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EDITORS' NOTE

As this Editors' Note outlines more fully below, Volume 11 of the *Macquarie Law Journal* is a themed edition that focuses on some key issues confronting the law and its intersection with non-human animals. But we begin with a special contribution by the Hon Michael Kirby, a Patron of our journal, on the outstanding legacy and influence of Professor Tony Blackshield, a Professor Emeritus of Macquarie Law School and a member of this journal's distinguished Editorial Board. Mr Kirby's paper is based on the address he delivered at the inaugural Tony Blackshield Lecture in October last year. We are very grateful to Mr Kirby for the time and effort he has invested in documenting some of the key aspects of Professor Blackshield's personal and professional life, and for reminding the legal academy and profession of the breadth of Tony Blackshield's work and its influence on the development of the law in Australia.

We are very pleased also to deliver the contributions on the theme of this edition. Human beings have been interacting with and utilising the various species of non-human animals since their *homo* genus came into being. Throughout recorded history there are scattered accounts of the efforts of philosophers and religious leaders to make sense of our place in the world relative to the other species of the animal kingdom. While some of these great thinkers espoused somewhat biocentric worldviews in which the interests and lives of animals were valued on equal terms with those of humans, such ideas certainly represented the exception rather than the rule. It was far more convenient, if not necessary, to place humans above the other animals on 'the great chain of being' during earlier times when reliance on animals for nutrition, transport and labour were fundamental to the sustainability and development of civilisations. From Aristotle to Aquinas, and through to Descartes, an anthropocentric ethic has governed the nature of our relationship with animals. Utilising animals as a means to our ends was sanctioned without qualification.

But as societies progressed economically, technologically and ethically, a greater consciousness of animal interests began to emerge. Jeremy Bentham's famous contribution in the late 18th century preceded a new era in our thinking about animals. Bentham rejected the traditional reliance on 'rationality' as a precondition for direct moral status, proposing that 'the question is not, Can they *reason*? nor, Can they *talk*? But, Can they *suffer*?'¹ The moral relevance of animal sentience was subsequently reflected in the enactment of numerous laws throughout the Western world to protect animals from cruelty. While this certainly represented an improvement on past indifference to animal suffering, anthropocentric influences still pervaded the design, implementation and application of such laws, severely limiting their intended effect. Providing one could demonstrate a 'legitimate purpose' (usually of an economic kind) for an animal being used in a particular way, such use would be legally sanctioned despite the fact that it may have caused pain and suffering to the animal.²

This traditional approach to animal welfare law and policy is now being challenged. The 'necessity' of causing animals harm is becoming increasingly difficult for animal use industries and governments to justify in the modern world amid sustained scrutiny from an expanding segment of the general population. Over the past three decades animal protection organisations have been very successful at raising awareness about the treatment of animals

¹ Jeremy Bentham, *The Principles of Morals and Legislation* [1781] (Prometheus, Amherst, 1988), 310.

² See, Peter Sankoff, 'The Welfare Paradigm: Making the World a Better Place for Animals?' in P Sankoff & S White (eds), *Animal Law in Australasia* (Federation Press, 2009).

used for the production of food and fibre, scientific research, sport and entertainment and for other instrumental purposes. Public discourse and engagement on animal welfare matters is now at an all-time high and appears to have all the hallmarks of what may be referred to as a 'social justice movement'.

Unsurprisingly, the legal fraternity has now entered the fray. Lawyers have a strong tradition of participating in social justice movements and of representing the rights of those who are unable to speak for themselves. It may therefore be seen as a fairly natural progression for lawyers to begin representing the interests of animals, and the legal academy has been leading the way. Questions relating to the legal status of animals, the determination of 'unnecessary harm', and the jurisprudential frames underpinning the legal recognition of animal interests have been vigorously pursued by legal scholars and in the process the new discipline of 'animal law' has emerged. While animal law has only started to develop in Australia within the past decade,³ its growth since that time has been exponential. The interest shown from students has been particularly intense. Today there are 13 law schools throughout the country offering courses in animal law,⁴ as well as several texts, edited collections and a bi-annual journal publication dedicated to the field.

Academic conferences also play a key role in developing new fields of scholarship. In October 2012 the Centre for Legal Governance at Macquarie Law School, in partnership with animal protection organisation RSPCA Australia, hosted a one-day conference in Sydney named *Tomorrow's Law: The Future of Animal Law*. The conference was very well attended and received, and it succeeded in bringing like-minded practitioners and researchers together to network and share ideas on how animal interests may be given greater recognition within the law.

It is against this background that we are pleased to present this issue of the *Macquarie Law Journal* on the theme 'Animals and the Law: Theory, Policy and Regulation.' In keeping with this theme, we have included contributions on animal rights philosophy, cases for animal welfare policy reform and critical analyses of relevant governance and regulatory frameworks.

We are delighted to begin the issue with an article on legal theory from a recent Macquarie Law School graduate, Tess Vickery. She takes on the ambitious challenge of delving into the complexities of Rawlsian theory to ask what it has to offer animal law. After presenting a workable contractarian model of justice for animals, Ms Vickery then contemplates its application in practice. This includes an intriguing discussion on the possibility of placing judges behind the 'veil of ignorance' when determining the question of 'necessary harm' in animal welfare cases. Her analysis is insightful and will no doubt prove to be a worthy contribution to this fundamentally important facet of animal law, and indeed animal rights theory more broadly.

The importance of establishing a theory of justice for animals is further highlighted in an analysis of animal welfare regulation by Elizabeth Ellis. Ms Ellis criticises government's tendency to relegate questions of animal welfare to the realm of morality in which the question of whether animals are made to suffer is left to individual preference. The article

³ Animal law first originated in the United States in the early 1970s: see Joyce Tischler, 'The History of Animal Law, Part 1 (1972-1987)' (2008) 1 *Stanford Journal of Animal Law and Policy* 1.

⁴ For information about the courses, visit Voiceless, 'Study Animal Law' at: <<https://www.voiceless.org.au/animal-law/study-animal-law>>

identifies a number of regulatory flaws including conflicts of interest in animal welfare standard setting and fragmented regulatory responsibility. The author attributes these flaws to an underlining conceptual incoherence: 'While recognition of sentience is supposedly the basis of animal welfare policy, in practice regulatory measures are informed by the human utility of animals and the degree of influence of those who benefit most.'

The challenges posed by moral pluralism are perhaps no better demonstrated than by Australia's current debate over the live animal export trade. As Katrina Craig's article demonstrates, the difficulties of differing attitudes to animal welfare are only exacerbated when they traverse cultural, religious and national boundaries. Ms Craig takes a holistic approach to her examination, considering not only the legal dimensions of the trade, but also the political, economic and practical matters that must be grappled with in determining future policy on the issue. Ultimately she concludes by recommending the trade be phased out and replaced with greater chilled and frozen meat exports.

Celeste Black's article also concerns the live export trade but takes a more focused line of inquiry. Ms Black assesses the impact of World Trade Organisation (WTO) rules on the Commonwealth Government's recently imposed Exporter Supply Chain Assurance System (ESCAS). Her analysis finds that concerns over possible non-compliance with WTO rules may have caused the Government to take an overly cautious approach to designing the ESCAS measures. After applying the relevant WTO rules to the ESCAS, Ms Black concludes by stating that the apparent deference given to free trade principles 'may have produced a live export licencing regime that is too weak to deliver the level of welfare outcomes that the Australian community rightly expects.' Overall, Ms Black's analysis provides a pertinent example of how considered legal analysis may serve to combat the regulatory 'chilling effect' caused by unsubstantiated fears of noncompliance with free trade laws.

The article by George Kailis takes us on a completely different regulatory trajectory in fisheries management. Professor Kailis tracks developments in fisheries management legislation between 1989 and 2007. He considers the impact such legislation has had on the common law public right to fish as interpreted by key High Court decisions. While not strictly an animal law analysis in the traditional sense, Professor Kailis' article does include an intriguing exploration of the difficulties faced by governments in attempting to assert property in free-swimming fish. The discussion serves to highlight the sometimes awkward and perhaps counterintuitive application of legal constructs of property to animals.

The final contribution to the issue consists of Patrick Leader-Elliott's critique of the Victorian Government's recently introduced offence of 'causing death by dangerous dog' under the *Crimes Act 1958* (Vic). He expresses concern over the drafting and scope of the offence. On the one hand, he believes the offence is too broad, in that it does not include an element of subjective fault. On the other hand, he argues the offence is also too narrow, in that it restricts liability to owners of dogs that are considered to be 'dangerous', 'menacing', or of a 'restricted breed.' While Mr Leader-Elliott does not intend to comment on the 'wisdom of enacting breed specific legislation', his subsequent critique of the 'restricted breed' precondition to liability will no doubt resonate with lawyers currently participating in this debate:

If the central question is one of adequacy of control and the prospects of death being caused, the breed of dog ... ought not matter, at least as a precondition to the imposition of liability. It is an artificial constraint on a legislative instrument directed at preventing deaths caused by a failure of dog owners to control their dogs.

Mr Leader-Elliott then highlights the flawed logic behind such an approach by drawing an analogy with restricting liability for ‘dangerous driving causing death’ to drivers of V8 vehicles and 500cc motorcycles.

We are pleased to conclude the issue with a book review by Professor Erika Techera, who introduces us to the seminal publication *Law and the Question of the Animal: A Critical Jurisprudence*. Published earlier this year by Routledge, it is the first volume dedicated solely to animal law jurisprudence and, as such, is sure to have a significant impact on the field.

The diversity of contributions presented in this edition of the *Macquarie Law Journal* serves to illustrate the wide range of issues covered by the burgeoning field of animal law. We believe these articles will provide a valuable contribution to the existing body of animal law scholarship in Australia. We would like to express our sincerest gratitude for the contributions of the authors, peer reviewers and student editors in helping to realise this objective.

Ilija Vickovich
Jed Goodfellow*

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EMERITUS PROFESSOR TONY BLACKSHIELD

A R BLACKSHIELD AND REALISM IN AUSTRALIAN CONSTITUTIONAL LAW

THE HON MICHAEL KIRBY AC CMG*

(Inaugural Tony Blackshield Lecture delivered on the occasion of the 40th
Anniversary of the Macquarie Law School, Macquarie University, 19 October 2012)

A R Blackshield taught many lawyers who later advanced to important positions in the judiciary, legal profession and academy. In this inaugural lecture honouring his scholarship and teaching, the author outlines Blackshield's life and explains the substantial and ongoing impact of his thinking. He was influenced by the perspectives of Professor Julius Stone. In a time of high formalism and legal positivism, Stone taught and wrote about the leeways for choice that judges enjoyed, particularly in high appellate courts. Blackshield extended and developed Stone's theses in a number of Australian universities. At first he utilised jurimetrics to illustrate his propositions. Later, he reverted to more traditional exposition. To this task Blackshield brought skills in public exposition as a prolific legal commentator. He also displayed unique talents in teaching generations of students the realities of constitutional law. His devotion to his students became legendary. He even composed and sang songs containing sharp commentary dedicated to leading decisions of the High Court of Australia. By teaching that lawyers should be quizzical, speculative, insightful and, where necessary, critical of constitutional decisions, Blackshield altered the conventional paradigm by which constitutional law had been taught in Australia. The author offers an affectionate early assessment.

I IN THE BEGINNING

As befits a pupil, I honour a teacher who helped to ready me for a life in the law. He helped me to see law, especially public and constitutional law, in its governmental and political context. He was one of the early professors of law at the Macquarie Law School. But before that, in his first years of undergraduate teaching at the University of Sydney Law School, he taught a class that included Murray Gleeson, David Hodgson, Graham Hill, Jane Mathews, Brian Tamberlin, me and others.

* Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-96); Judge of the Federal Court of Australia (1983-84); Chairman of the Australian Law Reform Commission (1975-84); Chancellor of Macquarie University (1983-92). The author acknowledges the comments of an anonymous reviewer which have been reflected in the text.

In Professor Blackshield's hands were placed two future Justices of the High Court of Australia, judges of the New South Wales Court of Appeal and of the Federal Court and other Federal and State courts, two future professors of law, leading businessmen, politicians and legal practitioners.¹ Great is the responsibility of the teachers who introduce untutored law students to the concepts of law that will dominate their lives, so important for their society. Great is the debt that we, the students, owe to our teachers, including Tony Blackshield.

Anthony Roland Blackshield was born on 25 February 1937 in Wagga Wagga, New South Wales. He was the son of Charles and Constance Blackshield. They were teachers for the New South Wales Department of Education, committed to the three great principles of public education that had been embraced in Australia, continent-wide, in the 1880s: it should be free, compulsory and secular.² Charles Blackshield taught in primary schools. His duties took him, his wife and family to school postings in Molong and Bathurst, and then to Nimbin, New South Wales where he was first appointed as headmaster. Later he was headmaster at Abermain, Cabramatta, Auburn North, Neutral Bay and Manly. When, thinking I had caught Professor Blackshield in a rare slip of gender incorrectness in acknowledging only his father's name in *Who's Who in Australia* (a fault not uncommon in earlier days), he pointed out that each of his parents had the initial C. For him, designating that initial referred to each of them, equally. Inferentially, he was already conscious of the word count.

What a different country Australia was at the time of Tony Blackshield's birth. The Governor-General was, once again, a member of the English nobility. General the Right Hon Alexander Gore Hore-Ruthven, Baron Gowrie, had assumed office in 1936, replacing the first Australian-born Governor-General, Sir Isaac Isaacs. Lord Gowrie had previously served for a time as Governor of New South Wales. Upon his elevation to Governor-General, he was replaced in the latter office by Captain the Right Hon John Loder, Baron Wakehurst. The best-selling law book at the time of Tony Blackshield's birth, written by the scholarly Justice of the High Court Herbert Vere Evatt, was *The King and His Dominion Governors*.³ The reserve powers of the Crown were thought to be in safe hands when they rested with friends of the King. The monarch, King George V, as King-Emperor, had just celebrated with Queen Mary his Silver Jubilee. The Australian Prime Minister of the day was Joseph Aloysius Lyons, originally a member of the Australian Labor Party (ALP), but by then leading the Nationalists after a close fought federal election in October 1937. The Chief Justice of the High Court of Australia was Sir John Latham, formerly Lyons' able and loyal deputy. He had been elevated to the post of Chief Justice, with gratitude for his loyalty, in 1935. Australia's vulnerability in a world of German and Japanese militarism was at last acknowledged in 1937 by the inauguration of the post of Australian Counsellor at the British Embassy in Washington. Latham was soon to be called back from the High Court to a diplomatic mission to Japan, aimed at avoiding war. It was to prove fruitless. Latham's distinguished colleague, Mr Justice Owen Dixon, was in April 1942 to take up the post of Minister to Washington, at the time of Australia's greatest existential peril.

¹ See M.D. Kirby, 'The Graduating Class of Sydney Law School 1962 – Talented, Lucky, Unquestioning' (2012) 36 *Australian Bar Review*, 189.

² Introduced in New South Wales by the *Public Instruction Act* of 1880 (Act 43, Vic. No. 23) (NSW). There was an earlier *Public Schools Act* of 1867, repealed and replaced in 1880. Similar moves happened throughout the Australian colonies.

³ Herbert V Evatt, *The King and His Dominion Governors* (1936), reprinted Frank Cass & Co, London, 2nd ed, 1967.

Tony Blackshield grew up, as I did, during the period of wartime and post-war austerity in Australia. Repeatedly, he was dux of the regional public schools that he attended. This would have assured his entry in 1949 to Maitland Boys' High School, a selective school, but in any event Charles Blackshield was by that time headmaster at Abermain and the family was living in Maitland. At high school too Tony Blackshield emerged as the top student of his year. In his graduating class he was one of five future professors. He matriculated to the University of Sydney, then offering the only undergraduate law course in New South Wales. He enrolled for the five year course which could be performed part-time concurrently with articles of clerkship. He undertook articles in a small legal firm with offices in Martin Place, Sydney. His principal solicitor was C Don Service. Like other law students of his day, Tony Blackshield took his lectures in Phillip Street, Sydney, rushing to and from them to fulfil the urgent demands of his master solicitor.⁴

Tony Blackshield completed his Bachelor of Laws degree in 1959. The pass degree was conferred on him in 1960 by the ancient Chancellor of the University of Sydney, Sir Charles Bickerton-Blackburn. By the year of his graduation, Australia was half-way through 23 years of Coalition federal government. There had been an almost equal interval of Labor Government in New South Wales. Australia was a land increasingly open to non-British, European migration, witnessing rising prosperity. However, it was socially homogenous, unquestioning and afflicted by serious discrimination against women and minorities.⁵ Like his parents, Tony Blackshield foresaw a future for himself as a teacher. It was at this point that he became the beneficiary of the well-judged support of one of his own law teachers, the remarkable and influential Professor Julius Stone.

II STONE'S JURISPRUDENCE

Julius Stone had come to the Sydney Law School in 1942 from Oxford via Auckland. In Sydney he was appointed Challis Professor of Jurisprudence and International Law. It was Blackshield's good fortune that he caught the eye of Stone, ever on the lookout for talented undergraduates to act as research officers to help him with his steady flow of legal writings on the subjects of his specialty. Tony Blackshield's undergraduate course had not been as distinguished as his school results had promised. But this mattered not to Stone, who saw in the gangling youth a sharp native intellect and a talent for original thinking that was not universal amongst law students of that time. This was especially unusual in the era of positivist legal formalism, advocated by Sir Owen Dixon, by now in his last years of service as Chief Justice of the High Court of Australia. It was on his swearing in to that office in 1952 that Dixon had declared, famously:

... [C]lose adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.⁶

Stone's own thinking had been influenced by great legal scholars in the United States, including Roscoe Pound and other realists who taught that this superficially attractive Dixonian instruction tended to disguise the real characteristics of the judicial method. For

⁴ See Kirby, above n 1, 192.

⁵ Ibid 200.

⁶ 'Swearing in of Sir Owen Dixon as Chief Justice', (1952) 85 CLR xi, xiv. See also M D Kirby, *The Judges* (Boyer Lectures, 1983) Sydney, ABC.

Stone, judges inescapably faced ‘leeways for choice’ in the ambiguities of constitutional and statutory language and in the process of analogous reasoning from past common law precedents, decided upon necessarily different facts.⁷ The young Blackshield was fascinated by Stone’s theory, so central to the idea of what the leading actors in the legal drama — the judges — actually did. Perhaps his upbringing in modest circumstances, in public schools and in regional and rural Australia, made him more open to Stone’s instruction than most of his fellow law students of the time, deriving from wealthy parents and private school education, more willing to accept unquestioningly the orthodox mythology.

Stone’s teaching was mildly shocking for many lawyers of the middle 1960s. This was so because of the great respect in which Dixon was held both nationally and internationally. In Blackshield, Stone had found a researcher who was not reluctant to scrutinise the orthodoxy and to subject it to critical, and sometimes sharp, analysis.

So it was that Tony Blackshield was recruited by Julius Stone as a part-time research assistant. In this way his career as a legal academic began. He worked in the tiny set of offices on the third level of University Chambers in Phillip Street, Sydney where Stone, ever surrounded by the aroma and smoke of his pipe, was protected from too many student intrusions by his executive assistant, Ms Zena Sachs. For Australians in an age of monochrome racial and social uniformity, the Department of Jurisprudence and International Law at the Sydney Law School was exotic. Other teachers inhabiting the confined space were Ilmar Tammelo, then a reader in law, and Charles Alexandrowicz, competing with a young Upendra Baxi and Stone’s burgeoning library for a space to sit. There was a constant stream of international visitors, including Ivanhoe Tebaldeschi and Giovanni Tarello from Italy, and Gyan Sharma from India. It was into this special environment that Tony Blackshield entered with his characteristic excited vigour and optimism.

His timing could not have been better. Stone was in constant demand to give lectures and to accept visiting overseas professorships, particularly in the United States of America. His absences from the Sydney Law School created opportunities for the young Tony Blackshield to act as tutor and then as junior lecturer for the bright-eyed undergraduates. Moreover, it opened the door to a more active role in an organisation that Stone had embraced to promote local debates about legal philosophy. The organisation was the *Internationale Vereinigung für Rechts und Sozialphilosophie* (IVR). This was a German-based organisation whose journal, or *Archiv*, was founded in 1907. To breathe life into the organisation, a local branch had been established called the Australian Society for Legal Philosophy (ASLP). The ASLP is still active and I recently participated in their conference at the Melbourne Law School. Coincidentally, it was presided over by Stone’s grand-daughter, Professor Adrienne Stone.⁸ Meetings of the ASLP were held in the North Shore homes of Julius Stone and Ilmar Tammelo. Blackshield and I attended. He always seemed to understand and enjoy the abstruse philosophical exchanges. Prudent silence was my mask when I felt out of my depth, as I did most of the time.

⁷ The theory of ‘leeways for choice’ was repeatedly propounded by Stone, influenced by Professor Karl Llewellyn: Julius Stone, *Social Dimensions of Law and Justice* (Maitland, Sydney, 1966) 648-649.

⁸ M D Kirby and J Allan, ‘A Public Conversation on Constitutionalism and the Judiciary between Professor James Allan and the Hon Michael Kirby’ (2009) 33 *Melbourne University Law Review*, 1032.

In 1963 an issue of the *Archiv* was devoted to contributions by members of the ASLP. On this occasion I shared the privilege with Stone, Blackshield, Geoffrey Sawer, David Derham and others. Blackshield's article addressed 'Some approaches and barriers to the definition of law'.⁹ My own contribution was on 'Dialectics and Law'.¹⁰ It was the first essay of mine in a law journal. For both Blackshield and me, many were to follow.¹¹

My topic of dialectics grew out of research I had performed for Stone in conjunction with his decision to update his masterpiece *The Province and Function of Law*.¹² He elected to do this in three 'successor volumes'. The first, published in 1964, was titled *Legal System and Lawyers' Reasonings*. This isolated and examined Stone's thought about the legal and judicial system and the materials and techniques that lawyers and judges use to perform their daily work. In Stone's acknowledgements, he singled out 'Mr Anthony Blackshield, LLB', designated his 'Senior Research Assistant'. He thanked him, first for his research work over the previous three years and then for making 'many helpful criticisms and suggestions'. He went on to say:

During this time Mr Blackshield moved from his noviciate into authorship of able independent papers arising from this research, published on his own account, which have already been of service in the present project. It is gratifying that training in the course of the present work should have contributed to a scholarly endowment which promises him a notable place in the oncoming generation of jurisprudential thinkers.¹³

The second volume in the series was *Human Law and Human Justice*.¹⁴ This explored the legal, social and economic contexts from which the ideals of human justice had developed. Stone dedicated the work to his graduate assistant Zena Sachs, herself a law graduate. He acknowledged Blackshield again in the first paragraph.¹⁵ Specifically, he declared that he had 'provided provocative and fruitful suggestions and materials for the sections on the medieval transmissions of notions of justice ... and for a number of [other] sections ... where he read and criticised the rest of the [manuscript]'.¹⁶

Finally, in October 1965 came the largest volume in the successor series, *Social Dimensions of Law and Justice*.¹⁷ Once again he thanked Blackshield, by now a 'Lecturer in my Department' for his 'admirably penetrating criticisms and suggestions'.¹⁸ Stone also made reference to my own research assistance on his treatment of law in the Soviet Union. I had 'gathered and organised much material for the first draft of Chapter 10 on Soviet-Marxist views about the withering away of the State'. He went on: 'Though he will probably not agree with the themes and conclusions which there emerged, the clash of ideas with him during writing was an invaluable prod'. These were modest thanks for countless hours spent reading tedious English language translations afforded to me by Ilmar Tammelo, containing speeches to the Soviet assemblies by Stalin, Malenkov, Bulgarin and Khrushchev. To me, some of these Soviet politicians appeared to be as uncertain of their bearings in legal

⁹ A R Blackshield (1963) 39 *Archiv für Rechts und Sozialphilosophie*, 35.

¹⁰ *Ibid* 91.

¹¹ Russell Smyth, 'Who Publishes in Australian Law Journals' (2012) 35 *University of New South Wales Law Journal*, 201.

¹² Julius Stone, *The Province and Function of Law*, Maitland Publications, Sydney 1946.

¹³ Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland, Sydney, 1964), vii.

¹⁴ Julius Stone, *Human Law and Human Justice*, Maitland, Sydney, January 1965.

¹⁵ *Ibid* vii.

¹⁶ *Ibid*.

¹⁷ Julius Stone, *Social Dimensions of Law and Justice*, Maitland, Sydney, 1966.

¹⁸ *Ibid* vii.

philosophy as I had been at the ASLP meetings. However, they lacked the prudence, or possibility, of silence. Shortly, I was to turn my ordeal to advantage, selecting the Marxist theory of the withering away of the state under communism as the research topic for my LLM research thesis. None of us had the foresight then to realise that the Soviet state would indeed wither away, but not in the manner that Stalin and his comrades had predicted.

To secure my master's degree in Law, in the newly introduced course work, I also undertook two subjects taught by Tony Blackshield and Don Harding. One of these took me into a subject that, I was to discover, was very close to Blackshield's heart. This was an empirical/analytical approach to judicial decision making, utilising a measurement technique known as scalograms. It was a methodology developed in a new branch of jurisprudence called 'jurimetrics'. It had first been postulated in the United States by Lee Loewinger in the 1940s. It became more popular in the 1960s when it spread to Australia, in part as a result of writings by the American scholar Glendon Schubert.¹⁹

Schubert turned his mathematical and analytical skills to an analysis of judicial decision making in the High Court of Australia.²⁰ His work was picked up in Australia by Tony Blackshield²¹ and Alan Tyree.²²

Needless to say, the application of jurimetrics to the decision making of the Justices of the High Court of Australia was not popular in many quarters. It was condemned as focusing primarily on outcomes and not on reasoning, and of addressing the courts' orders rather than the doctrine and learned discourse that had preceded the dispositions and resulted in those orders. Obviously, the doctrine and the reasoning were very important to the judges and the legal community. But from the point of view of the litigants (and quite frequently the community, the media and the governmental process) the orders constituted the most important product of the process. The judicial reasons were sometimes extremely long and occasionally impenetrable. The orders were typically short and, for the winner, sweet.

Moreover, the patterns that this form of analysis demonstrated, in the recurring outcomes of judicial reasoning, tended to lend weight to the propositions expressed, in general terms, by the modified realist schools of jurisprudence embraced by Roscoe Pound and Julius Stone. Whatever the doctrinal differences, they tended to demonstrate that judges had fairly consistent patterns of decision making. In effect, jurimetrics provided sustenance, and a measure of quantification and predictability, for common room gossip: that some judges were overall liberal and others legally conservative; that some tended to favour the tax commissioner and others the taxpayer; that some were hostile to plaintiffs and others were usually sympathetic to them; that some tended to favour the Crown and others the accused or citizen in a conflict between the state and the individual. To those lawyers who believed, and

¹⁹ Glendon Schubert, *The Judicial Mind*, 1965. This followed earlier studies by Fred Kort, 'Predicting Supreme Court Decisions Mathematically', (1957) 51 *American Political Science Review* 1; Fred Kort, 'Simultaneous Equations and Boolean Algebra in the Analysis of Judicial Decisions', (1963) 28 *Law and Contemporary Problems* 143.

²⁰ Glendon Schubert, 'Judicial Attitudes and Policy-Making in the Dixon Court' (1969) 7 *Osgoode Hall Law Journal*, 1; Glendon Schubert, 'Political Ideology on the High Court' (1968), 3 *Politics* 21. See also Tony Blackshield, 'Jurimetrics' in Tony Blackshield, Michael Coper and George Williams, *The Oxford Companion to the High Court of Australia*, OUP, Melbourne, 2001, 381.

²¹ A R Blackshield, 'Quantitative Analysis: The High Court of Australia, 1964-1969' (1972) 3 *Lawasia* 1.

²² Alan Tyree, 'The Geometry of Case Law' (1977) 4 *Victoria University of Wellington Law Review* 403; Alan Tyree, 'Fact Content Analysis of Case Law: Methods and Limitations' (1981), 22 *Jurimetrics Journal* 1.

taught, that judicial reasoning was preordained by the application of pure logic and ‘high technique’ to legal texts and past decisions, the scalogram represented, potentially, a most troublesome challenge.

It was for this reason that Blackshield’s lectures, for both the LLM course and the undergraduate classes during Stone’s absences, greatly attracted a cohort of students, ever on the lookout for excessive professional self-satisfaction and self-deception. My brothers, who followed shortly behind me at the Sydney Law School, have reminded me of Blackshield’s particular strength as a lecturer. He used few notes, yet spoke with much detail. He was engaging, a good storyteller, respectful of the judiciary, but mildly iconoclastic. In the sombre world of Dixonian legalism, this was like a daily splash of ice cold water thrown into the face of the orthodox.

For most of his professional career, Blackshield has continued to be so engaged. It did not take him long to drop the scalogram analysis. There was more professional future in analysing and criticising judicial reasoning according to its own terms. But the basic approach he was to take as a scholar of constitutional and public law was born of his relationship with Stone, nurtured in the crucible of jurimetrics, stimulated by scalograms and weaned in his ensuing early years of law teaching.

III EARLY CAREER

Blackshield’s appointment as a lecturer in law at the University of Sydney exposed him to many bright students. But also to some of the tensions that existed between the common law scholars of distinction in the law school and the large cohort of foreigners in Stone’s milieu, amongst whom Blackshield stood out mostly because of his Australianness.

In 1964, Blackshield was appointed as a Visiting Associate Professor at the University of Virginia in the United States. In 1965, he began a long association with India as an associate of the Indian Law Institute in New Delhi. In 1969, in recognition of his heavy teaching load, he was promoted to senior lecturer in law.

At about the same time, he joined the Australian Reform Movement which later grew into the Australia Party and subsequently into the Australian Democrats. This unusual move showed distaste on his part for each of the major political groupings in Australia and a desire for the political (and perhaps legal) middle ground. In 1962, the University of New South Wales (earlier named the University of Technology) began planning for a second law school in Sydney. The planning took some time before the University Council appointed a barrister, Mr J H Wootten QC, as the Foundation Professor and Dean of the Faculty of Law in October 1969.²³ This was an unusual appointment by that time, coming as it did from outside the ranks of academe. It was to prove highly influential and beneficial. Wootten himself confessed that ‘the only thing I knew about legal education was how bad my own was’.²⁴ By inference, this was a reference to his legal education provided at the University of Sydney. It comprised, to that time, mostly very large classes, a large cohort of part-time practitioner lecturers; virtually an entirely compulsory (no options) curriculum, and little social life for the students. Most of the students were preoccupied with their work-time duties as articulated clerks. Legal studies took a second place.

²³ M. Dixon, *Thirty Up: The Story of the UNSW Law School 1971-2001*, UNSW, 2001, 2.

²⁴ *Ibid.*

Hal Wootten has described the process that led to Blackshield's selection as one of the 'magnificent seven'²⁵ who made up the initial staff of the new University of New South Wales (UNSW) Law School:

As foundation Dean, my primary criterion for selecting the initial staff was that they should have the capacity to enthuse students for their legal studies. The powers that were in Sydney strongly recommended that I recruit two of their existing staff. One I knew to have problems with alcohol. The other, although expert in his subject, was known as perhaps the most boring exponent ever. I accordingly sought advice elsewhere – from students at Sydney Law School. The unanimous opinion conveyed to me was that the two most interesting lecturers were Garth Nettheim and Tony Blackshield. They became members of the staff for UNSW's first year of operation.²⁶

Blackshield served on the Faculty of Law of UNSW from 1971 to 1978. Initially he retained the rank of senior lecturer. Wootten was told he was 'brilliant and thoroughly personable' and 'a gem'.²⁷ So he moved. He had hoped to teach both jurisprudence and constitutional law. However, this had not proved possible at the University of Sydney because constitutional law was allocated to the Department of Common Law, while Jurisprudence belonged to Stone's Department. Because Stone himself would be obliged to retire in two years' time, Blackshield made his move. So did Nettheim, who was appointed a Professor of Law. The other professor was Professor Curt Garbesi, a gifted teacher of law. Richard Chisholm (later Professor and subsequently a Judge of the Family Court of Australia), Robert Hayes (later Associate Professor and an early Commissioner of the Australian Law Reform Commission), Michael Coper (later Professor and long time Dean of Law at the ANU) and Blackshield became the teachers. They had heavy workloads, operating out of initially primitive environments centred around the law library in 'Hut C'. It was a creative time in Blackshield's professional life. A law school that depended on questioning and understanding, small group tutorials and full-time academic staff had emerged to challenge the rote learning big class tradition of Sydney University. It was to become a healthy competition between the institutions.

It was at this time that Blackshield increased his engagement with the Australia Party. This took him to protests about such issues as the treatment of Aboriginals in Australia, the position of women, censorship and general police hostility to civil liberties. I know these things because, coinciding with Blackshield's engagement with the Australia Party, I was serving as a busy member of the committee of the New South Wales Council for Civil Liberties.²⁸ These were activities that were to bring both of us into contact with the realities of law in the streets. In my case this included Aboriginal advancement in Walgett, civic protests against the Vietnam War and compulsory military service, and activities to terminate White Australia and to uphold the rights of peaceful demonstration of alternative viewpoints.

Blackshield's activities brought him into contact with a young UNSW student, Wendy Bacon, later herself to be an academic. She had published the third issue of a mock edition of the student newspaper, which she called *Thorunka*. This contained material deemed obscene by New South Wales police. Following a jury trial that led to her conviction, Blackshield turned up outside the court to sell copies of the magazine on the morning she was due to be sentenced. Although he did not see any literary worth in the content of *Thorunka*, he

²⁵ An expression used by French CJ in his address at the dinner of the UNSW Law School 40th Anniversary, 2012.

²⁶ Letter from Hal Wootten to the author, October 2012.

²⁷ Dixon, above n 23, 8.

²⁸ A J Brown, *Michael Kirby: Paradoxes and Principles*, The Federation Press, Sydney, 2011, 69-70, 166-175.

condemned the prosecution. While he was waiting outside the court, a passerby thrust into his hand a publication condemning the trial judge (Judge David Hicks). Blackshield put this paper under his arm. He was subsequently arrested both for selling the condemned issue of *Thorunka* and for distributing an obscene attack on the Judge. His arrest caused something of a sensation at UNSW. Certainly, nothing like it had happened to any known lecturer at the University of Sydney Law School. The situation was complicated still further because, while awaiting the outcome of Ms Bacon's sentencing hearing, three media releases were prepared in Blackshield's name. One, highly critical of Judge Hicks, was only intended to be released if the sentence turned out to be unfair — which it was not. In the result, the wrong release was issued. Blackshield faced the possibility of yet another charge, then much more common than now, of contempt of court. In the end, taking Dean Wootten's advice, Blackshield wrote a personal letter of explanation and apology to the Judge. Wisely, Judge Hicks decided that no action should be taken on that score. But that left the two original charges outstanding.²⁹

The police charges against Blackshield for publishing obscene matter were defended by a young barrister, Mary Gaudron, later to be a Judge, Solicitor-General and Justice of the High Court of Australia. She drafted a letter that was sent by Blackshield's lawyer to the New South Wales Attorney-General suggesting that he should file a *nolle prosequi* in respect of the charges. This was agreed to in relation to the pamphlet. However, the charge arising from the sale of *Thorunka* stood. After the relevant law was amended, Mary Gaudron proposed a further letter to the new Attorney-General. This resulted in the dropping of the second charge. In the result, the young academic emerged from his travails with authority and without the blemish of a criminal conviction.³⁰

Years later, Hal Wootten commented that those familiar with Blackshield's later day *gravitas* would be astonished by his youthful engagements and his 'much more controversial character' in those days.³¹ No doubt these experiences, in the new environment of UNSW Law School, sharpened Blackshield's interest in law as an instrument of social policy and, occasionally, of oppression. It added to the fund of anecdotes that always brightened his lectures and public comments. His engagement with politics diminished after the election of the Whitlam Government in December 1972. He then had a great wave of law reform to consider. Subsequent changes in the personnel and decisions of the High Court of Australia made his analysis of its decisions more exciting and purposeful.³²

²⁹ A R Blackshield, 'The Wendy Bacon Case', unpublished address to the Australia Party Tuesday Club, 15 February 1970.

³⁰ Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story*, UWA Publishing, 2010, 87-88; Dorothy Campbell and Scott Campbell, *The Liberating of Lady Chatterley and Other True Stories*, NSW Council for Civil Liberties, 2007, 32-33.

³¹ 'Recollections of 1971-3', Note from Hal Wootten to Hon Michael Kirby.

³² Blackshield published several works on the ordeal of Justice Lionel Murphy: A R Blackshield, David Brown, Michael Coper and Richard Krever (eds), *The Judgments of Justice Lionel Murphy*, Primavera Press, 1986; David Brown and A R Blackshield, 'The Murphy Affair' in Jocelynn A Scutt (ed), *Lionel Murphy: A Radical Judge*, McCulloch Publishing, 1987, 230; A.R. Blackshield, 'Lionel Murphy and Judicial Method' in Michael Coper and George Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* The Federation Press, 1997), 224; A.R. Blackshield, 'Lionel Murphy: Return to the Court' (1986) 76 *Arena*, 28.

IV PROFESSOR AT LAST

In 1979, Blackshield took a career move sideways, accepting an appointment as Professor in the Department of Legal Studies within the School of Social Sciences at the new La Trobe University in Melbourne. Although Law at UNSW had injected a social values component, it was still bound by the professional curriculum to follow instruction in law in the books. La Trobe University involved teaching legal studies to non-lawyers. It therefore obliged Blackshield to stand outside the discipline he had made his own and to view law, uniformly, from a new and different perspective.

There was some speculation at UNSW as to why he would make this move. In 1971 he had seen his colleague Garth Nettheim promoted to Professor but, by 1978, the same rank had not come to him, although in 1974 he was appointed Associate Professor. La Trobe offered him professorial appointment. But it also provided an opportunity to study and teach the law from new viewpoints. One of these was a matter he had recognised as having increasing importance for the Australian community, namely the long neglected relationship of the law to the indigenous communities. He also began to pay increasing attention to the processes of legal change and the institutional mechanisms for law reform that had been established during the short Whitlam Government.³³ He began to write extensively on the High Court of Australia as a governmental institution.³⁴ He was a strong proponent of the termination of Privy Council appeals.³⁵ He helped to edit the *Festschrift* for Julius Stone, to which I also contributed.³⁶ He pursued his long interest in the meaning of justice and the role of values and morality in the law.³⁷ He took up his pen to write many letters to the editor and newspaper columns. In short, he became a public intellectual, commenting seriously, but critically, on the law and its institutions and personalities.³⁸ Consistently with his interests, he took as his theme 'The Revolt against Legal Formalism' for his inaugural lecture at La Trobe University.³⁹

In 1988 Blackshield accepted an appointment to return to Sydney as one of the early Professors of Law at Macquarie University. He was immediately popular with his students. He was also specially valued by his colleagues because of strong divisions that had emerged in the school which (to simplify things) divided traditionalists and formalists, on the one hand, from legal realists and advocates of critical legal studies, on the other. His already established reputation as a fine constitutional lawyer stood him in good stead with the former group. His track record as an 'intrepid intellectual whose public comment on current issues is clear, critical and authoritative'⁴⁰ endeared him to the latter.

³³ A R Blackshield, 'Law Reform' in Hugh Emy, Owen Hughes and Race Mathews (eds) *Whitlam Revisited: Policy Development, Policies and Outcomes*, Pluto Press 1993, 97.

³⁴ A R Blackshield, 'The High Court: Change and Decay (1980)' 5 *Legal Services Bulletin*, 107.

³⁵ A R Blackshield, 'The Last of England: Farewell to Their Lordships Forever', *Law Institute Journal (Vic)*, October 1982, 779.

³⁶ A R Blackshield (ed), *Legal Change: Essays in Honour of Julius Stone*, Butterworths, 1983.

³⁷ A R Blackshield 'The Hart-Devlin Controversy in 1965', (1967) 5 *Sydney Law Review*, 441 (A review of Patrick Devlin, *The Enforcement of Morals*, (1965) and H L A Hart, *The Morality of the Criminal Law*, Magnes Press, 1965.

³⁸ A R Blackshield, 'Barwick – Great and Vague Powers', *Australian Book Review* (No 21, June 1980), 1, 3-5 (a review of David Marr, *Barwick* (1980); 'A Pugnacious Competent': A Review of Sir Garfield Barwick, *A Radical Tory: Reflections and Recollections* (1995)' in *The Weekend Australian*, 15 July 1977, 7.

³⁹ La Trobe University, 1979.

⁴⁰ 'Flashback: Emeritus Professor Tony Blackshield', *Macquarie University Law School Alumni Book*, 2000, 150. See also Rosalind F Croucher and Jennifer K Shedden (eds), *Retro 30: Thirty Years of Macquarie Law*, Macquarie University, 2005, 150-51.

One of his early pupils at Macquarie Law School was George Williams (class of 1992), later a professor at UNSW. He recounted the fact that Blackshield was ‘the only teacher I ever had who would regularly give students over 100 pages of reading per two hour class ... He found even the constraint of 100 or more pages too difficult and would divide the pages into two columns with a very small font’. For all that, the classes were ‘greatly enjoyed’. Essays would be returned ‘with a mountain of red ink all over them’. ‘He was the only teacher who would mark papers at a greater length than the papers themselves’. This habit led to suggestions that he too needed a word limit.⁴¹ Williams assessed Blackshield’s impact as producing amongst his students ‘a passion for constitutional law and for reform of that system.’⁴² Williams saw Blackshield’s greatest strength as a teacher his ability to move effortlessly from theory to detailed case analysis, adding amusing anecdotes all the time.

Other students at Macquarie University praised his way of making constitutional law ‘come alive, taking its place amidst the vortex of politics and history’.⁴³ He became known as ‘the singing professor’. This *sobriquet* was earned by an outstandingly popular series of anniversary law dinners, which he inaugurated, that were illuminated by a song chosen by, and with words penned by, Blackshield himself. Because I was elected to serve as Chancellor of Macquarie University during the 1980s, it was my privilege to attend many such dinners. I recall that the former Chancellor of Macquarie University, and High Court Chief Justice, Sir Garfield Barwick, also attended at least one of these dinners. Barwick appeared to enjoy greatly the *Engineers Case Song*, mainly (I suspect) because he was always a passionate advocate for the principle established in that case.⁴⁴ It was a principle that greatly favoured the expansion of the legislative powers of the Federal Parliament at the cost of the States.⁴⁵

Blackshield’s years of service at Macquarie Law School were not without moments of pain. The disputes between the individuals and factions in the school were often highly personal and sometimes unpleasant. In his book on the early history of Macquarie University, Professor Bruce Mansfield and Mr Mark Hutchinson described the point which had been reached soon after Blackshield’s arrival:

Agitation in the School arrived after a more settled and constructive period under the calming leadership of A R Blackshield as Acting Head. The School passed a vote of no confidence in [Professor Dennis] Ong, and the staff association objected to his reinstatement. There appeared the childish manifestations, offensive hand bills and posters that had accompanied the earlier troubles in the School. The daily press was generally hostile to the University administration and reflected the views of the more alienated members of the traditional group, Ong’s supporters. A one-sided treatment turned, in the hands of some columnists and education journalists, into a campaign, at time personal and malicious.⁴⁶

The University Council and leadership laboured long and hard over the divisions. Ultimately, Professor Ong gave up and resigned as Head of School. According to Mansfield and Hutchinson:

⁴¹ George Williams, ‘George Williams Remembers Tony Blackshield’, in Rosalind F Croucher and Jennifer K Shedden (eds), *Retro 30: Thirty Years of Macquarie Law*, Macquarie University, 2005, 149.

⁴² Ibid.

⁴³ Margaret R Kelly, quoted in ‘Flashback: Emeritus Professor Tony Blackshield’, in Rosalind F Croucher and Jennifer K Shedden, above n 40, 151.

⁴⁴ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case)*, (1920) 28 CLR 129.

⁴⁵ Barwick CJ referred to this in his farewell remarks as Chief Justice: (1981) 148 CLR v, at ix-x.

⁴⁶ Bruce Mansfield and Mark Hutchinson, *Liberality of Opportunity: A History of Macquarie University 1964-1989*, Macquarie Uni/Hale & Iremonger, Sydney, 1992, 310.

In his first period as Acting Head (January-July 1989), Tony Blackshield had put forward a 'positively Herculean effort' to restore normal functioning and consultative processes and to move the School away from past obsessions, in the faith that in time the School's reputation would be restored in the legal fraternity'. The final 'Response' to the Pearce Report [on the future of the School], written by Blackshield and [Vice-Chancellor Di] Yerbury and submitted during that period (May 1999) had a strongly positive tone. It properly castigated the 'false dichotomy' between the traditional and the critical and contended, somewhat optimistically, that the difference and even the opposed understandings of 'law in context' at Macquarie, were 'integrated into an overall curriculum plan' in a systematic way.⁴⁷

A calmer period followed. The singing professor contributed to the slow process of healing with his enthusiastic and eclectic personality. He illustrated the role that generous personalities can play, by their actions and behaviour, in promoting inclusiveness in legal institutions. Such institutions are often divided by strongly held opinions, traceable to deep differences about the idea of law and its place in society.

It was during the Macquarie years that Blackshield turned his attention to the writing (with George Williams) of his important text *Australian Constitutional Law and Theory: Commentary and Materials*.⁴⁸ This is a major tome, made the stronger because it contains, under accessible conceptual headings, all of the major decisions of the High Court of Australia still having authority. The authentic voices of the judges are encapsulated in substantial abstracts. But there are added comments, side references and criticisms to illuminate the path of the student. Because of the great mass of detail in constitutional law, it was helpful to me, as a judge in exploring the development of constitutional doctrine, to resort to this text. Great care had been paid by the authors in extracting key passages from majority (and sometimes from dissenting) opinions. These are invaluable as gate-openers to the way in which different developments in constitutional discourse have emerged. Rightly, the book is extremely popular. A fifth edition was published in 2010. Although Blackshield protests that it will be his last, I hope that this is not so. Whatever happens, the authors should resolve to avoid the fate of the standard work on the Indian Constitution whose author, H M Seervai, mandated by his will that it should not be updated following his death.⁴⁹ The Blackshield and Williams text has won a permanent place in the Australian constitutional discourse and should long survive its original authors.

On his departure from Macquarie Law School the singing professor penned what he called a 'Swan Song'. Sung to the tune 'If I were a Bell', it reads:

I'll be doing no more Constitutional Law and Theory!
The reports of the courts had me all out of sorts and dreary,
When the High Court couldn't agree
And divided four against three,
The moment I saw it I knew,
There'd be seven,
Different
Points of view!

⁴⁷ Ibid.

⁴⁸ A R Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, Federation Press, 1998.

⁴⁹ H. M Seervai, *The Constitutional Law of India*, 4th ed, 2008.

Ask me how do I feel now the fifth edition is over:
 Well, all I can say is I feel like I'm dancing in clover!
 I was weary and bleary but now from theory I'm free –
 So I'm cheery now, 'cause it's cheerio from me!⁵⁰

Whilst several of the earlier songs had greater content and told, with exquisite accuracy, a complex and evolving story of constitutional doctrine with remarkable brevity, the last song portrayed for the first time the melancholy of age.

V POST-SWAN SONG AND CONCLUSIONS

Despite the promise of retirement, the stage door of life does not come easily to persons of Blackshield's generation. In 1997 he was appointed an Honorary Professor of the Indian Law Institute. In 1999, after Macquarie University named him a Professor Emeritus, he returned to UNSW as a Visiting Professor of Law. In the book *Thirty Up*⁵¹ his return to UNSW is celebrated with satisfaction as 'one of the quietly most reassuring things' that could be said about that Law School. The historian records that, on his earlier retirement from UNSW, he had been 'a bit disillusioned'. But on his return he saw that a lot of the original vision to which he had contributed, had survived: 'it is still broad and open in its approach to legal education'.⁵² And that was a goal of Blackshield throughout his life as a teacher of law.

