<td>Animal</td>
<td>Location</td>
<td>Issue</td>
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<tr>
<td>31. Caselaw</td>
<td><em>Larobina v R</em> [2009] NSWDC 79 (8 April 2009)</td>
<td>a ferret</td>
<td>Queenbeyan NSW</td>
<td>Injected ferret with an unknown substance, was with another defendant at the time</td>
<td><em>Crimes Act 1900</em> (NSW) s 530(1)(a)</td>
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<tr>
<td>32. Caselaw</td>
<td><em>R v McMahon</em> [2006] NSWDC 81 (3 November 2006)</td>
<td>rabbits</td>
<td>Sydney, NSW</td>
<td>Purchasing rabbits and mutilating them; mental health: inability to know that torturing the animals was wrong came about because of a psychosis from which the Crown agrees he was suffering. psychosis was brought on by the accused's consumption of drugs.</td>
<td>18 counts of committing an act of aggravated cruelty upon an animal <em>POCTAA</em> (NSW) s 6(1)</td>
</tr>
<tr>
<td>33. Caselaw</td>
<td><em>RSPCA v Hamilton</em> [2008] NSWLC 13 (14 July 2008)</td>
<td>Farm animals, mainly cattle 2,000 and 146 goats</td>
<td>Illabo, Riverina NSW</td>
<td>Drought; breeding for blood collection</td>
<td><em>POCTAA</em> (NSW) s 6 (1) and s8 (3); 5 (3)(c), 4 (3), 4 (2A)</td>
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<td>34. Lawlink</td>
<td><em>Richardson v RSPCA</em> [2008] NSWDC 342 (17 December 2008)</td>
<td>Cattle</td>
<td>NSW</td>
<td>Regarding section 5 fail to provide veterinary treatment for a heavy burden of cattle lice</td>
<td>Appeal against finding of guilt. One offence upheld; Appeals against findings of guilt regarding section 8(1) matters (x 17) dismissed.</td>
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<td>Queensland Court website - AustLII</td>
<td><em>Hudson v Miskell</em> [2011] QDC 44 (8 April 2011)</td>
<td>Cat</td>
<td>Sunshine Coast, Queensland</td>
<td>Filmed killing neighbour’s cat, showed to colleagues at work</td>
<td><em>ACPA</em> (Qld) s 18(1), (2)(g)</td>
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<tr>
<td>Queensland Court website - AustLII</td>
<td><em>R v Romano</em> [2008] QCA 140 (3 June 2008)</td>
<td>Goat</td>
<td>Party at Bellbowrie, a suburb in the semi-rural west of Brisbane</td>
<td>Group killed a goat; pleaded guilty in the District Court at Brisbane to one count of stealing stock, one count of breaking and entering premises and one count of injuring an animal</td>
<td>Injuring an animal, <em>Criminal Code</em> (Qld); section not mentioned - killing an animal that is stock (probably injuring animal capable of being stolen, s 468)</td>
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<tr>
<td>Caulfield</td>
<td><em>Australian Wool Innovation v Newkirk</em> [2005] FCA 290 (22 March 2005)</td>
<td>Sheep</td>
<td></td>
<td>Action taken by Australia Wool Innovation (AWI) against, among others, People for the Ethical Treatment of Animals (PETA). AWI argued that by alerting potential international wool buyers that the wool was sourced from animals who had been subjected to mulesing</td>
<td>Alleged PETA had contravened the <em>Trade Practices Act 1974</em> (Cth) ss 45, 45DB</td>
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<tr>
<td>Caulfield</td>
<td><em>Adams v Reahy</em> [2007] NSWSC 1276 (12 November 2007)</td>
<td>Dog</td>
<td>Windsor, Sydney</td>
<td>'Skinny dog'</td>
<td><em>POCTAA</em> (NSW) s 8 (1)</td>
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<td>Caulfield</td>
<td><em>Towers-Hammon v Burnett</em> [2007] QDC 282 (15 June 2007)</td>
<td>Cats</td>
<td>Rockhampton, Queensland</td>
<td>Beating 4 cats to death with an iron bar</td>
<td><em>ACPA</em> (Qld) s 18</td>
</tr>
<tr>
<td>Caulfield</td>
<td><em>Rural Export and Trading v Hahnheuser</em> [2007] FCA</td>
<td>Sheep</td>
<td>Live Export</td>
<td>Member of Animal Liberation SA added ham to feed trough in order</td>
<td><em>Trade Practices Act 1974</em> (Cth) s 45 DB</td>
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<tr>
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<td>1535 (4 October 2007)</td>
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<td>to prevent the sheep meeting Halal requirements</td>
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<tr>
<td>41. Caulfield</td>
<td><em>RSPCA v Ludvigsen</em> (unreported, Magistrates Court of South Australia, Magistrate Fahey M, 7 September 2007);</td>
<td>Pigys</td>
<td>South Australia</td>
<td>Cruelty to pigs</td>
<td><em>POCTAA 1985 (SA) s 13</em></td>
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<tr>
<td></td>
<td><em>Department of Regional Government and Local Government v Emmanuel Exports Pty Ltd</em> (Unreported, Perth Magistrates Court, Magistrate Crawford, 8 February 2008)</td>
<td>Sheep</td>
<td>Live Exprt Freemantle</td>
<td>Sheep died in transit; increased risk of harm in the form of inanition (starvation) and salmonellosis</td>
<td><em>AWA1992 (AWA) s 19</em></td>
</tr>
<tr>
<td>42. Caulfield</td>
<td><em>Moore v Lewis</em> [2008] QDC 105 (9 May 2008)</td>
<td>Kitten</td>
<td>Sunshine Coast, Queensland</td>
<td>Youth violence, kicked kitten and killed it in a local park</td>
<td>One count of cruelty <em>ACPA (Qld) s 18(1)</em></td>
</tr>
<tr>
<td>43. Caulfield</td>
<td><em>Animal Welfare Authority v Keith William Simpson</em> (Unreported, Darwin Magistrates Court, Magistrate Wallace, 4 Sept 2008)</td>
<td>Goats</td>
<td>Northern Territory</td>
<td>Company transporting goats on 58 hr journey, 1,400 goats – without water, food or rest</td>
<td>Guilty 12 charges under <em>AWA (NT) ss 6 (2) (a), 13</em></td>
</tr>
<tr>
<td>44. Cao text</td>
<td><em>RSPCA v Kenneth Poulger</em> (unreported, Maroochydore Magistrates Court, Magistrate Taylor, 10 March 2006)</td>
<td>Cow</td>
<td>Queensland</td>
<td>Attempting to kill cow by striking it on the head several times with a hammer and dragging it behind his car (had refused an offer by RSPCA to euthanase the cow).</td>
<td>2 charges: animal cruelty and obstructing an inspector</td>
</tr>
<tr>
<td>Search Source</td>
<td>Case</td>
<td>Animal</td>
<td>Location</td>
<td>Issue</td>
<td>Other relevant information</td>
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<tr>
<td>46. Cao text</td>
<td>Department of Local Government and Regional Development v Gregory Keith Dawson (Unreported, Fremantle Magistrates Court, Magistrate Musk, 22 July 2008)</td>
<td>Sheep</td>
<td>Fremantle</td>
<td>Defendant filmed throwing a sheep and using an electric prodder to the face of a sheep while unloading animals onto a ship</td>
<td>Fined $2500 plus court costs and prohibited from being in charge of a sheep and cattle for one year.</td>
</tr>
<tr>
<td>47. Cao text</td>
<td>Dept of Police and Emergency Management v Glen Peter Balke (unreported, Hobart Magistrates Court, Mgt Hill, 29 May 2009)</td>
<td>Battery hens</td>
<td>Tasmania</td>
<td>Departmental inspection – live hens living in the same cages as dead and decomposing carcasses</td>
<td>s 8 (1) AWA 1993 (Tas):</td>
</tr>
<tr>
<td>48. Cao text</td>
<td>RSPCA v Kyriackou (unreported, Melbourne Mgt Court, Magistrate Smith, 26 September 2008)</td>
<td>Calves</td>
<td>Victoria</td>
<td>Hobby farmer. RSPCA inspectors found a number of animals including emaciated calves, suffering from dehydration, diarrhoea and intestinal worms</td>
<td>Convicted of 35 counts cruelty including failure to provide food, water, shelter and veterinary treatment s POCTAA (Vic) ss 9(1)(c), 9 (1) (f) 9 (1) (i). Also, 3 counts of aggravated cruelty and 5 counts of not complying with inspector’s orders POCTAA (Vic) s 24ZP</td>
</tr>
</tbody>
</table>