In addition to his adjunct professorship at UNSW, the same rank was later conferred on him by Macquarie University and by the ANU. Working at UNSW and ANU, he helped to produce the *Oxford Companion to the High Court of Australia*.⁵³ First published in 2001, this compendium of excellent articles was duly published in time for the centenary of the Court in 2003. Blackshield, typically enough, wrote more entries than any other contributor. They ranged from biographical entries on several Justices (Deane, Fullagar, Jacobs, the Knox Court and the Murphy affair) to entries on cases, concepts and anecdotal matters, such as judicial reasoning and legal realism. Needless to say, some of the cases that gave birth to his songs are written up with enthusiasm by Blackshield (*Engineers Case, Melbourne Corporation Case and Tasmanian Dams Case*). Marshalling 230 authors, who wrote mostly on their specialties, to contribute to a book that is accurate, insightful and readable, was a task that demanded congenial personalities at the helm. Blackshield, with Michael Coper (ANU) and George Williams (UNSW), fitted the bill. It must be hoped that they, or successors, will write updates. Two of the topic authors were themselves later appointed as Justices of the Court (Heydon J and Gageler J) and one of these retired in February 2013 (Heydon J). It would be a tragedy if this useful collection became no more than a time capsule limited by writings collected up to late 2000.

Later lectures in this series named for Professor Blackshield will dig deeper into his legal writings, his theories of constitutional law, his criticisms of current and past doctrines, and his insights about the future. But first, it is necessary to record his life's journey which happily is continuing. In that journey, I have not intruded needlessly into his personal life. His first marriage in February 1964 to Leonie Ramsay produced his son Simon, now a native title

⁵⁰ Words by Tony Blackshield, music by Frank Loesser (from the 1950 musical *Guys and Dolls*). Note that most of the songs were adapted to popular music of the 1950s-70s but with a range suitable to the limits of the Singing Professor's vocal chords.

⁵¹ Above n 23.

⁵² Ibid 106.

⁵³ OUP, Melbourne, 2001.

lawyer in Western Australia. Simon's son Efrem, himself now a law graduate, was able to attend this lecture. I am glad he has heard of the affection, respect and influence that his grandfather's professional life has won. Upon the dissolution of his first marriage, Professor Blackshield married Rosemary Huisman in 2002. She is herself a distinguished scholar and poet. In the past, at the Department of English in Sydney, where I learned much poetry in days gone by, I had the privilege to launch a book of her poetry. She and members of her family attended this lecture. I thank the Dean of Law at Macquarie Law School, Professor Natalie Klein, for inaugurating the lecture. Such master spirits of the law should be celebrated.

Indeed, the story of Tony Blackshield's life reveals why it is proper to remember and uphold his contribution to legal philosophy and constitutional law in Australia. It has been a long and faithful journey, effectively maintaining (although with many personal touches) the realist jurisprudence propounded by his mentor Julius Stone. Most of the pupils and teachers who came within the orbit of Stone's influence (although not all) were profoundly affected by it. Certainly, this was so if they could release their minds from capture by the traditional verbalist, formalist and positivist doctrines beloved of English jurists, advanced by Owen Dixon and still popular in Australia. To this approach, like Stone, Blackshield brought a close discerning eye of textual analysis, an invocation of empirical scrutiny and a sharp scepticism, unwilling to accept any proposition at face value just because a judge had stated it.

Even in recent times, Blackshield has been examining in sharp relief the emerging doctrines of final constitutional courts in connection with the relationship between national constitutional law and the busy world of international law, with which constitutional law must now somehow be reconciled. This is a subject that has interested me for many years and about which I have written, both in decisions of the High Court⁵⁴ and in articles published in academic journals.⁵⁵ In one of his more recent essays, published significantly enough in India, Blackshield has also ventured upon this topic, demonstrating that his mind is still open to new thinking on new issues.⁵⁶ In this piece, he is especially critical of the opinion of Justice Michael McHugh, in the majority, in *Al-Kateb v Godwin*, for suggesting that an immigration detainee might be detained indefinitely in the custody of the Australian federal executive by force of legislation and executive action, without any hope of judicial relief.⁵⁷

It is by actions not words that lawyers, including judges and scholars, are themselves ultimately judged. Although the decision in *Al-Kateb* still stands as law, later opinions and orders of the High Court of Australia suggest that one day the *Al-Kateb* principle will be overturned. Its advocates and defenders continue to suggest its correctness.⁵⁸ However, the later reasoning of the Court suggests that it rests on a highly uncertain doctrinal foundation.⁵⁹

⁵⁴ *Newcrest Mining Corporation v Commonwealth* (1998) 195 CLR 337, at 657-660 and in other cases.

⁵⁵ Michael D Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes', (1993) 16 *UNSW Law Journal*, 363; Michael D Kirby, 'International Law – The Impact on National Constitutions', (2006) 21 *American University International Law Review*, 327.

⁵⁶ A R Blackshield, 'National Constitutions in an International World', (2008) 2 *Indian Journal of Constitutional Law*, 104. Blackshield is greatly respected in India as an influential scholar of Indian constitutional doctrine: see Madhav Khosla, *The Indian Constitution*, OUP, New Delhi, 2012, 182.

⁵⁷ *Al-Kateb v Godwin* (2004) 219 CLR 562, at 589-595 (per McHugh J). Compare my own reasons at 622-629.

⁵⁸ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 220-21 per Hayne J; and at 224-25 per Heydon J. By contrast, all opinions in the majority made reference to Canadian and European Court of Human rights decisions on prisoners voting cases. See also *Plaintiff M47/2012 v Director General of Security* (2012) 86 ALJR 1372.

⁵⁹ See *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1403-04 ([114] ff, esp [119]-[120]) per Gummow J).

The field of constitutional law is peculiar in the legal taxonomy. More than virtually any other category of law's discipline, it deals with large concepts and many of these are (as Dixon J himself acknowledged) political in the broad sense. A talent in interpreting a charterparty, a bill of sale or an insolvency statute is not necessarily the best (and certainly not the only) proper preparation for the great responsibility of interpreting and implying a nation's constitutional charter. In Australia, that responsibility devolves, ultimately, upon the seven Justices of the High Court. It is they who have the final word. At least they do so for a time, before any words that they have written are themselves overthrown or re-expressed by their successors.

It is in the context of this system of government and of its courts that a free nation needs the sharp minds of fine legal scholars. Working in law schools, they must of course, be respectful of basic doctrine, elucidated for their students in orthodox ways. They must instruct their pupils in the law as it is, derived by the application of the rules as they are. But they should also be quizzical, speculative, insightful and, where necessary, critical. It is with such values that our law students, and thus our future leaders in the legal profession and the judiciary, must be prepared for the never ending task of unveiling the mysteries of the Constitution.

For his contributions, in succession to Stone, to the minds of generations of lawyers, and for his gifts thereby to the citizens of Australia who live peacefully under their Constitution, I express one pupil's grateful thanks to Professor Tony Blackshield.⁶⁰

⁶⁰ Cf Michael D Kirby, 'Afterword' in Sunil Khilnani, Vikram Raghavan and Arun K Thiruvengadam, *Comparative Constitutionalism in South Asia*, OUP, New Delhi, 2013, 370 at 377.

WHERE THE WILD THINGS ARE (OR SHOULD BE): RAWLS' CONTRACTARIAN THEORY OF JUSTICE AND NON-HUMAN ANIMAL RIGHTS

TESS VICKERY*

Contractarian theories of justice are generally considered incapable of granting direct moral status to non-human animals on the basis that these creatures lack rationality. Mark Rowlands has argued that, contrary to this dominant view, John Rawls' seminal social contract theory not only allows for, but requires, the direct moral consideration of the interests of non-human animals. Rowlands' line of argument has been criticised, notably by Robert Garner. This paper provides a rebuttal of critiques by Garner and others and conducts a critical analysis of the practical consequences of adopting Rowlands' interpretation of Rawls' social contract in relation to non-human animals. Its concluding view is that this paradigm provides a sound theoretical construct for examining a wide range of issues in the area of animal rights.

I INTRODUCTION

In his influential work *A Theory of Justice*, John Rawls argues that the only legitimate principles of justice are those that would be chosen by rational individuals in a hypothetical 'original position' who are placed behind a 'veil of ignorance' which denies them knowledge of their socio-economic position, natural assets and abilities and conception of the good.¹ Rawls, like most contractarian theorists, chose to exclude non-human animals from this sphere of justice on the grounds that they lack rationality. Indeed, writers in this field generally agree that while contractarian theories may justify assigning some *indirect* moral status to non-human animals on the basis of their value to humans, they are fundamentally incapable of granting *direct* moral status to these creatures.²

The work of Mark Rowlands established a long overdue counter perspective to this view. Over the past fifteen years he has persuasively argued that a proper understanding of Rawls' theory (especially the relationship between Rawls' often overlooked intuitive equality argument and his well-known social contract argument) not only allows for the direct moral consideration of non-human animals, it demands it.³ Rowlands' argument has attracted many

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¹ John Rawls, *A Theory of Justice* (Harvard University Press, Revised Ed, 1999) 118.

² Mark Rowlands, 'Contractarianism and Animal Rights' (1997) 14(3) *Journal of Applied Philosophy* 235, 235.

³ *Ibid* 243.

critics, the most notable being Robert Garner who concedes that while Rawls' intuitive equality argument provides some support for the direct moral consideration of non-human animals, his influential social contract argument is superfluous and offers no value in that context.⁴

This paper seeks to fill a gap in the literature in two ways. It will provide a rebuttal of Garner's critique, which has been relatively unopposed since it was first espoused. It will also present an overarching critical analysis of the practical consequences of adopting Rowlands' interpretation of Rawls' social contract in relation to the treatment of non-human animals. Part II of the paper will set out Rowlands' argument in favour of a modified Rawlsean theory of justice which is inclusive of animals as direct moral subjects. Part III will consider some general critiques of animal-inclusive contractarian theories before turning to Garner's critique of Rowlands. It will conclude that Garner has misunderstood the fundamental interrelationship between Rawls' intuitive equality and social contract arguments with the consequence that he has fallen into the error of disregarding the latter's importance. Finally, Part IV will highlight the usefulness of Rowlands' modified Rawlsean theory as a means of resolving fundamental moral problems in animal welfare by applying it to two current issues: the practices of eating meat and treating animals as property. Overall, this normative analysis will lend support to the conclusion that Rawls' contractarian moral theory provides a strong case for the moral claims of non-human animals.⁵

II AN ANIMAL FRIENDLY INTERPRETATION OF A *THEORY OF JUSTICE*

A *An Overview of Rawls*

Many commentators assert that Rawls is unsympathetic to the plight of non-human animals.⁶ This is not entirely accurate. In *A Theory of Justice*, Rawls observes that the capacity of animals to feel pleasure and pain 'clearly imposes duties of compassion and humanity in their case.'⁷ Nonetheless, he concludes that non-human animals fall outside the scope of his theory of justice as it is not possible to include them in 'a natural way.'⁸ He makes this judgment because he confines his sphere of justice to 'moral persons' — those who have a 'conception of the good' (as expressed by a rational life plan) as well as a 'sense of justice' and a desire to act upon it in some minimal sense.⁹ Non-human animals, plagued as they are by irrationality, cannot fit this description and are thus excluded. It seems Rawls' intention was to relegate the issue of non-human animals to some ill-defined moral realm outside his primary sphere of justice where it could be dealt with at another time.¹⁰

However, as Bernard Rollin has observed, theories of morality 'have lives of their own that transcend the intentions of those who first articulated them.'¹¹ This is why Rowlands seeks, with the benefit of distance and hindsight, to re-evaluate and reinterpret Rawls' theories in

⁴ Robert Garner, 'Rawls, Animals and Justice: New Literature' (2012) 18 *Res Publica* 169.

⁵ Mark Rowlands, *Animal Rights: Moral Theory and Practice* (Palgrave MacMillan, 2nd ed, 2009) 118.

⁶ See, eg, Peter Carruthers, *The Animals Issue* (Cambridge University Press, 1992) 98-99; Tom Regan, *The Case for Animal Rights* (University of California Press, 1983) 174; Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006) 327.

⁷ Rawls, above n 1, 448.

⁸ *Ibid.*

⁹ *Ibid* 11.

¹⁰ *Ibid* 448.

¹¹ Bernard E Rollin, *Animal Rights and Human Morality* (Prometheus Books, 3rd ed, 2006) 53.

light of modern day discourses regarding animal rights. He begins by pointing out that Rawls relied on not one, but two arguments, to justify the principles of justice he sought to adopt. The first is his lesser known ‘intuitive equality’ argument.¹² The argument goes as follows: If I have done nothing to merit the possession of a certain property — that is, my possession of the property is morally arbitrary — then I am not morally entitled to any benefits that accrue from this act of possession.¹³ This argument is compatible with a traditional liberal equality ideology which prohibits discrimination on the basis of morally arbitrary properties such as socio-economic status, race and gender. However, what makes Rawls’ theory distinctive is the expansive range of properties he regards as morally arbitrary.¹⁴ Under the intuitive equality argument any ‘natural talent or capacity’ from good looks to a high IQ to athletic or artistic ability, is considered to be morally arbitrary property from which the lucky individual is not entitled to gain a benefit.¹⁵

This leads to Rawls’ second argument of the social contract. As a starting point, Rawls asks us to imagine the existence of an ‘original position’ — that is, a hypothetical arena in which individuals must determine which principles or morality to accept or reject.¹⁶ The individuals in the original position are rational in the sense that in choosing between principles of justice, they will choose those principles that best advance his or her own interests.¹⁷ These rational agents are then placed behind a veil of ignorance, which denies them knowledge of certain key facts about themselves such as their socioeconomic status, natural assets or abilities, conception of the good and knowledge of the particular circumstances (eg the level of civilisation) of the society they will ultimately inhabit.¹⁸ The aim of excluding these key facts is to ensure that any principles agreed to will be just. This is the crux of Rawls’ argument for ‘justice as fairness’. In this original position, we are able to ‘nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage.’¹⁹ As a result, whatever principles of justice these individuals would agree upon for the basic structure of society come from a place of perfect fairness. Therefore they are just.²⁰

Rawls’ arguments in relation to intuitive equality and the social contract do not exist independently of one another. Rather, they are ‘mutually reinforcing.’²¹ As Rowlands explains, there are many factors that could be included or excluded under the veil of ignorance and all would yield different principles of justice. Therefore, Rawls argues that one of the grounds for determining the conditions of the original position is whether it produces outcomes that we find intuitively acceptable — that is, they conform to the intuitive equality argument.

¹² Rowlands, above n 2, 238.

¹³ Ibid.

¹⁴ Ibid 239.

¹⁵ Ibid.

¹⁶ Garner, above n 4, 161.

¹⁷ Rawls, above n 1, 142.

¹⁸ Ibid 118.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Rowlands, above n 2, 240.

If, after this process, the contract does not produce results we find to be intuitively correct, we must decide whether to adjust the theory (if the intuition still seems compelling) or to shed the conflicting intuition (if the adjustments required seem too damaging to the theory's overall integrity).²² And thus, finally, after working from both ends, we reach Rawls' 'reflective equilibrium' — an internally consistent theory that sits well with all the considered and carefully reflected intuitions we have decided to keep.²³

B *Applying Rawls to Non-Human Animals*

Once the relationship between Rawls' intuitive equality argument and the social contract is made clear, Rawls' theory does not contain any obstacle that prevents non-human animals from obtaining direct moral status. The intuitive equality argument requires that no person should benefit from morally arbitrary property. However, as Rowlands points out, 'a person plays no role in deciding whether or not she is going to be rational, she either is or she is not. The decision is not hers, but nature's.'²⁴ The issue of species falls into the same category. Since it is the intuitive equality argument which informs the conditions of the original position, it must follow that both rationality and species should be excluded under the veil of ignorance. The question then becomes: If I did not know whether I was going to be a human or a non-human animal, or whether I was going to be rational or irrational, what kind of principles of justice would I choose to live by? Under this analysis, Rawls' decision to restrict justice to 'moral persons' turns out to be an unreflective judgment which can no longer stand up to the scrutiny of the social contract.

Thus, it does not follow that 'just because only rational agents can set up or be party to the rules, only such agents are protected by the rules.'²⁵ This is a logical fallacy, which according to Rowlands, has emerged in the literature due to a misunderstanding of the fundamental differences between a Hobbesian contractarian model and a Kantian contractarian model. A Hobbesian contractarian model relies upon a hypothetical social contract between rational actors to justify and give force to a certain moral code. The fact that rational, self-interested and equally positioned individuals would agree to certain principles of justice is what gives those principles their binding force.²⁶ By contrast, a Kantian model uses the contract as a purely heuristic device to identify and express the underlying principles in the moral code that we have in fact adopted in the real world.²⁷ Unlike the Hobbesian model, the Kantian model uses the contract to identify what is morally right or wrong in the first place.²⁸ The binding quality comes from the moral correctness of these principles, not from the agreement of the contractors.²⁹ Rawls clearly identifies with the Kantian model, frequently citing him throughout *A Theory of Justice*. Rawls points out that the original position is not an 'actual historical state of affairs.'³⁰ Rather, it is to be 'understood as purely a hypothetical situation characterised so as to lead to a certain conception of justice.'³¹ An unfortunate confusion

²² Frank Lovett, *Rawls's A Theory of Justice: A Reader's Guide* (Continuum International Publishing Group, 2011) 42.

²³ *Ibid* 42–43.

²⁴ Rowlands, above n 2, 242.

²⁵ Rollin, above n 11, 52.

²⁶ Rowlands, above n 5, 125.

²⁷ *Ibid*.

²⁸ *Ibid* 126.

²⁹ *Ibid* 126–127.

³⁰ Rawls, above n 1, 11.

³¹ *Ibid*.

between the two models had led friends and foes of non-human animal rights alike to disregard Rawls on the assumption that rationality is an integral element of his theory of the contract.

Indeed at times even Rawls appeared to be confused as to where he stood on the Hobbesian–Kantian contractarian spectrum, and this explains his ambivalent attitude towards non-human animals throughout *A Theory of Justice*. Rather than concluding that moral personhood was essential to direct moral consideration, Rawls chose merely to state that it was a ‘sufficient condition.’ Consequently, he pushed to one side the issue of whether it was a ‘necessary condition’, and left open the question of whether non-human animals were automatically disqualified due to their lack of rationality.³²

Furthermore, where Rawls does indicate that non-human animals should be excluded, his arguments are littered with qualifiers — it is ‘generally believed’³³ or ‘presum[ed]’³⁴ that we are ‘not required to give strict justice...to creatures lacking this capacity.’³⁵ This is because these observations are ‘unreflective intuitions’ — that is, intuitions in the common sense of the word, which have not been ‘duly pruned and adjusted by the sort of deliberations required to produce a mature conception of justice, or...to reach reflective equilibrium.’³⁶ Since, as established above, these unreflective intuitions conflict with Rawls’ intuitive equality argument, it follows that as part of the reflective equilibrium process, these unreflective intuitions regarding the status of non-human animals must be disregarded.³⁷ Rowlands concludes that these confusing, out of place references to non-human animals reflect nothing more than ‘unexpurgated, unnecessary and unwelcome’ remnants of a Hobbesian outlook which Rawls could never expunge.³⁸ Rawls, a product of his context, was never able to escape the Hobbesian idea of the need for an equality of power between contractors. Once Rawls’ social contract is revealed in its true form as a heuristic device — a purely hypothetical means of testing principles of justice — then these Hobbesian concerns are no longer relevant.³⁹

Ultimately, however, the fact that Rawls had a somewhat different view on the moral status of non-human animals is irrelevant. Rowlands is attempting to adapt Rawls’ theory to a new era of animal rights. Rawls’ failure to anticipate the later importance of his views on non-human animals does not make Rowlands’ argument any less legitimate. Indeed, a key point of difference between Rawls’ and Rowlands’ approaches should be noted. While Rawls was primarily concerned with reforming the major political, social and economic structures and institutions which form the building blocks of society,⁴⁰ Rowlands proposes to make use of the social contract in a much broader sense as a tool for assigning general moral rights and duties and resolving moral problems.⁴¹ This distinction will become clear in Part IV, when the application of Rowlands’ modified Rawlsian theory of morality to current animal issues will be considered. For now however, it is sufficient to conclude that Rawls’ contractarian theory of justice poses no barrier to assigning direct moral status to non-human animals.

³² Ibid 442-443.

³³ Ibid 441.

³⁴ Ibid 442.

³⁵ Ibid 448.

³⁶ Rowlands, above n 5, 154.

³⁷ Ibid 154-155.

³⁸ Ibid 155.

³⁹ Ibid.

⁴⁰ Ibid 47.

⁴¹ Rowlands, above n 5, 132.

III A RESPONSE TO ROWLANDS' CRITICS

Rowlands' line of argument has been disputed by two key sets of critics. The first is represented by Brian Baxter, Martha Nussbaum, Peter Carruthers and Will Kymlika. These scholars, although they do not reference Rowlands directly, express general concerns about extending Rawls' contractarian theory to include non-human animals. The second is represented by Robert Garner, who has specifically criticised Rowlands' argument on the basis that he has failed to sufficiently justify the value of Rawls' social contract in establishing a basis for the direct moral consideration of non-human animals. Part III of this paper, therefore, aims to break fresh ground in two ways. Firstly, it will provide a comprehensive synthesis of the general concerns voiced by Baxter et al and a critical rebuttal of these views. Secondly, and more importantly, it will respond to, and take issue with, Garner's previously unchallenged critique.

A *General Critiques of Non-Human Animal-Inclusive Contractarian Theories of Justice*

Brian Baxter is critical of the notion that non-human animals could be subjects of justice under a Rawlsian contractual theory of justice. He asserts that participants in the original position cannot be ignorant of their species because Rawls requires them to have a prerequisite level of rationality which allows them, at a minimum, to understand the different possibilities presented to them.⁴² Such abilities are only afforded to the human race. Baxter further maintains that it is pointless to imagine that these participants possess the characteristic of rationality, even for a short time, behind the veil of ignorance before they discover their true species, because such a scenario is senseless in a metaphysical sense. How can the person who conducts the contract exercise in human form turn out to be a non-human animal?⁴³ The weakness in this view is exposed by Rowlands when he explains that 'the veil of ignorance is neither an expression of, nor does it entail, a metaphysical theory of the person.'⁴⁴ Rather, it is a purely heuristic device designed to determine fairness. Just as we ensure a cake is divided evenly by preventing the cutter from knowing which piece they will receive, we ensure a fair distribution of rights and social goods by preventing those who could influence the selection process in their favour from doing so.⁴⁵

In a similar vein, Martha Nussbaum (a student of Rawls) asserts that the notion of a contract between humans and non-human animals is so 'fantastic' that it is not worthwhile pursuing.⁴⁶ Her concern is that there needs to be an element of 'realism' in the contract. Since the 'asymmetry of power' between humans and non-humans is too marked to imagine such a contract existing in the real world, imagining one is a useless exercise.⁴⁷ Julie Hilden dismisses Nussbaum's concern that a human/non-human animal contract is too 'fantastic' as a mere failure of her imagination. If children and fantasy writers and actors can imagine what it is like to be a non-human animal, why cannot philosophers and policy makers engage in the same exploration? Finding fault with employing imaginative scenarios is not a legitimate

⁴² Brian Baxter, *A Theory of Ecological Justice* (Routledge, 2005) 96.

⁴³ Ibid.

⁴⁴ Rowlands, above n 2, 239.

⁴⁵ Ibid.

⁴⁶ Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006) 333.

⁴⁷ Ibid 334.

critique, especially in light of advanced contemporary research, which has greatly enhanced our knowledge of the mental and physical lives of non-human animals.⁴⁸ If we accept for the sake of the argument that what Nussbaum terms an ‘empathetic gulf’ is a reality, the effort of undertaking the imaginative exercise of the original position becomes even more necessary and important. Writers such as John Hart Ely have argued that ‘discrete and insular minorities’ often require special protections in the political process; not just because they suffer from barriers to the political process, but because society has a tendency to lack empathy towards them on the basis of prejudice or inaccurate knowledge.⁴⁹ In light of these findings, Hilden asks the question: ‘If we find alien those on the “other side of the tracks” or in the “gay neighbourhood” or the “black neighbourhood” in our own towns, how much more alien will we find those who make their homes in our forests and mountains, whom we rarely see and may have been taught to fear?’⁵⁰ She concludes that unless we are able to empathise with these creatures (as we are forced to in the original position) any protections that we afford to non-human animals will be no more than paternalism.⁵¹

In contrast, Peter Carruthers expresses concern that excluding rationality and species behind the veil of ignorance is a slippery slope that could lead to more dubious claims for justice on behalf of plants or even inanimate objects.⁵² Rowlands is quick to point out that under his modified contractarian approach, ‘the scope of morality is restricted to things that an occupant of the original position could rationally worry about.’⁵³ A rational agent would not concern themselves with the possibility of becoming a rock or a tree, because ‘such objects are insensate and indifferent to what happens to them.’⁵⁴ Therefore, Rowlands’ modified Rawlsian contractarianism makes sentience the clear cut-off point for direct moral consideration regardless of the fact that sentience is a morally arbitrary quality.⁵⁵

Finally, Will Kymlicka takes issue with what he describes as the ‘curious sort of perversity’ inherent in incorporating non-human animals into Rawls’ contract.⁵⁶ While an advantage of the veil of ignorance is that it makes vivid the notion that sentient beings matter as ends in themselves, it does so by ‘imposing a perspective from which the good of others is simply a component of our own (actual or possible) good.’⁵⁷ Kymlicka queries why a theory of equal consideration for non-human animals could not be generated by simply asking agents in the original position to give consideration to the needs of others regardless of their arbitrary talents and misfortunes?⁵⁸ Ironically, Rawls’ cynicism about the ability of human kind to look out for those less fortunate is considered one of the strengths of his theory as he is trying to create ‘a kind of moral geometry with all the rigour which this name connotes.’⁵⁹ Consequently, he worked on the basis that ‘a conception of justice should not presuppose extensive ties of sentiment.’⁶⁰ Through the device of the social contract, Rawls is able to

⁴⁸ Julie Hilden, ‘A Contractarian View of Animals Rights Insuring Against the Possibility of Being a Non-Human Animal’ (2007) 14 *Animal Law* 5, 17.

⁴⁹ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 2006) 153

⁵⁰ Hilden, above n 48, 18.

⁵¹ *Ibid* 18.

⁵² Peter Carruthers, *The Animals Issue* (Cambridge University Press, 1992) 114–118.

⁵³ Rowlands, above n 5, 160.

⁵⁴ Hilden, above n 48, 10.

⁵⁵ Rowlands, above n 5, 160.

⁵⁶ Will Kymlicka, *Contemporary Political Philosophy* (Oxford University Press, 2nd ed, 2002) 69.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

⁵⁹ Rawls, above n 1, 105.

⁶⁰ *Ibid* 111-112.

minimise our reliance on moral intuitions and substitute them with ‘prudential judgements’ on what a rational, self-interested person would do in that situation.⁶¹ Consequently, the weakness referred to by Kymlika becomes, in actuality, a significant strength.

B *Garner’s Critique of Rowlands’ Interpretation of A Theory of Justice*

In light of the analysis above, it can be seen that most criticisms of non-human animal-inclusive contractarianism are founded on erroneous or facile assumptions. The most damaging criticism of Rowlands’ line of argument, however, comes from Robert Garner. His critique is significant for two reasons. Firstly, he is an internationally renowned scholar in the area of animal law who has written extensively on the topic of contractarianism and non-human animals. Thus, his criticisms carry a great deal of weight and are likely to have great influence on academic thinking in this field. Secondly, Garner is the only theorist who has engaged directly with Rowlands’ argument at length and responded with a substantial critique. It will be demonstrated that even his apparently seminal critique contains flaws that significantly undermine the viability of the negative concerns it expresses about the value of Rawls’ social contract.

In his article, ‘Rawls, Animals and Justice: New Literature, Same Response’, Garner sets out to systematically discredit every major theory proposed in support of a Rawlsean animal rights framework.⁶² Garner admits that Rowlands’ work represents the ‘most sustained and original attempt’ at achieving this goal and is even open to the idea that the intuitive equality argument is capable of supporting justice for non-human animals.⁶³ He quickly moves on from this concessional point to express serious doubts about Rawls’ and Rowlands’ reliance on the process of reflective equilibrium. Garner asserts that the point of the contractual device is to ‘develop moral principles from scratch.’⁶⁴ However, as a result of the process of reflective equilibrium, key moral decisions in Rawls’ theory — such as whether non-human animals should be subjects of justice — are made prior to the contract on the basis of the intuitive equality argument, rather than being developed through the contract itself.⁶⁵ Since the principle that ultimately allows for the inclusion of non-human animals into Rawls’ sphere of justice is derived from subjective moral principles decided upon prior to entering the original position, Garner asks: ‘What is the value added of persevering with a contractarian approach for those interested in the protection of animals?’⁶⁶ Those looking to advance the position of non-human animals would be ‘better off invoking the intuitive equality argument as a free standing principle from which the justice claims of animals...can be derived independently of the contract.’⁶⁷ If Garner’s view is correct on this point, Rawls’ social contract argument — the most distinctive aspect of his theory — would have to be abandoned which could, in turn, lead participants in this debate to question whether it is worth persevering with Rawls at all.

⁶¹ Lovett, above n 22, 42.

⁶² Garner, above n 4, 169.

⁶³ Ibid.

⁶⁴ Robert Garner, *Animals Ethics* (Blackwell Publishers, 2005) 86.

⁶⁵ Garner, above n 4, 169.

⁶⁶ Ibid.

⁶⁷ Ibid.

Contrary to Garner's assertion, the social contract argument serves a number of important, albeit supplementary functions.⁶⁸ Firstly, it has the capacity to 'render vivid our intuitions,' a function which should not be overlooked.⁶⁹ Rawls' philosophical writings are in a large part remembered for the memorable way in which his unique social contract brings to life the principles of justice he seeks to endorse. Secondly, the contract device has the ability to make more precise general intuitions and to extract consequences from them that help to create useful principles of justice.⁷⁰ Finally, the contract provides an impartial perspective 'from which we can test opposing intuitions.'⁷¹ As Kymlika explains, 'certain intuitions might seem less compelling when they are viewed from a perspective detached from one's own position in society.'⁷² For example, a gifted athlete might deeply believe, contrary to the intuitive equality argument, that their talents are not arbitrary — that is, their athletic skills were achieved solely by their hard work and perseverance and thus they are morally entitled to reap the benefits of these cultivated skills. If however, when placed in the original position behind the veil of ignorance they no longer object, then this is proof that the intuitive equality argument is correct.⁷³

Nonetheless, the fatal weakness in Garner's argument for the abandonment of the social contract argument is that the intuitive equality argument cannot stand without the former. Although the interdependence of these two facets of Rawls' theory has been outlined above, it is worth delving a little deeper into the origins of Rawls' work to understand why Garner's attempt to isolate the intuitive equality argument is so deeply flawed. Rawls was writing in a time when utilitarianism was the dominant moral theory. His aim in *A Theory of Justice* was to present an alternative moral viewpoint that was more in line with our moral intuitions.⁷⁴ Despite this aim, as Lovett observes, two key problems plagued the intuitionist theories of the time. Firstly, they consisted of 'a plurality of first principles which may conflict to give contradictory directives in particular kinds of cases.'⁷⁵ Secondly, they lacked any 'priority rules' for determining what should be done if these first principles conflict.⁷⁶ The aim of 'justice as fairness' was to resolve this priority problem. After all, an obvious objection to any purely intuitionist theory of justice is to query where our intuitions come from. Clearly they are not derived from considerations of justice alone. They also stem from custom, context and current expectations. This leads to situations where, for example, a male growing up in a heavily patriarchal society comes to have a deeply held intuition that women are morally inferior to men. How do we make sure that our intuitions are fair and have not been 'clouded by a parochial upbringing?'⁷⁷

⁶⁸ Kymlika, above n 56, 69.

⁶⁹ Ibid 68.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Lovett, above n 22, 6.

⁷⁵ Ibid.

⁷⁶ Rawls, above n 1, 30.

⁷⁷ Lovett, above n 22, 38.

Rawls answers this question by returning to his social contract argument. He asserts that we can trust that our intuitionist principles are just if they would be chosen by rational individuals in the original position behind the veil of ignorance. Indeed, as Lovett observes, a large part of the appeal of Rawls' theory is that it is capable of 'deriving moral conclusions from non-moral premises.'⁷⁸ The same man who believed women were inferior to men would not rationally choose to discriminate between the two genders behind the veil of ignorance if he no longer knows what gender he is. Thus, his original intuition must be abandoned.⁷⁹

However, the social contract is not a complete protection against bias because, as discussed earlier, our intuitions inform our definition of the original position. Thus, if our society truly believed that women were inferior to men, we may consequently choose not to exclude gender behind the veil of ignorance — and this would lead to results which, from a gender neutral standpoint, would seem unfair.⁸⁰ Consequently, another safeguard is required, and this takes the form of Rawls' second strategy — his reflective equilibrium. By whittling down our intuitions to those which are the most considered — that is, 'those judgements in which our moral capacities are most likely to be displayed without distortion' — and then weighing them against each other if they conflict, making reasoned judgements as to which should remain and which should be abandoned, only then do we arrive at a truly objective and internally consistent theory of justice.⁸¹

Thus, it is clear that a conception of justice 'cannot be deduced from self-evident premises' like the intuitive equality argument alone. Instead, its justification 'is a matter of the mutual support of many considerations, of everything fitting together into one coherent view.'⁸² This is what Rawls' social contract and reflective equilibrium provide. In light of this conclusion, Garner's premise that the social contract should be replaced by the intuitive equality argument as a free standing principle must fail and Rowlands' argument in favour of a non-human animal-inclusive contractarianism emerges largely unscathed.

IV APPLYING ROWLANDS' INTERPRETATION OF *A THEORY OF JUSTICE* TO CURRENT ANIMAL ISSUES

As foreshadowed earlier in this paper, Rowlands and Rawls differ somewhat in their proposed use of the social contract. While Rawls was concerned with extrapolating from the contract a just organisation of society in terms of the major social, economic and political institutions, Rowlands conceives of the contract as a more flexible tool which has the potential to provide a framework for the assignment of broader moral rights and resolve current ethical issues relating to non-human animals.⁸³ Despite these differences, Rowlands maintains that the hard work of developing a contractarian theory of non-human animal rights lies in 'defending the claim that non-human animals...are recipients of the protection offered by the contract, despite the fact they are not rational.'⁸⁴ He contends that, once this inclusion is established, the process of applying his theory to human/non-human animal interactions is relatively

⁷⁸ Ibid 39.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Rawls, above n 1, 42.

⁸² Kymlika, above n 56, 69.

⁸³ Rowlands, above n 2, 236.

⁸⁴ Rowlands, above n 5, 162.

straightforward.⁸⁵ Indeed, there has been little published academic analysis concerning the practical consequences of adopting a non-human animal-inclusive contractarian theory of justice.

Therefore, the fourth and final part of this article will apply Rowlands' modified social contract to two controversial non-human animal welfare issues — the practice of eating meat and the practice of treating non-human animals as property. This examination will reveal that although applying Rawls' schema does not always result in the clear-cut outcomes that Rowlands predicted, the methodology of the social contract remains a powerful tool for analysing and enlivening debate on non-human animal issues. Moreover, it provides a framework for the establishment of an effective advocacy base for the introduction of stronger rights and protections for non-human animals.

A *The Practice of Eating Non-Human Animals*

Vegetarianism, the practice of abstaining from eating meat, is the only specific practical issue that Rowlands has dealt with at length in his writings on contractarianism. He observes that although a person in the original position can fashion their moral and political world as they see fit, there are certain realities that must remain securely in place to make the exercise worthwhile. One of these realities is the natural order of living beings.⁸⁶ Thus, the issue of humans killing non-human animals for food remains pertinent. According to Rowlands, the first step in resolving this moral dilemma is to place ourselves in the original position behind the veil of ignorance as set out in Part II of this article. In this hypothetical scenario, we no longer have any knowledge of what species we will be in the world we are creating, or whether we will be rational or irrational. Then we ask ourselves: If I, as a rational, self-interested agent, did not know whether I would be a human or a non-human animal, would I choose to allow humans to kill non-human animals for food?⁸⁷

To answer this question, we must first consider what each group has to lose and gain from the practice of meat eating.⁸⁸ Compulsory vegetarianism would force humans to give up a number of features of our current existence, but not our life or our health.⁸⁹ The number of vegetarians subsisting on a healthy, meat-free diet proves that the consumption of meat is not essential to nutrition. Thus, the main loss to humans would be the pleasure of eating meat and the displacement associated with the abandonment of this embedded social practice. When this is contrasted against the loss suffered by non-human animals — the destruction of their very existence, not to mention the fear and pain suffered in the lead-up to their death as a result of modernised slaughtering processes — the rational choice is clear. In these circumstances, 'what one stands to lose as a human is surely inconsequential compared to what one stands to lose as a cow, or pig, or lamb.'⁹⁰ The practice of eating meat would therefore be outlawed.

⁸⁵ Ibid.

⁸⁶ Ibid 163.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid 165.

A major counter-argument here is that rational agents in the original position may come to a contrary conclusion if non-human animals were well-treated throughout their lives and experienced little to no suffering prior to their death.⁹¹ This objection draws on the work of utilitarian theorist Peter Singer, who is also acknowledged as the founder of the modern animal liberation movement.⁹² He asserts that non-human animals, by virtue of their sentience, have an interest in avoiding pain, which should be treated in the same way as that of a human. Singer agrees that the consumption of meat is a trivial, non-essential pleasure. However, he also argues that because non-human animals are incapable of appreciating their own consciousness or mortality, they have no interest in their continued existence. Therefore, provided non-human animals are killed painlessly, no harm has been inflicted upon them.⁹³

Rowlands, anticipating this argument, states that the notion that free range and pain-free farming could produce enough meat to feed the world's population is entirely impractical in terms of the amount of farming required and the impact it would have upon the environment.⁹⁴ Indeed, even Singer concedes that obtaining meat that has been raised and killed in a pain-free manner on a large scale is virtually impossible. He concludes, therefore, that a vegetarian or vegan diet is the more ethical option under the circumstances.⁹⁵ Rowlands' view differs from Singer here in one fundamental aspect. Rowlands asserts that although a world in which humans ate only wild or genuinely free-range non-human animals would be morally better than the world that exists now, it would not be better than one where all humans were vegetarians.⁹⁶ The fact remains that a 'relatively trivial interest of the human', the desire to eat meat as a pleasurable experience, is being weighed against 'the vital interest of a non-human — their very existence.'⁹⁷ Rational agents would not risk putting themselves in a position where their life could be ended on the whim of another regardless of the pain, or relative lack thereof, that was associated with their sudden demise.

A second anticipated objection to compulsory vegetarianism is the predator/prey argument: that is, animal husbandry cannot be morally reprehensible, as non-human animals naturally kill and eat each other. The usual response to this argument is to assert that non-human animals are not moral agents capable of dispassionate self-assessment in light of accepted moral principles, and thus cannot be held responsible for their actions.⁹⁸ However, as Rowlands points out, while this argument may justify the actions of non-human animals, it does not explain why humans do not have a moral duty to attempt to intervene where one non-human animal attempts to kill another, as they would have if one human tried to kill another.⁹⁹ Thus, from a contractarian perspective, a better response would be to return to the original position. If I did not know whether I was going to be a carnivore or an herbivore, I would not choose a rule that required moral agents to intervene to protect non-human animals. If I turned out to be a carnivore, I would have sentenced myself to a slow death by starvation. Even if I turned out to be an herbivore, studies show that the loss of predators in the wild inevitably leads to an increase in disease or starvation amongst the species.¹⁰⁰

⁹¹ Ibid 166-167.

⁹² Peter Singer, *Animal Liberation* (1995, Pimlico edition).

⁹³ Ibid.

⁹⁴ Rowlands, above n 5, 167.

⁹⁵ Singer, above n 92, 160

⁹⁶ Ibid 168.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid 169.

¹⁰⁰ Ibid.

Unfortunately, Rowlands' practical application of this theory fails to consider how Rawls' social contract device would deal with the difficult issue of veganism — the non-consumption of non-human animal or dairy products — as distinct from vegetarianism. It is questionable whether participants in the original position behind the veil of ignorance would be willing to morally distinguish between the loss of pleasure arising from being denied meat and the loss of pleasure from being denied all non-human animal-based products. If extracting milk or eggs from non-human animals caused the latter significant pain, this option would clearly not be one chosen by a rational participant in the original position. But what if the extraction could be carried out in a relatively pain free manner? Is the risk of losing the pleasure of consuming non-human animal products better or worse than the risk of being milked as a cow, or having eggs taken from you as a chicken? The decision is not so clear-cut. It highlights a limitation of the social contract — that in borderline circumstances, it cannot always provide specific, concrete answers to questions of morality. However, true to its nature as a heuristic device, it remains a useful tool for highlighting issues that may have previously been overlooked and for facilitating discussion about them.

B *The Practice of Treating Non-Human Animals as Property*

To consider the issue of whether the treatment of non-human animals as property can be justified under Rawls' social contract, we return to the original position. For the purpose of this heuristic exercise, we will assume that the participants in the original position have adopted enforced veganism. What remains is a society that does not eat meat or non-human animal products, but still envisions their relationship with non-human animals as one of owner/property. The question is: If I did not know whether I would be a human or non-human animal, would it be rational for me to allow the property status of non-human animals to persist? Once again, we need to consider the benefits and detriments for each group. It quickly becomes apparent that the property status of non-human animals, in a symbolic sense, has no bearing in the original position. A self-interested human has no interest in the status of a non-human animal; they only care what they can do with them. Furthermore, if I were a non-human animal, it would not be rational for me to care about my status as property on a symbolic level. As a human, the indignity of being someone's property might have a significant impact on my happiness. However, if I were a non-human animal, I would not be aware of whether I was someone's property or a free agent. What would matter to me is how I was treated in a very utilitarian sense, in terms of minimising pain and maximising pleasure. Thus, to conduct the contract exercise properly, it would be necessary to consider the benefits and detriments of each practice, which is able to take place due to the property status of non-human animals. Although a detailed analysis of this issue is beyond the scope of this paper, a number of points can be noted.

Firstly, some non-human animals, like household pets, due to the way society has developed, are largely incapable of living a safe and happy life independent of human care. The fact that humans are responsible for this predicament is, unfortunately, irrelevant. After all, Rawls' original position does not purport to be some kind of historical point in time before civilised society existed.¹⁰¹ As a heuristic device it is designed to test our intuitions and existing rules in a hypothetical, perfectly fair, environment. It is pointless for us to conceptualise the rules of justice that would exist in a society in which these non-human animals had not been bred, or a society that had not developed to a point where they can no longer exist in the wild. These

¹⁰¹ Rawls, above n 1, 11.

realities have already taken place and are irreversible. Therefore, a rational agent behind the veil of ignorance would allow for ownership of these kinds of non-human animals as this is a mutually beneficial relationship. Similarly, in regards to assistance animals, it is arguable such a relationship would be maintained. The benefit provided by guide dogs and other assistance animals is great, while the detriment to the animals (compared to the life they would be leading as pets) is very low. Although working dogs present a more difficult challenge — the benefit to humans remains about the same, but the risk of injury or death to the non-human animal is greater — they are still likely to be allowed under the original position.

It is highly likely, however, that these rational agents would also protect their interests by introducing strict animal welfare laws which, in addition to being adequately enforced by a well-resourced agency, would allow them (or, in reality, interested third parties on their behalf) to bring an action in response to an alleged breach of animal welfare laws. In other words, they would choose to endorse some kind of legal standing for non-human animals. Legal standing is something that is not currently provided for under the concept of property as it encompasses non-human animals in Australia.¹⁰² According to leading theorists, there are three key ways they could be introduced. Firstly, we could introduce a ‘guardianship model’ (akin to the one that already applies to children) to regulate human/non-human animal relations.¹⁰³ Secondly, we could legislate into existence a new category of property known as ‘living property’ in which legal and equitable title would be split between human owners and non-human animals, respectively. This would provide the non-human animal with a legally enforceable interest, which must be taken into account by the legal titleholder, while still facilitating an owner/pet relationship.¹⁰⁴ The third and final option for facilitating legal standing for non-human animals is the abolition of their property status and the introduction of legal personhood. Gary Francione has passionately argued for such an abolition. He asserts that it is preposterous to suggest that a system, which treats non-human animals as ‘things’, and then purports to fairly balance their interests against those of their owners, will ever achieve any real improvements.¹⁰⁵ Furthermore, it carries the risk of perpetuating, or even increasing, animal exploitation by making people feel better about supposedly more ‘humane’ animal exploitation.¹⁰⁶ The original position, however, is not concerned with these political realities. Consequently, any one of these options, provided that it could be adequately funded and enforced, would be acceptable to rational agents in the original position.

Although, as discussed above, the contractarian approach hits a snag when it is applied to more complex issues such as medical testing on non-human animals,¹⁰⁷ it remains a useful lens for reevaluating existing arguments about controversial animal issues.

¹⁰² Deborah Cao, *Animal Law in Australian and New Zealand* (Thomson Reuters, 2010) 78.

¹⁰³ *Ibid* 85.

¹⁰⁴ David Favre, ‘A New Property Status for Animals: Equitable Self Ownership’ in C R Sunstein and M C Nussbaum (eds) *Animals Rights: Current Debates and New Directions* (Oxford University Press, 2004) 245-250.

¹⁰⁵ Gary Francione and Robert Garner, *The Animal Rights Debate* (Columbia University Press, 2010) 26.

¹⁰⁶ Gary Francione, ‘Reflection on *Animals, Property and the Law* and *Rain Without Thunder*’ (2007) 70 *Law and Contemporary Problems* 9, 33.

¹⁰⁷ See Julia Tanner ‘Rowlands, Rawlsian Justice and Animal Experimentation’ (2011) 14(5) *Ethical Theory and Moral Practice* 569 for an in depth consideration of the application of Rowlands to vivisection.

C Reflections on the Practical Usefulness of Rowlands' Theory

It is interesting to note the similarities between the process of weighing the benefits and detriments in the original position and the 'unnecessary harm' test, which is currently applied in Australian courts in regards to animal welfare.¹⁰⁸ This test requires the court to balance a non-human animal's interest in avoiding harm to itself against a human interest in exploiting non-human animals in any given circumstance. However, there is a subtle but important difference between the two tests. While a Rawlsian analysis takes place in a perfectly fair, neutral environment behind the veil of ignorance, the 'unnecessary harm' test is viewed through the prism of a society that believes in human domination over non-human animals in which exploitation is prevalent.¹⁰⁹ There is no doubting that this context has a profound impact on the way in which the unnecessary harm test is conducted.

This moral gap in the unnecessary harm test concerns Peter Sankoff. He cites the Canadian case of *R v Menard*¹¹⁰ — one of the very few cases anywhere in the world to deal at length with the 'unnecessary harm' test — in which Lamer J admitted that 'in setting standards for the behaviour of men, we have taken into account our privileged position in nature...over animals.'¹¹¹ Such judicial statements make it clear that the unnecessary harm test, rather than being neutral, is weighted heavily from the outset in favour of the justification of harm against non-human animals.¹¹² This bias inevitably has an impact on the two key determinations the court has to make in regards to (a) whether a legitimate purpose exists and (b) whether the means used to achieve that purpose are legitimate?¹¹³ Judgments reveal that only three purposes are likely to be deemed illegitimate: sadistic cruelty, negligent or lax treatment of non-human animals and waste of economic capital.¹¹⁴ Regardless of clear evidence that there are more humane ways of achieving a purpose, the only means likely to be deemed legitimate are those that advance human convenience and economic gain.¹¹⁵

In this comparison between Rawls' contractarian analysis and the analysis currently conducted under the 'unnecessary harm' test, a clear practical use for Rowlands' work becomes evident. If judges applying the unnecessary harm test were to place themselves in the original position behind the veil of ignorance, where they did not know what their species was and then turned their minds to whether the actions taken in the case at hand were proportionate, this would make for a relatively fair and neutral procedure and lead to outcomes that would be far more 'friendly' to non-human animals. This could be achieved by introducing an interpretive provision into State animal welfare acts that would overrule or at least temper judicial authorities such as *R v Menard*¹¹⁶ and encourage a less anthropocentric interpretation of the unnecessary harm test. Such a provision would clarify that any assessment of unnecessary harm must be carried out objectively, without any reference to the existing inequalities that may exist between humans and non-human animals.

Clearly, effecting legislative change to make Rowlands' theory a reality in relation to the radical notion of mandating vegetarianism and veganism would be a momentous departure

¹⁰⁸ Cao, above n 102, 120

¹⁰⁹ Peter Sankoff, 'The Welfare Paradigm: Making the World a Better Place for Animals?' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (Federation Press, 2009) 20.

¹¹⁰ (1978) 43 CCC (2d) 458 (Que CA).

¹¹¹ Ibid 464.

¹¹² Sankoff, above n 109, 20.

¹¹³ Ibid 22.

¹¹⁴ Ibid 23-24.

¹¹⁵ Ibid 25.

¹¹⁶ (1978) 43 CCC (2d) 458 (Que CA).

from the current animal welfare framework in Australia and other developed nations. Currently, the most advanced of these systems continue to classify non-human animals as property and merely provide for some modest protection through welfare codes and anti-cruelty statutes. It is self-evident that the drastic reforms required will not occur anytime soon given Australia's current societal attitude towards non-human animals. For this reason, commentators such as Jonathan Lovvorn are very critical of the work produced by philosophers such as Rowlands. He sees it as an 'intellectual indulgence' to become concerned with advancing impractical theories 'while billions of animals languish in unimaginable suffering that we have the power to change.'¹¹⁷ Lovvorn argues, moreover, that such theories cause actual harm because they fuel the fire of anti-animal rights alarmists who assert that non-human animals cannot receive protection without conducting a fundamental overhaul of our legal system.¹¹⁸ Similarly, Mike Radford asserts that if the 'law is the means by which society expresse(s) its collective choice' and 'any shortcomings are those of the society itself', then the parlous state of modern day non-human animal welfare law clearly indicates that society is not ready to embrace the fundamental shift in the legal status of non-human animals proposed by Rowlands.¹¹⁹

Not everyone would agree that society's attitude towards non-human animals is so backward. Former High Court of Australia judge Michael Kirby has famously observed that 'there is nothing so powerful in the world as an idea whose time has come, and animal protection is just such an idea.'¹²⁰ Public opinion towards non-human animals has progressed dramatically over the past 30 years. It may not yet be at a stage where it would endorse legal personhood for non-human animals, or comprehensively support compulsory vegetarianism. Nonetheless, there is a strong argument to be made that all major societal reforms require a bedrock of persuasive logic and ethical clarity and that theorists such as Rowlands are playing an important role in laying down that foundation.

V CONCLUSION

A proper understanding of the interrelationship of John Rawls' intuitive equality and social contract arguments reveals that *A Theory of Justice* does not prevent non-human animals from achieving direct moral status. Rather, once the mutually reinforcing nature of these two arguments is properly understood, it is clear that Garner's critique, and others of a similar nature, are misconceived and that Rawls' contractarianism provides a strong foundation for the direct moral consideration of non-human animals. Although Rowlands' interpretation of contractarianism in relation to current non-human animal issues is overly simplistic in parts and blurred in others, it remains a very useful device for those seeking to justify the moral claims of non-human animals.

¹¹⁷ Jonathan Lovvorn, 'Animal Law in Action: The Law, Public Perception and the Limited of Animal Rights Theory as a Basis for Legal Reform' (2006) 12 *Animal Law* 113, 139.

¹¹⁸ Ibid.

¹¹⁹ Mike Radford, *Animal Welfare in Britain: Regulation and Responsibility* (Oxford University Press, 2001) 10-11.

¹²⁰ Voiceless: The Animal Protection Institute, *Michael Kirby AC CMG - Voiceless Patron* <<http://www.voiceless.org.au/who-we-are/michael-kirby>>

BEARING THE BURDEN: SHIFTING RESPONSIBILITY FOR THE WELFARE OF THE BEAST[†]

ELIZABETH ELLIS*

The contemporary focus on accuracy in food labelling in part reflects increasing community concern about animal protection. Yet the problematic nature of current animal welfare regulation suggests the failure of governments to respond in a commensurate manner. Regulatory problems are multiple and diverse: conflicts of interest, legislative incoherence, inconsistent policy and practice, lack of transparency and inadequate enforcement of the law. These regulatory deficiencies reflect modes of thinking that privilege individual over community responsibility and frame animal protection as a charitable concern. The result is a flawed animal welfare regime, at odds with official rhetoric and with the principle of legality that requires governments to be open and honest with the electorate. To start shifting the burden from animals to those with a greater capacity and the moral responsibility to bear it requires significant reform. Arguably, this includes consistent legislative provisions, independent and coherent mechanisms for standard-setting, administration and enforcement, and publicly available information about all aspects of animal use as a basis for informed community debate.

I INTRODUCTION

In 2012, a NSW egg producer was fined for mislabelling 38,000 dozen barn laid eggs as free range. The details were released in October of that year by the NSW Minister for Primary Industries as part of her responsibility for food safety legislation, under which the offences arose.¹ Although more informed food choices might ultimately benefit animals, the focus of

[†] A version of this paper was presented at Tomorrow's Law: The Future of Animal Law Conference, Sydney, 18 October 2012. Some of the ideas are also explored in "The Animal Welfare Trade-off or Trading Off Animal Welfare?" in Peter Sankoff, Steven White and Celeste Black (eds) *Animal Law In Australasia* (Federation Press, 2nd ed, 2013, forthcoming). The author would like to thank an anonymous reviewer for comments on a draft of this article.

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¹ Katrina Hodgkinson, Minister for Primary Industries, "Producer Fined for Mislabelling Eggs" (Media Release, 7 October 2012) <<http://www.foodauthority.nsw.gov.au/news/media-releases/mr-07-Oct-12-producer-fined-mislabelling-eggs/>>.

ministerial concern was clearly consumer protection not animal welfare. There is a certain irony here as the Minister for Primary Industries is also responsible for the administration of the *Prevention of Cruelty to Animals Act 1979* (NSW) and other State animal welfare legislation. In relation to both her animal welfare and food labelling responsibilities, the Minister appeared on ABC television in June 2012 in the context of a story about layer hens. In response to the claim by Animal Liberation that buying cage eggs is contributing to cruelty, the Minister volunteered that she purchases cage eggs, noting that “everybody is a little bit different” and she is “perfectly comfortable” with her choice. Asked whether there is a place for ethics in people’s food choices, the Minister’s response was brief: consumers should have the information necessary to make informed choices, with appropriate labelling of egg cartons a “really good step”.²

These ministerial statements are relevant to a discussion of animal protection in several ways over and above the immediate welfare issues associated with intensive farming. First, they illustrate the reliance on moral pluralism to frame animal welfare as a matter of individual preference or conscience rather than as a political issue requiring intervention by the state. The impact of this approach on the well-being of animals is considerable.³ Secondly, the focus on consumers’ right to know is relevant insofar as it reflects the value underlying the principle of legality frequently invoked by the courts. While the specific context is that of statutory interpretation and the judicial presumption that parliament does not intend to trample on commonly accepted rights, the principle of legality reflects a broader value: that governments should be open with, and accountable to, the people whom they represent.⁴ In other words, subject to Australia’s limited constitutional protections, governments may legislate in a way that intrudes on individual rights but must make it plain that they are doing so. These principles of openness and honesty underpin the capacity for informed community debate that is integral to the legitimacy of representative government.

While nonhuman animals lack rights in any formal legal sense, the focus on consumer protection reflects increasing community concern about animal welfare. Accordingly, consistent with the principle of open and accountable government, public administrations should be honest about the extent to which animal protection is secured by law. By reference to a selection of topical issues across a range of settings, this article identifies key characteristics of animal welfare regulation that impact on the level of protection afforded to animals, while also obscuring important policy issues and reducing public awareness of problematic aspects of the law. The article concludes that these characteristics diminish the capacity of the public to engage in informed debate and are inconsistent with the values of openness and accountability that underlie the principle of legality. In these circumstances, nonhuman animals bear the burden of suffering in terms of their use as a human resource, with significant change required to shift responsibility to those with a greater capacity and the moral responsibility to bear it.

² ABC Television, “Rotten Eggs”, 7.30 NSW, 8 June 2012 (Katrina Hodgkinson).

³ Gary Francione and Robert Garner, *Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, 2010) 146-154. See also Robert Garner, *Theory of Justice for Animals: Animal Rights in a Nonideal World* (Oxford University Press, 2013, forthcoming).

⁴ See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1, 46-7 (French CJ).

II CONFLICTS OF INTEREST

A return to the NSW Minister's stated preference for purchasing eggs from caged hens provides a useful starting point. On the same television program, RSPCA Australia's chief scientific officer, Bidda Jones, affirmed the opposition of the RSPCA to keeping hens in cages yet the Minister did not advert in any way to the significant animal welfare issues involved in intensive farming systems.⁵ A similar lack of sensitivity to animal welfare issues was evident in the same Minister's response to a Question without Notice in Parliament in May 2012 with respect to the keeping of sows in stalls. That the Minister's overwhelming concern was primary production is clear from her short answer that included the following remarks:

All sorts of things could be done to try to appease those who do not really understand farming, but would that be productive for our food sector? As someone who comes from a rural background, I understand primary production and the need for a farmer to be able to make money and continue with production.⁶

The Minister's apparently anomalous response to a question about animal welfare is symptomatic of a regulatory system characterised by conflicts of interest. In all Australian jurisdictions, animal welfare statutes are administered by government agencies whose core responsibilities lie elsewhere. It is not simply that animal welfare is peripheral to the main function of these agencies but that their core responsibilities and the requirements of animal welfare often conflict. Likewise, Ministers may be ill-informed and/or liable to privilege agricultural and industry interests over animal welfare. This privileging is most notable with respect to standard-setting, where industry interests dominate. The commitment under the Australian Animal Welfare Strategy (AAWS) to convert the Model Codes of Practice for the Welfare of Animals into national, enforceable Animal Welfare Standards and Guidelines was an opportunity to update the provisions to reflect changing community attitudes. One way of achieving this would have been to involve animal protection stakeholders in the process in a more meaningful way than had been the practice in relation to the Model Codes. To date, however, the development of these Standards and Guidelines has simply demonstrated industry's continuing dominance. Significantly, the process is managed by Animal Health Australia (AHA) which comprises peak industry bodies and government primary industries and agricultural departments. Of the eight priorities listed in AHA's strategic plan the only mention of animal welfare is in the context of maintaining and increasing livestock market access.⁷ The writing group that produced the initial draft for the major Land Transport of Livestock Standards, endorsed by the Primary Industries Ministerial Council (now the Standing Council on Primary Industries (SCoPI)) in 2009, did not include any animal welfare representation, an approach that has been maintained for the Cattle and Sheep Standards currently in development.⁸ Unsurprisingly, then, the standards development process favours the industry position in relation to contentious animal welfare issues, such as the proposed 30

⁵ ABC Television, above n 2.

⁶ NSW, *Parliamentary Debates*, Legislative Assembly, 31 May 2012, 12467 (Katrina Hodgkinson).

⁷ Animal Health Australia, *Strategic Plan 2010-2015*, <<http://www.animalhealthaustralia.com.au/wp-content/uploads/2011/05/AHA-Strategic-Plan-2010-2015.pdf>>.

⁸ Animal Health Australia, *Development of Australian Standards and Guidelines for the Welfare of Livestock* (February 2009) Australian Animal Welfare Standards and Guidelines, 9-10 <<http://www.animalwelfarestandards.net.au/files/2011/01/Animal-Welfare-Standards-and-Guidelines-Development-Business-Plan.pdf>>.

hour time off feed standard for bobby calves.⁹ Against this background, to badge the standards and guidelines as “animal welfare” is arguably to engage in a calculated deceit.

Conflicts of interest also occur with respect to compliance activity, although governments consistently fail to acknowledge the issue in these terms. In response to the Farmer Review of the live export trade which followed the broadcast of shocking cruelty to cattle in Indonesian abattoirs by ABC television in 2011¹⁰ the federal government introduced a new regulatory scheme, the Exporter Supply Chain Assurance System (ESCAS), to govern live exports. A key requirement of this scheme is the independent auditing of the supply chain. According to the federal Department of Agriculture, Fisheries and Forestry (DAFF), however, “payment to an auditor for carrying out the functions of an auditor does not constitute a conflict of interest and is generally the responsibility of the establishment being audited”.¹¹ That major breaches of ESCAS with respect to animal welfare have since been identified by animal advocates not exporter employed auditors¹² reinforces concern that the latter lack the requisite independence to sustain community confidence in the new regulatory arrangements. Moreover, investigation of alleged non-compliance is the responsibility of DAFF whose stated aim is “to enhance the sustainability, profitability and competitiveness of Australia’s agriculture, food, fisheries and forestry industries”.¹³ The same Department also determines what action to take, if any, where non-compliance is found to have occurred.¹⁴

But conflicts of interest are not confined to livestock welfare. At State level, primary industries departments are also responsible for animal welfare across a wide range of other settings, including companion animals, exhibited animals and feral animal control. As with livestock, there is also significant input from industry stakeholders and from government administrators whose primary interests are not animal welfare. An example is the establishment in 2011 of a Companion Animals Taskforce to provide advice to the NSW government on key welfare issues, particularly in relation to the very high rate of euthanasia of cats and dogs.¹⁵ Representatives of animal welfare organisations comprised three of the 10-member Taskforce.¹⁶ The resulting Discussion Paper, released for public comment in May 2012, dealt only cursorily with the most complex issues, such as mandatory desexing and the commercial sale of cats and dogs,¹⁷ while the public consultation process encouraged the confinement of submissions to the issues thus narrowly defined. Meanwhile, despite assurances by the Minister for Local Government that the Taskforce would hold community

⁹ Animal Health Australia, ‘Australian Animal Welfare Standards and Guidelines – Land Transport of Livestock: Proposed Amendment to the Land Transport of Livestock Standards (SB4.5) Bobby Calves Time Off Feed Standard’ (Post-Public Consultation Decision RIS, Primary Industries Ministerial Council, 6/7/2011) 90-93 <http://www.animalwelfarestandards.net.au/files/2011/05/Bobby-Calf-ToF-Decision-RIS-OBPR-endorsed-Final-_AHA6.7.11.pdf>.

¹⁰ Bill Farmer, ‘Independent Review of Australia’s Livestock Export Trade’ (Report, 2011).

¹¹ Department of Agriculture, Fisheries and Forestry, Australian Government, *Approved Auditor Information* (7 December 2011) <<http://www.daff.gov.au/aqis/export/ecri/approved-auditor-information>>.

¹² Department of Agriculture, Fisheries and Forestry, Australian Government, *Independent Audit Summary Reports of an Exporter Supply Chain Assurance System (ESCAS)* (23 May 2013) <<http://www.daff.gov.au/aqis/export/live-animals/livestock/escas/audit-reports#sect7>>.

¹³ Department of Agriculture, Fisheries and Forestry, Australian Government, *What we do* (28 April 2011) <<http://www.daff.gov.au/about/what-we-do>>.

¹⁴ Department of Agriculture, Fisheries and Forestry, Australian Government, *Guideline – Management of Non-Compliance* (17 May 2013) <<http://www.daff.gov.au/aqis/export/live-animals/livestock/escas/non-compliance>>.

¹⁵ NSW Companion Animals Taskforce, ‘NSW Companion Animals Taskforce Discussion Paper’ (Discussion Paper, Division of Local Government, Government of NSW, May 2012) 1.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, 11.

consultations around NSW this has not occurred.¹⁸ In all these circumstances, and with no public minutes of Taskforce meetings, there can be little confidence that the difficult and complex issues in relation to the high rates of companion animal euthanasia have received priority over commercial or other considerations. The Taskforce Report, released publicly in March 2013, contains some worthwhile recommendations, in particular the establishment of a breeder licensing system. Even if adopted, however, the impact of the recommended initiatives is likely to be limited without more stringent measures to address the underlying problem of the oversupply of cats and dogs.

III CONFLICTS AND INCOHERENCE

Community concern about government action sometimes shines a light on regulatory conflicts. In NSW, for example, wide opposition to the State government's decision to allow hunting in some national parks has highlighted the conflicting roles of the NSW Game Council in both regulating and promoting hunting. Citing the NSW Independent Commission Against Corruption, the *Sydney Morning Herald* editorialised "that 'the perception of a conflict of interests' within regulatory bodies 'can be as damaging as an actual conflict, because it undermines public confidence in the integrity of the organisation'".¹⁹ Under s 9 of the *Game and Feral Animal Control Act 2002* (NSW), the functions of the Game Council include representing the interests of licensed hunters, administering the licensing system the Act creates, providing advice to the Minister for Primary Industries and enforcing the legislation. The latter includes mandatory animal welfare provisions in a Code of Practice and compliance with mandatory provisions is a condition of game hunting licences.²⁰ It might be argued that any conflict of interest in reposing the enforcement of these provisions in the Game Council is balanced by s 6(b) of the *Game and Feral Animal Control Act* which provides that nothing in the Act affects the operation of the *Prevention of Cruelty to Animals Act 1979* (NSW) (POCTAA). At the same time, however, s 24(1)(b)(i) of the latter Act provides a defence against a cruelty prosecution where the relevant act or omission occurred in the course of, and for the purpose of hunting, shooting, snaring, trapping, catching or capturing the animal in a manner that inflicted no unnecessary pain.

The uncertainty created by the language of this defence and the co-existence of separate but overlapping regulatory regimes are symptomatic of a broader conceptual incoherence underlying the regulation of animal welfare. While recognition of sentience is supposedly the basis of animal welfare policy, in practice regulatory measures are informed by the human utility of animals and the degree of influence of those who benefit most. As a result, inconsistency infects every level of animal welfare regulation, with very different legislative regimes governing animals according to context and function. The oft-cited example is the

¹⁸ Donald Page, Minister for Local Government, "Pet Taskforce Set to Deliver Discussion Paper" (Media Release, 4 April 2012). According to the Taskforce Report, four targeted consultation sessions on the Discussion Paper were held during the submission period. These sessions were attended primarily by representatives of stakeholders who also had institutional representation on the Taskforce itself. Companion Animals Taskforce, *Report to the Minister for Local Government and the Minister for Primary Industries* (Report, Division of Local Government, October 2012), 5.

¹⁹ Editorial, "Allowing the Game Council's dual role poses too great a risk", *Sydney Morning Herald* (online), 8 March 2013 <<http://www.smh.com.au/opinion/editorial/allowing-the-game-councils-dual-role-poses-too-great-a-risk-20130307-2fo3b.html>>.

²⁰ *Game and Feral Animal Control Act 2002* (NSW) s 24; *Game and Feral Animal Control Regulation 2012* (NSW) sch 2. Note that not all game hunting requires a licence under the *Game and Feral Animal Control Act 2002* (NSW): see s 17.

exemption of stock animals from some or all of the provisions of State animal welfare statutes and/or the inclusion of a defence where the harm occurs in certain circumstances and causes no “unnecessary pain”. Prime examples in relation to POCTAA are s 9 which excludes stock animals from requirements governing exercise and s 24(1)(a) which effectively sanctions husbandry practices otherwise likely to be considered cruel. As the example of game hunting suggests, the leeway these provisions afford both reflects and complicates the enforcement of general cruelty provisions, already drafted to confine offences to “unnecessary” conduct.

Conceptual confusion also results in inconsistency at the subordinate level. For example, the *Game and Feral Animal Control Regulation 2012* (NSW) as originally drafted by the NSW Department of Primary Industries (DPI) included a clause that would have allowed the grant of a licence for unsupervised hunting by children between the ages of 12 and 17, including on declared public land.²¹ While strong opposition to this provision saw its removal from the final Regulation,²² the draft proposal provided a stark contrast with mandatory provisions governing companion animals. In NSW, both the *Animal Welfare Code of Practice – Breeding Dogs and Cats* and the *Animal Welfare Code of Practice – Animals in Pet Shops* prohibit the sale of cats and dogs to those under 18 years of age. These provisions, given legal force through their incorporation into the *Prevention of Cruelty to Animals Regulation 2012* (NSW) by reg 26, sch 1, suggest that children lack the maturity to care for and/or make responsible decisions with respect to companion animals. Yet these Codes are produced within the NSW DPI, the same government agency that was prepared to entrust the welfare of wild animals to unsupervised children as young as 12 and in circumstances that afford animals minimal, if any, protection.

A regulatory system fraught with inconsistency is in particular need of strong enforcement. Instead, successive governments have abdicated responsibility for enforcing animal welfare by largely outsourcing this quintessentially state function to private charities. The abdication of responsibility for a task that demands strong public accountability is in itself problematic but it also has significant consequences for animals, most obviously in terms of resourcing. With an annual NSW government grant of \$424,000 for the work of the RSPCA NSW inspectorate,²³ enforcement is inevitably complaint-driven²⁴ and leaves little scope for routine monitoring of compliance with regulatory provisions across a wide range of animal settings.²⁵ Beyond the immediate consequence that much animal welfare law stands unenforced is a broader issue: the mismatch between government rhetoric and practice. With regulatory standards commonly held up as evidence of a strong commitment to animal welfare, a failure to resource their enforcement leaves governments vulnerable to a charge of window dressing.

²¹ Public Consultation Draft, *Game and Feral Animal Control Regulation 2012* (NSW), 3 April 2012, cl 14. The proposed clause excluded hunting with a firearm and required written parental consent.

²² Department of Primary Industries, Government of NSW, ‘Public Consultation Outcomes, *Game and Feral Animal Control Regulation 2012*’ (Report, Department of Primary Industries, August 2012).

²³ See RSPCA NSW Annual Financial Reports <<http://www.rspcansw.org.au/services/publications>>. The annual grant for the work of the inspectorate should not be confused with a substantially larger one-off grant announced by the NSW government in 2011 for the specific purpose of rebuilding the RSPCA’s main Sydney shelter. This grant, a pre-election promise, is to be paid over two years. See Barry O’Farrell, Premier, Minister for Western Sydney, “NSW Government to Help RSPCA to Rebuild Yagoona Animal Shelter” (Media Release, 18 December 2011).

²⁴ Evidence to Legislative Council General Purpose Standing Committee, Parliament of NSW, Sydney, September 2010, 7 (Steve Coleman, CEO, RSPCA NSW).

²⁵ RSPCA Australia, ‘National Statistics 2011-12’ (Report, RSPCA Australia), Table 5 <<http://www.rspca.org.au/assets/files/Resources/AnnualStatistics/RSPCA%20Australia%20National%20Statistics%202011-2012.pdf>>. An additional problem is that in some jurisdictions there is no power to conduct routine inspections.

Funding is not the only problem however. An important, though less obvious consequence, is that to outsource the enforcement of a penal statute to private charities is to frame the protection of animals as a charitable concern, one less deserving of attention than other areas of public policy. The message that animal welfare depends upon community benevolence rather than state action reinforces the idea of individual responsibility invoked by the Minister with respect to the purchase of eggs. It is hardly surprising then that animal welfare charities are only able to carry out their enforcement functions with the financial support of private donors and the professional support of pro bono lawyers. This unusual arrangement simultaneously allows governments to save considerable funds while also appearing to take animal welfare seriously, by deferring to those with a long and trusted history of caring for animals. But this notion, that governments are simply making good use of specialist expertise, does not withstand scrutiny. If this were the case, much greater deference would be paid to RSPCA policies in the regulation of animal welfare; in fact, the views of the RSPCA are regularly trumped by commercial considerations in a wide range of animal settings, as the reference to layer hens illustrates. Such a selective reliance on the expertise of animal welfare charities suggests opportunism rather than sound public policy. This conclusion is reinforced by the choice of agency where governments have assumed some responsibility for animal welfare law, for example primary industries departments noted for the conflicts of interest described previously.

IV FRAGMENTATION OF REGULATORY RESPONSIBILITY

Sound public policy also appears to be lacking in the choice of food safety agencies as the principal regulators of animal welfare in domestic abattoirs, as recent events in NSW illustrate. Following the release of “disturbing video footage showing the gross mistreatment of animals” in a western Sydney abattoir, the NSW Food Authority reviewed the operations of all State domestic abattoirs.²⁶ The Minister for Primary Industries sought to assure the public that the problems revealed by the footage are “not representative of the general standard in other New South Wales abattoirs,” although she noted that confidence and skill levels varied.²⁷ According to the NSW Food Authority, the “findings from the abattoir review strongly suggest that staff competency and skills in animal welfare, including accountability of management, need to be addressed to change practices and culture in some premises”.²⁸ In response to the findings, additional requirements for domestic red meat abattoirs are being phased in, including the appointment of an animal welfare officer to oversee processing, mandatory meat industry training in stunning, sticking and shackling operations for relevant employees, and an additional annual audit focusing on animal welfare.²⁹ That such basic requirements were not already standard is in itself evidence of regulatory failure, as is the fact that the mistreatment which sparked the review was not exposed by the Food Authority but by an abattoir employee, Animal Liberation and the media.³⁰

²⁶ NSW Food Authority, ‘Safer Food, Clearer Choices, Annual Report, 2011-12’ (Annual Report, NSW Food Authority, 2012) 16.

²⁷ NSW, *Parliamentary Debates*, Legislative Assembly, 23 May 2012, 11851 (Katrina Hodgkinson).

²⁸ NSW Food Authority, ‘Training Requirements for Red Meat Domestic Abattoirs’ (General Circular, NSW Food Authority, 5 May 2012) 2.

²⁹ *Ibid.*

³⁰ Jen Rosenberg and Ben Cubby, “Covert Evidence of Cruelty Halts Abattoir”, *The Sydney Morning Herald* (online) 10 February 2012 <<http://www.smh.com.au/environment/animals/covert-evidence-of-cruelty-halts-abattoir-20120209-1rx7w.html>>.

For breach of its licence conditions, the NSW Food Authority fined the abattoir a total of \$5,200 and placed it on the name and shame register. In addition, separate enforcement action under POCTAA has been initiated by the RSPCA.³¹ Apart from the practical problems of communication and co-ordination between different agencies, this fragmented regulatory response is symptomatic of a crude distinction between animal welfare and animal cruelty, with the RSPCA considered relevant only in the latter case. This kind of unsophisticated regulatory response is not unique to animal law but reflects the enduring difficulty of defining the role of the criminal law where harm is caused in the context of economic activity. Indeed, the reluctance of governments to invoke the “full force of the criminal law against respectable employers engaged in productive economic activity”³² has been debated for decades in the context of workplace deaths and injuries. More recently, problems with the regulation of native vegetation clearing have been attributed in part to the inherent tension between conservation and development.³³ In relation to animals, however, problems associated with conceptual incoherence and fragmented regulatory responsibility are only just starting to be debated yet need to be urgently addressed because of the hidden nature of animal use and the inability of animals to represent their own interests.

V INVISIBILITY

As the case of the Sydney abattoir illustrates, members of the public often only become aware of animal mistreatment through the work of whistleblowers, animal protection agencies and the media. In relation to abattoirs, this problem has led to calls for mandatory CCTV surveillance. In February 2013, the NSW Greens introduced the Food Amendment (Recording of Abattoir Operations) Bill 2013 into the NSW Legislative Council to require video and audio recordings of animals in abattoirs and knackeries before and during the slaughter process. Mandatory installation of CCTV in all abattoirs is not an option currently supported by the NSW Minister for Primary Industries, despite her professed regard for informed consumer choice. Yet less than a year after the Minister assured the NSW Parliament that “tough new requirements aim to foster a culture in which management and employees in abattoirs adhere to the improved animal welfare standards”,³⁴ footage of multiple acts of cruelty at a poultry processing plant were aired on ABC television.³⁵ Once again, the incidents were identified by persons other than the regulator.

The issue of invisibility at federal level is no less troubling. Following an address to the National Press Club in Canberra on 20 January 2013, the Prime Minister, Julia Gillard, was asked about the suspension of the live cattle trade to Indonesia in 2011 following community outrage at the footage broadcast by the ABC. Ms Gillard’s reply was unapologetic: if the government had not acted at that time, “the Australian people would have effectively withdrawn the social licence of (the live export) industry and campaigns would have started in

³¹ NSW, *Parliamentary Debates*, Legislative Assembly, 23 May 2012, 11851 (Katrina Hodgkinson).

³² Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: System and Sanctions* (Oxford University Press, 1999) 7.

³³ Audit Office of NSW, ‘Performance Audit: Department of Land and Water Conservation: Regulating the Clearing of Native Vegetation’ (Auditor-General’s Report, Audit Office of NSW, August 2002) <http://www.audit.nsw.gov.au/ArticleDocuments/134/101__Land_Water_Conservation.pdf.aspx?Embed=Y>.

³⁴ NSW, *Parliamentary Debates*, Legislative Assembly, 23 May 2012, 11851 (Katrina Hodgkinson).

³⁵ ABC Television, *Lateline*, 20 March 2013.

a way that meant it could not be a continuing industry in our nation.”³⁶ While the Prime Minister made brief reference to animal welfare, she appeared unconcerned that conduct so grave as to constitute a threat to the continued existence of an entire industry had only come to the attention of the public through the work of animal protection organisations. A few months after the Prime Minister’s speech, further extreme cruelty to exported Australian cattle as exposed, again not by the government but by animal advocates and the media.³⁷

The invisibility of animal use is matched by a lack of transparency with respect to the relevant regulatory processes. While animal welfare charities provide only basic public data about their enforcement activities,³⁸ government agencies fare even worse in terms of their own administrative and compliance procedures. A few examples should suffice. The NSW Food Authority requires a formal application under the *Government Information (Public Access) Act 2009* (NSW) if seeking detailed enforcement data about abattoirs. The website of the NSW DPI is very general and includes no data on compliance activities in relation to the *Exhibited Animals Protection Act 1986* (NSW). Information about animals used in research and testing in NSW is included in the Annual Reports of the Animal Research Review Panel but the data lacks specificity in terms of whether, and how, the key principles of Replacement, Reduction and Refinement are being implemented. A similar lack of transparency is evident in relation to animal ethics committees, whose efficacy is difficult to test due to the secrecy of their deliberations. The desirability of greater institutional transparency is acknowledged by cl 2.1.11 of the 2011 public consultation draft of the *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes*. While this draft clause provides that institutions should consider making an annual report of compliance with the Code, as well as a summary of external reviews, publicly available, the provision is recommendatory only.³⁹ Even in relation to companion animals, routine data is difficult to generate because of the involvement of local councils, as well as animal welfare charities, in managing animal populations.

All these problems are exacerbated by a federal system in which the States and Territories retain primary responsibility for animal welfare but the Commonwealth also has some role. When the fragmentation of regulatory responsibility and the existence of various national codes of practice are factored in, obtaining a clear picture of enforcement activity becomes both difficult and time-consuming. Data collection in relation to the commercial killing of kangaroos provides an illustration of these problems.⁴⁰ The resulting information gap with respect to animal welfare regulation means that little is known about the extent of animal suffering, while any reforms that are introduced cannot be readily evaluated. As noted in a review of the AAWS published in 2010, “the lack of quantifiable data on animal welfare in Australia makes it difficult to know if the effort going into AAWS is achieving outcomes on

³⁶ ABC News, National Press Club, 30 January 2013 <<http://www.abc.net.au/news/2013-01-30/national-press-club-julia-gillard/4491528>>.

³⁷ ABC News, “Live Exports to Egypt Suspended amid Cruelty Probe”, 6 May 2013 <<http://www.abc.net.au/news/2013-05-04/livestock-exports-suspended-amid-cruelty-investigation/4669478>>.

³⁸ POCTAA requires that approved charitable organisations report to the Minister as set out in s 34B (3) and (4) and cl 34 of the Regulation. These reports do not appear to be released publicly.

³⁹ The current *Code of Practice for the Care and Use of Animals for Scientific Purposes* is the 7th edition (2004). The revised edition of the Code is due to be finalised by mid 2013. See Australian Government, National Health and Medical Research Council, *Review of the Australian Code of Practice for the Care and Use of Animals for Scientific Purposes* <<http://www.nhmrc.gov.au/health-ethics/animal-research-ethics/review-australian-code-practice-care-and-use-animals-scientific>>.

⁴⁰ Keely Boom, Dror Ben-Ami and Louise Boronyak, *Kangaroo Court: Enforcement of the law governing commercial kangaroo killing* (2012, THINKK).

the ground".⁴¹ More generally, without access to reliable information, animal advocates are vulnerable to a charge of being ill-informed, even if ignorance on a subject is not of their making.

VI CONCLUSION

This article has sought to demonstrate that the regulation of animal welfare has failed to engage with the more complex debates in this field, with attendant inconsistencies in terms of policy and legislation. Regulatory responsibility is fragmented both within and between States and Territories, with conflicts of interest a dominant feature of policy development and standard-setting. Enforcement is largely outsourced and significantly under-resourced and transparency is minimal. These regulatory deficiencies reflect modes of thinking that privilege individual action over community responsibility and frame animal protection as a charitable concern. The cumulative effect of these inter-related forces is a regulatory system which leaves animals vulnerable to competing interests while obscuring community knowledge about the extent to which animals are protected by law. This is at odds with much public rhetoric about animal welfare and with the values of open and accountable government. While some of the failings outlined in this article are found in other regulatory settings, they assume a particular significance in the context of animal welfare. Despite their sentience, animals are routinely used as a human resource, often in ways involving bodily harm and generally hidden from the public. In these circumstances, and unable to assert their own claims, animals are peculiarly dependent upon human agency for their protection.

Awareness of existing regulatory inadequacy is gaining momentum. Following a successful motion at the ALP National Conference in December 2011, a Labor caucus committee is developing a model to establish an Independent Office of Animal Welfare at the federal level.⁴² It appears that the work of the Independent Office would include the management of standard-setting, as well as oversight of the live export trade.⁴³ Although issues would remain with respect to the role of State primary industries departments, as well as enforcement more generally, the establishment of the proposed authority would be an important first step in introducing some balance into animal welfare policy. Ideally, this body would also act as a clearing house for national statistics on all facets of animal welfare regulation, though this would require the active co-operation of the States and Territories. In any event, with the likelihood of a change of government at the 2013 federal election, the Coalition's response to this initiative will be critical.

Coinciding with the push for an independent office, DAFF has advertised for tenders to review the Animal Welfare Standards and Guidelines development process. The review is to include the strengths and weaknesses of the existing process, alternative models for developing standards and guidelines and the effectiveness of stakeholder consultation under the current model.⁴⁴ Whether or not this review will support an independent office remains to

⁴¹ Bruce Gemmill, *Review of the Australian Animal Welfare Strategy 2009*, (2010, Department of Agriculture, Fisheries and Forestry, Government of Australia) 3
<http://www.daff.gov.au/__data/assets/pdf_file/0006/1935591/review-aaws.pdf>.

⁴² Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2013, 119 (Melissa Parke).

⁴³ *Ibid.*

⁴⁴ Department of Agriculture, Fisheries, and Forestry, Government of Australia, *Review of the Animal Welfare Standards and Guidelines Development Process* (20 February 2013) AusTender
<<https://www.tenders.gov.au/?event=public.atm.show&ATMUUID=F5B014F7-ECF7-254A-804D4C40A1482B9A>>.

be seen. Meanwhile, Luke Bowen, the executive director of the Northern Territory Cattlemen's Association, reportedly welcomed the review, stating both that it is important to have "sensible" national standards and that "it is critical for those with an interest in animal welfare to have a seat around the table".⁴⁵ With greater recognition of the failings of the current regulatory approach it may be that industry is prepared to show some flexibility in relation to existing arrangements if this helps to avoid more radical change.

But the time for compromise at the margins may have already passed. A regulatory system in which governments assumed greater responsibility for animal welfare would arguably be characterised by clear and consistent legislative provisions, genuinely independent standard-setting, administration and enforcement, much greater transparency about animal use, and resourcing commensurate with these imperatives. A useful starting point would be the routine provision of up to date, comprehensive and accessible information about the operation of all aspects of animal regulation to enable the community to participate in a more complex and contextualised animal protection debate. By helping to expose the shortcomings of current regulatory practices, this step would also specifically address that aspect of the principle of legality that exhorts parliaments, and by implication governments, to "squarely confront" the exercise of power and to "accept the political cost".⁴⁶ If consumers have a right not to be misled about how their eggs are produced, citizens have a right to be fully informed about the operation of food production systems, and the people and processes that determine these and other important animal welfare matters.

⁴⁵ Milanda Rout, "Livestock Standards for Review", *The Australian* (online), 25 February 2013, <http://www.theaustralian.com.au/national-affairs/foreign-affairs/livestock-standards-for-review/story-fn59nm2j-1226584625035>.

⁴⁶ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann) cited in *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501, 520 (French CJ).

BEEFING UP THE STANDARD: THE RAMIFICATIONS OF AUSTRALIA'S REGULATION OF LIVE EXPORT AND SUGGESTIONS FOR REFORM

KATRINA J CRAIG*

In Australia, animals intended for human consumption are first required to be 'rendered insensible' (stunned) and then slaughtered before they regain consciousness. However, research has shown that it is common practice in international slaughterhouses to condone methods that prolong the slaughtering process and torture the animal prior to its death. This paper is directed at illustrating the way in which the standards that ensure a relative degree of welfare for Australian animals are foregone once livestock reaches foreign ports, as the current export standards only ensure the consideration of the animals' welfare whilst in Australian jurisdiction. Consequently, altering the methods utilised by Australia to export live animals may increase levels of animal welfare, while simultaneously boosting employment opportunities within the Australian agricultural industry. This paper examines proposals for future reform of Australia's live export industry while alternatives, such as the supply of chilled meat, are suggested. It is concluded that the welfare of Australian livestock needs to be maintained from birth to slaughter. Accordingly, current policy requires a reform of the way in which live export is regulated to ensure the future welfare of livestock, maintain the economic strength of the Australian livestock industry and increase employment opportunities for those involved in the international distribution of livestock.

I INTRODUCTION

Australia is a leading supplier of high quality livestock to approximately 28 countries around the world.¹ Many of these importing countries do not possess the resources, environmental conditions or geography to successfully produce adequate numbers of livestock to satisfy their population.² As such, it is suggested that Australia's agricultural trade industry assists these regions by exporting livestock for food production and breeding, as well as in the form of chilled or frozen meat products.³

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¹ Meat and Livestock Australia, *Livestock Production: Transportation* (2012) <<http://www.mla.com.au/Livestock-production/transport>>.

² Meat and Livestock Australia, *Animal Health, Welfare and Biosecurity* (2012) <<http://www.mla.com.au/Livestock-production/Animal-health-welfare-and-biosecurity>>.

³ Department of Agriculture, Fisheries and Forestry, *Live Animal Export Trade* (2013) <<http://www.daff.gov.au/animal-plant-health/welfare/export-trade>>.

In addition to providing global importers with high quality meat, Meat and Livestock Australia (MLA) asserts that the Australian livestock industry also supports thousands of farming families by employing 13,000 people across rural and regional Australia and contributing \$1.8 billion to the national economy.⁴ It is further claimed that the international live export trade underpins the prices for numerous livestock producers across Australia by ‘providing an additional market’ to which these products may be sold.⁵

However, recent investigations into the welfare of Australian livestock, upon arrival at international destinations, have revealed that exported animals are often paying a devastating price for the national profit generated by the industry.⁶ These investigations have documented many instances of unnecessary suffering, ill-treatment, and cruel methods of slaughter of Australian livestock upon arrival at the various international importing destinations.⁷ This highlights that the welfare of these animals is rarely regulated, or considered, as a priority by the importing countries.

This paper does not review Australia’s commitment to, or regulation of, livestock welfare during the processes of domestic husbandry and handling. Rather, it illustrates the way in which Australian animal welfare regulations are limited once livestock reach foreign ports, where the standards of animal care are comparatively lower. Further, this paper purports that in order to achieve higher welfare standards for livestock, while maintaining Australia’s international trade relationships, profitability and employment opportunities, the chilled meat trade should replace the live export industry to all countries where that it is possible. In instances where it is not viable to supply chilled or frozen meat, livestock should be supplied by attaching standards, compliant with the Office International des Epizooties (OIE)⁸ guidelines, to the animal rather than the geographical location.

This paper will commence with an overview of Australia’s regulation of the live export of farmed animals, focusing on the political consequences of the current policy, particularly with regard to the recent Indonesian and Egyptian live export bans. Subsequently, the welfare of Australian livestock will be considered in the context of the cultural preference for freshly slaughtered meat. Before the implications of Australia’s live export trade on the welfare of farmed animals is assessed, the justifications for continuing the live export trade will be highlighted with reference to the ‘halal’ standards required by Islamic importers. Following this, the future of Australia’s live export trade will be evaluated, focusing largely on the ethical grounds that justify a revision of Australia’s current approach to this issue. Proposals for future reform will then be examined and alternatives to live export, such as the supply of chilled and frozen meats, will be proposed. It will then be concluded that the welfare of Australian livestock needs to be maintained from birth to slaughter, regardless of their geographic location. Consequently, the current policy requires reform to ensure the future welfare of livestock, maintain the strength of the Australian economy in this industry and increase employment opportunities for those involved in the distribution of livestock, both domestically and internationally. These proposed changes will ensure that livestock are treated as sentient beings rather than mere commodities for profit, without foregoing the livelihood and wellbeing of Australia’s export industry and its contributors.

⁴ Meat and Livestock Australia, *About the Red Meat Industry* (15 February 2013) <<http://www.mla.com.au/About-the-red-meat-industry/Livestock-exports>>.

⁵ Ibid.

⁶ Department of Agriculture, Fisheries and Forestry, *Live Animal Export Trade* (2012) <<http://www.daff.gov.au/animal-plant-health/welfare/export-trade>>.

⁷ Ibid.

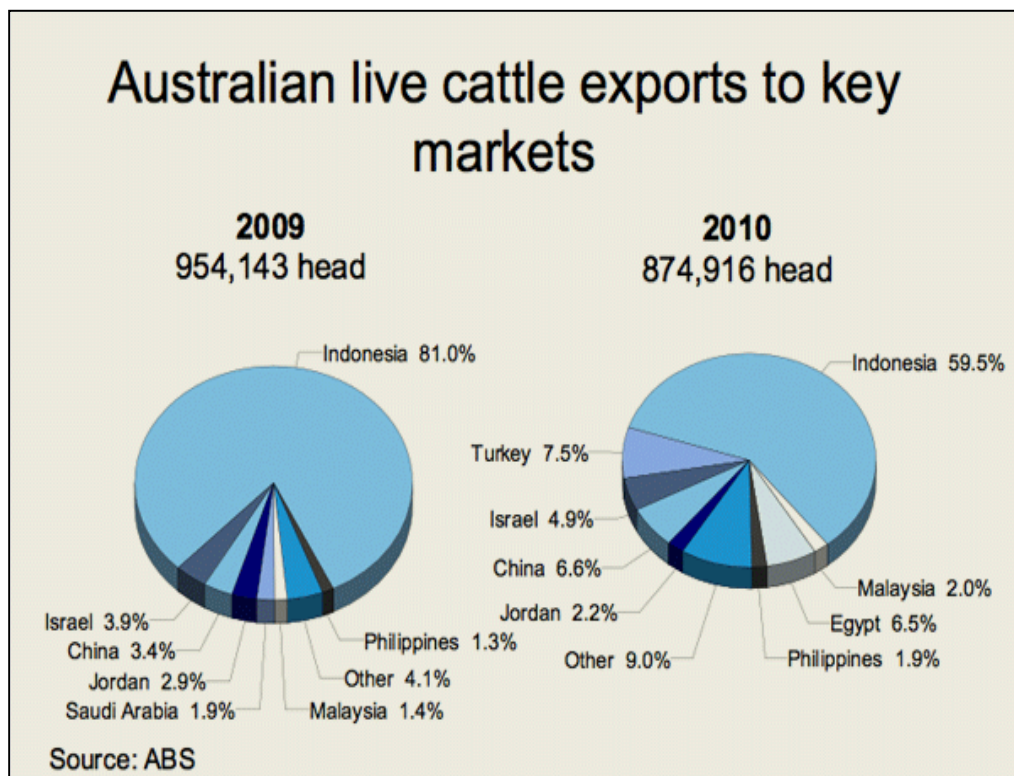
⁸ Also known as the World Animal Health Organisation.

II THE AUSTRALIAN LIVE EXPORT PROCESS

This section of the paper will present an overview of Australia's current regulation of the live export of farmed animals. The overview will illustrate the process by which Australian livestock are transported from their respective farming stations to foreign ports. It will be highlighted that, upon arrival at these foreign ports, the livestock are no longer protected by Australian law or regulation. It will further be noted that, as a result of this lack of regulation, Australian livestock are often subjected to cruel, and unnecessary, practices of transportation, handling and slaughter.

In 2009, approximately 3.56 million sheep and 954,143 cattle were exported live from Australian ports.⁹ A large proportion of Australian sheep are shipped to the Middle East, with Saudi Arabia being the main importer.¹⁰ Meanwhile, ports closer to Australian shores, such as those in Indonesia, import the majority of live cattle.¹¹ Figure 1 below¹² illustrates the primary importers of Australian beef livestock in recent years.

Figure 1



Many Australian export companies are funded by the Federal Government through statutory levies.¹³ Such corporations also have a Statutory Funding Agreement with the Federal Government detailing accountability and other obligations of the exporting company.¹⁴ When

⁹ Meat and Livestock Australia, above n 2.

¹⁰ Ibid.

¹¹ Michael Caulfield, 'Live Export of Animals' in Peter Sankoff and Steven White (eds) *Animal Law in Australasia: a new dialogue*, (Federation Press, 2009) 153-173.

¹² Australian Bureau of Statistics via 'Future Beef', *Livestock Markets*, (2013) <<http://futurebeef.com.au/topics/markets-and-marketing/live-export/Z>>.

¹³ LiveCorp, *Facts and Stats* (2013) <http://www.livecorp.com.au/Facts_and_Stats.aspx>.

¹⁴ Ibid.

exporting livestock from Australia, there are several processes with which companies must comply at each stage of the exportation process.¹⁵ All exporters are required to have a licence and each export needs a permit to gain approval for release from customs.¹⁶ Without this export permit, the livestock consignment cannot leave Australia. Failure, by an exporting company, to abide by Government orders under the *Australian Meat and Livestock Industry Act 1997* (AMLI Act) can result in the loss of licence.

Additionally, each proposed export must obtain Government approval for the export destination and relevant contingency planning.¹⁷ The selected livestock are subsequently transported to feedlots for pre-shipment quarantine where they remain for at least one week prior to loading.¹⁸ At these feedlots, the animals are commonly inspected by a veterinarian from the Australian Quarantine and Inspection Service (AQIS) who must issue a 'permit to leave for loading' prior to the consignment being transported to the docks.¹⁹ The livestock are then transported via trucks to the selected ports where they are loaded onto the vessels. These vessels are often bound for the Middle East or Asia,²⁰ where animal welfare standards are comparatively lower to Australian standards or non-existent.²¹

Livestock destined for the Middle East are accompanied by up to five independently accredited company stock workers and a third party veterinarian.²² It is noted by the author that the ratio of five stock workers and one veterinarian charged with the care of 100,000 livestock hardly falls in favour of animal welfare. Nevertheless, whilst onboard export vessels, the livestock are cared for to a standard which ensures that the majority of the animals survive the journey to foreign destinations.²³ All shipping vessels are required by the Australian Maritime Safety Authority (AMSA), under Marine Order 43, to be equipped with continuous food and water supplies for livestock. All vessels on long voyages are equipped with facilities to produce their own fresh water while at sea.²⁴ The Australian Standards for the Export of Livestock stipulate the quantity of water required for the differing species of livestock. Prior to disembarking from Australian shores, the quantity of food and water on board is examined by the AQIS before a health certificate may be issued.²⁵

Journeys transporting livestock via airfreight are controlled by the International Air Transport Association (IATA) Live Animal Regulations and are also governed by the Australian Standards for the Export of Livestock.²⁶ 'Trigger Levels' are utilised to regulate mortality rates of livestock during such voyages.²⁷ These levels are part of the AMSA Marine Order 43 and, if reached, require the ship's master to report to the AMSA before an investigation is instigated into causation.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Meat and Livestock Australia, above n 2.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ As illustrated in Figure 1 above.

²¹ United States Department of Agriculture, *Beef...from Farm to Table*, (2012) <http://www.fsis.usda.gov/factsheets/beef_from_farm_to_table/index.asp#2>.

²² Meat and Livestock Australia, above n 2.

²³ Ibid; it takes on average, three weeks to ship Australian livestock to the Middle East.

²⁴ LiveCorp, above n 14.

²⁵ Meat and Livestock Australia, above n 2.

²⁶ Ibid.

²⁷ Mortality rates: Sheep 2%, Beef (long voyage 1% and short voyage 0.5%).