**Cases Excluded from Sample**

<table>
<thead>
<tr>
<th>Search source</th>
<th>Case</th>
<th>Animal</th>
<th>Location</th>
<th>Reason for exclusion from sample</th>
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<table>
<thead>
<tr>
<th>Search source</th>
<th>Case</th>
<th>Animal</th>
<th>Location</th>
<th>Reason for exclusion from sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. 02-11 LexisNexis AU</td>
<td><em>DPP v Scicluna [2010] NSW SC 1368 (29 November 2010)</em></td>
<td>Not stated</td>
<td>Bega, NSW</td>
<td>Not stated – case excluded from sample as no details on the animal cruelty offence</td>
</tr>
<tr>
<td>2. 02-11 LexisNexis AU</td>
<td><em>Di Natale v Kelly (2006) 66 NSWLR 130.</em></td>
<td>Not stated</td>
<td>Picton, NSW</td>
<td>Case excluded from sample as no details on the animal cruelty offence</td>
</tr>
<tr>
<td>3. 02-11 LexisNexis AU</td>
<td><em>Booth v Frippery Pty Ltd [2006] 2 Qd R 210</em></td>
<td>Flying foxes</td>
<td>North Queensland</td>
<td>Heard under the <em>Nature Conservation Act 1992</em> (Qld) and related to the meaning of the phrase ‘directed towards the taking’.</td>
</tr>
<tr>
<td>7. Cao text</td>
<td><em>Brayshaw v Liosatos [2001] ACTSC</em></td>
<td>Cattle</td>
<td>ACT</td>
<td>Outside 2002-11 search parameters</td>
</tr>
</tbody>
</table>


¹² Ibid.