Upon their arrival at the foreign ports, the animals are offloaded into international feedlots where they are distributed to slaughterhouses and residential homes.²⁸ In an effort to illustrate their commitment to the welfare of Australian livestock, MLA has stipulated that producers of livestock must consider the five freedoms for animals and recognise the need to incorporate them into export management plans.²⁹ These five freedoms are borne from the RSPCA's belief that there are basic, fundamental principles to which animals should be entitled to, namely: freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury and disease; freedom to express normal behaviour; and freedom from fear and distress.³⁰

As a result of these guidelines, MLA purports that on average, over 99% of all Australian animals arrive 'fit and healthy' at their port of destination.³¹ However, Australian organisation 'Live Export Shame' (LES) asserts that these claims are used in an effort to misguide public perception of the live export trade.³² While LES agrees that Australia leads the world in the greatest number of sentient animals being exported overseas, they note that Australia also leads the world in causing massive 'suffering, cruelty and brutality to millions of animals every year' through the current regulation of the livestock trade.³³ Moreover, these guidelines are not mandatory. It may be sufficient for companies to merely consider these standards, rather than strictly abide by them, before exporting livestock.³⁴

Once offloaded at international ports, livestock are beyond the jurisdiction of Australian law.³⁵ Consequently, the Australian Government is unable to ensure that livestock are handled or slaughtered in accordance with Australian standards. Research has indicated that inhumane slaughter and handling practices that would be considered to be in breach of Australian laws, are common among importing countries.³⁶

Evidence has also illustrated that international buyers of livestock will often transport their purchases in car boots or on roof-racks in temperatures exceeding 40°C.³⁷ In some instances, sheep are herded into slaughtering facilities before being individually dragged to the slaughter area where their throats are cut and they are left to 'bleed out' over a drain.³⁸ Additionally, cattle's tendons may be slashed and their eyes gouged before their throats are cut without prior stunning. In Australia, these practices are illegal and the slaughter of all livestock is strictly regulated.³⁹

²⁸ Live Export Shame, *World's Best Practice in Live Export – just what does this mean?* (2012) <http://www.liveexportshame.com/worlds_best_practice.htm>.

²⁹ Meat and Livestock Australia, above n 3.

³⁰ RSPCA Australia, *Five Freedoms for Animals* (2009) <<http://kb.rspca.org.au/entry/318>>.

³¹ Ibid.

³² Live Export Shame, above n 29.

³³ Ibid.

³⁴ Ibid.

³⁵ Ban Live Export, *About Live Export* (2012) <<http://www.banliveexport.com/>>.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

III THE POLITICAL CONSEQUENCES OF AUSTRALIA'S LIVE EXPORT INDUSTRY

The previous section of this paper provided an overview of the process by which Australian livestock are transported from their respective farming stations to foreign ports. It was noted that, due to the inability to apply Australian welfare standards upon arrival at these foreign ports once the livestock are in the control of the importing countries, Australian livestock are often subjected to cruel and unnecessary practices of transportation, handling and slaughter. This section of the paper focuses on the political consequences of the current policy and the effect it has had on the livestock, the agricultural industry and the importing countries. In particular, this section presents a case study involving the Indonesian live export ban of 2011 and briefly reviews the recent Egyptian Live Export Ban of 2013, highlighting the consequential repercussions suffered by both the industry and the animals as a result of these abrupt interdictions.

In recent years, there have been a number of investigations, reports and media releases regarding the cruel methods utilised by international abattoirs during the slaughter of Australian livestock for human consumption.⁴⁰ Arguably the most confronting, and widely viewed by the Australian public, was an explicit exposé broadcast on the Australian television news program 'Four Corners' in 2011.⁴¹ This report featured graphic footage of Australian livestock being mistreated during processing at several Indonesian abattoirs and highlighted a distinct lack of consideration for animal welfare standards.⁴² The public reaction to this report was immense. In three days 200,000 Australians joined the 'GetUp petition' directed towards persuading the Federal Government to ban live export.⁴³ In response to this overwhelming public reaction, the Federal Government temporarily suspended the live cattle trade to Indonesia.⁴⁴

A *The Indonesian Live Export Ban of 2011*

Indonesia is Australia's most significant live beef export partner.⁴⁵ The ban on Indonesian live export began in June 2011 and lasted approximately four weeks. The implementation was so sudden that organisations involved in the livestock industry suffered significant consequences due to the lack of time available to implement contingency plans.⁴⁶ This ban was the Government's reaction to public pressure, political influence and significant lobbying by animal advocacy groups.⁴⁷ Minister for Agriculture, Mr Joe Ludwig, believed that while the Government's response was focused on animal welfare issues, the sustainability of the

⁴⁰ Ibid.

⁴¹ Australian Broadcasting Corporation, *A Bloody Business* (2011) <http://www.abc.net.au/4corners/special_ed/20110530/cattle/>.

⁴² Anne Worthington 'Live exports to shamed abattoirs suspended' *Australian Broadcasting Corporation News* (online) 1 June 2011, <<http://www.abc.net.au/news/2011-05-31/live-exports-to-shamed-abattoirs-suspended/2738896>>.

⁴³ Ban Live Export, above n 26.

⁴⁴ Malcolm Farr 'Cattle industry reeling over live export ban to Indonesia' *News.com.au* (online) 8 June 2011, <<http://www.news.com.au/business/cattle-industry-reeling-over-live-export-ban-to-indonesia/story-e6frfm1i-1226071368446#ixzz1ajiQUOPq>>.

⁴⁵ Contributing \$319 million to the Australian economy and importing 59.5% of the country's cattle in 2010 according to Bill Farmer, 'Independent Review into Live Export Trade -Australia Indonesia Business Council' on *Minister for Agriculture, Forestry and Fisheries* (June 2011) <http://www.maff.gov.au/media_office/media_releases/media_releases/2011/june/mr-bill-farmer-ao-to-conduct-independent-review-into-live-export-trade>.

⁴⁶ Farr, above n 45.

⁴⁷ Ibid.

live export industry was in jeopardy following the sudden ban.⁴⁸ Similarly, Senator Barnaby Joyce of the National Party claimed that the ban of live exports to Indonesia ‘could wreck the livelihood of beef producers and transporters here, as well as meat suppliers in Indonesia’.⁴⁹ Further, Mr Warren Truss of the National Party stated that it was clear the Government had no contingency plan for the cattle industry following the sudden ban.⁵⁰ Conversely, Independent Senator Nick Xenophon stated that the ban was evidence that ‘the Government has finally listened to the Australian people that they do not support such cruel and inhumane treatment of animals.’⁵¹

The sudden ban also had devastating effects on many of the livestock that were preparing for the voyage to Indonesia. An Australian cattle station owner reported that he would be forced to begin shooting his stock as he could no longer afford to support them due to the ban.⁵² The Federal Opposition stated that this case was evidence that the live export ban was causing significant animal welfare issues in Australia.⁵³ However, Senator Ludwig countered that the cattle station owner could access emergency funds if needed.⁵⁴ Further, chief executive of the RSPCA Heather Neil stated that ‘no cull should be necessary of cattle in Australia’ if the pastoralists were accessing and investigating the financial assistance and support available to them during the ban.⁵⁵

Exactly one month after its commencement, Senator Ludwig announced that the Government had lifted the ban.⁵⁶ However, trade did not resume immediately due to the introduction of a revised Industry Action Plan (IAP) that required exporters to obtain new permits and increase their monitoring of livestock.⁵⁷ Under this new system, exporters were obliged to track their livestock to ensure that they are slaughtered in approved abattoirs. Additionally, the Indonesian abattoirs were to be subjected to independent audits to ensure their processes satisfied international standards.⁵⁸

Senator Ludwig assured the public that the permits and independent audits would compel exporters to guarantee higher welfare standards for the cattle.⁵⁹ Mr Ludwig stated that ‘these strict new conditions have been written into all export permits’ and that ‘permits will only be issued to those exporters who can demonstrate that this will be the case.’⁶⁰

48

Ibid.

49

Ibid.

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Ibid.

51

Ibid.

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Bronwyn Herbert ‘Cattle cull shines live export ban in political spotlight’ *Australian Broadcasting Corporation News* (5 July 2012) <<http://www.abc.net.au/pm/content/2011/s3261734.htm>>.

53

Ibid.

54

Ibid.

55

Ibid.

56

Steven Scott ‘Live Export Ban Lifted...with a catch’ *Courier Mail* (7 July 2012) <<http://www.couriermail.com.au/business/live-export-ban-lifted-says-agriculture-minister-joe-ludwig/story-e6freqmx-1226089173962>>.

57

Herbert, above n 53.

58

Australian Government Live Exports, *Livestock export supply chain regulatory approach* (2011) <http://liveexports.gov.au/__data/assets/pdf_file/0005/1955624/supply-chain-assurance-and-welfare-standards-080711.pdf>.

59

Ibid.

60

Scott, above n 57.

The Greens Party condemned the resumption of the live export trade, maintaining that the new permit system was inadequate as it did not require animals to be stunned prior to their slaughter.⁶¹ While international guidelines do not stipulate that cattle must be stunned before slaughter, Mr Ludwig affirmed that exporters would be 'urged to encourage the use of stun guns in overseas abattoirs'.⁶²

Animals Australia (AA) has postulated that merciless treatment will continue under the recently introduced IAP. Consisting of three fundamental elements, namely to increase the use of restraint boxes, to advance the use of stunning in five Indonesian abattoirs and a 'desired outcome' to satisfy OIE standards by 2015, these proposals are not new and have previously failed to ensure the welfare of Australian livestock.⁶³

The Keniry Report, released in early 2004, contained eight suggestions for future reform of the live export trade. While these recommendations had the potential to improve the practices involved with Australia's live export trade, the RSPCA highlighted that these proposals were not binding on the industry and acted as mere 'ideas' for bettering the animal welfare standards during live export.⁶⁴ As such, the RSPCA currently contends that 'there remain inherent problems in the long distance transport of animals and animals often suffer severe cruelty at their destination'.⁶⁵ Therefore, as the recommendations are purely suggestive, not legally binding and do not protect livestock upon arrival at foreign slaughterhouse, it is unlikely that the IAP will achieve adequate results.

On 18 August 2011 two bills were introduced to the Australian House of Representatives: the 'Live Animal Export Restriction and Prohibition Bill 2011' by Mr Andrew Wilkie, the Independent Member for Denison, and the 'Live Animal Export (Slaughter) Prohibition Bill 2011' introduced by Greens Member for Melbourne, Mr Adam Bandt.⁶⁶ These Bills sought to cease Australia's live export trade but were both denied by the House of Representatives.⁶⁷ Despite their rejection, Ms Siobhan O'Sullivan, a research fellow from the School of Social and Political Sciences at the University of Melbourne, claimed that these proposals were revolutionary as the Australian Government had become progressively more involved with issues relating to the management of live exports. This was evidenced by the request to Prime Minister Julia Gillard, one week prior to the introduction of the Bills, to allow a conscience vote on the issue of live export.⁶⁸ This was significant as, historically, conscience votes had only been permitted for a limited number of matters⁶⁹, none of which traditionally related to animal welfare.⁷⁰

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Caulfield, above n 12.

⁶⁵ Ibid.

⁶⁶ Siobhan O'Sullivan 'Live animal exports and Australian politics; more than a case of conscience' *The Conversation* (23 August 2011) <<http://theconversation.edu.au/live-animal-exports-and-australian-politics-more-than-a-case-of-conscience-2964>>.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ They are: (a) stem cell research, cloning and IVF; (b) abortion, euthanasia and capital punishment; (c) drug reform, war crimes, homosexuality and gambling; and (d) privilege concerns, parliamentary procedure and standing orders.

⁷⁰ O'Sullivan, above n 67.

Ms O'Sullivan contends that the logic supporting the request for a conscience vote relating to the live export trade is possibly linked to a 'sense that [live export] is a deeply felt issue' and that there was a significant response to the *Four Corners* broadcast.⁷¹ However, Ms O'Sullivan also highlighted that the matter of live export is markedly different to the issues that Ministers usually submit for vote in Parliament, based on their conscience.⁷² She explained that the major difference was the significant financial investments and returns associated with the live animal export trade, stating that 'the overtly economic nature of animal agriculture means a conscience vote on the issue is almost unthinkable'.⁷³ The live export industry is largely founded on the notion of 'necessary suffering' that Ms O'Sullivan asserts is at the core of animal welfare law both domestically and internationally.⁷⁴

The principle of 'necessary suffering' infers that it is wrong to cause an animal to suffer unless it is deemed 'necessary'.⁷⁵ Interpretation of this notion requires a utilitarian approach by which the pain and suffering of the animal is weighed up against the potential benefit to humans of treating the animal in a particular manner.⁷⁶ The application of this test is prompted by the inclusion of various characteristics within the protective provisions of the legislation that infuse a degree of subjectivity into what constitutes animal cruelty.⁷⁷ However, it has been commonly held that necessity is satisfied if it is associated with 'standardised, mass animal use, usually for an economic purpose'.⁷⁸ This principle is the basis on which the Australian Government justifies factory farming, yet prohibits acts of violence against companion animals.⁷⁹ As such, despite its significant tradition of suffering, cruelty and death, the acceptability of live export has been maintained through economic rationalisation. Notwithstanding the fact that where economic interests are concerned, necessity may allow increased animal suffering, Ms O'Sullivan postulates that this is not a standard that can endure scrutiny. She asserts that eventually, 'even the most economically advantageous activity will become difficult to justify when the suffering of the animals is sufficiently great and brought to the community's attention'.⁸⁰

In the case of *Department of Regional Government and Local Department v Emanuel Exports Pty Ltd*⁸¹ ('*Al Kuwait*' Case), a magistrate's court was required to consider whether the welfare of the animals being exported live should be subordinated to the 'essentialism' of economic growth.⁸² One of the issues that arose was whether it was necessary to export 'fat sheep' when evidence existed that such sheep were prone to higher mortality rates.⁸³ The Court held that:

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ O'Sullivan, above n 67; Caulfield, above n 12; Deborah Cao, Katrina Sharman, and Steven White *Animal Law in Australia and New Zealand* (Lawbook Co., 2009) 204-207.

⁷⁵ Deborah Cao, Katrina Sharman, and Steven White, *Animal Law in Australia and New Zealand* (Lawbook Co., 2009) 204-207.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ O'Sullivan, above n 67.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ (Unreported, Western Australia Magistrates Court, Crawford M, 8 February 2008).

⁸² Cao, above n 76.

⁸³ Ibid.

The beneficial or useful ends sought to be attained must be reasonably proportionate to the extent of suffering caused and in no case can substantial suffering be inflicted, unless necessity for its infliction can reasonably be said to exist.⁸⁴

Consequently, it was found that the sheep had been subjected to unnecessary harm under the *Animal Welfare Act 2002* (WA). However, the accused parties had been issued an export permit by the Commonwealth Government and so, pursuant to s 109 of the Commonwealth Constitution, were acquitted due to an operational inconsistency between the State and Federal laws.⁸⁵

Despite this acquittal, Ms Glenys Oogjes, Director of Animals Australia, stated that:

[This] finding is not only damning for the industry, as this was a routine shipment, but politically it is groundbreaking. There is now immense pressure on the Federal Government to respect State law.⁸⁶

This ruling highlights the need for legislative reform of Australia's regulation of animal welfare. This need for reform is due to the operational inconsistency between the State and Federal laws as any export permit issued by the Federal Government that allows 'fat sheep' to be transported in the second half of the year⁸⁷ will be permitting animal cruelty under State law. If this inconsistency remains unreformed, the Commonwealth will continue to undermine the States and Territories' power to protect animals in such circumstances. Ms Oogjes supports the necessity of legislative reform, concluding that:

The... Government must act on this ruling by not approving export permits that allow exporters to breach state animal welfare regulations. To do otherwise, would not only be knowingly permitting cruelty, but undermining the ability of the state legislation to protect animals from cruelty.⁸⁸

Despite the acquittal of the accused and the inapplicability of the result as legal precedent, this decision remains significant for a number of reasons. First, its rationale has been accepted by the Government of Western Australia.⁸⁹ Second, it highlighted the difficulty of applying the *Animal Welfare Act 2002* (WA) and similar legislation, to conduct relating to the live export process.⁹⁰ Third, it emphasised the limited protection offered by both the State and Federal legislation.⁹¹ Finally, it illustrated that the 'multiplicity of regulatory sources' hinders, rather than advances the protection of livestock during export due to the operational inconsistencies between differing legislation.⁹² Consequently, although the current regulatory framework is allegedly designed to impose standards of animal welfare upon the industry, the decision in '*Al Kuwait*'⁹³ reveals the inadequacy of the framework's ability to achieve appropriate welfare standards.⁹⁴

⁸⁴ (Unreported, Western Australia Magistrates Court, Magistrate Crawford, 8 February 2008) 98.

⁸⁵ Laura Morfuni, 'Pain for Profit: an analysis of the Live Export Trade' (2011) 16 *Deakin Law Review* 497-538.

⁸⁶ *Ibid.*

⁸⁷ Fat sheep are the primary types of sheep and the peak time for exports according to Morfuni, above n 86.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ (Unreported, Western Australia Magistrates Court, Magistrate Crawford, 8 February 2008).

⁹⁴ Morfuni, above n 86.

1 *The Federal Government's Action on Live Export since the Indonesian Ban*

In response to the Indonesian ban and the subsequent societal tumult, the Federal Government released a plan to reform the live export trade. This plan was announced by the Minister for Agriculture, Fisheries and Forestry, Mr Joe Ludwig, on 21 October 2011.⁹⁵ The reforms were founded on conclusions and recommendations of two Industry Government Working Group reports and the Independent Review of the Live Export by Bill Farmer AO.⁹⁶ The Federal Government has effected these amendments by altering legislative Orders under the *Export Control Act 1982* (Cth) and the *Australian Meat and Live-stock Industry Act 1997* (Cth).⁹⁷

The supply chain assurance framework, developed immediately following the ban in June 2011, was modified and was to be applied to all importing countries by the end of 2012.⁹⁸ This new framework requires all potential exporters of Australian livestock to demonstrate that: the animals will be handled in accordance with OIE standards up to the point of slaughter; they have control of, and can account for, the livestock; and they have independent audits conducted of the supply chain prior, and subsequent, to the completion of export.⁹⁹

Further, the Federal Government has stated that it intends to conduct a 'comprehensive review of the Australian Standards for the Export of Livestock (ASEL) by 29 March 2013' in addition to a review of the current livestock carriage and shipping standards by the Australian Maritime Safety Authority.¹⁰⁰ The Government also claims that it will 'improve the support and assessment of AQIS-accredited veterinarians by providing further training, streamlining reporting processes and strengthening audit methods'.¹⁰¹ In addition, it has been proposed that the Federal Government will be conferring with State and Territory Governments to encourage various amendments to existing legislation, including the incorporation of animal welfare standards.¹⁰²

Internationally, the Federal Government asserts that it will encourage the practice of stunning in export markets but will not make it mandatory as it is not obligatory under the OIE standards.¹⁰³ Also, \$10 million has been allocated over four years¹⁰⁴ to be provided to eligible countries that import Australian livestock in an effort to improve the standards of animal welfare.¹⁰⁵ On the domestic front, the Government has promised to provide five million dollars over two years to support livestock exporters in helping them create improved supply chains.¹⁰⁶ While these suggestions appear to be addressing the issues of livestock welfare, the reform propositions are largely focused on 'conferring', 'suggesting' and 'reviewing' existing methods and regulations. Consequently, there is no indication that existing practices will be amended to a standard that will effect significant change in current animal welfare standards.

⁹⁵

Ibid.

⁹⁶

Department of Agriculture, Fisheries and Forestry, *Australian Government Action on Live Export* (2011) <http://www.daff.gov.au/liveexports/Government_action#new>.

⁹⁷

Ibid

⁹⁸

Ibid; at the time of writing, it is not yet known whether this has been successfully implemented.

⁹⁹

Department of Agriculture, Fisheries and Forestry, above n 97.

¹⁰⁰

Ibid.

¹⁰¹

Ibid.

¹⁰²

Ibid.

¹⁰³

Ibid.

¹⁰⁴

From the 'Official Development Assistance' contingency fund.

¹⁰⁵

Department of Agriculture, Fisheries and Forestry, above n 97.

¹⁰⁶

Ibid.

Over the past few years, it has been alleged that the Federal Government has jeopardised the red meat industry due to the recent mismanagement of the live export trade.¹⁰⁷ The Government figures compiled in 2012 claimed that the live export ban resulted in at least 274,000 animals being stranded, 326 jobs lost in northern Australian and that it affected over half of the northern Australian cattle producers.¹⁰⁸ The emergence of possible class action, brought by beef producers against the Federal Government, is evidence of the significant detriment and loss the ban has caused Australian farmers.¹⁰⁹ It has been revealed that almost 12 months after the Indonesian live export ban, many beef producers are seeking ‘hundreds of millions ... in compensation’ from the Federal Government.¹¹⁰ The release of the 2012 Federal Budget Papers indicated that:

The Australian Government may become liable for compensation following the decision by the Minister for Agriculture, Fisheries and Forestry to suspend the export of livestock to Indonesia for a period of one month in 2011.¹¹¹

In response to the possibility of the class action by beef producers, Independent Member of Parliament, Mr Bob Katter, proposed that MLA should ‘foot the bill’ of the class action compensation stating that ‘[MLA] was paid a hundred million a year to look after our interests [and] quite frankly did nothing whatsoever ... so I would think [they] would be caught in the action here’.¹¹²

However, MLA advised they had not been served with any form of legal notice and their only knowledge of the class action was to the extent that it was mentioned in the 2012 Federal Budget Papers¹¹³. Minister Ludwig himself declined to comment and instead released a written statement advising that he believed ‘it would be inappropriate to comment on any matters that may be subject to action before the courts’.¹¹⁴

The damage sustained by livestock and its producers during the Indonesian Ban was considerably more significant than the alleged changes the Federal Government’s IAP and the new supply chain assurance framework claimed to have on animal welfare.¹¹⁵ In light of the multimillion dollar class action against the Federal Government, the introduction of the permit system and a proposed ‘comprehensive review’ of the current regulations far from provide a solution to the unjustifiable suffering of livestock and its producers during the Indonesian live export ban.¹¹⁶

¹⁰⁷ Patricia Peterson ‘Beef Industry at Threat’ *Warwick Daily News* (10 August 2012) <<http://www.warwickdailynews.com.au/story/2011/08/10/dr-patricia-petersen-lecturer-in-economics-at-cen/>>.

¹⁰⁸ Mitchell Nadin, Milanda Rout ‘Cattle Farmers Demand Compo for Indonesia’ *The Australian* (15 May 2012) <<http://www.theaustralian.com.au/news/nation/cattle-farmers-demand-compo-for-indonesia-live-export-ban/story-e6frg6nf-1226355287475>>.

¹⁰⁹ AAP ‘Beef Farmers seek compensation over live export ban to Indonesia’ *The Herald Sun* <<http://www.heraldsun.com.au/news/victoria/beef-farmers-see-compensation-over-live-export-ban-to-indonesia/story-fn7x8me2-1226355260699>>.

¹¹⁰ *Ibid.*

¹¹¹ James Nason, ‘Talks continue around live export compensation claims’ *Beef Central* (15 February 2013) <<http://www.beefcentral.com/live-export/article/2768>>.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Live Export – Indefensible, *Live Animal Exports; The Issues*, (2011) <<http://liveexport-indefensible.com/facts/issues.php>>.

Further, while the same Government Department¹¹⁷ retains control over both the agricultural industry and standards of animal welfare, there remains a stark conflict of interest that will always inevitably fall in favour of economic gain. While the class action may deliver some reprieve to livestock producers for their losses, the suffering of livestock fails to be addressed, and continues to be intrinsically condoned by Federal legislation. Simply because international guidelines do not require livestock to be stunned prior to slaughter, does not mean that such a requirement is not necessary to achieve and ensure adequate standards of welfare for farmed animals.¹¹⁸

B *The Egyptian Live Export Ban 2013*

Arguably, the most compelling evidence that confirms the inadequacy of the Government reforms can be found in the recently obtained footage of the abhorrent mistreatment of Australian cattle in Egyptian abattoirs. This graphic evidence was obtained by Animals Australia and was subsequently provided to the Department of Agriculture, Forestry and Fisheries in late April 2013.¹¹⁹ In response to this footage, live trade to Egyptian ports was suspended in early May 2013.¹²⁰

Following the implementation of this ban, the damning footage was broadcast publicly on the Australian television program '7.30 Report'¹²¹, featuring evidence captured in late 2012 and early 2013, of Australian cattle being abused in two Egyptian abattoirs.¹²² The video revealed numerous instances of horrific treatment of Australian animals, including: a cow having its eyes stabbed and leg tendons slashed after it escaped from a slaughter box; and a cow that escaped from its restraint box and was found wandering the abattoir with a gaping neck wound, sustained during a failed attempt by abattoir workers to effect successful slaughter.¹²³

This abuse occurred in abattoirs previously described as 'state of the art' by industry leaders.¹²⁴ Mr Jeff Murray, president of the Meat Division of the Western Australian Farmers Federation had reported that he had been impressed with the standards of these Egyptian abattoirs, which he observed during his visit in November 2012.¹²⁵ Mr Murray further stated that the Egyptian Ban is 'another blow to beef producers reeling from falling prices caused by a lack of demand for live exports'.¹²⁶ This response, defending the international abattoirs in which these horrific instances of animal cruelty occur, highlights that the priorities of the Australian agricultural industry lie in the continuation of animal suffering in the name of profit.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Chris Johnson, 'Live exports to Egypt suspended', *Sydney Morning Herald* (Sydney) 4 May 2013.

¹²⁰ Ibid.

¹²¹ James Dowling, 'Videos of cattle abuse halt live exports to Egypt', *Herald Sun*, 3 May 2013.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Brad Thompson and Andrew Tillett, 'Call to make live export ban permanent' *The West Australian*, 7 May 2013.

¹²⁵ Ibid.

¹²⁶ Ibid.

Investigations have now been launched, by relevant Australian and Egyptian regulators, to inspect the current standards and practices occurring in such abattoirs.¹²⁷ Tasmanian Independent Member of Parliament, Mr Andrew Wilkie stated that ‘the latest shocking revelation of cruelty to Australian animals, this time in Egypt, surely must sound the death knell for Australia's live animal export industry’.¹²⁸ Agriculture Minister Mr Joe Ludwig responded to the public and ministerial pressure to permanently cease the Australian live export trade by claiming that 99.9 per cent of animals exported live were not abused.¹²⁹ Mr Ludwig, however, could not provide a source for this percentage.¹³⁰ Greens Senator, Ms Lee Rhiannon, stated that, ‘[Mr Ludwig] should move quickly to transition away from live exports and establish an overdue independent Office of Animal Welfare’.¹³¹

At the time of writing, the full effect of this new ban is unknown. However, it is anticipated that the consequences will be akin to those suffered as a result of the previously implemented Indonesian live export ban. This strongly highlights that the reforms implemented by the Government, following the Indonesian Ban, have failed. It reinforces this paper's position that, while the suggestions for reform appear to be addressing the issues of livestock welfare, they are predominantly focused on ‘conferring’, ‘suggesting’ and ‘reviewing’ existing methods and regulations. Consequently, there is no indication that existing practices will be amended to a standard that will effect significant change in current animal welfare standards.

As such, this paper contends that the Federal Government should adopt a proactive, rather than reactive approach, by addressing the root cause of these issues. Instead of spontaneously banning live export to individual importing countries in response to footage of mistreatment of Australian livestock in foreign slaughterhouses, this paper suggests that a proactive approach would primarily involve replacing the live trade with the chilled and/or frozen meat trade.

IV ANIMAL WELFARE V CULTURAL PREFERENCE

The preceding section of this paper focused upon the political consequences of the current policy and the effect it has had on the livestock, the agricultural industry and the importing countries. In particular, it examined the repercussions, on both the industry and the livestock, following the Indonesian live export ban of 2011 and the Egyptian live export ban of 2013. This section of the paper considers the welfare of Australian livestock in the context of the cultural preference for freshly slaughtered meat. Before the implications of Australia's live export trade on the welfare of farmed animals is assessed, the justifications for continuing the live export trade will be highlighted with reference to the ‘halal’ standards required by Islamic importers.

¹²⁷ Dowling, above n 122.

¹²⁸ Sue Neales, ‘Egypt cruelty death knell for live exports, warns Wilkie’, *The Australian*, 7 May 2013.

¹²⁹ James Nason, ‘Ludwig defends new regulatory system in wake of new cruelty footage’, *Beef Central*, 5 May 2013.

¹³⁰ *Ibid.*

¹³¹ Johnson, above n 120.

Throughout Asia and the Middle East, many developing countries depend on the trade of livestock for their supply of affordable meat products.¹³² A number of these countries cannot afford commodities such as home refrigeration and access to supermarkets.¹³³ Additionally, live animals are considered important for various cultural reasons. For example, the purchase and ritual slaughter of live animals at the end of Ramadan in the Middle East is considered a central component of Islamic culture.¹³⁴ The live export industry purports that because chilled meat and live export serve different purposes, the industry could not be replaced by chilled meat.¹³⁵ Further, the industry asserts that in instances where Australia has been unable to satisfy the demand for live animals in the Middle East¹³⁶, the demand was met by countries such as Sudan, Somalia and Iran that do not share 'Australia's commitment to animal welfare'.¹³⁷

In addition to the cultural justifications for continuing livestock export, the industry claims that the trade is a 'major contributor' to the Australian economy, generating \$1.8 billion annually towards the country's Gross Domestic Product. The industry also provides for almost 13,000 jobs within 30 individual business types and pays a total of \$987 million per year in salaries.¹³⁸ Advocates of the industry maintain that the trade makes a 'huge contribution' to the regional areas of Australia as many of the jobs it provides are located rurally.¹³⁹ This is largely due to the central role played by the industry in supporting the economic activity and social welfare within large divisions of these rural communities that, in turn, assist in maintaining the wellbeing of Australian families.¹⁴⁰ Additionally, Australia has arguably developed a noteworthy trade relationship within the Middle Eastern and Asian meat markets.¹⁴¹ It has been suggested that the strength of this relationship may be in jeopardy if the live export trade were to be banned.¹⁴² However, the Department of Agriculture, Farming and Fisheries (DAFF) estimated that the total value of live exports in 2005 was approximately \$700 million compared to over \$5.9 billion contributed by processed meat exports.¹⁴³

Consequently, it is contended that the trade relationship between Australia and countries throughout the Middle East and Asia would not be significantly compromised if the live export industry were to be phased out. The validity of this assertion is reinforced by the knowledge that certain Australian abattoirs have the ability to successfully perform ritual slaughter, in accordance with both animal welfare guidelines and specific religious requirements. The most common form of religious slaughter required by importing countries throughout the Middle East and Asia is known as 'halal'.¹⁴⁴

¹³² Live Export – Indefensible, above n 117.

¹³³ O'Sullivan, above n 67.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Due to drought or restricted shipping capacity.

¹³⁷ Department of Agriculture, Forestry and Fisheries, above n 97.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ RSPCA Australia, *What is Halal slaughter in Australia?*(2012) <http://kb.rspca.org.au/What-is-halal-slaughter-in-Australia_116.html>.

A *The 'Halal' Standard*

The process that traditionally satisfies the 'halal' standard involves the invocation of Allah's name over the animal prior to slaughter and the cutting of the animal's throat while it is fully conscious.¹⁴⁵ The most practised method of 'halal' slaughter in Australia uses a reversible stunning process rather than the irreversible stunning method used in conventional humane slaughter.¹⁴⁶ This differs to tactics employed overseas due to different interpretations of the Quran where stunning may be prohibited.¹⁴⁷ However, certain abattoirs in Australia may be permitted to perform ritual slaughter in accordance with the nationally adopted guideline 'Ritual Slaughter for Ovine (Sheep) and Bovine (Cattle)', without prior stunning if approved by the relevant meat inspection authority.¹⁴⁸ In such cases, cattle are required to remain in an upright, restrained position and must be stunned instantly after the throat is cut.¹⁴⁹ For the slaughter of sheep, the guidelines stipulate that the jugular veins and the carotid arteries must both be adequately cut. If it is found that these blood vessels are not completely severed, the guidelines require the animal to be immediately stunned to prevent further suffering.¹⁵⁰ Both commercial and 'halal' certified chickens are stunned prior to slaughter.¹⁵¹

As a result of its various investigations, the RSPCA has stated that it is 'strongly opposed to all forms of slaughter that do not involve prior stunning of the animal' as it is deemed to cause unnecessary suffering.¹⁵² This is founded on the fact that the animals subjected to religious slaughter suffer due to 'the use of increased restraints, injuries caused by the slaughter methods, and subsequent bleeding out'. Nevertheless, the RSPCA accepts that while stunning during the slaughter process does mitigate some of these welfare concerns, it does not exclusively eliminate animal suffering.¹⁵³

B *Livestock Mortality Rates*

Despite the fact that the Australian meat production industry has demonstrated that it has the ability to slaughter livestock in accordance with religious requirements such as 'halal', the requirement for live animals persists due to the significant cultural preference that certain markets have for freshly slaughtered meat.¹⁵⁴ Consequently, the question arises as to whether these preferences justify the suffering that Australian livestock endure whilst in transit to, and upon arrival at, foreign ports.

¹⁴⁵ Department of Agriculture, Forestry and Fisheries, *Australian Government Authorised Halal Program - guidelines for the preparation, identification, storage and certification for export of halal red meat and red meat products* (2009) <<http://www.daff.gov.au/aqis/export/meat/elmer-3/notices/2009/mn09-08>>.

¹⁴⁶ RSPCA Australia, above n 145.

¹⁴⁷ Alex Bruce, 'Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of Religious Slaughter of Animals' (2011) 34 *University of New South Wales Law Journal* 359-362.

¹⁴⁸ Ibid.

¹⁴⁹ This process is known as 'sticking' and requires one person to perform the sticking and another to control the stunning. During this method, the cattle are stunned immediately if any problems occur while attempting to restrain the animal.

¹⁵⁰ RSPCA Australia, above n 146.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Department of Agriculture, Forestry and Fisheries, above n 145.

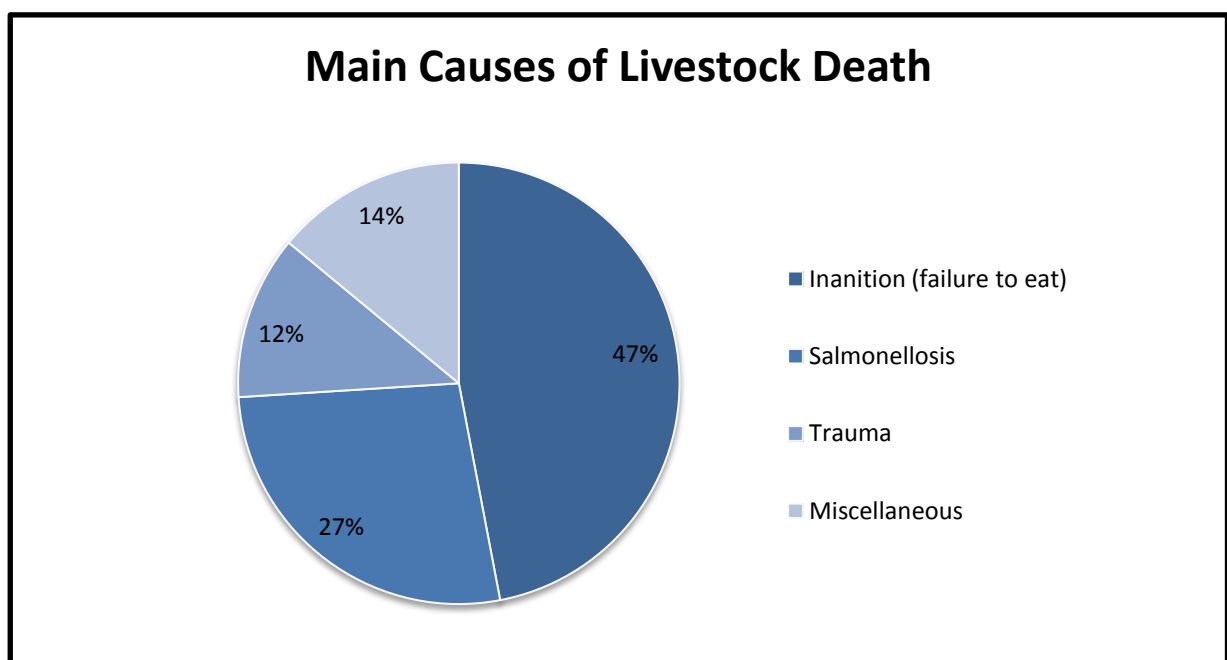
Animals Australia has documented evidence that illustrates that many of the livestock deaths occur during the sea voyage.¹⁵⁵ Pursuant to the *Australian Meat and Livestock Industry Act 1997* (Cth), a report on the mortality rates of livestock exported from Australia is tabled every six months in each House of Parliament. Table 1 provides an illustration of cattle deaths while onboard voyages destined for foreign ports.¹⁵⁶

Table 1 CATTLE EXPORT VOYAGES

Year of Voyage	2005	2006	2007	2008	2009	2010
Number of Voyages	244	221	261	285	339	272
Head Exported	547,356	623,052	712,320	983,653	939,722	848,265
Mortalities	769	1,088	747	1,131	932	1192
Average Mortality Rate	0.14%	0.175%	0.10%	0.11%	0.10%	0.14%

Although 0.14% may appear to be a small median rate of mortality, these figures illustrate that during each voyage in 2010, an average of at least four animals died just *days* after being deemed fit for travel from Australian ports. Figure 2 below exhibits the main causes of livestock death during these voyages.¹⁵⁷ In addition to these median mortality rates, the live export trade has also been wrought with disastrous events in which large numbers of Australian animals have perished.¹⁵⁸

FIGURE 2



¹⁵⁵ Department of Agriculture, Forestry and Fisheries, above n 4.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ In 1999, 829 cattle suffocated after ventilation aboard the *Temburong* failed on a voyage to Indonesia while in 2002, 800 cattle and 1,400 sheep died on board the *Becrux* after overheating.

Further investigations conducted by AA have found that ‘unhealthy’ livestock are often rejected upon their arrival in the Middle East. For instance, over 5,500 sheep died on board the *Cormo Express* in 2003 when 57,000 sheep remained at sea for almost three months after they were rejected by the Saudi Arabian importer on the basis that six percent of the consignment population were infected with scabby mouth.¹⁵⁹

In March 2011, AA and the RSPCA recorded the treatment and slaughter of cattle in 11 Indonesian abattoirs.¹⁶⁰ The results revealed that every slaughterhouse failed to meet international animal welfare guidelines.¹⁶¹ Further, it was found that the majority of animals were tortured prior to slaughter through methods of eye gouging, tail twisting, kicking and tail breaking.¹⁶² On average, these cattle sustained 11 cuts to the throat while fully conscious, with one animal having its throat cut a total of 33 times.¹⁶³ In addition, the investigation revealed that half of the animals being observed showed ‘signs of consciousness’ over 1.5 minutes after having their throat cut.¹⁶⁴ In one instance, an Australian animal was tortured for 26 minutes before being slaughtered.¹⁶⁵

Professor Temple Grandin¹⁶⁶ stated that the restraint boxes installed by MLA and LiveCorp in Indonesian abattoirs breached ‘every humane standard all around the world’ and were ‘absolutely atrocious and unacceptable’.¹⁶⁷ This evidence illustrates the eagerness of the Australian live export industry to provide livestock regardless of the sub-standard handling practices that occur in foreign abattoirs. Further, the installation of the restraint boxes highlights the way in which the industry actively contributes to the mistreatment of Australian livestock.¹⁶⁸

This contribution perhaps, while not justified, is to be expected of the live export industry, due to the large profit involved in maintaining the livestock trade.¹⁶⁹ However, the Federal Government’s knowledge of, and even assistance to, the sub-standard treatment of Australian livestock is less comprehensible.¹⁷⁰ Such knowledge and involvement exposes the actions of Senator Ludwig, and other Members of Parliament, as quite contemptuous and cynical. Consequently, this paper contends that cultural preference for freshly slaughtered meat does not justify the suffering endured by Australian livestock while in transit to, and upon arrival at, foreign ports. Unfortunately, while the Australian Government continues to assist and contribute to the suffering of its livestock in importing countries, this unacceptable treatment will continue. However, it is important to note that currently, this continuation of suffering is founded more upon financial gain of the industry, than cultural preference of the importing country. In any event, it is evident that ensuring the welfare of Australian livestock is not currently considered a priority for the Australian Government.

¹⁵⁹ The acceptable amount of animals being imported by Saudi Arabia with scabby mouth is 5% according to Caulfield, above n 12.

¹⁶⁰ This research laid the foundations for the *Four Corners* broadcast, referred to earlier in this paper.

¹⁶¹ Live Export – Indefensible, *Animal Australia’s Investigations* (2011) <<http://liveexport-indefensible.com/investigations/>>.

¹⁶² Ibid.

¹⁶³ Live Export – Indefensible, above n 117.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ International expert in slaughtering practices.

¹⁶⁷ Sarah Ferguson, *Interview with Temple Grandin from Colorado State University* (30 May 2011) <<http://www.abc.net.au/4corners/content/2011/s3230885.htm>>.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

V THE FUTURE OF AUSTRALIA'S LIVE EXPORT TRADE

The previous section of this paper considered the welfare of Australian livestock in context of the cultural preference for freshly slaughtered meat. It examined the justifications for continuing the live export trade, with particular reference to the 'halal' standards required by Islamic importers. It was concluded that the preference for fresh meat does not justify the unnecessary suffering endured by Australian livestock. Additionally, it was also noted that the Australian Government is currently contributing to this suffering. This section of the paper evaluates the future of Australia's live export trade, focusing predominantly on the ethical grounds that, the writer contends, justify a revision of Australia's current approach to this contentious issue. Several proposals for future reform are also examined while alternatives to the live export trade, such as the supply of chilled and frozen meats, are proffered.

To foster the future of the live export trade, organisations such as MLA and LiveCorp invest levies into the 'Livestock Export Program'.¹⁷¹ This joint initiative endeavours to improve the livestock trade in Australia, during export and upon arrival at foreign slaughterhouses. LiveCorp and MLA assert that these initiatives assist in fostering the future of the live export industry in Australia.¹⁷²

Critics argue that this industry-directed funding for animal welfare research has made it difficult for the public to obtain a clear insight into the implications of the management and husbandry practices conducted within the livestock industry.¹⁷³ The reasons for this may be attributed to the fact that MLA is in control of which research projects are conducted. Professor Clive Phillips, a Professor of Animal Welfare at the University of Queensland, has stated that this needs to be 'changed urgently'.¹⁷⁴ Professor Phillips argues that it would be more beneficial for researchers to be able to publish the results of their investigations without the live export industry dictating what is made public.¹⁷⁵ If the welfare of animals is found to be compromised during the live export process, the industry standards are likely to be challenged.¹⁷⁶ As a result, improved standards may be introduced into the code of practice or legislative provisions that may create difficulty for the industry to change their existing processes. Professor Phillips suggests that it is 'totally wrong' that the industry maintains control over the research projects as there is a 'vested interest in preserving the status quo' and any modifications to the processes are likely to cost the producers money.¹⁷⁷

¹⁷¹ Meat and Livestock Australia, *Livestock Export Program* (2011) <<http://www.mla.com.au/About-the-red-meat-industry/Livestock-exports/Livestock-export-program>>.

¹⁷² LiveCorp Australia, *Trade support – MEA* (2011) <http://www.livecorp.com.au/Member_Services/Business_Services/Trade_Support_MEA.aspx>.

¹⁷³ Michael Atkin, 'Abattoir Research Knocked Back: professor' *Australian Broadcasting Corporation* (9 June 2011) <<http://www.abc.net.au/worldtoday/content/2011/s3239769.htm>>.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

A *Justifications for a Revision of Australia's Regulation of the Live Export
of Farmed Animals*

This section of the paper investigates what justifications currently exist that may warrant a revision of the Australian live export trade. In March 2011, the Centre for International Economics (CIE) conducted a study which found that since 2005 the livestock export industry has generated approximately one billion dollars annually, with an average of 74% of this profit going to the producers of livestock.¹⁷⁸ Mr Cameron Hall, CEO of LiveCorp, stated that this evaluation by the CIE confirms the 'significant flow-on benefits the livestock export industry provides to livestock producers and regional economies'.¹⁷⁹ Mr Hall contended that the industry would lose an average of \$126 million each year without the live export trade. He noted that this is largely because boxed meat would be inadequate in substituting the trade in key live export markets.¹⁸⁰

However, over the last two years, three individual economic reports have revealed that live exports are actually undermining the meat processing industry in Australia.¹⁸¹ In a 2009 report by economic consulting firm, ACIL Tasman, an investigation into the live sheep export trade found that phasing out the exportation of live sheep and increased meat processing in Australia would 'reap long-term benefits for farmers and the economy rather than be of significant detriment to the wellbeing of farming families.'¹⁸² In a report commissioned in 2010 by Australia's leading meat processors,¹⁸³ it was revealed that live exports compete with Australia's beef exports and threaten to destroy 36,000 jobs, five billion dollars in turnover and approximately three and a half billion dollars in assets.¹⁸⁴ This investigation highlights that because Queensland cattle are being progressively exported live to Indonesia, this results in lost processing opportunities in Australia. Indonesia perpetuates this loss by imposing high tariffs on imported beef products and prohibiting the importation of fundamental cuts of beef in an effort to protect its own beef industry.¹⁸⁵ Consequently, the export of live animals means that premium Australian cattle are being processed in importing countries and then sold in competition with imported Australian beef.¹⁸⁶ This competition is both detrimental and unnecessary as leading meat processors have unanimously confirmed that Australia possesses the ability to process all sheep and cattle currently being exported live.¹⁸⁷ Further, contrary to the claim that, without live export, many jobs supporting rural communities would disappear, these reports found that 'thousands of jobs would be created by increased domestic processing'.¹⁸⁸

¹⁷⁸ Live Export Care, *Leading economist confirms importance of live export to the Australian economy* (2011) <<http://www.liveexportcare.com.au/LatestNews/Leading+economist+confirms+importance+of+live+export+to+the+Australian+economy.htm>>.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ ACIL Tasman 'Australian live sheep exports: economic analysis of Australian live sheep and sheep meat trade' (2009) [prepared for the World Society for the Protection of Animals] <<http://www.humanechain.org.au/media/1943/acil%20tasman%20report.pdf>>.

¹⁸² Live Export – Indefensible, above n 161.

¹⁸³ Teys Bros, Swift Australia and Nippon Meat Packers Australia.

¹⁸⁴ Live Export – Indefensible, above n 161.

¹⁸⁵ SG Heilbron Economic & Policy Consulting, *The Future of the Queensland Beef Industry and the Impact of Live Cattle Exports* (2010) [prepared for Teys Bros, Swift Australia and Nippon Meat Packers Australia] <<http://www.humanechain.org.au/media/3983/live%20cattle%20final%20report%2010062010.pdf>>.

¹⁸⁶ ACIL Tasman, above n 181.

¹⁸⁷ Live Export – Indefensible, above n 161.

¹⁸⁸ Ibid.

In addition to the economic justifications that warrant a revision of Australia's livestock trade, there are also ethical reasons why the industry desperately needs reform. One such reason is founded on the fact that, upon arrival in importing countries, Australian livestock are exposed to the customs and practices of that country.¹⁸⁹ AA has found that none of the countries involved in live trade with Australia have standards that enforce a minimum level of welfare for livestock.¹⁹⁰

Attempts to enforce animal welfare standards overseas, as they exist in Australia, have been subject to international debate.¹⁹¹ Critics claim that countries with different religious practices or specific cultural preferences should not be required to observe practices which respect Australian sensitivities or values.¹⁹² However, these animal welfare standards are founded on universal recommendations, established by the OIE, that arguably go beyond the preferences of a particular culture. These standards are comparable to international human rights to be free from suffering and are not to be confined to specific cultures or countries.¹⁹³ However, when contemplating the imposition of standards upon importing countries, it is necessary to also consider any World Trade Organisation (WTO) implications that may arise from this approach.

Pursuant to Article 20 of the General Agreement on Tariffs and Trade (GATT), Governments are permitted to 'act on trade in order to protect animal life or health, provided they do not discriminate or use this [provision] as disguised protectionism'.¹⁹⁴ The WTO contends that if a country applies international standards to its trade conduct, it is less likely to encounter issues of illegality than if it were to implement its own standards.¹⁹⁵ The Sanitary and Phytosanitary Measures Agreement (SPS) imparts the basic rules that outline the standards for food safety and the standards for animal and plant health. This agreement permits countries to implement their own standards, but states that these standards must be founded on science and should only be applied to protect human, animal or plant health or life.¹⁹⁶ It prohibits arbitrary or unjustified discrimination between countries whose circumstances and/or conditions are alike or similar.¹⁹⁷

While the WTO recommends countries utilise international standards, it also maintains that such countries can also implement higher standards if justified by empirical evidence. The SPS also states that different countries may employ varying standards and methods of goods inspection, provided all standards are founded on science. However, too many diverse standards can make it challenging for both the exporting and the importing countries. The Technical Barriers to Trade Agreement (TBT) attempts to mitigate this challenge by ensuring that differing regulations, and other associated procedures, do not create unnecessary or conflicting obstacles upon the trade. Despite their existence, these agreements and regulations

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Mark Schipp, 'International Animal Welfare Standards and Australia's Contribution' *Outlook 2013 Conference, Department of Agriculture, Forestry and Fisheries* (29 April 2013) <<http://www.daff.gov.au/abares/outlook/conference-program/transcripts/mark-schipp>>.

¹⁹² Live Export – Indefensible, above n 161.

¹⁹³ Ibid.

¹⁹⁴ World Trade Organisation, *The Agreements* <http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap2_e.pdf>.

¹⁹⁵ Ibid.

¹⁹⁶ World Trade Organization, *The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SP Agreement)* (2013) <http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm>.

¹⁹⁷ Ibid.

are futile if not all of the contracting countries are members of the WTO, as is the case of the numerous Middle Eastern countries to which Australia exports livestock. Consequently, it would be rather exigent for Australia to impose its standards of animal welfare upon importing countries that are not members of the WTO, without that country amending or altering its current animal welfare standards, if any such standards exist.

In such instances where a particular country is unwilling to comply with basic international animal welfare standards (as Australia does), this paper suggests that the dissenting country or countries must source their live meat products from alternative exporters, whose meat quality may be comparatively inferior. Consequently, although it would be unjust for Australia to impose regulations on livestock unless it was part of a wider global movement, or in accordance with the WTO stipulations, minimum standards should be imposed upon importing countries when dealing with Australian produce, provided that these regulations are in accordance with international animal welfare models as recommended by organisations such as the OIE.

B *Alternatives to Live Export: The Chilled Meat Trade*

Animal welfare advocates contend that the chilled meat trade may be a 'viable alternative' to the live export industry.¹⁹⁸ This is proposed on the basis that all importing countries in the Middle East are also purchasing chilled meat that generates greater profits than the export of live animals.¹⁹⁹ Recent research has revealed that in 2010, \$433 million was made from the export of frozen or chilled mutton and lamb to the Middle East.²⁰⁰ Further, Australia has approximately 40 'halal' abattoirs that are overseen by Islamic officials appointed by the importing countries to ensure that the slaughter is performed in accordance with the 'halal' standards.²⁰¹ These slaughterhouses export the carcasses of the animals to the importing countries in chilled or frozen form.²⁰² The reversible pre-stunning of sheep and cattle prior to the cutting of the throat has been approved by Islamic leaders in Australia as the animal is not injured and remains alive. This is consistent with the 'halal' requirements of ritual slaughter.²⁰³ This method appears to strike a prudent balance between satisfying the traditional methods of 'halal' slaughtering and ensuring that the animals involved are subjected to a quick and relatively painless death. Interestingly, during several recent investigations by AA in the Middle East, it was revealed that many Australian animals imported live were not being slaughtered in accordance with 'halal' requirements.²⁰⁴

Arguably one of the greatest impediments to the adoption of the chilled meat trade is the claim that importing countries do not have the facilities to store frozen, chilled or pre-packaged meat.²⁰⁵ In response to this assertion, AA has highlighted the fact that the leading importers of Australian sheep²⁰⁶ are considerably wealthy nations.²⁰⁷ Many consumers within

¹⁹⁸ Live Export – Indefensible, *Halal meat exports – a viable alternative* (2011) <<http://liveexport-indefensible.com/facts/halal.php>>.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Investigations were conducted in November 2003, January 2006, December 2006, September 2007 and December 2007; Live Export – Indefensible, above n 161.

²⁰⁴ Bruce, above n 146.

²⁰⁵ Live Export Care, above n 178.

²⁰⁶ Saudi Arabia and Kuwait.

these countries already purchase their meat products from supermarkets and in restaurants.²⁰⁸ Consequently, the claim that there is a lack of refrigeration in most importing countries lacks a substantial evidentiary basis. Additionally, during a previous ban on live export to Saudi Arabia from 1991-2000, it was reported that there was a 'three-fold increase in exports of chilled and frozen mutton and lamb to that market'.²⁰⁹ This illustrates that Islamic countries are willing to import meat that has been slaughtered in Australia.

However, Indonesian consumers do not have the same access to refrigeration as Saudi Arabia and Kuwait, as nearly 40 million Indonesians live below the poverty line.²¹⁰ As such it has been suggested that Indonesia cannot afford to purchase and maintain chilled meat imported from Australia and so must obtain its meat freshly slaughtered.²¹¹ However, this argument is not persuasive as the poorer populations in Indonesia cannot afford to buy Australian beef, whether chilled or freshly slaughtered. Therefore, such an argument lacks comparative relevance as live export does not solve the issue of the poorer Indonesian population's limited access to Australian beef.

It has also been suggested that banning the live export trade would have devastating consequences on the farming communities throughout Australia.²¹² However, the livestock export industry has been detrimental towards various rural Australian communities for over 20 years.²¹³ For example, the Australian Meat Industry Employees Union (AMIEU) has opposed the live export trade for many years due to its contribution to the liquidation of multiple slaughterhouses across Australia. The AMIEU alleges that approximately 150 meat processing plants have closed over the past two decades, resulting in a loss of some 40,000 jobs for rural Australians.²¹⁴ This has occurred because the industry has relocated jobs to importing countries where the standards of animal welfare are significantly lower.²¹⁵

Arguably, the most compelling argument in favour of Australia adopting an alternative to live export is the fact that New Zealand has successfully done so since 2007 with the introduction of the Customs Export Prohibition (Livestock for Slaughter) Order 2007. When compared to the Australian industry, the New Zealand trade is much smaller, with only about 10 million sheep being exported live between 1986 and 2004, during which 200,000 died.²¹⁶ The live export trade in New Zealand reportedly generates approximately NZD\$49 million per annum.²¹⁷

²⁰⁷ Live Export Care, above n 178.

²⁰⁸ Ibid.

²⁰⁹ SG Heilbron Economic & Policy Consulting, above n 185.

²¹⁰ Live Export Care, above n 178.

²¹¹ Ibid.

²¹² Live Export – Indefensible, *Damning live export reports obtained through Freedom of Information*, (2011) <http://liveexport-indefensible.com/foi_reports.php>.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

However, following the disastrous ‘*Cormo Express* incident’ in 2003²¹⁸, the New Zealand live export trade almost ceased.²¹⁹ In a report evaluating the *Cormo Express* disaster, the Animal Rights Legal Advocacy Network (ARLAN) concluded that the live export of sheep was fundamentally incompatible with the purposes of the New Zealand *Animal Welfare Act 1999* (NZ).²²⁰ It has been suggested that the present New Zealand laws regulating the live trade of farmed animals represent a significant improvement, particularly when compared with existing Australian legislative provisions.²²¹

The introduction of the Customs Export Prohibition (Livestock for Slaughter) Order 2007 prohibits all live exports for slaughter but allows individual consignments on a ‘case-by-case’ basis. Permission for these consignments is only granted when slaughter is conducted in commercial abattoirs where international OIE standards are followed.²²² Additionally, audits of these slaughter facilities are conducted by Government inspectors to ensure compliance with OIE guidelines. Malcolm Caulfield contends that the Australian Government should follow New Zealand’s ‘impressive lead’ as it demonstrates that live export can be banned or limited successfully without devastating effects on economy, employment opportunities or international trade relations.²²³

C *Proposals for Reform of Australia’s Live Export of Farmed Animals*

In order for Australia’s agricultural animal trade to continue as an enduring and respected national industry, significant changes must be implemented. Ultimately, this paper suggests that the live export trade should be replaced with an increased chilled and frozen meat trade. In instances where it is not viable to export chilled meat, live export may be continued on a case-by-case basis. However, where this is undertaken, Australian welfare regulations should be attached to the animal rather than to its geographical location at each stage of meat production. Therefore, the standards regarding the welfare of Australian livestock should be attached to the animals from birth to death, regardless of where the livestock is destined to be slaughtered.

This proposal could be combined with the increase of regulation of animal welfare while livestock are being transported to international ports. This increased regulation may be attained through the introduction of various ‘checkpoints’ that exist after livestock depart Australian shores. While on board the vessel, at least one veterinarian and several stock workers may be assigned to a manageable number of livestock. For instance, four stock workers and one veterinarian must be attached to every 500 animals. This may overcome the current problems associated with not having enough professional personnel onboard voyages to tend to sick or anxious animals. Additionally, officials nominated by Australian animal welfare experts could be stationed at the foreign receiving ports and also at the nominated slaughterhouses to ensure that adequate welfare standards are abided by from voyage to slaughter. This process would arguably maintain the standards of animal welfare once livestock leaves Australia and also create a large number of employment opportunities for Australian citizens.

²¹⁸ This incident involved the unnecessary deaths of approximately 5,500 sheep, as discussed above in Part IV, subsection B.

²¹⁹ Live Export Shame, *Live Sheep Exports and Animal Welfare: an impossible match* (2011) <http://www.liveexportshame.com/impossible_match.htm>.

²²⁰ Ibid.

²²¹ Caulfield, above n 12.

²²² Ibid.

²²³ Ibid.

However, there are obvious problems with this proposition. First, additional funding will be needed to support a greater number of people at each check point and this will be reflected in the prices of live meat. Second, it is unlikely that the Government would support such a complex and expensive project. Third, there are several legal barriers that impede the imposition of Australian standards onto Indonesian abattoirs. For example, these standards could only be enforced through trade agreements, contractual promises and diplomacy, all of which are difficult to achieve when negotiating increased commercial standards, stricter regulation and higher costs with an economically weaker country. Finally, the profitability of the live export industry may be threatened by a decrease in demand when Australian live meat prices escalate as a result of these increased costs.

To counter this, the introduction of a more prominent chilled meat trade may be the most logical solution to the issues of economy, employment, animal welfare and political relations. Further, if the live export industry were banned, it would allow Australia's globally recognised 'disease-free' meat status to be brought to the foreground, thereby adding significant potential to increasing the current trade of chilled meat to importing countries.²²⁴ AA and the RSPCA consider that, 'far greater long-term security for both Australian farmers and Australian workers in meat processing industries ... could be created through vigorous marketing of Australian chilled disease-free meat to importing countries'.²²⁵ However, the full potential of Australia's chilled and frozen meat trade will not be realised while the industry continues to export job opportunities and livestock to foreign ports, where the concept of animal welfare for farmed animals is comparatively lower or non-existent.

VI CONCLUSION

This paper contends that the welfare of Australian livestock needs to be maintained from birth to slaughter. Consequently, the current policy requires reform to: ensure the future welfare of livestock; maintain the strength of the Australian livestock industry; and increase employment opportunities for those involved in the distribution of livestock, both domestically and internationally.

Currently, once in the control of importing countries, Australian livestock are often subjected to cruel and unnecessary practices of transportation, handling and slaughter due to the inability to apply Australian welfare standards once the livestock are in a foreign jurisdiction. However, previous attempts to enforce animal welfare standards overseas, commensurate to those in Australia, have been subject to international debate.²²⁶ Critics claim that countries with different religious practices, or specific cultural preferences should not be required to observe procedures which respect Australian sensitivities or values.²²⁷

With reference to these criticisms, this paper notes that the proposed animal welfare standards are founded on universal recommendations, established by the OIE, that go beyond the preferences of a particular culture. Such standards are comparable to international human rights to be free from suffering and are not to be confined to specific cultures or countries.²²⁸ While the Australian standards of animal welfare arguably fall short of those required for adequate animal welfare, the standards of livestock welfare upon their arrival at foreign ports are significantly lower.

²²⁴ Live Export – Indefensible, above n 209.

²²⁵ Live Export – Indefensible, above n 117.

²²⁶ Schipp, above n 191.

²²⁷ Ibid.

²²⁸ Live Export – Indefensible, above n 161.

It is further contended that the preference for fresh meat by foreign countries does not justify the unnecessary suffering endured by Australian livestock. Therefore, the live export of Australian farm animals is not the most humane method of providing red meat and other animal products to the world. Consequently, in order to achieve higher welfare standards for livestock, while maintaining Australia's international trade relationships, profitability and domestic employment opportunities, the chilled meat trade should replace live export industry to all countries wherever possible. This paper purports that the trade relationship between Australia and countries throughout the Middle East and Asia would not be significantly compromised if the live export industry were to be phased out.

Furthermore, if the live export industry were banned it would allow Australia's globally recognised 'disease-free' meat status to be brought to the foreground, thereby adding significant potential to increasing the current trade of chilled meat to importing countries.²²⁹ However, the full potential of Australia's chilled and frozen meat trade will not be realised while the industry continues to export job opportunities and livestock to foreign ports, where the concept of animal welfare for farmed animals is comparatively lower or non-existent.

This paper further maintains that, for countries where it is not viable to supply with chilled or frozen meat, livestock should be supplied by attaching standards, compliant with the OIE guidelines, to the animal rather than the geographical location. In such instances, live export may be continued on a case-by-case basis. However, where this is undertaken, Australian welfare regulations should be attached to the animal, rather than its geographical location, at each stage of meat production. Therefore, the standards regarding the welfare of Australian livestock should be attached to the animals from birth to death, regardless of where the livestock is destined to be slaughtered.

Moreover, there exists a blatant conflict between the legislative protections afforded to domestic companion animals and those imparted upon farm animals, particularly during the process of live export. Similarly, while the same Government Department retains control over both the agricultural industry and standards of animal welfare, the conflict of interest will always inevitably fall in favour of economic gain.

In summary, while the ongoing maltreatment of live exported animals continues to be exposed to both the Federal Government and the Australian public, such issues ought to weigh on the consciences of all fair minded Australians and be the imprimatur of change. This paper asserts that the aforementioned proposals for change will ensure that livestock are treated as sentient beings rather than mere commodities of profit, without foregoing the livelihood and wellbeing of Australia's export industry and its contributors.

²²⁹

Ibid.

LIVE EXPORT AND THE WTO: CONSIDERING THE EXPORTER SUPPLY CHAIN ASSURANCE SYSTEM

CELESTE BLACK*

There is some evidence to suggest that, in developing the new supply chain regulatory scheme for the export of live cattle and sheep, the Federal Government took the view that Australia's commitment to free trade principles as a member of the World Trade Organisation could have a potential limiting effect on the form of the new export regulations. This article provides a brief overview of the new Exporter Supply Chain Assurance System (ESCAS) and then analyses aspects of the ESCAS in light of the General Agreement on Tariffs and Trade (GATT) and the Technical Barriers to Trade Agreement. Although some aspects of the ESCAS could be seen to violate the principles of the GATT, specifically the prohibition on export restrictions, there are strong arguments that the measures would be defensible under one or more of the General Exceptions found in Article XX. However, this is not to suggest that stronger measures that provide a higher degree of animal welfare protection could not also be defended if challenged.

I INTRODUCTION

In the wake of the ABC *Four Corners* report¹ revealing the brutal treatment of Australian cattle at Indonesian abattoirs and the resulting groundswell of public outrage, the Australian Government temporarily suspended the export of live cattle to Indonesia. In formulating a longer lasting response, the Government was presented with various options, including a ban of the trade or stricter regulation. There is evidence to suggest that, in developing the new policy, consideration was given to Australia's commitment to free trade principles as a member of the World Trade Organization (WTO).² The purpose of this article is to examine the regulatory regime ultimately adopted by the Government, the Exporter Supply Chain Assurance System (ESCAS), in light of WTO law and the potential issues that could be raised in relation to an ESCAS-type system under the General Agreement on Tariffs and Trade

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1 ABC, 'A Bloody Business', *Four Corners*, 30 May 2011 (Sarah Ferguson, Reporter)

2 Australia has been a member of the World Trade Organization since its establishment in 1995 with the *Marrakesh Agreement Establishing the World Trade Organization* (Marrakesh, 15 April 1994), entry into force 1 January 1995, [1995] ATS 8. This agreement incorporates the *General Agreement on Tariffs and Trade* (1994, as amended by the Uruguay round), as well as the *Agreement on Agriculture*, the *Agreement of Sanitary and Phytosanitary Measures* and the *Agreement on Technical Barriers to Trade*, amongst others. Australia is a signatory to the *General Agreement on Tariffs and Trade 1947*(Geneva, 30 October 1947), entry into force 1 January 1948 [1948] ATS 23, which is incorporated into the GATT 1994 [1995] ATS 40.

(GATT) and the Technical Barriers to Trade Agreement (TBT Agreement).³ The focus of this article is on the implications of free trade principles, as embodied in the WTO agreements, on a regulatory response like the ESCAS and is not an evaluation of the ESCAS more generally.

This article commences with a brief overview of the new ESCAS system and how it fits within the broader legislative system that currently applies to the live export trade. After describing the context within which free trade issues have been raised, the article analyses the relevant rules under the GATT that could be considered relevant in relation to restrictions on exports generally and their potential application to the ESCAS. On the assumption that an argument could be made that the ESCAS does violate an article of the GATT, the application of the General Exceptions will be considered and reference will be made to the pending EU seal product ban dispute. The relevance of the TBT Agreement will also be briefly considered as it gives preference to the use of international standards. Throughout the analysis of the WTO law reference will be made to previous decisions of the Panel and Appellate Body but it should be noted that decisions under the WTO dispute settlement process are only binding on the parties and do not have precedential value. However, a dispute settlement body may follow the reasoning in previous reports if it is considered persuasive.⁴

II THE REGULATION OF LIVE EXPORT AND THE ESCAS

Under its trade and commerce power,⁵ the Australian Government has undertaken to regulate the international trade in live animals, which may in some instances co-exist with State level animal welfare laws. The focus of this article is the new ESCAS, a regulatory scheme that applies to animals exported live from Australia as feeder or slaughter stock (breeder stock are not covered by the scheme) from the time of their arrival at the port of destination up to and including their slaughter. The regulation of the live export trade more generally will only be described briefly here as it has been comprehensively analysed by others.⁶

³ There would not appear to be any application of the Agreement on Agriculture to an ESCAS-type of licencing system. Although live animals are included in the covered products (HS 1) for the purposes of the Agreement, it applies to export subsidies and to export restrictions only when such restrictions are put in place to prevent critical shortages of food (which fall under GATT Art X:1(a)). See, eg, *Agreement on Agriculture*, Annex 1 (covered products), Art 12 (export restrictions).

⁴ A critical component of the WTO system is the dispute settlement process. If a WTO member believes that another member has violated one of the trade rules, it can initiate this process. There is first a period of consultation but if this does not resolve the issue, a Panel is established to hear the matter. The Panel Report on the matter will indicate whether in the opinion of the Panel, a WTO rule has been violated and, if it has, how the challenged measures should be amended. The Panel Report will be adopted automatically as a ruling of the Dispute Settlement Body unless it is appealed by one of the parties or rejected by consensus of all WTO members. If there is an appeal, nominated members of the Appellate Body will consider the matters raised in the appeal and produce a report documenting its decision. This Appellate Body Report will be adopted by the Dispute Settlement Body unless rejected by consensus. Specifically in relation to issue of precedence, “[i]f the reasoning developed in the previous report in support of the interpretation given to a WTO rule is persuasive from the perspective of the panel or the Appellate Body in a subsequent case, it is very likely that the panel or Appellate Body will repeat and follow it. This is also in line with a key objective of the dispute settlement system which is to enhance the security and predictability of the multilateral trading system.” WTO, *Dispute Settlement System Training Module: Ch 7, Legal effect of panel and appellate body reports and DSB recommendations and rulings*, 7.2 ‘Legal status of adopted/unadopted reports in other disputes’ (2013) at <http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c7s2p1_e.htm>.

⁵ *Australian Constitution* s 51(i).

⁶ See, eg, Malcolm Caulfield, *Handbook of Australian Animal Cruelty Law* (Animals Australia, 2009) ch 4 and Graeme McEwan, *Animal Law: Principles and Frontiers* (Barristers Animal Welfare Panel, 2011, available online at <[ww.bawp.org.au](http://www.bawp.org.au)>) ch 3.

Before moving on to consider the structure of the laws currently in place, it is important to note that any attempts of the Government to control activities that occur beyond its jurisdiction are necessarily limited under international law, under which ‘the traditional grounds for jurisdiction have been territory and nationality.’⁷ A state may exercise jurisdiction over activities occurring within its territory (including territorial waters)⁸ and may also prosecute nationals on the basis of their nationality, though this jurisdiction is generally only exercised in certain cases such as treason or offences against national security.⁹ In the context of live export, jurisdictional constraints are also presented by the fact that the live export ships are most often registered outside of Australia and therefore are not included in the scope of Australia’s jurisdiction.¹⁰ The ownership of the livestock often transfers to the importer on loading or, at the latest, on arrival at the port of destination.¹¹

This point was clearly illustrated in the Western Australia Magistrates Court decision in the *Emanuel Exports* case.¹² In relation to a particular shipment of sheep bound for the Middle East in 2003, which resulted in higher than to be expected mortality rates amongst the sheep, it was alleged that the transportation of specifically identified classes of sheep violated several provisions of the *Animal Welfare Act 2002* (WA).¹³ Magistrate Crawford determined that there was a violation of the state animal welfare law but that the state law was inoperative in this regard as it would give rise to an operational inconsistency with the Commonwealth law in relation to live exports. The accused were acquitted.¹⁴ It was noted that the State’s case was limited to the first 24 hours of the journey, whilst the vessel was still within Australian territorial waters, and that the ‘Court has no jurisdiction with respect to the treatment of animals in international waters and beyond.’¹⁵ The limits of jurisdiction have an obvious and significant impact on the extent to which Australian law can reach the live export trade and, as a result, the ESCAS can only at best achieve indirect control of actions within importing countries through the export licensing system.

The export of livestock is regulated primarily through the operation of the *Australian Meat and Live-stock Industry Act 1997* (Cth) and the *Export Control Act 1982* (Cth) and associated regulations and orders. The *Australian Meat and Live-stock Industry Act* provides, inter alia, for the issuing of licences to export live animals. The Secretary may make orders under the

⁷ Gillian Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis, 2nd ed, 2011) [8.4].

⁸ Ibid [8.8].

⁹ Ibid [8.14]. Other extensions of jurisdiction, such as universal jurisdiction, are possible but rarely sought by states. Ibid [8.22].

¹⁰ For example, as far as can be determined, the live export ships used by Wellard Rural Exports Pty Ltd include the Ocean Drover, the Ocean Outback and the Ocean Swagman, which are all registered in Singapore. Emanuel Exports has used the Al Shuwaikh (flag state Kuwait) as recently as September 2012. Registration information from <marinetraffic.com>.

¹¹ Australian Livestock Exporters’ Council, Submission to the *Independent Review of Australia’s Livestock Export Trade* (the Farmer Review), 21 July 2011, 18.

¹² *Department of Local Government & Regional Development and Emanuel Exports Pty Ltd, Graham Richard Daws & Michael Anthony Stanton* (Unreported, Magistrates Court of Western Australia (Criminal Jurisdiction), Magistrate CP Crawford, 8 February 2008).

¹³ Specifically, it was alleged that the exporters were cruel to the sheep as they transported them in a way that was likely to cause them unnecessary harm in violation of s 19(2) of the *Animal Welfare Act 2002* (WA), the sheep were confined in a way likely to cause them unnecessary harm (see s 19(3)(a) on the meaning of cruelty), and that the sheep were not provided with proper food (see s 19(3)(d) on the meaning of cruelty).

¹⁴ There has been some doubt expressed with regard to this conclusion. See, eg, McEwan, above n 6, 62-69.

¹⁵ *Emanuel Exports*, above n 12, [8].

Act and it is a condition that the export licence holder must comply with any such orders.¹⁶ The ESCAS was established by way of the issue of the *Australian Meat and Live-stock Industry (Conditions on live-stock export licences) Order 2012* (on 1 March 2012), which requires that export licence holders comply with the *Export Control (Animals) Order 2004* (hereinafter the *Animals Order*), where this Order was amended to incorporate the ESCAS. The *Export Control Act* applies to the export of ‘prescribed goods’ and stipulates that regulations may prohibit their export, subject their export to conditions or require a licence.¹⁷ Pursuant to the *Export Control (Orders) Regulations 1982*, the Minister may make orders¹⁸ and under this power the *Animals Order* was made, where this order prescribes live animals for the purposes of the *Export Control Act*.¹⁹ The *Animals Order* stipulates a number of conditions in relation to the export of livestock including the holding of a licence under the *Australian Meat and Live-stock Industry Act* and the holding of an export permit in relation to the particular shipment.²⁰ As amended, from 27 February 2012, the Secretary must approve an ESCAS as part of the process of issuing an export permit in relation to livestock exported for slaughter.²¹

The ESCAS has been incorporated into all stages of the approval process that applies to a particular export consignment of livestock. An approved ESCAS must be in place prior to the sourcing of stock, in the same way that the Notice of Intention to Export and the Consignment Risk Management Plan are required.²² Both the application for permission to leave for loading and the application for the export permit must include the approved ESCAS.²³ In granting an export permit, the Secretary must consider whether, amongst other things, the exporter is in a position to comply with the ESCAS.²⁴

More specifically, the ESCAS must include the details of the supply chain up to and including slaughter (to evidence control of the supply chain), the tracking of the livestock (to allow Australian animals to be traced through the supply chain) and independent auditing and reporting details (where these reports must cover control, tracing and animal welfare).²⁵ The Secretary may only approve the ESCAS if satisfied that the ESCAS will ensure that the handling of the livestock (including slaughtering) will be in accordance with the recommendations of the World Organisation for Animal Health (the OIE) (these standards are discussed below).²⁶ The approval will depend on how the ESCAS addresses these issues, the exporters’ record of adherence with other approved ESCASs and any conditions thereon, and any other relevant information.²⁷ The Secretary may approve the ESCAS subject to conditions and may later vary, impose new conditions upon, or revoke the ESCAS.²⁸

¹⁶ *Australian Meat and Live-stock Industry Act 1997* (Cth) s 17.

¹⁷ *Export Control Act 1982* (Cth) s 7.

¹⁸ *Export Control (Orders) Regulation 1982* (Cth) reg 3.

¹⁹ *Export Control (Animals) Order 2004* (Cth) O 1.04.

²⁰ *Ibid* O 2.02.

²¹ An important exception to the ESCAS requirement is in relation to breeder live-stock. See *Ibid* O 2.42A(4).

²² *Export Control (Animals) Order 2004* (Cth) O 2.45.

²³ *Ibid* O 2.54 and O 2.59.

²⁴ *Ibid* O 2.59(1)(c)(v).

²⁵ *Ibid* O 2.42A.

²⁶ *Ibid* O 2.44(2A).

²⁷ *Ibid* O 2.44(2B).

²⁸ *Ibid* O 2.46A.

Beyond the listing of the broad issues that should be addressed in the ESCAS, no further details with regard to the requirements are provided in the *Animals Order*. The more detailed requirements and guidance have been developed by the Department of Agriculture, Fisheries and Forestry (DAFF) and are available by way of the department website.

The genesis of the ESCAS approach can be traced back to measures put in place with regard to live cattle exports to Egypt, which had been temporarily suspended in 2006. Australia and Egypt signed a memorandum of understanding, *Handling and Slaughter of Australian Live Animals*, which provides that Australian animals would be protected ‘in line with agreed international standards’²⁹ which is understood to refer to OIE standards. A ‘Supply Chain Assurance’ system, with the OIE guidelines at its core, was proposed by the Australian Livestock Exporters’ Council in March 2011, in response to a request from the Minister for Agriculture, Fisheries and Forestry, Senator Joe Ludwig, in January 2011 to advise on how a closed-loop system similar to that in place in Egypt might be rolled out more broadly.³⁰ When negotiations were under way to resume live cattle exports to Indonesia, a similar approach, with specific reference to the OIE guidelines and ultimately known as the ESCAS, was adopted as a condition to the resumption of trade.³¹ Two Industry Government Working Groups (IGWGs) were formally established to consider the details of the ESCAS. Their work led to reports and recommendations with respect to live cattle and buffalo exports as well as live sheep and goat exports.³² Concurrently, the *Independent Review of Australia’s Livestock Export Trade* (the Farmer Review) was initiated in the wake of the Indonesia suspension³³ and one of the recommendations to come out of the review was that these basic principles from the Indonesia approach (the ESCAS) be rolled out to all live export markets,³⁴ a process that was completed at the end of 2012.³⁵ The four major components of the scheme, now reflected in the *Animals Order*, are: control of the supply chain (by ownership or contract);

²⁹ Minister for Agriculture, Fisheries and Forestry, the Hon Peter McGuaran, ‘Livestock exports to resume after Egypt assurances’ (Media release, DAFF06/138PM, 3 October 2006). The memorandum of understanding is not available to the public. Ultimately, only cattle exports are approved and only where they are destined for the one abattoir that has been certified in Egypt. See *Australian Meat and Live-stock Industry (Export of Live-stock to Egypt) Order 2008* (Cth).

³⁰ Letter from Mr Peter Kaen, Chairman of the Australian Livestock Exporters’ Council (ALEC), to the Minister Joe Ludwig dated 22nd March 2011, attached to the ALEC Submission to the Farmer Review, above n 11, annex 2.4.

³¹ Minister for Agriculture, Fisheries and Forestry, Senator Joe Ludwig, ‘International standard for live export trade to Indonesia’ (Media release, DAFF11/181L, 21 June 2011); *Australian Meat and Live-stock Industry (Export of Live-stock to the Republic of Indonesia) Order 2011 (No 2)* (Cth) in effect from 6 July 2011. This replaced *Australian Meat and Live-stock Industry (Export of Live-stock to the Republic of Indonesia) Order 2011* (Cth) (made 7 June 2011), which temporarily prohibited all exports of livestock for slaughter to Indonesia.

³² Industry Government Working Group on Live Cattle Exports, *Report to Australian Government Minister for Agriculture, Fisheries and Forestry* (26 August 2011) and Industry Government Working Group on Live Sheep and Goats Exports, *Final Report to Australian Government Minister for Agriculture, Fisheries and Forestry* (26 August 2011).

³³ *Independent Review of Australia’s Livestock Export Trade* (the Farmer Review), presented to Government 31 August 2011. This review was initiated by the Government on 13 June 2011. Minister for Agriculture, Fisheries and Forestry, Senator Joe Ludwig, ‘Mr Bill Farmer AO to conduct independent review into live export trade’ (Media release, DAFF11/177LJ, 13 June 2011).

³⁴ *Independent Review of Australia’s Livestock Export Trade* (the Farmer Review) (2011) Recommendation 10.

³⁵ Under the terms of the amended order, the new ESCAS regime would not apply to declared countries with respect to declared livestock until the relevant declaration date, allowing for a phase-in of the new system, where such declarations were to be determined by the Secretary of DAFF and published on the DAFF website. The final countries/animals came under the scheme on 1 January 2013. *Export Control (Animals) Order 2004* (Cth) O 7.03.

animal traceability; independent auditing to ensure compliance with OIE standards; and reporting and accountability. Guidance on the auditing process with regard to animal welfare matters is now provided by way of checklists issued by DAFF, which are based on the checklists developed by the IGWGs.

The only multinational governmental organisation that has taken a significant interest in animal welfare is the World Organisation for Animal Health, known as the OIE, with 178 members. The OIE was originally established to address issues of disease control in animals and food safety³⁶ but identified animal welfare as a priority area in its 2001-2005 Strategic Plan and first included animal welfare principles in its *Terrestrial Animal Health Code* (the OIE Code) in 2004.³⁷ In its current form, Chapter 7.5 of the OIE Code provides a set of recommendations with respect to the slaughter of animals for human consumption. Although the recommendations reveal a clear preference for pre-slaughter stunning on animal welfare grounds, stunning is not required by the Code. This is a significant weakness with the OIE Code in comparison with Australian standards that generally require stunning except in the context of ritual or religious slaughter.³⁸ It is also important to note, as did the Farmer Review, that the OIE Code is merely a set of recommendations and is not itself enforceable.³⁹

Given jurisdictional limits, neither the Australian Government nor DAFF has the legal authority to conduct compliance inspections of export supply chains, including slaughter facilities, in export destination countries so the integrity of the system relies on the independent auditing and reporting requirements of ESCAS. This system has been developed by DAFF and is based on the recommendations contained in the IGWG 2011 reports but this level of detail is, again, not included in the Order.⁴⁰ The audits must address the following three areas: animal welfare, traceability and control. Part of the approval process for a new ESCAS is a pre-commencement audit and performance audits must also be undertaken once the ESCAS is in use. According to the DAFF standards, in the case of cattle and buffalo, performance audit reports must be provided for the first five consignments to a new supply chain, along with the end of processing reports, and ongoing audits are as determined by

³⁶ World Organisation for Animal Health, *About Us: History* (2013) <<http://www.oie.int/about-us/history/>>. The OIE takes its name from the 1924 agreement under which it was established: International Agreement for the creation of an Office International des Epizooties.

³⁷ World Organisation for Animal Health, *Animal Welfare: The OIE's achievements in animal welfare* (2013) <<http://www.oie.int/animal-welfare/animal-welfare-key-themes/>>. The full text of the Terrestrial Animal Health Code is available online through the OIE website.

³⁸ Like many areas of animal law, the regulation of the slaughter of animals for food is piecemeal, with each state and territory including rules with regard to slaughter generally through food safety rather than animal welfare laws, with an overlay of federal regulation in the context of products bound for export. However, some uniformity is obtained through the *Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption*, which requires pre-stunning of livestock prior to slaughter except when under an approved arrangement for ritual slaughter. Australia and New Zealand Food Regulation Ministerial Council, *Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption*, cl 7.10 and 7.12. (CSIRO, 2007). For a discussion of the legal issues with respect to religious slaughter see Alex Bruce, 'Do sacred cows make the best hamburgers? The legal regulation of religious slaughter of animals' (2011) 34(1) *UNSW Law Journal* 351.

³⁹ *Farmer Review*, above n 33, 69.

⁴⁰ The details of the auditing requirements can be found on the DAFF website. DAFF, *Independent Audit of an Exporter Supply Chain Assurance System – Cattle and Buffalo: Independent auditing requirements* (1 March 2012) <<http://www.daff.gov.au/aqis/export/live-animals/livestock/escas/independent-audit-escas-cattle-and-buffalo>>; DAFF, *Independent Audit of an Exporter Supply Chain Assurance System – Sheep and Goats: Independent auditing requirements* (1 March 2012) <<http://www.daff.gov.au/aqis/export/live-animals/livestock/escas/independent-audit-escas-sheep-and-goats>>.

DAFF on a 'risk/performance basis'.⁴¹ In the case of sheep and goats, performance audits are required every two months for the first six months and then at a frequency determined by DAFF.⁴² The DAFF materials also emphasise the independence and competence required of the auditors.

As DAFF has no power to inspect, it must rely on notifications of potential cases of non-compliance from the exporters (presumably revealed through the auditing process) and from third parties. To date, three cases of 'major' non-compliance have been found by DAFF, where one was reported by the exporter and two arose from Animals Australia investigations.⁴³ Where non-compliance is shown, DAFF has prepared guidelines for the management of such non-compliance.⁴⁴ The powers of DAFF are effectively limited to actions seeking to prevent such a circumstance arising again, such as further conditions on the export licence or revoking approval of the ESCAS, and are not in the nature of a punishment for the offending conduct.

III EXPORT RESTRICTIONS AND WTO LAW

There are indications that the Australian Government may have felt constrained by WTO law in designing its response to the live export crisis in Indonesia. The purpose of this part is to evaluate some of the more obvious issues that could be raised at the WTO with regard to a system like the ESCAS. Given that the general goal of the WTO is trade liberalisation, a restriction on exports, such as the requirements of the ESCAS, could be seen to interfere with free trade and therefore violate WTO commitments. It should be noted in this discussion that relatively few WTO disputes to date have involved export restrictions, with the bulk of disputes related to restrictions on imports, but many of the same principles apply in both types of cases.

At the time that negotiations were underway with the Indonesian Government to allow the resumption of the live cattle trade, the Australian media reported that an Indonesian government official threatened to lodge a complaint with the WTO if restrictive measures were to apply only to Indonesia and it appears that these comments were taken seriously.⁴⁵

⁴¹ DAFF, *Cattle and Buffalo: Independent auditing*, above n 40.

⁴² DAFF states on its website that an ESCAS for sheep should be audited three times per year, with two of those required in the high volume/high risk of non-compliance times of year, that is, festival times. This reflects the risk that sheep will be taken from the approved supply chain and sold to private individuals where no safeguards with respect to animal welfare apply. No End of Processing reports are required for sheep exports. DAFF, *Sheep and Goats: Independent auditing*, above n 40.

⁴³ DAFF, *Independent Audit Summary Reports of an Exporter Supply Chain Assurance System (ESCAS): Summary details of major and critical non-compliance with ESCAS requirements* (31 January 2012) <<http://www.daff.gov.au/aqis/export/live-animals/livestock/escas/audit-reports>>.

⁴⁴ DAFF, *Guideline – Management of Non-Compliance* (17 May 2012) <<http://www.daff.gov.au/aqis/export/live-animals/livestock/escas/non-compliance>>.

⁴⁵ This was reported widely in Australia. See, eg, ABC, 'Indonesia protests live cattle export ban', *ABC Lateline*, 8 June 2011 (Tom Iggulden, reporter); Tom Allard and Richard Willingham, 'Indonesia cries foul over live cattle export ban: LIVE EXPORTS – REACTION', *The Age* (Melbourne), 9 June 2011. Recent documents released by way of FOI requests show that the issue was being taken seriously (email dated 8 June 2011 from Ludwig senior adviser requesting to see any available legal advice about the international law ramifications in response to a report in *The Australian* (8 June 2011): 'Indonesia says ban on live cattle exports may be discriminatory') and later the same day email dated 8 June 2011 entitled 'WTO issue' containing 'Agreed words from DFAT' on addressing the issue. These documents and more are available at <<http://www.daff.gov.au/animal-plant-health/welfare/export-trade>>.

The clearest indication that trade law concerns may have had an influence on the design of the ESCAS can be found in this statement from the IGWG Cattle Report:

In applying any new regulatory framework to the export of Australian live animals it is important that this be done in a manner which is consistent with Australia's international trade obligations. Export restrictions are generally not permitted under the World Trade Organization but there are some exemptions to this general rule. Of relevance here are provisions that enable Australia to apply measures that are necessary to protect Australian public morals or the health of Australian animals. It is also important that Australia not discriminate in the application of these standards across countries, that it apply the least trade restrictive measures necessary to meet the required standards and it not apply measures that exceed those which are applicable domestically. With this in mind, it is important that the proposed framework be based around internationally agreed standards (as opposed to Australian standards) and that the measures applied do not exceed those that are in place in Australia.⁴⁶

More recently, the Government reiterated its concern that any measures adopted, such as mandating stunning, must meet WTO obligations.⁴⁷

This short statement from the IGWG Cattle Report highlights the important WTO issues that will be explored in this article. Firstly, a foundation principle of GATT is that measures must not discriminate between countries, so the application of the ESCAS to all export markets is important. Secondly, export restrictions are not generally permitted under GATT so the ESCAS must be tested to see if it is in the nature of an export restriction. If it is an export restriction, the measures can still be maintained if they meet the requirements of one of the General Exceptions of Article XX of GATT. Finally, with respect to the use of standards, the IGWG report suggests that the standards applicable under the ESCAS should be based on international standards. The WTO agreement with the most direct reference to the use of standards is the Technical Barriers to Trade Agreement so the potential application of this agreement to the ESCAS will also be analysed.

A *The GATT and Export Restrictions*

As a starting point it is necessary to identify Australia's obligations as a member of the WTO and a signatory to the GATT, which is the principal multilateral agreement dealing with trade in goods. If a violation of a requirement expressed in one of the GATT articles is found, a Contracting State may rely on one of the General Exceptions found in Article XX to justify the trade restriction. The discussion in this article only relates to restrictions on exports under the GATT — there is extensive literature on GATT restrictions on imports generally and their interaction with animal welfare issues more specifically.⁴⁸ In developing an ESCAS or similar system, particular consideration should be given to the requirements of Articles XIII and XI.⁴⁹

⁴⁶ Industry Government Working Group, Cattle Report, above n 32, 8-9.

⁴⁷ Australian Government, *Response to Senate Rural Affairs and Transport References Committee Inquiry: Animal welfare standard in Australia's live export markets, Live Animal Export (Slaughter) Prohibition Bill 2011 (No 2), and Live Animal Export Restriction and Prohibition Bill 2011 (No 2) dated November 2011* (July 2012) 9.

⁴⁸ See, eg, Peter Stevenson, 'The World Trade Organisation rules: A legal analysis of their adverse impact on animal welfare' (2002) 8 *Animal Law* 107; Laura Nielsen, *The WTO, Animals and PPMs* (Martinus Nijhoff Publishers, Leiden, The Netherlands, 2007); Steve Charnovitz, 'The Moral Exception in Trade Policy' (1998) 38 *Vanderbilt Journal of International Law* 689; Edward M Thomas, 'Playing Chicken at the WTO: Defending an animal welfare-based trade restriction under GATT's moral exception' (2007) 34 *Boston College Environmental Affairs Law Review* 605.

⁴⁹ GATT Article X may also be relevant as it relates to the administration of trade regulations. Pursuant to paragraph (3), trade regulations must be administered in a uniform, impartial and reasonable way and

Article XIII sets out the principle of non-discrimination, stating that no prohibition or restriction shall apply on the export of any product to the territory of any other contracting party unless the exportation of the like product to all third countries is similarly prohibited or restricted.⁵⁰ This underlies the importance that the ESCAS, which was originally only applicable to exports of cattle to Indonesia, be extended to all other markets. Article XIII requires non-discrimination with regard to all ‘like products’, an issue that has been considered extensively in relation to the Article III prohibition of restrictions on imports.⁵¹ The accepted criteria for like products are based on product characteristics, end uses and consumer preferences and there is little doubt that live cattle and live sheep would not be considered ‘like’. As a result, differences in the regulation of exports of these animals would not likely raise concerns under this Article.

The most significant potential challenge to export restrictions like the ESCAS is contained in Article XI, dealing with quantitative restrictions. Article XI:1 states, inter alia, that no prohibitions or restrictions made effective through export licences shall be instituted or maintained on the export of any product destined for the territory of any other contracting party.⁵² The Article goes on to list exclusions from this prohibition, such as in the case of critical shortages of foodstuffs, but none of the listed circumstances are relevant to live exports from Australia.⁵³

such regulations must be published. The administration of the regulations by DAFF to date and the provision of the details regarding the system by way of the department website would appear to be sufficient in this regard.

⁵⁰

GATT, Art XIII(1).

⁵¹

The issue of ‘like products’ has been considered a barrier to the imposition of trade restrictions on the basis of animal welfare standards, the argument being that the likeness of products is determined on the basis of the properties of the end products and not on the basis of the process and production methods (PPMs) that lead to that product. See Stevenson, above n 48, 110-115. This viewpoint is derived from comments made by the Panel in the Tuna-Dolphin I and II reports. GATT Panel Report, *US – Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, not adopted by the GATT Council) and GATT Panel Report, *US – Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, not adopted by the GATT Council). However, neither of the Panel reports was adopted by the GATT council and therefore, arguably, these comments should not be considered conclusive of the issue. The test for ‘likeness’ was elaborated on in the more recent opinion of the Appellate Body in the EC—Asbestos case where the AB adopted a three part test for likeness: the properties, nature and quality of the products; the end uses of the products in the given market; and consumers’ tastes and habits in relation to the products. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (12 March 2011) [101]-[103]. Whether these criteria can admit non-product related PPMs and the role of PPM distinctions under GATT has been subject to extensive academic attention but are still unresolved questions. See, eg, Douglas A Kysar, ‘Preferences for processes: The process/product distinction and the regulation of consumer choice’ (2004) 118 *Harvard Law Review* 525, in particular 540-548 and references therein, and Steven Charnovitz, ‘The law of environmental “PPMs” in the WTO: Debunking the myth of illegality’ (2002) 27 *Yale Journal of International Law* 59. In the more recent Tuna Labelling case, the Panel made the following observation: “To the extent that consumer preferences, including preferences relating to the manner in which the product has been obtained, may have an impact on the competitive relationship between these products, we consider it *a priori* relevant to take them into consideration in an assessment of the likeness.” Panel Report, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.249]. The issue of whether the tuna products were “like products” was not addressed on appeal. Appellate Body Report, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R (16 May 2012). Arguably, the same analysis could be applied to the manner in which the product is produced.

⁵²

GATT, Art XI(1).

⁵³

Ibid Art XI(2)

Export licensing requirements, such as the ESCAS, could arguably be seen to violate Article XI, even though they do not ban exports, because they restrict exports or make exporting more difficult. It is therefore important to consider the WTO disputes on this issue to determine the way in which these rules have been applied and therefore whether the ESCAS could arguably be seen to violate Article XI.

B *WTO Disputes Regarding Export Restrictions*

As noted above, there have only been a few disputes brought before the WTO to date that address restrictions on exports. For those that have been heard, there is an underlying concern that the export restrictions in effect provide an advantage to domestic producers, perhaps by keeping domestic prices for inputs lower or to encourage processing of products domestically. The ESCAS has no such object. In fact, the Government has initiated several financial assistance schemes to offset the impact of the suspension of trade to Indonesia and the implementation of the ESCAS.⁵⁴ However, a country importing livestock from Australia could take the view that the ESCAS disadvantages its interests by reducing the number of animals made available through exports or by the upward pressure on prices that the raised standards and monitoring mechanisms would create. Examination of previous decisions regarding export restrictions may assist in determining if a challenge of the ESCAS could be maintained.

As identified by Karapinar,⁵⁵ until recently there have only been three export restriction disputes under the GATT and each of these only reached the Panel opinion level: Canada – Herring and Salmon (1988)⁵⁶; Japan – Semiconductors (1988)⁵⁷; and Argentina – Hides and Leather (2001).⁵⁸ More recently, the Appellate Body has issued a decision in China – Raw Materials (2012)⁵⁹ and a new dispute, China – Rare Earths, is currently underway. These various decisions will not be considered in detail here but a few facts will be highlighted as they illustrate the types of export measures that have been challenged under Article XI and therefore can inform an opinion as to whether the ESCAS would be susceptible to such a challenge.

⁵⁴ An assistance package valued at \$30m was made available to primary producers and other related businesses affected by the suspension of trade to Indonesia. Prime Minister Julia Gillard and Minister for Department of Agriculture, Fisheries and Forestry, Sen Joe Ludwig, ‘\$30 million assistance package for live export industry’ (Press release, DAFF11/186LJ, 30 June 2011). This was in addition to income assistance provided to industry workers. Minister for Agriculture, Fisheries and Forestry, Sen Joe Ludwig, ‘Live animal trade income assistance package’ (Media release, DAFF11/185L, 27 June 2011). In addition, \$10m from the Official Development Assistance contingency reserve was made available to eligible countries that import Australian livestock and wish to work to improve animal welfare standards and \$5m has been allocation to support exporters to meet the new ESCAS requirements. Minister for Department of Agriculture, Fisheries and Forestry, Sen Joe Ludwig, ‘Gillard Government reforms live export trade’ (Media release, DAFF11/240L, 21 October 2011).

⁵⁵ See Baris Karapinar, ‘Defining the legal boundaries of export restrictions: A case law analysis’ (2012) 15(2) *Journal of International Economic Law* 443.

⁵⁶ GATT Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc L/6268 - 35S/98 (20 November 1987, adopted 22 March 1988) GATT BISD 355/98.

⁵⁷ GATT Panel Report, *Japan – Trade in Semi-Conductors*, GATT Doc L6309 – 35S/116 (24 March 1988, adopted 4 May 1988) GATT BISD 355/116.

⁵⁸ Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WTO Doc WT/DS155/R (19 December 2000).

⁵⁹ Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WTO Doc WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (30 January 2012) (this is a joint report on the disputes initiated by the US (DS394), the EC (DS395) and Mexico (DS398)).

However, as noted above, a characterisation of the ESCAS as an export restriction is not necessarily fatal to the measure as it may still be justified through reliance on one of the General Exceptions.

In the pre-WTO Canada – Herring and Salmon dispute, the measures at issue prohibited the export of herring and salmon from Canada unless the fish had been processed, that is canned, salted, smoked, dried, pickled or frozen. The Panel held that this was a violation of Article XI.⁶⁰ It is considered unlikely that the ESCAS, which still allows the export of the product but subject to conditions, would be seen as analogous to the Canadian measures, which prohibited the export of non-processed fish entirely.

In Japan – Semiconductors, the facts evidenced a number of measures that together had the effect of restricting exports of semi-conductors below specified costs to markets other than the United States in violation of Article XI:1.⁶¹ The Panel also concluded that the export licensing system resulted in undue delays of up to three months in issuing licences, which also violated Article XI:1.⁶² This case illustrates that an export licensing system may be characterised as a restriction on exports in violation of GATT, even though exports of the product are not prohibited as such. In the context of ESCAS, for example, the requirement to arrange for an audit of a supply chain before it can be approved as part of the export permit application process could, arguably, be seen as an undue burden that results in undue delays in issuing licences.

In Argentina — Hides and Leather, representatives of the hide processing industry were allowed to attend and monitor the customs control over the export of raw and semi-tanned hides. Although this was not a *de jure* restriction on exports, the European Communities (EC) contended that it was a *de facto* restriction, as the presence of representatives of the hide tanning industry would have a chilling effect on exports, in violation of Article XI. The EC was only able to provide circumstantial evidence that export numbers were very low and could not show that the export measures were the cause. As a result, the EC failed to meet the evidentiary burden. However, what the decision does confirm is that an export measure need not be restrictive on its face; that is, a measure can violate the GATT by virtue of its effect.⁶³ Evidence could potentially be brought to show that the operation of the ESCAS has had the effect of reducing exports of livestock and therefore it is a restriction on this trade.

More recently there have been two high-profile disputes involving alleged export restrictions established by China. The first, the China-Raw Materials case, was the subject of an Appellate Body decision in early 2012.⁶⁴ The complex dispute involved a series of measures that impacted on the export of various raw materials including bauxite.⁶⁵ The complainants, the United States, Mexico and the EU, identified a total of 40 measures in their claims, where these fell into four categories of export restraints: export duties; export quotas; minimum

⁶⁰ Although the parties and the Panel all agreed that the measures were in violation of Art XI, Canada argued that the measures were justified by the exception found in Art XI:2(b) or Art XX(g). The Panel concluded that neither of these exceptions were available. See Panel Report, *Canada – Herring and Salmon*, above n 58 [4.3] and [4.7].

⁶¹ Panel Report, *Japan – Semi-conductors*, above n 59 [132(A)].

⁶² *Ibid* [132(B)].

⁶³ Panel Report, *Argentina – Hides and Leather*, above n 60 [11.15]-[11.19].

⁶⁴ AB Report, *China – Raw Materials*, above n 59.

⁶⁵ The raw materials covered by the measures are: bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorous and zinc.

export price requirements; and export licensing requirements.⁶⁶ The complainants argued that these measures created scarcity in global markets for the raw materials, driving up prices, and created an advantage for local Chinese producers due to their access to these materials at lower prices. For current purposes, it is important to note that the Panel analysed in detail the issue of automatic versus ‘non-automatic’ and ‘discretionary’ licences in the context of Article XI. The Panel made following comments:

It seems to the Panel that if a licensing system is designed such that a licensing agency has discretion to grant or deny a licence based on unspecified criteria, this would not meet the test we set out above in order to be permissible under Article XI:1. The possibility to deny the licence would be ever present; hence, the system by its very nature would always have a restrictive or limiting effect. It makes no difference, in the Panel's view, that discretion may be applied in a particular case such that a licence is authorized. The system offers no certainty that licences will be granted and hence it is not permissible.⁶⁷

On this issue, the Panel concluded that the undefined discretion provided to the Chinese authorities, which included a power to request additional unspecified documents before a licence would be issued, would allow those measures to be applied in such a way as to restrict exports in a WTO inconsistent manner and was in violation of GATT Article XI:1.⁶⁸ The opinion of the Appellate Body in this case was largely based on procedural grounds and unfortunately does not provide further jurisprudence on this issue. A concern could be raised that, as a general matter, the ESCAS does not operate automatically and therefore the grant of export licences and permits are restricted. In addition, various elements of the ESCAS, as developed and administered by DAFF, include a degree of discretion with regard to the conditions for approval of the ESCAS (an example being the discretion with regard to ongoing auditing requirements), which could be seen as an additional restriction on trade.⁶⁹

Most recently, the dispute resolution process has been initiated in the China – Rare Earths case with respect to measures applying to the export of rare earths, tungsten and molybdenum.⁷⁰ Not unlike the China – Raw Materials case, the complainant, the United States, argues that various measures including export duties, export quotas, minimum export prices and licensing requirements operate to restrict exports in a manner inconsistent with the GATT, including Article XI.⁷¹ It is also asserted that the measures are not administered in an impartial and uniform manner and some measures are not published, in violation of Article X.⁷² Should this dispute advance to a Panel Report, the analysis of licensing measures will be instructive in an attempt to analyse the robustness of the ESCAS.

⁶⁶ AB Report, *China – Raw Materials*, above n 59, [2].

⁶⁷ Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WTO Doc WT/DS394/R, WT/DS395/R, WT/DS398/R (5 July 2011) [7.921].

⁶⁸ *Ibid* [7.948].

⁶⁹ The Panel stated that even where the underlying measure may be justified under another article of the GATT, a licensing system that included discretionary elements could be seen as an unacceptable restriction: “a licence requirement that results in a restriction additional to that inherent in a permissible measure would be inconsistent with GATT Article XI:1. Such restriction may arise in cases where licensing agencies have unfettered or undefined discretion to reject a licence *application*.” (emphasis in original) Panel Report, *China – Raw Materials*, above n 69 [7.957].

⁷⁰ *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, DS431. Complainant United States. Joined for a single panel with DS432 (Complainant EU) and DS433 (Complainant Japan).

⁷¹ Request for Consultations by the United States, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc WT/DS431/1, G/L/982 (15 March 2012).

⁷² *Ibid*.

C *Reliance on the General Exceptions*

Were a complainant to be successful in arguing that the ESCAS amounted to an export restriction in violation of Article XI, the measures could be defended by resorting to the General Exceptions of Article XX. In effect, Article XX provides exceptions so that measures that are otherwise WTO-inconsistent can nonetheless be maintained. There are two parts to this test: the measure must fit within the terms of one of the listed exceptions and must meet the requirements of the chapeau of Article XX.⁷³ There has been some academic interest to date in considering the extent to which these exceptions could protect an animal welfare related import restriction and some of these issues may be considered further in the EU seal product ban case currently pending at the WTO.⁷⁴ This part will provide an overview of how these exceptions could be relied upon in defense of the ESCAS.

1 *The Public Morals Exception*

In its reports, the IGWGs suggest that restrictions on live exports could be defended under either the public morals or animal health exceptions found in Article XX. Specifically, Article XX(a) provides an exception for a measure ‘necessary to protect public morals’. This test requires that the interest underlying the measure must be within the scope of public morals and the measure must be necessary to protect that interest. The notion of public morals was elaborated on in the US – Gambling case,⁷⁵ argued in relation to the General Agreement on Trade in Services, which has an identical public morals exception.⁷⁶ In that case, the Panel reasoned (and this analysis was upheld by the Appellate Body)⁷⁷ that the term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation,⁷⁸ and the ‘content of these concepts [public morals and public order] for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.’⁷⁹ This same standard was more recently applied in the China – AV Products case, where import restrictions placed on AV products such as videos were held to protect public morals.⁸⁰

⁷³ See Appellate Body Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc TW/DS58/AB/R (12 October 1998) [147].

⁷⁴ *Canada-European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS400) and parallel dispute DS401 initiated by Norway.

⁷⁵ Appellate Body Report, *United States – Measure Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (7 April 2005); Panel Report, WTO Doc WT/DS285/R (18 November 2004). For a detailed discussion of the history behind the public morals exception and the significance of the US – Gambling case see Mark Wu, ‘Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine’ (2008) 33 *Yale Journal of International Law* 215.

⁷⁶ *General Agreement on Trade in Services*, Art XIV(a).

⁷⁷ Appellate Body Report, *US – Gambling*, above n 75 [296].

⁷⁸ *Ibid* [6.465].

⁷⁹ *Ibid* [6.461].

⁸⁰ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (21 December 2009).

Given Australia's long history of animal protection legislation, as evidenced by the animal welfare laws at the State and Territory level, as well as Commonwealth laws,⁸¹ it should be a relatively straightforward case to argue that the public morals of the Australian community include animal welfare protection. To date there is no WTO authority on the issue of whether animal welfare is a matter of public morals but the EU seal product ban dispute may provide an opportunity for this issue to be addressed.

In order to rely on the paragraph (a) exception, the second hurdle is the test of 'necessity'. As interpreted by the Appellate Body, this involves a weighing up of the objective sought to be obtained (the extent to which it is vital and important) and the impact on trade.⁸² Whether there is any reasonable alternative available that would achieve the same level of protection but would be less trade restrictive is also a relevant consideration.⁸³

Arguments have been put forward in favour of a complete ban of live exports, like that in place in New Zealand,⁸⁴ as the only way to guarantee the acceptable treatment of livestock raised in Australia and slaughtered for food.⁸⁵ Alternatively, it has been suggested that the *Animals Order* be amended to require stunning before slaughter along the lines required in Australia.⁸⁶ It could therefore be argued that the ESCAS is a less trade-restrictive measure (compared to these alternatives) that can adequately address the public moral concern regarding animal welfare.⁸⁷ It could also be argued that requiring audited compliance with OIE guidelines is necessary to protect this interest, especially given the evidence that other less formal efforts of the Australian Government and industry groups to improve welfare standards within many importing jurisdictions (such as through providing training and equipment) have not been successful.⁸⁸

⁸¹ The importance of animal welfare as a public interest can be seen at a Commonwealth level by way of, for example, the Australian Animal Welfare Strategy and the Australian Standards for the Export of Live-Stock. Australian Government, DAFF, *Australian Animal Welfare Strategy and National Implementation Plan 2010-14* (2011) and DAFF, *Australian Standards for the Export of Livestock (version 2.3) and Australian Position on the Export of Livestock* (2011).

⁸² Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Appellate Body Report, WTO Doc WT/DS161/AB/R, WT/DS169/AB/R (10 January 2001) [162] (considering the necessity test in the context of GATT Art XX(d)), cited with approval in Appellate Body Report, *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (12 March 2001) [172] (considering the necessity test in the context of GATT Art XX(b)).

⁸³ Ibid.

⁸⁴ *Customs Export Prohibition (Livestock for Slaughter) Order 2010* (NZ).

⁸⁵ For example, two Bills were considered by Parliament in 2011 that sought to prohibit the export of live stock for slaughter: Live Animal Export (Slaughter) Prohibition Bill (No 2) 2011 (put forward by the Australian Greens) and Live Animal Export Restriction and Prohibition Bill (No 2) 2011, which provided for a phase out period until 2014 (put forward by Senator Xenophon). The Senate Rural Affairs and Transport References Committee inquiry recommended that neither Bill be passed. The Senate, Rural Affairs and Transport References Committee, Parliament of Australia, *Animal welfare standards in Australia's live export markets, Live Animal Export (Slaughter) Prohibition Bill (No 2) 2011 and Live Animal Export Restriction and Prohibition Bill (No 2) 2011* (November 2011), 17.

⁸⁶ Livestock Export (Animal Welfare Conditions) Bill 2012, Private Members Bill introduced by Andrew Wilkie MP.

⁸⁷ According to a recent survey conducted by Essential Vision in November 2012, 25% of those surveyed thought that Australia should not export livestock to any country at all, 54% thought that live exports should be allowed only to countries that guarantee that they will be treated humanely, and 15 % thought that Australia should export live cattle and sheep to any country that wants them. Survey conducted by Essential Vision and reported on 19 November 2012.

⁸⁸ There is ample evidence that extensive efforts of the Australian Government and the industry peak bodies LiveCorp and Meat & Livestock Australia within jurisdictions such as Indonesia and Egypt have not been

2 *Protecting Animal Life or Health*

Article XX(b) provides an alternative exception for measures ‘necessary to protect human, animal or plant life or health’. This exception also has had little consideration to date in the context of animal welfare so any conclusions to be drawn on the availability of this exception are somewhat speculative. In the early Tuna–Dolphin I case, the Panel rejected the proposition that the US measures designed to limit the importation of tuna to that obtained by dolphin-friendly fishing methods was within the scope of Article XX(b), but on the basis that the conditions imposed were unpredictable and therefore could not be regarded as necessary to protect the health or life of dolphins.⁸⁹

More recently, the Tuna Labelling case raised the issue of whether the US dolphin-friendly tuna labelling scheme violated the TBT Agreement.⁹⁰ Under the TBT Agreement, technical regulations that give rise to a trade restriction may be justified if they are necessary to pursue a legitimate objective, where a non-exhaustive list of legitimate objectives is given in the Agreement.⁹¹ The Panel concluded that the protection of dolphins was a legitimate objective of the labelling regime as it fell within the ‘protection of ... animal or plant life or health, or the environment’ and further that the broad terms in which the objective is expressed (which is very similar to that of GATT Article XX(b)) has the effect of ‘allowing Members to pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened.’⁹² Although the interest sought to be protected by the ESCAS is not animal life (given that the animals are explicitly being exported for slaughter), a modern conception of animal health is broader than disease prevention and includes welfare, as evidenced by, for example, the consideration given to such matters by the OIE. Therefore, an argument could be made that the ESCAS would meet the first hurdle of the exception due to its link with animal health but the issue of whether the measures in place are necessary to achieve this objective would again need to be addressed.

successful in raising animal welfare standards, particularly with regard to handling and slaughter, to a level acceptable to the Australian public. For example, see Evidence to Senate Rural Affairs and Transport Legislation Committee, Estimates Hearings: Agriculture, Fisheries and Forestry, Parliament of Australia, Canberra, 24 May 2011, 105-120, and responses to questions on notice, in regard to investments and training specifically in Indonesia. See also ALEC, Submission to the Farmer Review, above n 11, Annex 11: MLA-LiveCorp Research and Development Projects and Annex 13: Animal Welfare Issue and Improvements Achieved by MLA/Livecorp.

⁸⁹ GATT Panel Report, *US – Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, not adopted by the GATT Council) [5.228]. A similar conclusion was reached in the Tuna-Dolphin II case, where the argument in favour of the Art XX(b) exception failed on the “necessary” test. GATT Panel Report, *US – Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, not adopted by the GATT Council) [5.39].

⁹⁰ *Technical Barriers to Trade Agreement* (incorporated into the WTO Agreement as part of Annex 1A).

⁹¹ *Ibid* Art 2.2.

⁹² Panel Report, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.437]. This conclusion was not disputed on appeal. Appellate Body Report, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R (16 May 2012) (the Tuna Labelling case).

3 *Extra-Territorial Impacts*

A potentially significant argument raised in the context of the Article XX exceptions is the ‘rule on extra-territoriality’.⁹³ When applied in the context of animal welfare standards, Stevenson suggests that there is a view that one country can protect animals located within its jurisdiction but cannot (in effect) impose its standards on another country by way of trade restrictions.⁹⁴ This ‘rule’ can be traced to comments made by the Panel in the pre-WTO Tuna–Dolphin cases. In Tuna–Dolphin I:

If the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.⁹⁵

The US measures requiring specific dolphin-friendly fishing practices were rejected for the purposes of both Article XX(b) and Article XX(g) (an exception for measures related to the conservation of exhaustible natural resources).⁹⁶ It is suggested that this same concern would be equally applicable to measures seeking to rely on the Article XX(a) exception.

Further, in the Tuna–Dolphin II case, the Panel stated that ‘[i]t could not be said that the General Agreement proscribed in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure’ and used the Article XX(e) exception for products of prison labour as an example.⁹⁷ However, the Panel then made the following statement:

If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.⁹⁸

⁹³ Stevenson, above n 48, 122.

⁹⁴ Ibid, 122-127.

⁹⁵ GATT Panel Report, *US – Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, not adopted by the GATT Council) [5.27].

⁹⁶ Ibid [5.32]. GATT Article XX(g) provides an exception for measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”. In relation to the Art XX(g) exception, the Panel stated: “A country can effectively control the production and consumption of an exhaustible natural resource on to the extent that the production or consumption is under its jurisdiction. This suggests that Article XX(g) was intended to permit contracting parties to take trade measures *primarily* aimed at rendering effective restrictions on production or consumption within their jurisdiction.” Ibid, [5.31] (emphasis added).

⁹⁷ GATT Panel Report, *US – Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, not adopted by the GATT Council) [5.16].

⁹⁸ Ibid [5.26].

On this basis the US measures, which effectively required the exporting country to show that it had a comparable regulatory program to the US and had a rate of incidental taking of marine mammals comparable to US vessels, were seen as measures taken to force other countries to change their policies to mirror those of the US and were not justified under Article XX(g).⁹⁹

More recently, this hurdle was avoided in the Shrimp–Turtle case, where the Appellate Body explicitly declined to make a ruling regarding any ‘implied jurisdictional limit’ to Article XX(g).¹⁰⁰ The Appellate Body concluded that the endangered sea turtles meant to be protected by the standards (which required the use of turtle-exclusion devices in the catching of shrimp) were migratory and therefore had a relevant connection with the US.¹⁰¹ In the US – Gasoline case, clean air was considered an exhaustible natural resource for the purposes of Article XX(g) and issues of territorial reach were not raised (although this may be because clean air is a global commons).¹⁰² In other cases involving the protection of human health or public morals, the protection was inwardly directed towards the country’s own population — protecting French residents from the dangers of asbestos, US residents from online gambling and Chinese residents from inappropriate materials.

In the view of Stevenson, these arguments miss the point:

The aim of such countries is not to force other countries to change their standards, but to be at liberty to prohibit within their own territory the marketing of products (whether domestically produced or imported) derived from practices which involve animal suffering.¹⁰³

Given that the ESCAS is an export restriction, the offending conduct sought to be prevented is necessarily occurring in the overseas jurisdiction, and what the measures are effectively seeking to do is restrict the supply of the livestock to those overseas markets unless they comply with the prescribed standards. To re-phrase Stevenson’s argument, it could be said that the aim is (arguably) not to force other countries to change their standards but to be at liberty to prohibit the supply of animals to other territories where local practices give rise to unacceptable levels of animal suffering.

Alternatively, it could be argued that, as the measures are based on OIE guidelines, the OIE members have already approved the standards prescribed by the ESCAS. Therefore, the ESCAS does not require Australian standards to be adopted but rather that the already multilaterally accepted OIE guidelines be put into practice. It is hoped that the ‘rule’ of extra-territoriality will be addressed and clarified in the seal products case (discussed below) given that the measures at issue in that case target the inhumane slaughter of seals undertaken outside of the EU.

⁹⁹ Ibid [5.27].

¹⁰⁰ Appellate Body Report, Shrimp-Turtle, above n 73, [133].

¹⁰¹ Ibid.

¹⁰² Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS52/AB/R (29 April 1996).

¹⁰³ Stevenson, above n 48, 126.

4 *The Chapeau*

In order to rely on any one of the Article XX exceptions, the measure must also meet the tests of the chapeau (the introductory material to the Article). The measure must not result in arbitrary or unjustifiable discrimination between countries and must not be a disguised restriction on international trade. These tests were analysed in detail in the context of the Shrimp-Turtle dispute: although the protection of sea turtles met the requirements of Article XX(g) as ‘relating to the conservation of exhaustible natural resources’ the manner in which the measures were applied was held to violate the conditions of the chapeau.¹⁰⁴ It is considered that the Shrimp–Turtle case is the most relevant case for current purposes given the outward-looking nature of the measures in that case and their objective of protecting animals (sea turtles).

The Appellate Body went to great lengths to emphasise the important role of the chapeau in preventing the abuse or misuse of the exceptions:¹⁰⁵

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (eg, Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.¹⁰⁶

The measures in Shrimp–Turtle I effectively required that overseas fishers meet the same standards as applicable to US domestic shrimpers in order to be certified. The Appellate Body concluded that the manner by which the US sought to achieve its goal of protecting sea turtles amounted to both unjustifiable and arbitrary discrimination as between members of the WTO.¹⁰⁷

The US measures were adjusted in light of the decision but were challenged again in Shrimp–Turtle II, where the Panel concluded that the new measures, which required standards that were ‘comparable in effectiveness’ (rather than ‘essentially the same’) now met the requirements of the chapeau.¹⁰⁸ This decision highlights the need for negotiation and flexibility in a certification regime, which arguably can be evidenced in the ESCAS given the outcomes-based standards that must be met for approval of a supply chain. Although DAFF provides checklists on its website, these are merely provided as suggestions. Another factor that weighed in favour of the US’s case was evidence that the government repeatedly offered technical assistance and training to other governments,¹⁰⁹ efforts not unlike those of Australia with regard to the ESCAS.

The ESCAS may also be more likely to pass the test of the chapeau given that the welfare code upon which it is based, the OIE guidelines, is an internationally developed set of standards that has already been accepted by the members of the OIE (although this acceptance

¹⁰⁴ Appellate Body Report, Shrimp-Turtle, above n 73.

¹⁰⁵ Ibid, [156]-[158].

¹⁰⁶ Ibid, [159].

¹⁰⁷ Ibid, [186].

¹⁰⁸ Panel Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (15 June 2001); Appellate Body Report confirming findings, WTO Doc WT/DS58/AB/RW (22 October 2001) [144].

¹⁰⁹ Ibid [5.118]-[5.119].

does not mean the standards are binding).¹¹⁰ In addition, the way in which the OIE guidelines are themselves structured, which flows through into the ESCAS checklists, is outcomes based rather than prescriptive as to animal handling techniques, thereby retaining a degree of flexibility.

5 The EU Seal Product Ban Dispute

There is a real possibility that many of the uncertainties with respect to the application of WTO principles to measures directed towards improving animal welfare will be considered, if not resolved, in the dispute resolution process currently under way involving the EU's measures to prohibit the import and sale of seal products.¹¹¹ The dispute concerns the European Union regulation that bans seal products being placed on the European Community market in all but a few limited circumstances.¹¹² Given that these measures operate as a ban they arguably fall foul of Article XI.¹¹³

The case is likely to focus on the availability of one of the Article XX exceptions. As evidenced in the introductory paragraphs to the Regulation, animal welfare considerations are the drivers behind the ban and there is no evidence of environmental protection as a motivating factor. Therefore, the Article XX argument is likely to rely on the public morals exception. This dispute may therefore, importantly, provide a definitive statement that animal welfare is within the scope of this exception. The areas likely to generate greater debate are the application of the necessity test in this context and the application of the chapeau.

In the application of the public morals exception, the relative weight or importance given to animal welfare concerns as compared to interests of market access will be incorporated into the necessity test as will a consideration of whether a less trade-disruptive measure could have attained the stated objective. For example, rather than a ban, could there have been a labelling or certification scheme. The preamble to the Regulation specifically states that, in the view of the EC, these options would not be effective.¹¹⁴ The Panel may also consider it relevant to

¹¹⁰ It should be noted that the live export markets to which the ESCAS applies are all members of the OIE.

¹¹¹ *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400, commenced by Canada. Norway has commenced a parallel dispute resolution process in WT/DS401. The dispute settlement process was commenced in 2009 but the Panel has not yet heard the arguments.

¹¹² *Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products*, Official Journal of the EU, L286/36-39 (31.10.2009). The circumstances under which importation is allowed are threefold: seal products resulting from Inuit or other indigenous community traditional and subsistence hunting; goods imported on an occasional nature wholly for the personal use of travellers; and by-products of sustainable management practices regulated at a national level and only if on a non-profit basis. However, as pointed out by Fitzgerald, in effect the regulation does not ban seal products passing through the EU on route to other markets. Peter L Fitzgerald, "Morality" May Not Be Enough to Justify the EU Seal Product Ban: Animal Welfare Meets International Trade Law' (2011) 14 *Journal of International Wildlife Law & Policy* 85, 94.

¹¹³ Howse and Langille argue strongly that the seal products ban does not violate the GATT but, if it were concluded that it did, the public morals exception would be available. Robert Howse and Joanna Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' (2012) 37 *Yale Journal of International Law* 367, 397-411. In their argument they maintain that it is inappropriate to apply Article XI to the seal products ban – given that the same restrictions apply to imported and domestically produced products, they argue that it is appropriate that these measures be considered under Article III, where a violation of this article would not be found. Ibid 405-407.

¹¹⁴ EC Regulation No 1007/2009, above n 112, preamble para (11) and (12).

adjudge whether there is sufficient flexibility in the measures. The three stated exceptions to the ban could also be relevant in considering whether the ban is arbitrary, and Fitzgerald asks why seals have been singled out when other fur-bearing animals are subject to similarly cruel hunting or slaughtering practices.¹¹⁵ However, Howse and Langille make a persuasive case that the ban should be justified under both the public morals and animal health exceptions.¹¹⁶ The dispute may also provide an opportunity to address the issue of extra-territorial reach (given that the seal hunting takes place outside the EU). The Panel was composed in October 2012 and its final report is expected in October 2013.

D *Technical Barriers to Trade*

In many WTO cases involving trade restrictions, the complainants will include claims under the TBT Agreement. Although it is not entirely clear that such a claim could be brought with respect to the ESCAS, the IGWG Reports place much emphasis on the need to apply international standards, rather than Australian standards, and the TBT Agreement makes more direct reference to international standards than does the GATT.

A threshold issue is whether the ESCAS is a technical regulation as defined for the purposes of the TBT Agreement — if the ESCAS is not a technical regulation then the TBT Agreement is not applicable. The Annex I definitions state that a technical regulation is a ‘document which lays down product characteristics or *their related* processes and production methods ... with which compliance is mandatory’ (emphasis added). A three-part test to determine if a measure is a technical regulation has been developed: the regulation must apply to a designated product or group of products; the regulation must lay down one or more characteristics; and compliance with this characteristic must be mandatory.¹¹⁷ Although it seems quite clear that the handling and slaughter standards stipulated in the ESCAS framework are process or production methods (PPMs), these processes would not affect the character of the ultimate product (being processed meat) and would therefore be considered ‘unincorporated’ or ‘non-product related’ PPMs. The wording of the definition of technical regulation, in particular the use of the phrase ‘their related’, suggests that technical regulations would only include regulations which require PPMs that relate to the product characteristics and therefore do not encompass non-product related PPMs. Although it is not free from doubt, there is a strong argument that the TBT Agreement simply does not apply to non-product related PPMs such as the ESCAS.¹¹⁸

In the recent decision in the US – Tuna Labelling case, the AB confirmed that the dolphin-safe labelling scheme was a technical regulation, even though it clearly relates to a non-product related PPM, the fishing method. The US submitted that the measure was not related to product characteristics but the AB did not take a view on this point.¹¹⁹ There is an

¹¹⁵ Fitzgerald, above n 112, 129.

¹¹⁶ Howse and Langille, above n 113, 411-421.

¹¹⁷ Appellate Body Report, *Asbestos*, above n 53, [66]-[73], adopted and applied by the Appellate Body in Appellate Body Report, *EC – Trade Description of Sardines*, WTO Doc WT/DS231/AB/R, [176], and Panel Report, *Tuna Labelling*, above n 94, [7.53] and AB Report, *Tuna Labelling*, above n 94, [179].

¹¹⁸ See, Jan McDonald, ‘Domestic regulation, international standards, and technical barriers to trade’ (2005) 4(2) *World Trade Review* 249, 255-256 and references therein; Elizabeth Sheargold and Andrew Mitchell, ‘Oils Ain’t Oils: Product Labelling, Palm Oil and the WTO’ (2011) 12 *Melbourne Journal of International Law* 396 at 402; Abhinay Kapoor, ‘Product and process methods (PPMs): “A losing battle for developing countries”’ (2011) 17(4) *International Trade Law Review* 131, 137-138.

¹¹⁹ Appellate Body Report, *Labelling*, above n 95, [197]

argument that an extension of the definition of technical regulation in Annex 1, which states that ‘it may also include... labelling requirements as they apply to a product, process or production method’, is broader and will pick up labelling schemes that relate to non-product related PPMs, given there is no qualifier that the PPM in this instance be ‘related’ to the product characteristics.¹²⁰ Again, this issue is not settled and it seems likely that extension to non-product related PPMs is only for the purposes of characterising labelling schemes as technical regulations.

The ESCAS also has the curious feature of stipulating a PPM that will only occur after the export has taken place. The wording of the TBT Agreement suggests that the technical regulations must be met before the import or export takes place and the measures at issue in the prominent cases to date have had the same backward-looking approach.

Although there is clearly some doubt on this issue, if one were to conclude that the ESCAS regime, or more specifically the animal welfare component of the scheme, is a technical regulation, the TBT Agreement stipulates that technical regulations shall be no more trade-restrictive than necessary to fulfill a legitimate objective¹²¹ and that a party must use the relevant international standard (if one exists) unless it would be ineffective in fulfilling the legitimate objective.¹²² Legitimate objectives are defined inclusively for the purposes of this agreement and include the protection of animal life or health. As noted above, in the recent Tuna Labelling case, the Panel accepted as legitimate the objective of dolphin protection and there is no obvious reason why livestock protection would not also be accepted. The TBT Agreement has a clear preference for harmonisation through the use of international standards, of which the OIE guidelines would be the likely model,¹²³ as this is seen to facilitate international trade.¹²⁴ However, this would not necessarily prevent an argument being made that a higher, Australian standard, one that requires pre-slaughter stunning, is necessary to achieve the objective of ensuring welfare standards acceptable to the Australian Government and the Australian people. However, the added difficulty of making such an argument could have influenced the ESCAS designers to rely on the OIE guidelines.

IV CONCLUSION

When examined from a WTO law perspective, a system like the ESCAS, that requires compliance with detailed regulatory and reporting requirements with respect to the grant of export licences and permits, raises several issues. The GATT requirement of non-discrimination in the application of export restrictions (Article XIII) has arguably been addressed by the application of the ESCAS to all major categories of livestock and all export markets. However, the Article XI prohibition on export restrictions is more problematic given that the WTO jurisprudence suggests that non-automatic licensing regimes and licensing regimes that incorporate discretions, such as the ESCAS, could be considered trade restrictions inconsistent with the GATT. Reliance on one of the General Exceptions would then be required for the measures to be maintained. The strongest case would appear to lie

¹²⁰ McDonald, above n 118, 256-257.

¹²¹ TBT Agreement, Art 2.2.

¹²² TBT Agreement, Art 2.4.

¹²³ The OIE standards are already relied upon as the reference standards for the purposes of the WTO *Agreement on the Application of Sanitary and Phytosanitary Measures* in relation to animal health and zoonosis. See *SPS Agreement*, Annex A(3)(b).

¹²⁴ McDonald, above n 118, 251-252.

with the Article XX(a) public morals exception, with reference to animal welfare as the motivation for the licensing regime. The measures must be deemed necessary to achieve the objective of animal welfare protection, where this requires a balancing of the interest being protected against the impact of the measures on trade. Evidence could be provided that Australia's previous efforts to improve welfare outcomes through funding equipment improvements and providing training have not been effective and therefore stronger measures are required. Although the issue of extra-territorial impacts could be raised, given that the current scheme relies on the OIE guidelines rather than Australian standards, there is less of a case to be made that Australia is seeking to impose its standards on importing countries.

Finally, in order to meet the conditions of the chapeau, a more generalised balancing test is applied that compares the member's right to invoke the exception and the other members' rights under the GATT more broadly. There is also an enquiry into whether the measures give rise to arbitrary or unjustifiable discrimination. In this regard, the degree of flexibility in the specific procedures that can be adopted by an importer in meeting the ESCAS animal welfare outcomes and, again, the use of internationally accepted OIE guidelines as the framework, would weigh in favour of the measures. For completeness, it seems unlikely that the ESCAS could be characterised as a technical regulation for the purposes of the TBT Agreement, so concerns that this agreement would require reliance on OIE guidelines rather than Australian guidelines may be unfounded.

Although, as described in this article, the potential WTO issues raised by the ESCAS can be addressed, this is not to say that a stricter set of standards, such as welfare protections based on the Australian slaughter standards that require stunning in most cases, would not also be defensible if tested. And, of course, it is probably obvious to suggest that just because import or export measures are potentially subject to a WTO challenge does not necessarily mean that they will be disputed. For example, consider the New Zealand order that effectively prohibits live exports, which has not been challenged. Unfortunately the deference that appears to have been given to free trade principles may have produced a live export licensing regime that is too weak to deliver the level of welfare outcomes that the Australian community rightly expects.

UNINTENDED CONSEQUENCES? RIGHTS TO FISH AND THE OWNERSHIP OF WILD FISH

GEORGE KAILIS*

Statutory schemes for fisheries management in Australia introduced between 1989 and 2007 sought to improve outcomes of fisheries management and enhance the ability of governments to raise revenue from fishing activities. A key method in doing so has been the creation of new forms of statutory fishing rights that necessarily affected pre-existing common law public rights to fish. In addition, some Australian state governments have gone further and asserted ownership of all wild fish in their waters. These legislative reforms will be assessed in the context of an apparent shift in the High Court's approach to the interpretation of fisheries and wildlife legislation in 2008. After a review of fishing legislation in Australia, possible unintended consequences of assertions of property and the abrogation of public rights to fish are highlighted. It is concluded that legislative drafters should specify more clearly the intended effects of fisheries legislation on the public right to fish, and the intended effects of provisions on the ownership of wild fish.

I INTRODUCTION

Between 1988 and 2007, all Australian governments managing marine fisheries¹ introduced new and substantially reformed legislative schemes for fisheries management. A key objective of those schemes was to improve the quality of fishing rights, typically by providing for the creation of more clearly defined rights of access under statutory plans of management.² The creation of new forms of fishing rights in this manner has necessarily affected the common law public right to fish. In addition, some states of Australia have sought to emphasise their rights to fisheries by asserting ownership of wild fish in the water, a novel legal concept.³

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¹ The states of Australia, the Commonwealth of Australia (the federal government) and the Northern Territory. The Australian Capital Territory, although self-governing, is land-locked and does not abut a relevant marine jurisdiction.

² See, eg, *Fisheries Management Act 1991* (Cth) Pt 3. For a general discussion of fisheries management plans, see Warwick Gullett, *Fisheries Law in Australia* (LexisNexis Butterworths, 2008), 205–248.

³ *Fisheries Act 1995* (Vic) s 10(1); *Living Marine Resources Management Act 1995* (Tas) s 9(1); *Fisheries Management Act 2007* (SA) s 6(1).

The legal impact of fisheries legislation on the public right to fish depends on whether that legislation has wholly abrogated the public right, or has merely regulated the exercise of the right. After reviewing fisheries legislative schemes introduced since 1988, this article highlights some anomalous consequences of these reforms, including some speculation on the effect of assertions of state ownership of wild fish.

Three key decisions of the High Court of Australia are central to the assessment of legislative schemes enacted since 1988. These are *Harper v Minister for Sea Fisheries*,⁴ *Yanner v Eaton*⁵ and *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust*.⁶ In 1989, *Harper's Case*⁷ confirmed that the public right to fish, which originated in English common law, was part of Australian common law.⁸ In 1999, *Yanner v Eaton*⁹ provided a guide to the appropriate interpretative stance to be taken in relation to natural resource management legislation, albeit in the context of indigenous common law rights. In 2008, the *Blue Mud Bay Case*¹⁰ decided that fisheries legislation in the Northern Territory had wholly abrogated the public right to fish. As will be discussed below, that case undermined the authority of *Yanner v Eaton*.¹¹ The result has been that, since 2008, fisheries legislation is more likely to be judicially interpreted so as to wholly abrogate the public right to fish, and statutory declarations of ownership of fish are more likely to be given a wide effect.

In undertaking this analysis, it is acknowledged that fisheries legislation also affects indigenous rights to fish.¹² This article does not cover this issue in depth, but touches on it where cases such as *Yanner v Eaton*¹³ have influenced the statutory interpretation of natural resource management legislation. The effect of comprehensive fisheries legislation on public rights is, however, different to the effect of such legislation on native title. It is well accepted that indigenous rights do not revive when an extinguishing event has passed.¹⁴ Public rights to fish are however abrogated, not extinguished by legislation, and *may* revive once an abrogatory event has passed. The potential for public rights to revive is beyond the scope of this paper, but it is relevant to note that the public right is not referred to as having been extinguished in the *Blue Mud Bay Case*.¹⁵

⁴ (1989)168 CLR 314 ('*Harper's Case*').

⁵ (1999) 201 CLR 351.

⁶ (2008) 236 CLR 24 ('*Blue Mud Bay Case*').

⁷ Public rights to fish 'were effectively ignored by Australian law until they were resuscitated in a public law context in *Harper v Guma v Northern Territory* (2005) 141 FCR 457, 480 (Selway J).

⁸ (1989) 168 CLR 314.

⁹ (1999) 201 CLR 351.

¹⁰ (2008) 236 CLR 24.

¹¹ (1999) 201 CLR 351.

¹² As in *Dietman v Karpany* [2012] SASCFC 53 (11 May 2012). The relationship between indigenous common law rights as protected and extended by the *Native Title Act 1993* (Cth) and the public right to fish was considered by the High Court of Australia in *Commonwealth v Yarmirr* (2001) 208 CLR 1. See generally: Richard Bartlett, *Native Title in Australia* (Butterworths, 2004); Gullett, above n 2.

¹³ (1999) 201 CLR 351.

¹⁴ *Fejo v Northern Territory* (1998) 195 CLR 96.

¹⁵ (2008) 236 CLR 24; Nor is the right referred to as having been extinguished in the cases leading up to it: *Guma v Northern Territory* (2005) 141 FCR 457; *Guma v Northern Territory* (2007) 158 FCR 349.

II NEW DIRECTIONS IN FISHERIES MANAGEMENT

A *Rights Based Approach to Fishing*

The right of the public to fish in the sea and tidal waters and access areas between the high and low tides is an ancient common law right.¹⁶ The origins of the right have been variously ascribed to the Magna Carta,¹⁷ a presumed past exercise of the rights of the Crown in favour of the public¹⁸ and the responsibility of the Crown to generally protect the interests and rights of its subjects.¹⁹ United States authors have claimed that the origins of the public right to fish lie in Roman Civil Codes, compiled in the 500s under the authority of Emperor Justinian.²⁰ Regardless of the ultimate origin of the right, *Harper's Case*²¹ not only confirmed the reception of the right into Australian law, but the leading judgment of Brennan J outlined the key elements of the right that applied under Australian law.²²

In economic terms, the public right to fish is an example of an 'open access' management regime. It provides for a right of access but, in the absence of private rights or regulation, marine and estuarine fisheries are susceptible to overfishing by the public.²³ The problem of over-exploitation of open access resources was highlighted in 1968 in the article by Garrett Hardin titled 'The Tragedy of the Commons'.²⁴ As early as 1882, the English courts recognised that the public's right to fish could lead to the 'destruction' of a fishery.²⁵ The Australian states were early adopters of fishing regulation, such as the setting of legal minimum sizes.²⁶ In the 1980s, a new form of fisheries management was introduced in Australia. This new 'rights-based'²⁷ approach had its genesis in criticisms of the outcomes of fisheries management based on traditional models of marine management.²⁸

¹⁶ Gullett, above n 2, 82–4; Bernard Walrut, 'The Public Rights to Use the Sea and Rivers' (2003) 20 *Environmental Planning Law Journal* 423, 428–9; Tim Bonyhady, *The Law of the Countryside* (Professional Books, 1987), 253.

¹⁷ *AG for British Columbia v AG for Canada* [1914] AC 153, 171.

¹⁸ Stuart Archibald Moore and Hubert Stuart Moore, *The History and Law of Fisheries* (Stevens and Haynes, 1903), 115.

¹⁹ *AG for British Columbia v AG for Canada* [1914] AC 153, 169.

²⁰ See, eg, Robert Haskell Abrams, 'Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in *Glass v. Goeckel*' (2007) 40 *University of Michigan Journal of Law Reform* 861, 877. Such accounts have been criticised in James L Huffman, 'Speaking of Inconvenient Truths — A History of the Public Trust Doctrine' (2008) 18 *Duke Environmental Law and Policy Forum* 1. (1989) 168 CLR 314.

²¹ *Ibid*, 325–336 (Brennan J).

²² For a general description of problems with open access and the evolution of rights in natural resources towards property rights, see Anthony Scott, *The Evolution of Resource Property Rights* (Oxford University Press, 2008).

²³ Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

²⁴ *Goodman v Mayor of Saltash* (1882) 7 AC 633, 646 (Lord Chancellor Selbourne).

²⁵ Daryl McPhee, *Fisheries Management in Australia* (Federation Press, 2008), 93.

²⁶ Ross Shotton, 'FAO Fisheries Technical Paper 404/2 — Use of Property Rights in Fisheries Management' (Proceedings of FishRights99 Conference, Fremantle Western Australia, 11–19 November 1999); In other jurisdictions there is a reference instead to 'catch share' fisheries instead, for example Christopher Costello, Steven D Gaines and John Lynham, 'Can Catch Shares Prevent Fisheries Collapse?' (2008) 321 *Science* 1678.

²⁷ Alistair McIlgorm, 'Economics in Fisheries Management' in Warwick Gullett, Clive Schofield and Joanna Vince (eds), *Marine Resource Management* (LexisNexis, 2011) 197, 207–209.

Rights-based approaches were a response to defects in the management of the open access nature of fisheries, including over-fishing, a build up of excessive vessel numbers and fishery collapses.²⁹ Separate articles by Gordon³⁰ and Scott³¹ argued that in the absence of private rights, additional fishers will enter a fishery and fishing efforts will rise until it is uneconomical for even more fishers to enter that fishery. Gordon and Scott demonstrated that in the absence of private rights, the result would be an economically inefficient waste of resources. Although these seminal articles were published in the 1950s, it was not until the 1980s that their theoretical insights were reflected in the development of more economically and legally sophisticated mechanisms for fisheries management, particularly in Iceland and New Zealand.

Rights based approaches have been criticised as privatising public resources for private gain,³² and have even been characterised as undermining human rights.³³ They have however now achieved broad recognition for their contribution to improving the outcomes of fisheries management.³⁴

In the 1970s, Australian states such as South Australia³⁵ and Western Australia took partial steps towards rights based management regimes for commercial fisheries³⁶ by adopting increasingly restrictive ‘limited entry’ schemes.³⁷ These schemes restricted the number of licences in a fishery, typically associated with loosely binding restrictions on vessel and fishing gear type. Even where the number of licences is limited by regulation, fishers still have an economic incentive to increase their share of the catch at the expense of their fellow fishers through investment into bigger boats, better fishing technology or other factors of production.³⁸ Improved fishing rights can lead to a re-orientation of fishers away from wasteful competition over a finite resource and towards more economically beneficial activities.³⁹ In the 1980s, Australian fishery managers⁴⁰ began experimenting with

²⁹ Ibid, 197–8.

³⁰ H Scott Gordon, 'The Economic Theory of a Common Property Resource' (1954) 62 *Journal of Policy and Economics* 124.

³¹ Anthony Scott, 'The Fishery: The Objectives of Sole Ownership' (1955) 63 *Journal of Political Economy* 116.

³² See Daniel W Bromley, 'Abdicating Responsibility: The Deceits of Fishery Policy' (2009) 34 *Fisheries* 280; Quentin R Grafton et al, 'Comment on “Abdicating Responsibility: The Deceits of Fisheries Policy”' (2009) 34 *Fisheries* 291; Michael Harte et al, 'Individual Fishing Quotas and Responsible Fisheries Policy' (2009) 34 *Fisheries* 294.

³³ The views of the Human Rights Committee on 24 October 2007 in the case *Erlingur Sveinn Haraldsson and Arnar Snaevar Sveinsson vs. the Icelandic State* (Communication No. 1306/2004).

³⁴ Costello, Gaines and Lynham, above n 27, 1680.

³⁵ For a historical context see W Zacharin, C Dixon and M Smallridge, 'Towards Self Management for the Western King Prawn Fishery in Spencer Gulf, South Australia' in R Townsend, Ross Shotton and H Uchida, 'Case Studies in Fisheries Self-Governance' (FAO Fisheries Technical Paper, Fisheries and Aquaculture Department, FAO, 2008). This case study tracks the development of a limited entry fishery from the 1970s to the late 2000s.

³⁶ In all Australian marine jurisdictions, commercial fishing activities are managed separately from recreational fisheries.

³⁷ The Western Rock Lobster Fishery, one of Australia’s largest, only converted to a full quota based scheme in 2009: Department of Fisheries (WA), 'Licensing and Allocation under a New Management Plan for the West Coast Rock Lobster Fishery: A Discussion Paper' (Discussion Paper, Department of Fisheries (WA). 2012) 4–5.

³⁸ McIlgorm, above n 28, 206–7.

³⁹ Quentin R Grafton et al, *Economics for Fisheries Management* (Ashgate, 2006) 130–1.

⁴⁰ At the national level this trend was confirmed in an influential policy paper: Commonwealth of Australia *New Directions for Commonwealth Fisheries Management in the 1990s* (Australian Government Public Service, 1989).

management schemes that created tradeable rights, giving fishers a specific share of the expected catch of a fishery. In Australia, where a fisher has an interest in a specified share of a catch, the fishery is typically described as a 'quota' managed fishery.⁴¹

B *Judicial Recognition of New Statutory Forms*

In 1989 the High Court considered the legal effects of a statutory scheme introduced to implement rights-based management. Although limited entry schemes can be characterised as a form of regulation of the public right to fish, the more comprehensive a statutory scheme becomes, the harder it is to classify it as merely regulatory in nature. In *Harper's Case*,⁴² the Court recognised that, in reality, the public right to fish abalone in Tasmania had not merely been regulated, but had been wholly abrogated and replaced with new statutory rights for both recreational and commercial fishers.

The dispute in *Harper's Case*⁴³ centred on the introduction of a quota scheme for the Tasmanian commercial fishery for wild abalone. The scheme was established by regulation under the *Fisheries Act 1957* (Tas).⁴⁴ Contemporaneously with the introduction of the quota scheme in the mid and late 1980s, there was a substantial increase in the market price of abalone. The effect was an increase in profitability of commercial abalone fishing and substantial increases in the value of commercial abalone licences. Complaints followed that the result was the enrichment of a small number of fishers to the detriment of the public.⁴⁵ The Tasmanian government responded to community concern and to the prospect of a new source of revenue by substantially raising the fees it levied on the commercial abalone fishery.⁴⁶ Commercial quota holders challenged those fee increases on the basis that they constituted a state excise duty that was invalid under s 90 of the *Australian Constitution*. The principal arguments put to the High Court focused on whether or not the State of Tasmania 'owned' wild uncaught abalone in the sea.⁴⁷ The relevance of this point was that if Tasmania owned wild abalone in the water, then any licence fees charged could be classified as a royalty for use of state property, and would not be classified as an excise on the production of fish. The licence fees would not then fall foul of s 90 of the *Australian Constitution*.

⁴¹ See, eg, *ibid.*

⁴² (1989) 168 CLR 314.

⁴³ *Ibid.*

⁴⁴ The relevant regulatory history is summarised in the leading judgement: *ibid* 326–8 (Brennan J).

⁴⁵ 'Abalone Licence Plea', *Hobart Mercury* (Hobart) 11 June 1988, 7.

⁴⁶ See *Harper's Case* (1989) 168 CLR 314, 326–8 (Brennan J).

⁴⁷ *Harper's Case* (1989) 168 CLR 314, 319 submissions of Counsel for the fishing interests; 320–1 (Bale QC) (during argument).

Justice Brennan delivered the leading judgement in *Harper's Case*.⁴⁸ His Honour did not focus on questions of state ownership as put to the Court by the parties, but rather on legislative arrangements between the Commonwealth and Tasmania for the management of fisheries. He held that these arrangements testified to 'the consent of the Crown to the creation of those rights', being rights created under statute.⁴⁹ After noting that the abalone resource was susceptible to over-exploitation, Brennan J concluded that:

The public right of fishing for abalone in State fishing waters is thus abrogated and private statutory rights to take abalone in limited quantities are conferred on the holders of commercial and non-commercial abalone licences. The Regulations thus control the exploitation of a finite resource in order to preserve its existence. They seek to achieve this end by imposing a general prohibition on exploitation followed by the grant of licences for the taking of limited quantities of abalone. The only compensation, if compensation it be, derived by the public for loss of the right of fishing for abalone consists in the amounts required to be paid by holders to obtain abalone licences under the Regulations.⁵⁰

Justice Brennan classified these new statutory rights as being 'analogous to a *profit a prendre*' and characterised licence fees as a 'charge for the acquisition of a right'.⁵¹ His Honour expressed doubt in relation to the claims of ownership by Tasmania of wild abalone,⁵² but he did not ultimately need to express a final opinion on this issue as he had decided that the fees paid by abalone fishers were for new statutory rights, and not for pre-existing rights in fish held by the State.⁵³

The joint reasons provided by Mason CJ, Deane and Gaudron JJ contrasted older forms of fisheries management with the statutory regime created for abalone. They emphasised the role of the state in creating new and exclusive rights, concluding that:

[w]hat was formerly in the public domain is converted into the exclusive and controlled preserve of those who hold licences ... [I]t is an entitlement of a new kind created as part of a system for preserving a limited public natural resource in a society which is coming to recognize that, in so far as such resources are concerned, to fail to protect may destroy and to preserve the right of everyone to take what he or she will may eventually deprive that right of all content ... [U]nder this licensing system the general public is deprived of the right of unfettered exploitation of the Tasmanian abalone fisheries ...⁵⁴

Although the High Court found that the fees in this instance did not amount to an excise duty, Dawson, McHugh and Toohey JJ warned that access fees might still constitute a duty of excise in some circumstances.⁵⁵ Uncertainty on when a fee might, or might not, be classified as an excise may have encouraged Tasmania to assert ownership of living marine resources in s 9(1) of the *Living Marine Resources Management Act 1995* (Tas). This explanation for the inclusion of s 9 of the Act was raised in parliamentary debate, but it received an equivocal response from the Tasmanian Minister for Fisheries.⁵⁶

⁴⁸ The other judges of the Court recorded their agreement with Brennan J. Ibid 325 (Mason CJ, Deane and Gaudron JJ), 336 (Dawson, Toohey and McHugh JJ).

⁴⁹ Ibid 332 (Brennan J).

⁵⁰ Ibid 335–336.

⁵¹ Ibid.

⁵² Ibid 335.

⁵³ Ibid 336. See also ibid 336–7 (Dawson, Toohey and McHugh JJ).

⁵⁴ Ibid 325 (Mason CJ, Deane and Gaudron JJ).

⁵⁵ Even if those fees also served 'the purpose of conserving a natural resource': ibid 336 (Dawson, McHugh and Toohey JJ).

⁵⁶ '[T]he fish belong to the State, to the people of Tasmania': Tasmania, *Parliamentary Debates*, House of Assembly 28 June 1995, 34–79 (Mr Robin Gray, Minister for Primary Industry and Fisheries).

C *The Impact of Indigenous Rights to Fish*

Two aspects of *Harper's Case*⁵⁷ limit the easy application of the High Court's approach to the interpretation of the legislative reforms to fisheries management discussed in this article. The first is the limited extent of the exclusive rights in that case as the statutory scheme in that case related only to the abalone fishery. The second aspect is that fisheries legislation was interpreted in the absence of consideration of indigenous interests.

The judgement in *Harper's Case*⁵⁸ was delivered prior the historic 1992 decision of the High Court in *Mabo v Queensland (No 2)*,⁵⁹ which established the survival of indigenous native title rights under Australian common law. Formal confirmation by the High Court that non-exclusive common law based indigenous rights extended to the sea and coast occurred in 2001 in *Commonwealth v Yarmirr*.⁶⁰

The recognition of common law native title rights prompted a re-consideration by the High Court of the appropriate stance to take when interpreting legislative schemes of natural resource management.⁶¹ The High Court in *Yanner v Eaton*⁶² considered the degree to which indigenous rights to wildlife had survived statutory schemes of regulation and control in Queensland. In this case, the indigenous defendant had been charged with hunting without a permit contrary to the *Fauna Conservation Act 1974* (Qld). Section 54(1) of the Act prohibited hunting unless a person was authorised under the Act. Section 7(1) of the Act provided that all fauna was the 'property' of the Crown and 'under the control of the Fauna Authority'.⁶³ Although these provisions of the Act appeared to create a comprehensive and exclusive licensing scheme, the High Court found that indigenous rights had not been extinguished.

On the issue of the effect of a general prohibition followed by the establishment of a licensing regime, Gleeson CJ, Gaudron, Kirby and Hayne JJ stated that native title rights were not severed by requiring 'a permit to be held to hunt or fish'.⁶⁴ The majority characterised the legislative scheme overall as being one of 'conditional prohibition',⁶⁵ and that indigenous common law rights to hunt had been highly restricted but not extinguished.⁶⁶ The majority

⁵⁷ (1989)168 CLR 314.

⁵⁸ (1989)168 CLR 314.

⁵⁹ (1992) 175 CLR 1.

⁶⁰ (2001) 208 CLR 1; *Mabo v Queensland (No 2)* (1992) 175 CLR 1, did not address indigenous interests in the seas and shores surrounding the Torres Strait Islands; See Bartlett, above n 12, 236 (note 2) for the reasons why this was so.

⁶¹ As seen in a shift in approach by the High Court when considering the same legislation in *Walden v Hensler* (1987) 166 CLR 561 compared to *Yanner v Eaton* (1999) 201 CLR 351. See further discussion below.

⁶² (1999) 201 CLR 351.

⁶³ That Act having been passed before 1975, any protection offered by the *Racial Discrimination Act 1975* (Cth) would not apply: See, *Western Australia v Ward* (2003) 213 CLR 1, 62 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁶⁴ *Yanner v Eaton* (1999) 201 CLR 351, 373 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). Justice Gummow applied a somewhat different test of whether the licensing provisions were 'clearly, plainly and distinctly' inconsistent with indigenous rights, but came to a similar conclusion: at 396.

⁶⁵ *Ibid* 373 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

⁶⁶ *Ibid*.

drew support for their conclusion from s 211 of the *Native Title Act 1993* (Cth).⁶⁷ Section 211 preserved indigenous rights to hunt and fish where a law ‘prohibits or restricts persons from carrying on [hunting and fishing] other than in accordance with a licence’. The majority observed that s 211 assumed that laws of conditional prohibition, such as in this case, did not ‘affect the existence’ of native title rights to hunt and fish.⁶⁸ Following this case, it appeared that only clear prohibitions of universal effect, such as in relation to conservation, would have an extinguishing effect.⁶⁹

On the impact of the statutory assertion of Crown property, Gleeson CJ, Gaudron, Kirby and Hayne JJ found sufficient flexibility in interpretation of the word ‘property’⁷⁰ as used in s7(1) of the Act to allow for the continuation of common law native title rights to hunt and fish. They characterised property as a term that could signify a ‘wide variety of different forms of interest’.⁷¹ They then held that the reference to ‘property’ in the *Fauna Conservation Act 1974* (Qld) should be interpreted as a way of describing the aggregate of State rights over wildlife and that, accordingly, the vesting of ‘property’ under Section 7(1) did not have an extinguishing effect on indigenous rights.⁷² The majority judgment referred with approval to the judgment of Chief Justice Vinson in the US Case of *Toomer v Witsell*,⁷³ who stated that ‘[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource’.⁷⁴

The relevance of *Yanner v Eaton* to fisheries legislation lies in the sceptical eye cast by the majority on the extinguishing effect of legislative provisions that asserted property in, as well as control over, wildlife.⁷⁵ By way of contrast, in *Harper’s Case*,⁷⁶ the outcome was a finding in favour of an abrogation, rather than regulation, of rights. There is nothing necessarily inconsistent with a wildlife licence scheme of general application being interpreted differently to a fishery scheme whose very purpose was to create an ‘exclusive and controlled preserve of those who hold licences’.⁷⁷ The common ground in these two cases lies in the methodology adopted in interpreting the legislation in question.

⁶⁷ That protection however, is limited in scope. Hunting and fishing must be for personal, domestic and non-commercial purposes and the activity must be authorised by indigenous law and custom, *Native Title Act 1993* (Cth) s 211(2)

⁶⁸ *Ibid* 373 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

⁶⁹ Eg, *Western Australia v Ward* (2003) 213 CLR 1; See also, the note to s 211 of the *Native Title Act 1993* (Cth) s 211 stating that ‘In carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application’.

⁷⁰ In s 7(1) of the then *Fauna Conservation Act 1974* (Qld).

⁷¹ *Yanner v Eaton* (1999) 201 CLR 351, 367 (Gleeson CJ, Gaudron Kirby and Hayne JJ); See also, Gummow J, in similar terms: at 388–9.

⁷² *Ibid*; Justice Callinan did not dispute that regulatory schemes that included a statutory declaration of ownership or licence requirements might preserve indigenous rights. He was of the view however, that the legislative schemes failed to do so in this case. He took as particularly relevant to his conclusions the removal of a previous indigenous exemption to the Act: at 408; See also, the view of McHugh J: at 375.

⁷³ *Ibid* 369 (Gleeson CJ, Gaudron Kirby and Hayne JJ) .

⁷⁴ *Toomer v Witsell* (1948) 334 US 385; As authority for this statement, Vinson CJ referred to Pound, *An Introduction to the Philosophy of Law* (1922): at 402; See also, *Baldwin v Montana Fish and Game Commission* 436 US 371 (1978), and *Hughes v Oklahoma* 441 US 322 (1979) for discussions of the issues raised in *Toomer v Witsell* (1948) 334 US 385.

⁷⁵ *Yanner v Eaton* (1999) 201 CLR 351, 369–71 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

⁷⁶ (1989)168 CLR 314.

⁷⁷ *Harper’s Case* (1989)168 CLR 314, 325 (Mason CJ, and Deane and Gaudron JJ).

In each case, the Court considered the general purpose of the legislative scheme for natural resource management, and then interpreted the words of the relevant act in that context. This broad methodological approach to statutory interpretation, which can be described as a ‘text and context’ approach,⁷⁸ was not followed by the majority of the High Court in *the Blue Mud Bay Case*,⁷⁹ which focused almost solely on the specific text of the relevant statutory provisions.

The *Blue Mud Bay Case*⁸⁰ resolved a longstanding conflict⁸¹ over public access to the tidal zone⁸² of the Northern Territory. At issue was whether the public right to fish, when combined with the *Fisheries Act 1988* (NT), preserved access by commercial and recreational fishers to the tidal zone covered by fee simple titles issued under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (*LRA*). The Schedules to the *LRA* were explicit in stating that the geographical boundaries of those titles extended down to the low water mark covering the tidal zone.⁸³ At first instance, Selway J held that the public right to fish did allow access to the tidal zone under *LRA* title.⁸⁴ On appeal, the Full Federal Court on appeal held that the legal effect of the *LRA* was to exclude public rights to fish over *LRA* title.⁸⁵

On appeal to the High Court, the majority approached the issues in the dispute in a different order and looked first to whether the provisions of the *Fisheries Act 1988* (NT) had abrogated the public right to fish.⁸⁶ According to the majority, it was not necessary to consider the effect of the *LRA* on the public right to fish, as the *Fisheries Act 1988* (NT) had already wholly abrogated the public right.⁸⁷ It is important to keep in mind that the majority did not resolve the conflict between the public right to fish and indigenous rights under the *LRA*, instead finding that no such conflict existed as the public right to fish had already been wholly abrogated.⁸⁸ The exclusion of recreational and commercial fishers from the tidal zone was an incidental effect of the loss of the public right to fish under the *Fisheries Act 1988* (NT), rather than a consequence of the *LRA*.

⁷⁸ See, eg, *Gumana v Northern Territory* (2007) 158 FCR 349, 373 (French, Finn and Sundberg JJ).

⁷⁹ *Blue Mud Bay Case* (2008) 236 CLR 24, 55–6 (Gleeson CJ, Gummow, Hayne and Crennan JJ).

⁸⁰ *Ibid.* See also, *Gumana v Northern Territory* (2005) 141 FCR 457 (first instance); and *Gumana v Northern Territory* (2007) 158 FCR 349 (appeal to Full Federal Court).

⁸¹ See A E Woodward, ‘Commonwealth, Aboriginal Land Rights Commission: *Second Report*’ (Report No 2, Aboriginal Land Rights Commission, 1974); See also B W Rowland, ‘Examination of the Aboriginal Land Rights (Northern Territory) Act 1976-80’ (Report to Minister for Aboriginal Affairs, 1980) .

⁸² The tidal zone in this context means the foreshore when exposed by tides, waters between the high and low water marks, tidal rivers and estuaries.

⁸³ Expert evidence lead by the Northern Territory was that *LRA* title could cover 84 to 88 percent of the Northern Territory Coast; *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2007) HCA Trans 721, [50].

⁸⁴ *Gumana v Northern Territory* (2005) 141 FCR 457, 486 (Selway J).

⁸⁵ *Gumana v Northern Territory* (2007) 158 FCR 349 (French, Finn and Sundberg JJ).

⁸⁶ *Blue Mud Bay Case* (2008) 236 CLR 24, 55–6 (Gleeson CJ, Gummow, Hayne and Crennan JJ). The parties’ oral arguments before the Court centred on whether the public right to fish extended over tidal zones granted under the *LRA*: See, *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2007) HCA Trans 721; *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2007) HCA Trans 722.

⁸⁷ *Blue Mud Bay Case* (2008) 236 CLR 24, 55–6 58 (Gleeson CJ, Gummow, Hayne and Crennan JJ).

⁸⁸ *Ibid.* 55.

In assessing the effect of the *Fisheries Act 1988* (NT) on public rights, the majority stated that '[T]he statutory abrogation of a public right may appear not only from express words but by necessary implication from the text and structure of the statute'.⁸⁹ Counsel for the Northern Territory Government and counsel for commercial fishers had each argued that there needed to be evidence of clear intent for legislation to have the effect of abrogating a pre-existing public right,⁹⁰ an orthodox view of authorities relating to public rights such as *Potter v Minahan*.⁹¹ A finding of a *necessary* implication would seem to be sufficient to satisfy a test of clear intent. The real issue was why there was a finding of necessary implication in the first place.

On its face, s 10 of the *Fisheries Act 1988* (NT) appeared to be an example of a conditional prohibition of the type found in *Yanner v Eaton*.⁹² Section 10(1) stated that fishers 'shall not ... take any fish ... unless under and in accordance with a licence'. Section 10(2) substantially limited the effect of s 10(1) on recreational fishers by providing that 'nothing in this section shall apply to the taking of fish ... by a person for subsistence or personal use'. The majority did not explain why the words of the Act led to a finding of a necessary implication rather than the alternative of a conditional prohibition. There was no reference to *Yanner v Eaton*⁹³ by the majority despite it being cited in argument.⁹⁴ Certainly on its face, the *Fisheries Act 1988* (NT) is less comprehensive than the legislation considered in *Yanner v Eaton*.⁹⁵ Under the *Fauna Conservation Act 1974* (Qld), 'property' in wildlife was vested in the Crown.⁹⁶ Furthermore, the requirement to hold a licence was not relieved by broad exceptions similar to those in s 10(2) of the *Fisheries Act 1988* (NT).

In explaining their interpretation of the *Fisheries Act 1988* (NT), the majority did not review the regulatory history of fisheries management in the Northern Territory,⁹⁷ or the objects of the Act. Instead, the majority referred to cases on legislative regulation of prerogatives⁹⁸ of the Crown:

⁸⁹ Although referring here to the 'structure' of the Act, the majority focused almost entirely on the interpretation of s 10(2) of the Act: *ibid* 58.

⁹⁰ *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2007) HCA Trans 721: Mr Bennett 'a statute will not be taken to override common law rights unless it does so with great clarity': at [3360] (Mr Bennett) (in argument); '[An] express or clear intention': at [1700] (Ms Perry) (in argument).

⁹¹ (1908) 7 CLR 277; Although possibly an outdated view on common law rights: See, J J Spigelman, 'Legitimate and Spurious Interpretation' (Lecture delivered at University of Queensland, Brisbane, 12 March 2008)..

⁹² (1999) 201 CLR 351, 373 (Gleeson CJ, Gaudron Kirby and Hayne JJ)

⁹³ (1999) 201 CLR 351.

⁹⁴ *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2007) HCA Trans 722, [6730] (Jackson) (in argument).

⁹⁵ (1999) 201 CLR 351, 373. See above n 61 and accompanying text.

⁹⁶ *Fauna Conservation Act 1974* (Qld) s 7(1) (as at 1999).

⁹⁷ Cf the approach of Mansfield J in *Director of Fisheries (Northern Territory) v Arnhem Land Aboriginal Land Trust* (2000) 170 ALR 1, 15–18 (Mansfield J)

⁹⁸ Prerogatives are remnant rights of the English Crown that can be exercised directly and not by legislation. In Australia such prerogatives must have been received into Australian law and then survived constitutional and legislative changes since reception: See John Goldring, 'The Impact of Statutes on the Royal Prerogative: Australasian Attitudes as to the Rule in *Attorney-General v De Keyser's Royal Hotel Ltd*' (1974) 48 *Australian Law Journal* 434; For a recent case involving the prerogative, see *Cadia Holdings Pty Ltd v State of New South Wales* (2010) 242 CLR 195.

When a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory scheme laid down by the Parliament ... [W]hether and how a person may take fish or aquatic life in the Northern Territory are questions to be answered by resort to the Act, not any common law public right. The common law public right has been abrogated.⁹⁹

It is possible that the majority had been influenced by the view of Selway J at first instance that the prerogative is the ultimate source of the public right to fish.¹⁰⁰ It is not clear from the reasons provided by the High Court whether the majority was proposing a new general rule relating to ‘necessary implication’, a specific rule relevant to this legislative scheme only, or a rule relevant to fishery management because of an association between the public right to fish and the prerogative. It was possibly a mixture of all of the above. The High Court has commented on how competing canons of statutory interpretation can ‘jostle for acceptance’.¹⁰¹

Although the majority characterised the *Fisheries Act 1988* (NT) as ‘comprehensive statutory regulation’,¹⁰² they also held that licences under that Act did not provide a right of access to the tidal zone under *LRA* title. The majority held that ‘the *Fisheries Act* does not deal with where persons may fish. Rather, the *Fisheries Act* provides for where persons may *not* fish’.¹⁰³ The Act therefore removed a public right of access (albeit a very highly regulated one), but did not replace it with a statutory right of access. The High Court found a substantial, and in this case apparently unintended,¹⁰⁴ impact of abrogation on access. The result was that legislation intended to support the ability of the Northern Territory to develop and manage fisheries,¹⁰⁵ led to a significant reduction in the area in which recreational and commercial fishers could fish, at least without permission from *LRA* title holders.

The majority’s finding that fisheries licences issued under the Act had a limited effect substantially reduced the likelihood that the licensing scheme under the Act may have extinguished native title rights, as well as wholly abrogated the public right to fish.¹⁰⁶ Notwithstanding any differences between extinguishment and abrogation, the test for extinguishment¹⁰⁷ of common law based native title rights has been expressed in terms similar

⁹⁹ *Blue Mud Bay Case* (2008) 236 CLR 24, 58 (Gleeson CJ and Gummow, Hayne and Crennan JJ), citing *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 459 (McHugh J); See also *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44; *Barton v The Commonwealth* (1974) 131 CLR 477; *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] AC 508.

¹⁰⁰ *Gumana v Northern Territory* (2005) 141 FCR 457, 476 (Selway J).

¹⁰¹ *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43, [51] (Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

¹⁰² *Blue Mud Bay Case* (2008) 236 CLR 24, 58 (Gleeson CJ and Gummow, Hayne and Crennan JJ).

¹⁰³ *Ibid* 60 (emphasis added).

¹⁰⁴ Particularly in relation to recreational fishing. In the second reading speech introducing this legislation, the Minister instead stressed the increasing importance of recreational fishing to the Northern Territory: Northern Territory, *Parliamentary Debates*, 13 October 1988, 4569–74 (Michael Reed, Minister for Primary Industry and Fisheries).

¹⁰⁵ See, above n 92.

¹⁰⁶ Eg, extinguishment in terrestrial parks in Western Australia in *Western Australia v Ward* (2003) 213 CLR 1.

¹⁰⁷ Eg, ‘The expression “clearly and distinctly” in relation to the required intention emphasises the burden borne by a party seeking to establish the extinguishment of subsisting rights...by necessary implication from the provisions of a statute’: *Wik Peoples v Queensland* (1996) 187 CLR 1, 185 (Gummow J).

to the test claimed for abrogation of the public right.¹⁰⁸ Indeed, counsel for the Northern Territory in the *Blue Mud Bay Case* drew to the High Court's attention the possible implications for native title of the interpretative stance eventually taken up by the majority in their written decision.¹⁰⁹ A regulatory scheme for fisheries management expressed in general terms will need to be 'just right'¹¹⁰ to wholly abrogate the public right without having the potential to extinguish common law native title rights.¹¹¹

The effect of fisheries legislation on native title rights was recently considered by the Supreme Court of South Australia in *Dietman v Karpany*.¹¹² In that case, the majority held that past South Australian regulation of fisheries had been so extensive that they extinguished native title based fishing rights in South Australia.¹¹³ Although the *Blue Mud Bay Case*¹¹⁴ was not directly cited in the majority judgment,¹¹⁵ it was an authority put to the court, and discussed in the minority dissenting judgment of Blue J.¹¹⁶ Leave to appeal to the High Court has been granted and the South Australian decision may well be reversed on appeal. The High Court is, however, generally considered to be reluctant to overrule its own recent decisions.¹¹⁷ Accordingly, even if *Dietman v Karpany*¹¹⁸ is reversed, the decision in *The Blue Mud Bay Case*¹¹⁹ is likely to be distinguished rather than overruled, and so remain an influential case on the abrogation of the public right to fish.

III AUSTRALIAN FISHERIES STATUTES AFTER 1989

A *A Continuum of Approaches*

*Yanner v Eaton*¹²⁰ is an authority for the proposition that licence schemes for natural resource management should generally be characterised as schemes of conditional prohibition. The *Blue Mud Bay Case*,¹²¹ on the other hand, is an authority for the proposition that fisheries management regimes cast in the licence form will wholly abrogate the public right to fish.

¹⁰⁸ See above n 92.

¹⁰⁹ *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2007) HCA Trans 722, [6750]; See also, Graham Hiley, 'Is Native Title as fragile as the Public Right to fish?' (2008) 8(10) *Native Title News* 166; In *Akiba v Queensland* (No 2) [2010] FCA 643, Finn J stated that the tests for common law public rights and indigenous rights were different: at [842]. Justice Finn's judgement was successfully appealed in *Commonwealth v Akiba* [2012] FCAFC 25. A further appeal has been made to the High Court.

¹¹⁰ Following the language of the story of Goldilocks and the Three Bears, just right being like the porridge somewhere between too cold and too hot.

¹¹¹ At least before taking into account the impact of the *Racial Discrimination Act* 1975 (Cth) and the *Native Title Act* 1993 (Cth), the provisions of which would need to be considered if legislation was seen as having a potentially extinguishing effect. However, this issue is beyond the scope of this article. [2012] SASCFC 53 (11 May 2012).

¹¹² *Ibid* [35] (Gray J).

¹¹³ (2008) 236 CLR 24.

¹¹⁴ *Dietman v Karpany* [2012] SASCFC 53 (11 May 2012), (Gray J).

¹¹⁵ *Ibid* [80–86] (Blue J).

¹¹⁶ 'In accordance with recent High Court practice, [the High Court] superseded rather than overruled': J J Spigelman, 'Public Law and the Executive' (2010) 34 *Australian Bar Review* 10, 15; See also, Matthew Harding and Ian Malkin, 'Overruling in the High Court of Australia in Common Law Cases' (2010) 34 *Melbourne University Law Review* 519.

¹¹⁷ [2012] SASCFC 53 (11 May 2012).

¹¹⁸ (2008) 236 CLR 24.

¹¹⁹ (1999) 201 CLR 351.

¹²⁰ *Blue Mud Bay Case* (2008) 236 CLR 24

Reconciling these two different approaches to statutory interpretation is problematic. At the very least, broadly worded provisions in natural resource management legislation cannot safely be assumed to be ‘legislative shorthand’¹²² for full powers of management. This leaves the question of what might be relevant factors to the assessment of when a legislative scheme has the effect of abrogation. Even if the weight that the High Court applies to those factors may vary in the future, identification of relevant factors will assist legislative drafters¹²³ who wish to clarify whether their regulatory scheme rests on the regulation of the public right to fish, or instead on the abrogation and replacement of the public right.

In assessing the impact fisheries legislation may have on public rights, three factors appear relevant from the principal cases considered above. Firstly, whether there are assertions of ownership that are inconsistent with the public right to fish. Secondly, whether the legislation is in the form of a general prohibition on fishing, with rights of fishers then being of a statutory nature. Finally, whether there are additional aspects of the legislation that might clarify the effects of the legislative scheme. There is no fixed list of what these additional aspects might be, but statutory rights of access and the treatment of indigenous rights are considered below.

Based on these three factors, the legislative schemes of the states¹²⁴ can be arranged on a continuum of the degree to which they are likely to either abrogate public rights, or regulate but preserve public rights. Victorian legislation is at one end of the continuum, providing an explicit and exclusive statutory base for the rights created. New South Wales’ legislation is at the other end, and is regulatory in nature, preserving the public right to fish, at least for recreational fishers. The other state schemes can be arrayed along that continuum. Discussion of the legislative schemes in the Australian states will be prefaced by comment on Commonwealth fisheries legislation, the structure of which has been influenced by the Commonwealth’s focus on commercial fisheries management.

B Commonwealth Fisheries

The objectives of the *Fisheries Management Act 1991* (Cth) reflect the Commonwealth’s central concern for ‘efficient and cost-effective’ management of fisheries.¹²⁵ The Act is principally concerned with economic outcomes and the management of commercial fisheries.¹²⁶ The Act contains neither an assertion of the ownership of wild fish by the Commonwealth,¹²⁷ nor a general prohibition on fishing without a licence. Commercial fishing without a licence is however an offence under s 95 of the Act. Given s 95, the general public’s

¹²² See, *Toomer v Witsell* (1948) 334 US 385, 402 (Vinson CJ); *Baldwin v Montana Fish and Game Commission* 436 US 371 (1978); *Hughes v Oklahoma* 441 US 322 (1979).

¹²³ Eg, reform of fishing legislation in Western Australia is currently under review: Department of Fisheries (WA), Regulatory Impact Decision Statement: Fisheries and Aquatic Resources Management Bill 2011 (Regulatory Impact Statement, Department of Fisheries (WA), 2012), 2.

¹²⁴ Northern Territory legislation already being considered in the *Blue Mud Bay Case* (2008) 236 CLR 24.

¹²⁵ Section 3(1)(a)

¹²⁶ David Borthwick, ‘Review of Commonwealth Fisheries: Legislation, Policy and Management’ (Department of Agriculture Forestry and Fisheries (Cth), 2012), vi, 9.

¹²⁷ The principal objective of the *Fisheries Management Act 1991* (Cth) in s 3(1)(a) is ‘Fisheries management on behalf of the Commonwealth’.

right to fish commercially has almost certainly been wholly abrogated by the Act. It is theoretically possible for the general public's right to fish commercially to have been wholly abrogated, but for a commercial fisher's public right to fish to continue in some form, albeit subject to extensive regulation. In applying the general interpretative stance in the *Blue Mud Bay Case*¹²⁸ however, a finding of regulation rather than abrogation would need to be supported by clear and explicit words to that effect. The comprehensive nature of the provisions of the *Fisheries Management Act 1991* (Cth) instead supports the contrary proposition, that commercial fishers' rights depend wholly on the Act. For example, under s 17, the Australian Fisheries Management Agency has an obligation to implement plans of a management for all commercial fisheries, unless it determines that one is not needed.¹²⁹ Based on the overall structure of the Act, it so substantially regulates commercial fishing that it is almost certain that all public rights to fish commercially have been wholly abrogated.

The limited coverage in the Act of recreational fishing reflects the Commonwealth Government's focus on commercial fisheries. Most recreational fishing in Australia takes place close to shore and is managed by the states.¹³⁰ Offshore recreational fisheries are typically managed by the states under statutory arrangements agreed with the Commonwealth.¹³¹ There is very limited coverage of recreational fisheries in the provisions of the *Fisheries Management Act 1991* (Cth). The Act lacks a prohibition on recreational fishing without a licence equivalent to that for commercial fishing in s 95. Indeed, s 10(3)(a) of the Act provides that management plans will only apply to recreational fishing where that activity is specifically mentioned. In 2004, amendments to the Act¹³² clarified that recreational charter boat fishing¹³³ was to be classified as recreational fishing. This amendment further restricted the effect of general provisions of management plans on recreational fishers under the Act. Given the above, the *Fisheries Management Act 1991* (Cth) is very unlikely to have wholly abrogated recreational public rights to fish, although in relation to a specific fishery, those rights could be so extensively regulated by a management plan that they would have been abrogated. That the Act was not intended to create a fully comprehensive statutory regime for *all* fishing activities is supported by the lack of reference in the Act to the management of indigenous fishing.¹³⁴

C Victorian Fisheries Legislation

In the *Fisheries Act 1995* (Vic), a declaration of the ownership of wild fish has been combined with broadly worded prohibitions on fishing without a licence (or exemption). The combined effect is almost certain to have wholly abrogated public rights to fish, replacing them with statutory rights under the Act. Section 10(1) *Fisheries Act 1995* (Vic) includes an explicit assertion of Crown 'ownership' in wild fish 'found' in state waters. Gullett has

¹²⁸ (2008) 236 CLR 24.

¹²⁹ *Fisheries Management Act 1991* (Cth) s 17.

¹³⁰ Borthwick, above n 126, 9.

¹³¹ Gullett, above n 2, 251–2. Borthwick, above n 126, 9.

¹³² *Fisheries Legislation Amendment (High Seas Fishing and Other Matters) Act 2004* (Cth).

¹³³ Where the owner of a charter boat takes persons recreational fishing for a fee, it is a commercial activity for the charter boat owner, but a recreational activity for the passengers: See, *Fisheries Management Act 1991* (Cth) s 4.

¹³⁴ A significant exception is in the Torres Strait, where the Commonwealth is involved in the management of a number of commercial and indigenous fisheries under a different and complex legislative framework that takes into account Australia's treaty obligations to Papua New Guinea: See generally, Stuart Kaye, *The Torres Strait* (Martinus Nijhoff, 1997).

suggested that the reference to fish ‘found’ in Victorian waters in s (10)(1) of the *Fisheries Act 1995* (Vic) implies that property only applies to fish located in Victorian waters, avoiding the absurdity of ownership changing as fish move in and out of Victorian waters in an ‘unfound’ state.¹³⁵ If this was indeed the intent of the Act, it is not disclosed in the Explanatory Memorandum to the original Fisheries Bill, which emphasised prior Crown ownership.¹³⁶ The term ‘found’ is an undefined term in the Act, but the structure of s 10 makes it clear that a fish would be ‘found’ some time before actual possession by a fisher, so the support of s 10 for the conclusion that the public right to fish has been necessarily abrogated is not substantially affected.

Section 10(2) further provides that property in fish only ‘passes’ to fishers when taken lawfully under the Act. Section 150 provides for royalties to be levied on fishers, and as noted above in the discussion on *Harper’s Case*,¹³⁷ for a fee to be properly classified as a royalty there must first be state ownership. Indeed, if these provisions on ownership were intended to avoid fees being classified as excise duties, they would likely be ineffective in achieving this purpose unless they wholly abrogated the public right to fish.

That the public right to fish has been wholly abrogated is further supported by comprehensively worded licensing provisions under the Act. Section 36 (1) implements a comprehensive licensing regime for commercial fishing. A recreational licence is also required for marine fisheries under s 44(1).¹³⁸ Both ss 44 and 36 are in the form of a prohibition on the activity, with subsequent authorisation by licence or permit.

The cumulative effect of the provisions of the *Fisheries Act 1995* (Vic) is to create a comprehensive statutory regime, and consequently the abrogation of all public rights to fish.¹³⁹ That the Act was intended to create a truly comprehensive legislative regime is suggested by a lack of a general exemption in the Act for indigenous fishers, coupled with a very limited statutory provision for permits to be issued under s 49(2)(h) for a ‘specified indigenous cultural ceremony’. Indeed, given the assertion of state ownership of marine resources, indigenous rights to Victorian fisheries¹⁴⁰ would likely have been extinguished, and would only have survived the effects of the *Fisheries Act 1995* (Vic) if otherwise protected, for example, by a combination of the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth).

¹³⁵ Gullett, above n 2, 64. Although if fish were located and therefore ‘found’, but not then actually caught and landed, similar problems might still arise.

¹³⁶ ‘Clause 10 specifies the circumstances in which ownership of wild fish and other flora and fauna passes from the Crown to licence holders, permit holders or other persons’: Explanatory Memorandum, Fisheries Bill 1995 (Vic), 1.

¹³⁷ (1989) 168 CLR 314. See above n 46 and accompanying text.

¹³⁸ This was not an original feature of the Act, but included by the *Fisheries Amendment Act 1997* (Vic).

¹³⁹ At least to the extent of the legislative competence of the State. There may be constitutional restrictions on assertions of property in waters outside the limits of the State (generally the low water mark) and where the legal basis of that assertion is based on the Commonwealth and reciprocal state legislation. However, resolution of that question is beyond the scope of this article; See, Gullett, above n 2, 65.

¹⁴⁰ Presuming they have not been otherwise extinguished, which is a real possibility in Victoria. See *Yorta v Yorta* (2002) 214 CLR 422.

Given that the public right to fish has been wholly abrogated, then following the authority of the *Blue Mud Bay Case*,¹⁴¹ any vesting of waters in private individuals would be interpreted free of any common law assumptions in relation to the public right to fish and access for this purpose.¹⁴² Where land or waters are vested in a public authority, access by fishers for the purpose of fishing might depend on the goodwill of that authority, or alternatively specific authority for access might be required. In some circumstances, a fishing licence might be sufficient authorisation of access. Such an implication is more likely to be found in detailed management arrangements for fisheries in a specific area, analogous to the undefined something ‘more’ referred to by the majority in the order granted in the *Blue Mud Bay Case*.¹⁴³ That a fishing licence *might* be capable of providing such authority is suggested by s 50A of the Act, which clarifies that a licence does not of itself authorise access to ‘water authority property’.

D *Tasmanian Legislation*

Tasmanian legislation includes a statement of ownership of living marine resources. Section 9(1) of the *Living Marine Resources Management Act 1995* (Tas) states that ‘all living marine resources ... are owned by the State’. That Act however, is less emphatic in its assertion of ownership than the Victorian Act. For example, the Tasmanian Act does not have an equivalent provision to the statement that wild fish are owned by the ‘Crown in the right of Victoria’,¹⁴⁴ and there is no equivalent provision to s10(2) of the *Fisheries Act 1995*(Vic), which sets out the circumstances when property in fish will pass to fishers.

The provisions of the Tasmanian Act on the prohibition of fishing activity are similar to those found in s 10 of *Fisheries Act 1988* (NT). There is a general prohibition on taking fish without a fishing licence in s 60(1) of the *Living Marine Resources Management Act 1995* (Tas). This general prohibition on taking without a licence is relieved by a wide exemption for recreational fishers in s 60(2)(a),¹⁴⁵ and for Aboriginal fishers in s 60(2)(c). Given the similarity of s 60 to s 10 of the *Fisheries Act 1988* (NT), as considered in the *Blue Mud Bay Case*,¹⁴⁶ the Tasmanian Act will almost certainly have wholly abrogated the public right to fish for both commercial and recreational fishers. Recreational fishers’ rights therefore depend either on the general exemption in s 60(2)(a) of the *Living Marine Resources Management Act 1995* (Tas), or on a statutory management plan issued for a specific fishery. In a similar fashion, it could be argued that s 60(2)(c) concerning Aboriginal access is a statutory right in favour of Aboriginal persons, rather than a preservation of a common law indigenous right.¹⁴⁷

For commercial fisheries, s 32 of the *Living Marine Resources Management Act 1995* (Tas) provides a somewhat circular definition of management plans under the Act, stating that ‘a management plan consists of rules relating to a specified fishery’. The authority of a fishing licence is described in fairly restrictive language in s 63, stating that ‘a fishing licence

¹⁴¹ (2008) 236 CLR 24

¹⁴² Although general public rights of navigation would be unaffected.

¹⁴³ (2008) 236 CLR 24, 67 (Gleeson CJ, Gummow, Hayne and Crennan JJ).

¹⁴⁴ *Fisheries Act 1995* (Vic) s 10(1).

¹⁴⁵ Recreational licences are only required for some high value marine fisheries in Tasmania such as Rock Lobster. See *Fisheries (Rock Lobster) Rules 2011* (Tas) r 10.

¹⁴⁶ (2008) 236 CLR 24.

¹⁴⁷ Subject to any preservation under the *Native Title Act 1993* (Cth), or other legislation overriding the potentially extinguishing effects of the *Living Marine Resources Management Act 1995* (Tas).

authorises the holder of the licence to carry out fishing in accordance with the licence'. On the other hand, Parts 3 and 4 of the Act contain extensive provisions on management plans and quota rights.¹⁴⁸ Even without the authority of the *Blue Mud Bay Case*,¹⁴⁹ the provisions of the Act relating to commercial fishing would likely be sufficiently extensive to have wholly abrogated the public rights of all fishers to fish commercially and recreationally.

In summary, compared to Victoria, the provisions of the Tasmanian Act are less emphatic on ownership, and the requirement to hold a recreational licence is only valid for some fisheries. It is possible that, but for the *Blue Mud Bay Case*,¹⁵⁰ Tasmanian legislation might have been capable of being interpreted as merely regulatory in nature with respect to recreational fishing activities. *Yanner v Eaton*¹⁵¹ would then be authority for reading down the assertion of ownership to mean a general statement of the interests of the state in fisheries management. Nonetheless, a claim as to ownership combined with the similarity of s60 of Act to s10 of the *Fisheries Act 1988* (NT) makes it highly likely that all public rights to fish in Tasmania have been abrogated. Given differences in wording from that in Victorian legislation, whether wild fish are 'owned' by the State of Tasmania in a fashion analogous to private ownership will depend on the degree to which the authority of *Yanner v Eaton*¹⁵² has been weakened on this point.

E Western Australian Legislation

In Western Australia, the objects of the *Fish Resources Management Act 1994* (WA) include in s 3(1) 'to share and conserve ... the State's fish and other aquatic resources ... for the benefit of present and future generations'. The Act however does not include a specific assertion of property by the State in wild fish. For commercial fisheries, Part 6 of the Act sets up a system of management plans and authorisations. Although the Act does not explicitly require that all commercial fishers hold a commercial licence, reg 121 of the *Fish Resource Management Regulations 1995* (WA) does. That regulation provides that all persons who engage in commercial fishing must hold a licence under the Act.¹⁵³ By way of contrast, for recreational fishers, reg 123(1) provides only that a licence must be held for specified activities listed in reg 124. The activities listed in reg 124 are however quite extensive. From 2010, all recreational fishing activities from a boat came under a new licensing regime created under regs 124B–124D. Recreational fishing from a beach with a line however is not listed under reg 124 and so, consequently, a licence is not required.¹⁵⁴ Although there is no general exemption in the Act for Aboriginal fishers, s 6 of the Act provides that indigenous fishers are not required to hold a recreational licence when fishing for non-commercial purposes.

¹⁴⁸ *Living Marine Resources Management Act 1995* (Tas), Pts 3, 4.

¹⁴⁹ (2008) 236 CLR 24.

¹⁵⁰ *Ibid.*

¹⁵¹ (1999) 201 CLR 351.

¹⁵² *Ibid.*

¹⁵³ That this important provision is in the Regulations, rather than Act itself, demonstrates the range of legislative styles in Australia and the difficulty of comparing legislation across jurisdictions.

¹⁵⁴ *Fish Resource Management Regulations 1995* (WA) reg 124.

The Act and Regulations create a comprehensive regime for commercial fishers, almost certainly abrogating the public right to fish of commercial fishers, replacing those rights with a statutory scheme. Section 66 of the Act (on commercial management plans) is expressed in positive terms, authorising a person to undertake an activity, and not merely relieving them of a prohibition on an activity. Section 66(2) states that an 'authorisation may authorise a person... to engage in fishing or any fishing activity of a specified class in a managed fishery or an interim managed fishery'. A new s 73A was added in 1997 to clarify that managed fisheries authorisations were subject to marine reservations for conservation under the *Conservation and Land Management Act 1984* (WA).¹⁵⁵ That this amendment was deemed necessary suggests that its drafters were of the view that authorisations under Part 6 of the *Fish Resources Management Act 1994* (WA) might otherwise provide a statutory right of access.

In relation to recreational fishing, the Act and Regulations create an extensive, but not fully comprehensive, regime. Certainly, the public right to fish commercially has been wholly abrogated by reg 121. Whether regulation of recreational activities is so extensive that the public right to fish recreationally has also been wholly abrogated is less certain. It is a matter of interpretation and judgment when regulation of the public right to fish becomes an abrogation of the right and is replaced by a new scheme.¹⁵⁶ If all recreational fishing activities were licensed under the Regulations to the Act, such a threshold may have been passed in Western Australia. However, it would appear that the recreational activities for which a licence is unnecessary are sufficiently extensive that the public right to fish has not yet been wholly abrogated. This conclusion is all the more likely given that the Act lacks provisions on ownership comparable to the legislation in either Tasmania or Victoria.

In summary, the public right to fish for recreational purposes has been highly regulated, but is unlikely to have been wholly abrogated in Western Australia. It is likely however that a combination of reg 121 and the extensive provisions of the Act concerning licensing and management of commercial fishing, wholly abrogate the public right to fish commercially for both commercial and recreational fishers.

F *New South Wales Fisheries Legislation*

In New South Wales, the objectives section of the *Fisheries Management Act 1994* (NSW) does not contain an express declaration of ownership or assertion of property in wild fish. Section 3(1) merely includes an objective to 'share the fishery resources of the State'. There is no general prohibition of access in the provisions of the Act. Under s 6 of the Act, there is a broad power to define a fishery and declare 'fishery management strategies' for it under Part 1A.¹⁵⁷

All commercial fishing activity is required to be licensed under s 102(1) of the Act. Notwithstanding some differences in wording from the statutory provisions considered in the *Blue Mud Bay Case*,¹⁵⁸ on the authority of that case s 102(1) is likely to have wholly abrogated the public rights to fish commercially for both commercial and recreational fishers.

¹⁵⁵ *Acts Amendment (Marine Reserves) Act 1997* (WA) s 48.

¹⁵⁶ 'The line between regulation and abrogation may be an artificially fine one': *Arnhem Land Aboriginal Land Trust v Director of Fisheries* (2000) 170 ALR 1, 17 (Mansfield J).

¹⁵⁷ Specifically, *Fisheries Management Act 1994* (NSW) ss 7A–7D.

¹⁵⁸ (2008) 236 CLR 24.

This however leads to an anomaly in the Act over commercial access to inland waters. Section 38(1) creates an independent statutory right to fish from boats in inland waters (non-tidal rivers and creeks) for both commercial and recreational fishers. The result is that in New South Wales commercial fishers can rely on a statutory right to access water across private lands in inland waters, but as their public right to fish has been abrogated, there is no comparable right of commercial fishers to access marine and estuarine waters (whether private or otherwise). Section 38(1) suggests that it was either not the original intent of the Act to abrogate the rights of commercial fishers, or alternatively, it was taken for granted that they would have access to marine waters on some other basis. It is possible that, but for the *Blue Mud Bay Case*,¹⁵⁹ s 38(1) would have been interpreted as supporting the implication that the Act regulated, rather than wholly abrogated, the public rights to fish of commercial fishers.

In relation to recreational fishing in New South Wales, Division 5 of the Act creates a comprehensive system of recreational fees. There are significant differences between provisions relating to fees on recreational fishers compared to licence requirements on commercial fishers.¹⁶⁰ For commercial fishers, under s 102 the relevant offence is the taking of fish without a commercial licence. Under the Act, recreational fishing activities in New South Wales are *not* expressed as being conditional on the holding of a licence. For recreational fishers, it is the non-payment of a fee under s 34(J) that is the offence. To clarify, this means that it is not the take by recreational fee evaders that is *prima facie* unlawful, but non-payment of the fee. This difference in legislative approach supports the inference that recreational fishing derives its legality from the public right to fish, rather than the statutory provisions of the Act. That it was the intent of the drafters of the Act to preserve the public right to fish is clear from a note provided in s 3 of the Act. That note both summarises the common law public right to fish and explains that the purpose behind s 38(1) was to extend the rights of fishers by creating a statutory right to fish in inland waters.¹⁶¹ The Act does not expressly preserve indigenous rights, but scant guidance can be drawn from this omission as it is unlikely that indigenous rights have been extinguished by the Act.¹⁶²

Further supporting the inference that the public right to fish has not been wholly abrogated, the Act introduces the concept of 'public water land'. Under s 4(1), where land is vested in the Crown for a public purpose, the Act provides that it is still to be classified as 'public water'. Limited exemptions for exclusive possession of public water land are provided for in Pt 6, Div 3 of the Act. The limited nature of these exemptions indicates that the drafters' intent was to favour public access.

In conclusion, the *Fisheries Management Act 1994* (NSW) implements commercial and recreational fishing management without triggering the complete abrogation of the public right to fish, at least for recreational fishers. Although there are broad provisions in the Act that would authorise the adoption of management schemes for recreational fisheries, given the overall structure of the Act, it seems likely that they regulate but do not wholly abrogate the

¹⁵⁹ Ibid.

¹⁶⁰ As compared to Victoria, where the provisions of the *Fisheries Act 1995* (Vic) relating to prohibition and licensing of recreational and commercial fishers are very similarly worded in ss 36(1) and 44(1).

¹⁶¹ *Fisheries Management Act 1994* (NSW) s 3.

¹⁶² See *Mason v Tritton* (1994) 34 NSWLR 572.

public right to fish.¹⁶³ On the authority of the *Blue Mud Bay Case*¹⁶⁴ however, s 102 not only abrogates the general public's right to fish for commercial gain, it also has the likely effect of wholly abrogating commercial fishers' public rights as well, notwithstanding any anomalies that may arise.

G Other Jurisdictions

Based on the factors identified above, Victoria and New South Wales fisheries legislation represent opposite ends of a continuum of legislative approaches. Tasmanian legislation is broadly similar to that in Victoria, if less clearly comprehensive in nature. Western Australian legislation would fall somewhere in the middle of that continuum. Other state regimes can also be placed on this continuum. In South Australia, the *Fisheries Management Act 2007* (SA) includes an assertion of ownership of wild fish in broadly similar terms to that in Victoria.¹⁶⁵ The Act contains a general prohibition on commercial fishing except by licence,¹⁶⁶ but does not include an equivalent general prohibition on recreational fishing. Due to the lack of comprehensive recreational licensing provisions in the Act, the complete abrogation of public rights is less certain than that in Victoria. If the assertion of ownership of wild fish is interpreted literally, however, the Act is likely to have wholly abrogated all public rights to fish, replacing them with statutory rights or statutory exemptions. Based on the continuum referred to above, the *Fisheries Management Act 2007* (SA) would be classified somewhere between Victoria and Western Australia.

In Queensland the *Fisheries Act 1994* (Qld) refers to the 'community's fish resources' in s 3(1) but the Act does not include a declaration of ownership in wild fish. There is no general prohibition on commercial fishing in the Act itself. However, the *Fisheries Act 1994* (Qld), *Fisheries Regulation 2008* (Qld) and declared management plans¹⁶⁷ work together to limit fishing for commercial purposes to those holding licences under the Act. For example, the *Fisheries Act 1994* (Qld) includes wide provisions for the declaration of 'regulated fish' under s 78 and for setting out 'prescribed waters' under s 79A. Regulation 627 supplements these provisions by limiting the use of boats for commercial fishing activities to licensed commercial fishers.¹⁶⁸ A piecemeal approach to regulation makes a sweeping assessment of the impact on the public right to fish problematic, but it is likely the regulatory scheme in Queensland has abrogated the public right to fish commercially of both recreational and commercial fishers and replaced it with a statutory right to fish commercially. Although the Act provides for the management of recreational fisheries, including the creation of fishery management plans under s 32, there is no general prohibition on recreational fishing, and in practice a recreational licence is only required in limited circumstances.¹⁶⁹ Accordingly, the

¹⁶³ Presuming limited further changes in the law arise from High Court appeals from the Full Federal Court and South Australian Supreme Court: See, *Commonwealth of Australia v Akiba* [2012] FCAFC 25; *Dietman v Karpany* [2012] SASCFC 53 (11 May 2012).

¹⁶⁴ (2008) 136 CLR 24.

¹⁶⁵ *Fisheries Management Act 2007* (SA) s 6(1); This is arguably more extensive than that in Victoria as it refers to all wild fish in South Australian waters, not fish 'found' in those waters as in s 10(1) of the *Fisheries Act 1995* (Vic); See, above n 130.

¹⁶⁶ *Fisheries Management Act 2007* (SA) s 53.

¹⁶⁷ Under Part V of the *Fisheries Act 1994* (Qld).

¹⁶⁸ *Fisheries Regulation 2008* (Qld) r 627.

¹⁶⁹ Department of Agriculture, Forestry and Fisheries, *Recreational Fishing Rules for Queensland — A Brief Guide* (12 July 2012) Queensland Government: Department of Agriculture, Forestry and Fisheries <www.daff.qld.gov.au/28_2981.htm>.

right of the public to fish recreationally is unlikely to have been wholly abrogated. Based on the continuum referred to above, the Queensland Act and Regulations would be classified as lying somewhere between Western Australia and New South Wales, being less restrictive than Western Australia, but without the clarity of intent on public rights and access that exists in New South Wales' legislation.

IV INCIDENTAL CONSEQUENCES

A *Access for the Purpose of Fishing*

Even where the public right to fish has been extensively regulated, it nonetheless provides an underlying legal presumption in favour of access to the sea, foreshore and tidal rivers for the purpose of fishing. Where there are competing *private* interests over such areas, the presumption in favour of the public right to fish is however likely to be given little weight.¹⁷⁰ In reality, private grants of exclusive (fee simple) estates below the high water mark are rare in Australia, so the practical impact of private grants on the public right to fish is limited.¹⁷¹ *LRA* fee simple title to the tidal zone in the Northern Territory is an exception to the usual practice, not an example of it. Given the limited area over which competing private rights exist, access under the public right to fish to areas vested in a government agency is generally likely to be of greater importance to fishers. As noted by Selway J in *Gumana v Northern Territory*¹⁷² there has been extensive vesting of waters for ports and harbours in public authorities in Australia.¹⁷³ The Full Federal Court in *Gumana v Northern Territory* held that old common law assumptions in favour of the preservation of public rights should be applied with caution,¹⁷⁴ and the weight now to be given to those assumptions depends on the context in which they are being considered.¹⁷⁵ Based on the Federal Court's 'text, structure and context' approach to interpretation,¹⁷⁶ it would seem reasonable that the public right to fish would more likely be accorded a substantial weight where land or waters are vested in a public body for a public purpose. The Federal Court's approach to interpretation seems logical, but the degree of authority to be accorded to its view is uncertain given the successful appeal from the Full Federal Court to the High Court in the *Blue Mud Bay Case*.¹⁷⁷ Although the High Court majority did not directly overrule the Full Federal Court on this point, it adopted a very different approach to the issues in the case.¹⁷⁸ A partial reconciliation of the two approaches would see context as important to the application of old common law rules to

¹⁷⁰ *Re MacTiernan; Ex Parte Coogee Coastal Action Coalition* (2005) WAR 138; See also, *Georgeski v Owners Corporation SP* (2004) 62 NSWLR 534

¹⁷¹ A feature taken for granted in Australia, but not in other jurisdictions: See, Richard Hildreth, 'Australian Coastal Management: A North American Perspective' (1992) 9(3) *Environmental Planning and Law Journal* 165.

¹⁷² *Gumana v Northern Territory* (2005) 141 FCR 457, 479–80 (Selway J).

¹⁷³ *Ibid*; See also, *Georgeski v Owners Corporation SP* (2004) 62 NSWLR 534. For example the *Rottneest Island Authority Act 1987* (WA) covers the waters around Rottneest Island as well as the land, with control and management vesting in the authority under s 11(2).

¹⁷⁴ *Gumana v Northern Territory* (2007) 158 FCR 349 (French, Finn and Sundberg JJ).

¹⁷⁵ *Ibid* 374; The Court had already concluded that the public right to fish was excluded by the 'text, structure and context of the *Land Rights Act*': at 372.

¹⁷⁶ *Ibid* 374.

¹⁷⁷ (2008) 236 CLR 24.

¹⁷⁸ See, above n 82 and n 83, and accompanying text.

resolve conflicts between public rights and other rights, but for context to be less important to the preliminary question of whether the public right has been abrogated by fisheries legislation. This reconciliation however, leaves unanswered why context has less relevance to fisheries legislation.

Regardless of the appropriate test for abrogation, where the public right to fish has been wholly abrogated, a legal presumption in favour of access by fishers will have been lost. For example, the old English common law rule that applied to private grants of harbours or oyster leases was that those grants were subject to public rights of fishery and navigation, at least to the extent that those activities were consistent with the purpose of the grant.¹⁷⁹ It may well be true that the public right to fish is now a weak right. However, it still provides a starting point for the judicial interpretation of legislative vesting provisions. If the right has been wholly abrogated, then the public right to fish no longer forms part of the overall context of the legislation under consideration. It is arguable that where the public right to fish has been wholly abrogated by fishing legislation, then fishing and lawful access over such areas requires either specific legislative authority,¹⁸⁰ or the consent of the agency in which that area has been vested. Where access requires both a fisheries licence *and* the consent of another body, there is the potential for conflict over the management of access and of fishing activities.

Given the potential effect of abrogation on access to areas vested for public purposes, there is an advantage in fishing legislation clarifying access arrangements. Fisheries managers in some jurisdictions may already have the power to address access in statutory management plans for fisheries. For example, it is likely that in Western Australia, the relevant act includes such powers. This may resolve some conflict over access to those fisheries managed by means of detailed and highly specific management plans, but it is unlikely to be sufficient to clarify access generally. Recreational fishing management arrangements are typically less detailed than those governing commercial fishing activities. Recreational fishers might only have a generic statutory exemption supporting their right to fish.¹⁸¹ Access conflicts affecting recreational fishers are therefore unlikely to be resolved through the piecemeal development and application of fishery management plans. In relation to recreational access, the approach adopted in New South Wales of declaring areas as 'public water land' has merit.¹⁸²

B *Ownership of Fish and the Problems of Property*

As foreshadowed earlier, assertions of ownership of fish, and especially free-swimming fish, pose novel questions for legal analysis. That neither the Crown nor any other person could own free-swimming fish has been a long accepted legal proposition dating back to Bracton in the 1200s.¹⁸³ There have been only limited exceptions for so-called 'royal fish' such as whales, and that exception is highly unlikely to have made the transition from English law

¹⁷⁹ For eg, *Gann v Free Fishers of Whitstable* (1865) 11 ER 1305; *Mayor of Colchester v Brooke* (1845) 115 ER 518.

¹⁸⁰ For eg, provisions relating to 'public water land' in *Fisheries Management Act 1994* (NSW) s 4.

¹⁸¹ As in *Fisheries Act 1988* (NT) s 10(2).

¹⁸² *Fisheries Management Act 1994* (NSW) s 4(2).

¹⁸³ Samuel Thorne, *Bracton on The Laws and Customs of England II* (Harvard University Press, 1968), 39–40 65; The likely date of compilation is around 1256–1258, with some elements possibly dated as early 1215: See M T Clanchy, *England and its Rulers 1066 – 1272* (Fontana, 1983), 158–61.

into Australian law.¹⁸⁴ In *Fisheries Law in Australia*, Gullett doubted the validity of assertions of state ownership below the low water mark,¹⁸⁵ although not whether the states can exercise jurisdiction over fishing activities in those waters (under the *Coastal Waters (State Title) Act 1980* (Cth)). Justice Brennan was sceptical about the effectiveness of assertions of state ownership of wild abalone in *Harper's Case*.¹⁸⁶ Even if state declarations were invalid over waters subject to the *Coastal Waters (State Title) Act 1980* (Cth), there is no reason why declarations of ownership would not be valid over waters within the limits (generally above the low water mark) of an Australian state.¹⁸⁷ Potential conceptual problems with state ownership remain. Wild fish might pass out from state ownership as they leave a jurisdiction, re-acquiring that status if they return.¹⁸⁸ In addition, for fisheries partly within and partly outside the limits of a state, the effect would be the creation of further jurisdictional complexity in an area already replete with such.¹⁸⁹

If assertions of property are taken literally, then the effect is to import property concepts into the law of fisheries to a much greater degree than that anticipated by Brennan J in *Harper's Case*, with his analogy to the creation of limited property rights equivalent to a '*profit a prendre*'.¹⁹⁰ There is a significant difference between property in a right to take a fish, and property in the fish itself. Although the licences and permits created under new legislative schemes put in place since the 1980s are property, the courts have so far emphasised the limited statutory nature of the access rights created by such schemes.¹⁹¹ On their face, Victorian and South Australian declarations of ownership of wild fish go beyond governing access and merely being an 'instrument of regulation'.¹⁹² That in Victoria and South Australia property in fish 'passes'¹⁹³ from the State to the holder of a licence, strongly suggests that what is passed is a right more closely equivalent to private rights than a mere assertion of regulatory authority.

As an illustration of the possibilities that might arise from a property-based approach to fisheries management and legislation, a number of states have Criminal Code provisions that provide for statutory defences when property rights are involved.¹⁹⁴ Section 22 of the

¹⁸⁴ *Baldick v Jackson* (1910) 30 NZLR 343. On reception more generally see Bruce Harvey McPherson and Kay Saunders, *The Reception of English Law* (Supreme Court of Queensland Library, 2007).

¹⁸⁵ Gullett, above n 2, 65.

¹⁸⁶ (1989)168 CLR 314, 335 (Brennan J).

¹⁸⁷ But likely not valid in the Northern Territory, given limits on its legislative competence: See, Heather Ahlstrom Coldwell, 'Fee Simple Estate and Footholds In Fishing: The Australian High Court's Formalistic Interpretation Of The Aboriginal Land Rights Act' (2010) 19 *Pacific Rim Law & Policy Journal* 303, 324–6.

¹⁸⁸ *Yanner v Eaton* (1999) 201 CLR 351, 367 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

¹⁸⁹ See, Michael White and Nick Gaskell, 'Australia's Offshore Constitutional Law: Time for Revision?' (2011) 85 *Australian Law Journal* 504, 509; Marine jurisdictional arrangements have been described by one of Australia's most experienced public servants as 'the most 'flaky' the Reviewer has come across in dealing with cross-jurisdictional issues': Borthwick, above n 128, ix-xx.

¹⁹⁰ *Harper's Case* (1989)168 CLR 314, 329 (Brennan J).

¹⁹¹ *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567, 584 (Black CJ, Davies and Sackville JJ).

¹⁹² D E Fisher, *Australian Environmental Law: Norms, Principles and Rules* (Thomson Reuters, 2010), 272.

¹⁹³ *Fisheries Act 1995*(Vic) s 10(2); *Fisheries Management Act 2007* (SA) s 6(2).

¹⁹⁴ A statutory defence of this nature was also raised in the Queensland case of *Walden v Hensler* (1987) 166 CLR 561.

Criminal Code Act 1913 (WA) provides a general statutory defence of the exercise of an ‘honest claim of right’, provided that the offence also relates to ‘property’ (a defence referred to as ‘mistake’¹⁹⁵ in criminal law). Such a defence might become widely applicable if a state ‘owns’ wild fish, as most fisheries offences would involve property of the state. This possibility is somewhat theoretical in nature, but not inherently implausible. In the Western Australian case of *Mueller v Vigilante*, McKechnie J rejected an appeal by the state from a magistrate’s decision to dismiss a charge of the take of undersized fish. His Honour based his decision on the application of s 22 of the *Criminal Code Act 1913* (WA).¹⁹⁶ McKechnie J held that the statutory defence of ‘honest claim of right’ was available to the charges laid under the *Fish Resources Management Act 1994* (WA), as a claim of right based on native title was a right in relation to property.¹⁹⁷ If Western Australia adopted Victorian style legislative provisions relating to state ownership of, and property in fish, further extensions of this defence might be possible, as arguably all legal relationships to fish also become questions of property.

Ownership of wild fish is a legal concept fundamentally at odds with the common law tradition, and consequently, at odds with laws and regulations drafted on assumptions based on that tradition. Further anomalies might be identified in other areas of law, for example in relation to legislation on animal welfare. That they have not yet been identified may be due, in part, to the specialised nature of fisheries law and experts. At the very least, residents of South Australia and Victoria might be surprised to find that shark attacks are carried out by a fish ‘owned’ by their state. There is no clear offsetting advantage to the disadvantage of potential uncertainties raised by state ownership. At best, there is a very remote possibility that state ownership would validate licence fees that would otherwise be constitutionally invalid. Even discounting the doubts raised by Brennan J on arguments put forward on such a basis in *Harper’s Case*,¹⁹⁸ the practical utility of such an approach is severely limited. Not only would licence fees have to be so high as to be incapable of being characterised as access fees, but the resources on which they were assessed would have to be wholly within the limits of a state to avoid great jurisdictional difficulties in application.

V CONCLUSION

A key objective for the introduction of the new fisheries legislative schemes adopted since 1988 was to improve management outcomes through ‘the explicit allocation of access to fish resources between stakeholders’.¹⁹⁹ Uncertainty works against that objective. Australia’s fishers, researchers and managers have identified the establishment of clear allocated rights to fisheries as Australia’s second highest priority for reform.²⁰⁰ When expansive legislative language on ownership is mixed with rights-based management, there is a risk of unanticipated consequences from both the loss of rights of access and the reversal of common law assumptions on the ownership of wild fish. If it is intended to wholly abrogate public

¹⁹⁵ See generally, Thomas Crofts and Kelley Burton, *The Criminal Codes: Commentary and Materials* (Thomson Reuters, 2009), 589–633.

¹⁹⁶ *Mueller v Vigilante* [2007] WASC 259, [43]–[45] (McKechnie J).

¹⁹⁷ *Ibid.*

¹⁹⁸ (1989) 168 CLR 314, 335 (Brennan J).

¹⁹⁹ South Australia, *Parliamentary Debates*, Legislative Council, 22 November 2006, 1121 (G E Gago, Minister for the Environment).

²⁰⁰ Ridge Partners, Deborah Wilson Consulting Services and Fisheries Research and Development Corporation (Australia) *Evaluating Australia’s Marine Capture Fisheries: Final Report to the FRDC’s Resource Working Group* (Ridge Partners, 2009).

rights and replace them with a statutory scheme, then it is desirable that access issues are directly addressed, especially access to waters and lands vested in bodies for public purposes. In relation to legislative assertions of ownership, there is no evidence that the potential utility of such measures outweighs the risks associated with them.

CAUSING DEATH BY DANGEROUS DOG: VICTORIA'S NEW OFFENCES FOR FAILING TO CONTROL PRESCRIBED DOGS

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In 2011 the Victorian Parliament passed the Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011. The main purpose of the Bill was to create a new offence of causing death by failure to control a dangerous, menacing or restricted breed of dog. This was done by the insertion of sections 319B and 319C into the Crimes Act 1958 (Vic). Section 319B creates a new homicide offence where a person fails to control a dangerous, menacing or restricted breed of dog and that failure results in death. This offence has no requirement of subjective fault with respect to death, and is comparable to the Victorian offence of causing death by dangerous driving. It is argued that there are serious flaws in the offence, particularly concerning the absence of any need to prove subjective fault on the part of the person in charge of the dog. The offence in s 319C of failing to control a dangerous, menacing or restricted breed dog where that failure endangers, or may endanger, life is also considered. The legislation is critically examined and its necessity discussed, leading into a comparison of the new provisions with existing criminal offences that may apply in the case of dog attacks on humans.

I INTRODUCTION

On 17 August 2011, four year old Melbourne girl Ayen Chol was fatally mauled by a pit bull terrier that had escaped from a neighbour's yard. Her death was widely reported and it prompted the Victorian Parliament to pass the *Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Act 2011*.¹ This Act received royal assent on 8 November 2011, less than two months after being introduced on 14 September 2011.² It inserted two new offences into the *Crimes Act 1958 (Vic)* (the Act): failure to control a dangerous, menacing or restricted breed dog that kills a person;³ and reckless failure to control a dangerous, menacing or restricted breed dog where that failure creates a danger that another person may be killed.⁴ Various sections of the *Domestic Animals Act 1994 (Vic)* ('DAA') were also amended.

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¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 14 September 2011, 3216 (Peter Walsh); Megan Levy, 'Pit Bull Ripped Girl From Mum's Leg', *The Age* (online), 18 August 2011 <<http://www.theage.com.au/victoria/pit-bull-ripped-girl-from-mums-leg-20110818-1iyvs.html>>; 'Dog Pulled Girl From Mother's Legs' *ABC News* (online), 19 August 2011, <<http://www.abc.net.au/news/2011-08-18/dog-pulled-girl-from-mothers-leg/2845390>>; Amelia Harris and Terry Brown, 'Ayen Chol Clung to her Mum But Relentless Pitbull Could Not be Stopped', *The Daily Telegraph* (online), 19 August 2011, <<http://www.dailytelegraph.com.au/news/sydney-news/ayen-chol-clung-to-her-mum-but-relentless-pitbull-could-not-be-stopped/story-e6freuzi-1226117752772>>, among many others.

² Victoria, *Parliamentary Debates*, Legislative Assembly, 14 September 2011, 3215–6 (Peter Walsh).

³ *Crimes Act 1958 (Vic)* s 319B.

⁴ *Crimes Act 1958 (Vic)* s 319C.

This article will critically examine the new provisions of the Act, analysing the way they are likely to operate in practice. The new provisions will be considered in light of the existing law in Victoria relating to offences against the person, particularly the offences of manslaughter,⁵ and endangerment of life.⁶ Both of the new offences are specific offences against the person arising from the failure to control dogs of certain prescribed types.

Both offences traverse ground covered by a number of existing offences in Victoria.⁷ This in itself is not a reason to object to the new offences, as there are a number of good reasons to create specific offences to cover conduct already falling within a broad offence, particularly where that broad offence is one as serious and amorphous as manslaughter. Two of these reasons are the historical reluctance of juries to convict of manslaughter in what might be thought of as borderline cases, and the desirability of fair labelling of conduct.⁸ The offence of causing death by failure to control a prescribed dog is also likely to have an area of operation not covered by the existing law of negligent manslaughter. It is necessary to consider the differences between the criminal negligence standard of fault and that provided for by s 319B. The development of the law in relation to causing death by dangerous driving provides a helpful parallel in this regard.⁹

The provisions, particularly s 319B, are problematic for a number of reasons. Section 319B is an offence carrying a maximum penalty of imprisonment for 10 years that does not require any proof of subjective fault where the defendant is the owner of the dog. Minimal fault is required for this offence where the defendant is not the owner of the dog. The only available defences are reasonable mistake of fact and the act of another.¹⁰ Liability may be imposed without proof of any intentional or reckless act on the part of the defendant. Section 319C requires proof of a reckless act which results in the dog being out of control, but may not require proof of any subjective foresight of result. If it does require such subjective foresight, it is entirely subsumed within the existing offence of recklessly endangering life contained in s 22 of the Act. Again, this may be justified from a labelling perspective, but does not extend potential criminal liability beyond the existing criminal law of Victoria.

It will be argued that s 319B sets the threshold for criminal liability too low; a serious offence of this type demands some form of subjective fault. Section 319C is either redundant or sets the threshold for liability lower than the offence of recklessly endangering life. Though

⁵ *Crimes Act 1958* (Vic) (Vic) s 5; *Nydam v The Queen* [1977] VR 430; *Wilson v The Queen* (1992) 174 CLR 313.

⁶ *Crimes Act 1958* (Vic) s 22.

⁷ For example, the offence of manslaughter in the case of s 319B, and recklessly endangering life and negligently causing serious injury in the case of s 319C. There are also a number of offences under the *DA Act* that will overlap with ss 319B and 319C, which are discussed later in this article.

⁸ Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 4th ed, 2003) 89–92.

⁹ See, *King v The Queen* (2012) 245 CLR 588; *McBride v The Queen* (1966) 115 CLR 44; cf *Callaghan v The Queen* (1952) 87 CLR 115. It is worth noting that the new provisions appear immediately after the offences of causing death by dangerous or culpable driving in the *Crimes Act 1958* (Vic). While this is not significant as a matter of statutory construction, it is indicative of the mindset of the Victorian parliament. This mindset is further evidenced by the Explanatory Memorandum to the Bill, which expressly compares s 319B with the offence of causing death by dangerous driving: Explanatory Memorandum, Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011 (Vic) 4.

¹⁰ The legislation is silent on the availability of these defences, so recourse must be had to general common law principles articulated in cases such as *He Kaw Teh v The Queen* (1985) 157 CLR 523; *CTM v The Queen* (2008) 236 CLR 440 and *Proudman v Dayman* (1941) 67 CLR 536 in relation to reasonable mistake of fact, and *Snell v Ryan* [1951] SASR 59 in relation to act of another.

specific offences can have value for the purposes of denunciation and fair labelling of conduct, it will be argued that there is no coherent reason to enact such laws in relation to dangerous, menacing or prescribed dogs as a discrete class of dangerous thing requiring specific regulation.

II STRUCTURE OF THE LEGISLATION

Sections 319B and 319C of the Act provide:

319B. Failure to control dangerous, menacing or restricted breed dog that kills person

(1) If-

- (a) an owner of a dangerous dog, menacing dog or restricted breed dog fails to keep the dog under control; and
- (b) the dog kills another person (the victim); and
- (c) a reasonable person would have realised that that failure would expose the victim or any other person to an appreciable risk of death-

the owner is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

(2) If-

- (a) a person (other than the owner of a dangerous dog, menacing dog or restricted breed dog)-

- (i) is, for the time being, in charge or has care of the dog; and
- (ii) fails to keep the dog under control; and
- (iii) is reckless as to whether the dog is a dangerous dog, menacing dog or restricted breed dog; and

- (b) the dog kills another person (the victim); and

- (c) a reasonable person would have realised that that failure would expose the victim or any other person to an appreciable risk of death-

the first mentioned person is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

319C. Recklessness as to whether controlling dangerous, menacing or restricted breed dog may place another person in danger of death

(1) An owner of a dangerous dog, menacing dog or restricted breed dog who, without lawful excuse, recklessly engages in conduct so that the dog is not under control, and that conduct places or may place another person in danger of death, is guilty of an indictable offence.

Penalty: Level 6 imprisonment (5 years maximum).

(2) A person (other than the owner of a dangerous dog, menacing dog or restricted breed dog) who-

- (a) for the time being, is in charge or has care of the dog; and
- (b) is reckless as to whether the dog is a dangerous dog, menacing dog or restricted breed dog; and
- (c) without lawful excuse, recklessly engages in conduct so that the dog is not under control, and that conduct places or may place another person in danger of death-

is guilty of an indictable offence. Penalty: Level 6 imprisonment (5 years maximum).

Both of the new offences concern dogs falling within three legislatively defined categories: dangerous, menacing, and restricted breed.¹¹ Throughout this article, dangerous, menacing or restricted breed dogs will be referred to by the general term ‘prescribed dogs’, except where it is necessary to distinguish between the categories of prescription.¹² Section 319B(1) of the Act makes it an offence for the owner of a prescribed dog to fail to keep that dog under control where the dog causes the death of another person in circumstances where a reasonable

¹¹ Each category is defined by the *DA Act*: Restricted breed dogs are identified in s 3 of the Act. Part 3 Division 3 deals with dangerous dogs, and Part 3 Division 3A with menacing dogs.

¹² As, for example, when discussing the various offences that may be committed under s 29 of the *DA Act*.

person would realise that the failure to maintain control of the dog would expose another person to an appreciable risk of death. Section 319B(2) creates a very similar offence, except that it applies to a person other than the dog's owner who at the relevant time has control or charge of the dog. Section 319C of the Act creates an offence of recklessly engaging in conduct so that the prescribed dog is not under control, where the dog not being under control exposes another person to danger of death. Again, the offence is divided into subsections (1) and (2), depending on whether the person is the owner of the dog or merely in control of the dog at the relevant time.

The offences impose serious criminal liability on people who fail to control certain classes of dog, where that failure leads to the death of another person, or to a situation in which some other person's life is, or may be, endangered. In the s 319B offence, there is no requirement of subjective fault in relation to the failure to control, result or risk of harm, and liability will attach where a reasonable person would have recognised that such failure would expose another person to an appreciable risk of death. In the s 319C offence, subjective fault is required only in relation to the failure to control, which must be reckless.

Dangerous, menacing and restricted dog breeds are all defined in the *DAA*.¹³ Only dogs falling within these statutory definitions are subject to the offences created by ss 319B and 319C. Death, injury or the endangerment of life caused by dogs which have not been designated dangerous, menacing or restricted breeds are dealt with under separate provisions of the *DAA*. Deaths caused by dogs not falling within the relevant classes may also amount to manslaughter if the requirements for that offence are met.¹⁴

¹³ See, *DA Act* s 3; pt 3, divs 3, 3A and 3B. Restricted breeds are the American Pit Bull Terrier or Pit Bull Terrier, Dogo Argentino, Fila Brasileiro, Japanese Tosa and Perro de Prasa Canaria, all of which are prohibited from import into Australia under Schedule 1 of the *Customs (Prohibited Imports) Regulations 1956* (Cth). Such dogs are also restricted or prescribed in New South Wales, South Australia, Tasmania and Western Australia. Under s 34 of the *DA Act* a dog may be declared dangerous if it has caused death or serious injury either to a person or animal by biting or otherwise attacking, if the dog is a menacing dog and the owner has been issued with two infringement notices in respect of failing to keep that dog restrained, if the dog has been declared dangerous by another jurisdiction or if the dog has attacked other people or animals on two or more occasions. Section 34A also provides that a guard dog kept on non-residential purposes is a dangerous dog, as is a dog that has been trained to bite or attack. Under s 41A, a dog may be declared a menacing dog if it has rushed at any person, or attacked any person or animal, but not so as to cause serious injury, or if the dog has been so declared in another jurisdiction. Both provisions contain exemptions to cover situations where the dog attacked due to being abused, teased or assaulted, where the person or animal attacked was a trespasser to premises inhabited by the dog, where another person known to the dog was being attacked in front of the dog or in the course of certain approved hunts.

¹⁴ It seems more probable that death caused by failure to control a dog would give rise to a charge of negligent manslaughter, and that is the offence which will be particularly considered in this article, with specific reference to the difference between the criminal negligence standard and the reasonable person standard in s 319B. However, it is possible that such a death could also give rise to a charge of manslaughter by unlawful and dangerous act where there was some other unlawful act preceding death. Given the breadth of 'failure to control' as an expression, almost all instances of a s 319B offence will involve an unlawful act. The test for 'dangerousness' set out in *Wilson v The Queen* (1992) 174 CLR 313 is less stringent than that in s 319B, requiring only that a reasonable person would recognise that the unlawful act carries an appreciable risk of serious injury, rather than the s 319B requirement that the realisation would be one of an appreciable risk of death. The question is whether the various offences amounting to a 'failure to control' constitute 'unlawful acts' for the purposes of unlawful dangerous act manslaughter. On this point, see *Andrews v DPP* [1937] AC 576, and more recently in Victoria, *R v Nguyen (Ruling No 2)* [2010] VSC 442 (29 September 2010). The question whether failing to control a dog is an unlawful act or a lawful act done in a dangerous way is capable of being answered either way. In many cases the underlying offence will be one of omission, which may preclude prosecution for unlawful dangerous act manslaughter: see, Paul Fairall, *Homicide: The Laws of Australia* (Thomson Reuters, 2012) 226–7 [10.1.1030].

Harm caused by such non-prescribed dogs may give rise to liability under the general offence of causing harm by negligence, but only where the harm amounts to serious injury.¹⁵

Victoria's new offences go further than any other jurisdiction in specifically criminalising the conduct of dog owners whose failure to control their prescribed dogs results in death. The offence created by s 319B is comparable to the offence of dangerous driving causing death.¹⁶ The comparison arises because the s 319B offence will impose criminal liability where death is caused regardless of subjective fault, and does not require satisfaction of the criminal negligence standard required for negligent manslaughter. Parliament has created a specific offence of causing death by the failure to adequately manage a defined class of dangerous thing; a prescribed dog. The offence in s 319B creates a new homicide offence separate from the general law of homicide, which suggests that there is something particularly serious or culpable about causing death by failure to control a prescribed dog.

The offence created by s 319C is clearly analogous to the existing offence of recklessly endangering life in s 22 of the Act.¹⁷ Both offences require that there be reckless conduct on the part of the defendant which endangers life. The new offence in s 319C has an additional requirement that the reckless conduct be such that a dog is out of control. It can be seen as a specialised form of the reckless endangerment offence. As discussed below,¹⁸ it may require less to be proved in terms of subjective fault than the general endangerment offence in s 22.

A Table Showing ss 319B and 319C

Physical Element Type	Physical element	Fault Element	Physical Element	Fault Element
	Section 319B		Section 319C	
Conduct	Owner or other person in charge of dog fails to control	- Act of another will apply as a defence Reasonable mistake of fact may apply	Owner or other person engages in conduct such that dog is not under control	Recklessness
Circumstance	Dog is Dangerous, Menacing or Restricted breed	Where failure to control is by owner, no fault. Where failure	Dog is Dangerous, Menacing or Prescribed breed	Where failure to control is by owner, no fault. Where failure

¹⁵ *Crimes Act 1958* (Vic) s 24.

¹⁶ *Crimes Act 1958* (Vic) s 319; So much is acknowledged in the Explanatory Memorandum, Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011 (Vic) 4; Victoria, *Parliamentary Debates*, Legislative Assembly, 14 September 2011, 3216 (Peter Walsh); Cf the offence of culpable driving causing death contained in s 318 *Crimes Act 1958* (Vic).

¹⁷ Explanatory Memorandum, Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011 (Vic) 4.

¹⁸ See the heading 'Section 319C'.

	Reasonable person would recognise failure to control carries appreciable risk of death	to control by a person other than the owner, knowledge or recklessness that dog is a prescribed dog - Reasonable mistake of fact may be available.	Conduct places or may place another person in danger of death	to control by a person other than the owner, knowledge or recklessness that dog is a prescribed dog. Uncertain whether the person need to be aware of the fact that life has been endangered. ¹⁹
Result	Death	-	-	-

The following discussion considers each element of the new offences.

III CAUSING DEATH OR ENDANGERING LIFE

Section 319B applies only in circumstances where failure to control the dog causes the death of another person. Insofar as the offence is one falling within the homicide cluster, this is a necessary precondition; a homicide offence obviously requires death as an element. Similarly, s 319C will only be engaged where a person's life is or may have been endangered. Any lesser risk created by failure to control a dog will be insufficient to ground liability. The offence may be made out where someone has been injured by an out of control dog, but only if the prosecution is able to prove that life was or may have been endangered.

If the aim of the new offences is to criminalise the conduct of those who culpably fail to control prescribed dogs, it appears incongruent that liability be limited to the situation where death is caused or life endangered. It is probable that far more people are injured by dogs than are killed by dogs. This limitation may be justified by the fact that the provision is designed only to capture the most consequentially serious instances of dog attack. Death is, obviously, the most serious consequence. A statutory regime that applied only to causing death would fail to capture conduct which resulted in catastrophic injury but not death. The inclusion of s 319C would likely cover this situation — such injury would be likely to endanger life. However, these provisions will not apply where serious but not life-threatening injuries are inflicted.

¹⁹ Under s 22 of the Act, which provides for a general offence of recklessly endangering life, the defendant must subjectively be aware that their conduct has endangered life. The question whether this is required for s 319C is considered below.

Much contemporary criminal law assesses culpability at least in part on consequence.²⁰ The significance of this observation in the present context is not that the consequence affects liability, but that it affects culpability. The fact that a defendant's conduct has inadvertently caused serious harm is a factor that may be considered when assessing culpability. Limiting ss 319B and 319C to circumstances in which death is caused or life is endangered limits potential liability to all but the most serious instances of dog attack. Conduct falling short of this most serious category is not seen as being so culpable, and is dealt with under the much more forgiving provisions of the *DAA*.²¹

Even allowing for the fact that the legislation is designed to capture only the most serious and morally culpable instances of dog attacks, there is little justification for the omission of an offence covering the situation in which a person is seriously injured but their life is not endangered.

IV FAILURE TO CONTROL

'Control' is inclusively defined to include a range of circumstances covered by the *DAA*.²² 'Control' is defined to include failing to comply with any of the requirements of ss 24, 26(1), 28, 29, 38, 39, 40, 41, 41E, 41F(1)(a), 41G, 41H, 41HA and 41I of that Act. These sections create a range of offences that may be committed by a dog owner, or by someone who is in apparent control of a dog. The offences cover dogs found at large outside of the owner's premises,²³ urging dogs to attack,²⁴ incidents of dog attack, rushing at or chasing people,²⁵ the restraint of dangerous, menacing and restricted breed dogs,²⁶ and the use of warning signs and appropriate identification for such dogs.²⁷ It should be noted that s 319A of the *Act* provides that the definition of 'control' is inclusive of those sections of the *DAA*, and therefore is likely to apply to situations not directly covered by those sections. Breach of any of the enumerated provisions of the *DAA* will constitute a failure to control for the purposes of the serious offences created in ss 319B and 319C. Conduct not amounting to a breach of any of these provisions may still constitute a failure to control as the sections identified in s 319A of the *Act* do not provide an exhaustive definition of 'control'.

A *Control as Physical Element*

Conduct that may amount to a failure to control includes both acts and omissions. Determining whether an act has occurred will generally be fairly straightforward. Urging a dog to attack,²⁸ for example, requires a positive act of urging, which can be clearly identified. However, conduct amounting to a failure to control a dog may also be an omission, and issues arise here around both subjective fault and voluntariness. For example, a dog is not under control if it is at large outside the owner's premises.²⁹ This is better seen as a state of affairs

²⁰ Offences of causing death or harm by dangerous driving fall within this description.

²¹ See 'Comparable Law', below.

²² *Crimes Act 1958* (Vic) s 319A.

²³ *DA Act* s 24.

²⁴ *DA Act* s 28.

²⁵ *DA Act* s 29.

²⁶ *DA Act* ss 38, 41, 41E, 41G and 41I.

²⁷ *DA Act* ss 39, 40, 41F, 41H and 41HA.

²⁸ *DA Act* s 28.

²⁹ *DA Act* s 24.

than as conduct on the part of the owner, and may arise without any act on the part of the owner. Indeed, such a situation may arise without any conduct whatsoever on the owner's part. It could be argued that any instance in which a dog is at large outside the owner's premises demonstrates a failure to fulfil the duty to control the dog, and is therefore an omission, but this transforms the offence into a compound requiring conduct (failing to fulfil the duty) leading to a state of affairs (the dog being at large). If this construction is accepted, it is then necessary to ask whether fault is required in relation to the failure.

Given that there is already a range of legal duties to control dogs, there is no problem with characterising most instances of a failure to control as an omission.³⁰ That said, a failure to control may not fall within any of the duties articulated in the *DAA*, although the duties are quite comprehensive. The new offences themselves create a general duty to keep any prescribed dog under control. Serious issues in relation to voluntariness also arise. If there is no conduct engaged in by the defendant, and no awareness on the part of the defendant that anything must be done (because, for example, the defendant has no idea her dog is not under control), it seems impossible to meaningfully speak of the defendant voluntarily failing to control her dog. Voluntariness in relation to control of dogs can be distinguished from voluntariness in cases involving causing death by dangerous driving. In those cases, there is a clearly identifiable course of voluntary conduct (driving) immediately before death is caused.³¹

This is an example of the potential breadth of s 319B — it is an offence that may be committed without any physical element that can be fairly described as conduct, although conduct will of course be sufficient. As long as a particular state of affairs — a prescribed dog being out of control — exists, this physical element will be made out. There is no need to prove that the dog was out of control due to any act on the part of the owner or person in charge of the dog.

B *Fault with Respect to Control*

There is no express requirement in s 319B that the owner or person in charge of the dog must knowingly fail to keep the dog under control, or be aware that the dog is not under control. Arguments in favour of implying such a requirement are likely to be defeated by a comparison with the wording used in s 319C.³² The requirement in s 319C that the defendant's failure to control the dog be reckless serves as an indication that no fault is required for the element of failure to control under s 319B, which contains no reference to fault in relation to the failure to control. This observation leads to the conclusion that the s 319B offence is one that may be made out without the need to prove any fault element, at least where the defendant is the owner of the dog.³³

³⁰ For a recent judgment on omissions in the criminal law, see, *Poniatowska v DPP (Cth)* (2011) 244 CLR 408.

³¹ See, eg, *Jiminez v The Queen* (1992) 173 CLR 572, in which the defendant fell asleep while driving, resulting in a fatal collision. While asleep, his conduct was not voluntary, but leading up to falling asleep it was.

³² *Crimes Act 1958* (Vic) s 319C(1), (2)(c), which expressly requires that the defendant 'recklessly engages in conduct so that the dog is not under control'.

³³ Where the defendant is not the owner of the dog, fault must be proved with respect to the fact that the dog is a prescribed dog: *Crimes Act 1958* (Vic) s 319B(2)(a)(iii). There is no need to prove fault in relation to the dog being out of control.

Requiring an intentional or reckless failure seems to set the bar too high, as in many cases it would be very difficult to show that a defendant intentionally failed to exercise control over a dog.³⁴ It is much more likely that the failure to control will be determined on an objective basis; the dog is either under control or it is not. The question is then whether a reasonable person would regard that failure as likely to expose others to the unacceptable risk.

This raises a significant issue. Section 319B appears not to require proof of fault with respect to failing to control a prescribed dog. As an objective assessment, the dog is either out of control or it is not. If the dog is out of control, the question asked by s 319B is whether a reasonable person would have realised that that failure would expose the victim or any other person to an appreciable risk of death. The reasonable person here is, presumably, one who is aware that the dog is out of control. In many cases it will be the situation that the reasonable person and the person in charge of the dog are not in the same position.

Assuming that the defence of reasonable mistake of fact would be available to a defendant charged under s 319B,³⁵ the approach taken to what the reasonable person would have realised will be very important. If the defendant is confined to arguing that he or she was reasonably mistaken with respect to the risk posed by the dog when out of control, then the scope of the defence will be very limited, possibly to the point of non-existence.³⁶ On the other hand, if the defendant is also able to argue that he or she was reasonably mistaken about the dog being out of control in the first place, then its scope is broader.³⁷ Whichever approach is adopted, it remains the case that there is no need for subjective fault to be proven in order for the offence to be made out, and the onus falls to the defendant to point to some evidence supporting a claim of reasonable mistake of fact.³⁸

The main constraint on the scope of s 319B is likely to be the requirement that a reasonable person would recognise that failure to control the dog would pose an appreciable risk of death. In fact, this appears to be the only constraint. ‘Control’, even though defined by reference to the *DAA*,³⁹ is likely to cover almost anything someone can do or fail to do with a dog. There is very little conduct which is not going to fall under one or other of the *DAA* offences. In any event, the definition given to ‘control’ in s 319A of the Act is not exhaustive.

Section 319B provides that a reasonable person would recognise ‘that that failure would expose the victim or any other person to an appreciable risk of death.’ The use of ‘that that’ may be important. It demands an assessment of the specific failure alleged against the defendant — would a reasonable person recognise that *the very* failure to control by the defendant exposed some other person to an appreciable risk of death? This demands consideration of the foreseeable risks of what the defendant actually did or failed to do, not an

³⁴ Although, of course, there may be cases in which this can be shown, such as the situation in which the person in charge of a dog urges the dog to attack.

³⁵ Casting the offence as one of absolute liability seems unduly harsh. On determining whether an offence is one of strict or absolute liability: see, eg, *He Kaw Teh v The Queen* (1985) 157 CLR 523, *Proudman v Dayman* (1941) 67 CLR 536; *CTM v The Queen* (2008) 237 CLR 440.

³⁶ See, for example, *R v Clarke* (2008) 100 SASR 363, in which Doyle CJ held that there was no scope for a defence of reasonable mistake where the central question involved consideration of what a reasonable person would have realised: at [25]–[28]. A mistake in such circumstances is by definition unreasonable.

³⁷ Of course, the defendant must point to evidence showing a positive belief, which if true, would have rendered the conduct innocent. Ignorance is insufficient: *Proudman v Dayman* (1941) 67 CLR 536; *State Rail Authority of New South Wales v Hunter Water Board* (1992) 65 A Crim R 101.

³⁸ *CTM v The Queen* (2008) 237 CLR 440.

³⁹ *Crimes Act 1958* (Vic) s 319A.

abstract consideration of possible risks arising from some general failure to control. However, even if the consideration is one specifically focused on the facts of the particular case, it remains an objective consideration with no regard to what the defendant actually knew.

V REASONABLE PERSON STANDARD V NEGLIGENCE

Section 319B requires that a reasonable person would realise that failure to control the prescribed dog would expose others to an appreciable risk of death. This operates as an objective standard that determines whether the owner or handler of a prescribed dog that causes death will be liable under s 319B.

This offence reflects a legislative trend in favour of enacting specific statutory homicide offences rather than relying on the existing manslaughter offences to cover such conduct.⁴⁰ The legislation raises general issues in relation to various forms of what may be called ‘objective liability’, that is, liability which attaches to a person without proof of subjective fault. There is a particular difference between criminal negligence as it exists at common law and the specific standard of objective fault provided for by the legislation.⁴¹

Victoria already has an offence of negligent manslaughter.⁴² This offence will be made out where the conduct (whether an act or omission) of the defendant causes the death of another person, and that conduct falls so far short of the standard a reasonable person would expect as to warrant criminal sanction.⁴³ Any person in charge of a dog who failed to maintain control of that dog would be liable for manslaughter if the dog caused the death of another person and the failure to maintain control was determined to be grossly negligent. This will cover some, but not all, cases in which a dog causes death. One clear purpose of the legislation is to create a new and extended category of specific liability where a prescribed dog causes death — a category that does not require negligence to be made out.

The question whether a reasonable person would recognise that the defendant’s failure to control the dog would expose another person to an appreciable risk of death is more closely aligned with considerations of dangerousness than negligence.⁴⁴ Given the legal distinction between ‘dangerous’ and ‘culpably negligent’,⁴⁵ there will be a significant area of exclusive operation for the s 319B offence. In part, this is because not every culpable failure to control will be grossly negligent and, in part, because the two considerations are legally quite unrelated. Although the two questions are likely to require consideration of the same factors, the High Court has held that it is appropriate to consider the question of dangerousness in isolation from that of negligence in cases concerning dangerousness.⁴⁶

⁴⁰ In Victoria, see ss 318 and 319 of the *Crimes Act 1958* (Vic) covering causing death by culpable or dangerous driving. These offences are a paradigm example of statutory homicide offences that apply to conduct which otherwise would be likely to fall under the manslaughter umbrella.

⁴¹ This is very similar to the differences between dangerousness and negligence discussed in *King v The Queen* [2012] HCA 24 (20 June 2012) and *McBride v The Queen* (1966) 115 CLR 44; cf *Callaghan v The Queen* (1952) 87 CLR 115.

⁴² *Crimes Act 1958* (Vic) s 5; *Nydam v The Queen* [1977] VR 430.

⁴³ *Nydam v The Queen* [1977] VR 430.

⁴⁴ Explanatory Memorandum, Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011 (Vic) 4.

⁴⁵ *King v The Queen* [2012] HCA 24 (20 June 2012); *McBride v The Queen* (1966) 115 CLR 44.

⁴⁶ *King v The Queen* [2012] HCA 24 (20 June 2012); *McBride v The Queen* (1966) 115 CLR 44.

The approach taken by the courts to offences of causing death by dangerous driving shows that the standard to be applied when assessing liability for the s 319B offence does not involve a determination of negligence, criminal or otherwise. The statutory standard expressly stated in s 319B is whether ‘a reasonable person would have realised that [the] failure [to keep the dog under control] would expose the victim or any other person to an appreciable risk of death’. This is different from, and less stringent than, the common law requirement that the failure be a gross departure from the general standard of care.

Section 319B can be seen as imposing a more onerous standard on the owner or handler of a prescribed dog than is imposed on other dog owners or handlers. A person who owns or is in charge of a non-prescribed dog must be culpably negligent before they can be convicted of manslaughter where that dog kills someone. A person who owns or is in charge of a prescribed dog need only fail to control in circumstances where a reasonable person would recognise that failure would expose another person to appreciable risk of death. The lower threshold for prescribed dogs appears to be justified on the basis that the owner or handler should be ‘on notice’ as regards the particular risk posed by that dog. Owners and handlers of non-prescribed dogs are not similarly on notice, and are not held to such a high standard. The existence of s 319B as a separate offence also means that people who fail to control their prescribed dogs, or prescribed dogs under their control, resulting in the death of another are more likely to be convicted of a homicide offence than people who manage other potentially dangerous things with less than an acceptable level of care. A person who fails to take reasonable care when using a firearm, for example, and thereby causes death may be convicted of manslaughter, but only if the failure to take care can be said to be grossly negligent.⁴⁷ By creating a specific offence with a reasonable person test different from the objective test of gross negligence, the Victorian Parliament has placed the failure to control prescribed dogs in a special category of culpability shared with dangerous or culpable driving.

VI DOG A PRESCRIBED TYPE

A universal problem arising from breed-specific legislation is determining whether a particular dog is or is not a member of a restricted or prescribed breed.⁴⁸ This article is concerned with the attribution of fault as a result of a dog’s categorisation as being a dangerous, menacing or restricted breed dog, rather than the wisdom of enacting breed-specific legislation.⁴⁹

⁴⁷ Liability for manslaughter may also attach to such a case by operation of the doctrine of unlawful and dangerous act manslaughter: see, *R v Nguyen (Ruling No 2)* [2010] VSC 442.

⁴⁸ There is a wealth of scholarship on this question, and it is not one I propose to discuss in this article: See, Devin Burstein ‘Breed Specific Legislation: Unfair Prejudice & (and) Ineffective Policy’ (2004) 10 *Animal Law* 313; Safia Gray Hussain ‘Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won’t Solve the Dangerous-Dog Dilemma’ (2006) 74 *Fordham Law Review*, 2847; Bruce McKenna, ‘Breed Discrimination Laws: So Wrong in So Many Ways’ (2011) 58 *Federal Lawyer*, 4; Julie A Thorne ‘If Spot Bites the Neighbor, Should Dick and Jane go to Jail?’ (1988) 39 *Syracuse Law Review* 1445, among many others. The debate is particularly vigorous in the United States. In Victoria there is a detailed gazetted standard for restricted breed dogs, almost exclusively given over to pit bull terriers: Victoria, *Standard for Restricted Breed Dogs in Victoria*, No S 283, 1 September 2011. Despite the detail in the gazetted standard, problems with its application remain. For example, see *Dundas v Monash City Council* [2012] VSC 578 (29 November 2012), in which Kaye J overturned two council determinations that particular dogs were pit bulls and held that there must be a ‘a substantial, or high, level of correspondence between the material characteristics of the dog and the criteria specified in the Standard’: at [120]. That said, the problem is one of correct application of a detailed standard by councils and courts, rather than an amorphous assessment of whether a dog is a particular breed or not.

⁴⁹ It is acknowledged that some of the criticisms of the Victorian offences are very similar to general criticisms of breed-specific legislation, particularly with regard to the need to assess the risk posed by a particular dog.

The offences distinguish between the owner of a dog and a person who is not the owner, but who is in charge of the dog at the relevant time. For the most part the offences are structured in the same way regardless of who is in charge of the dog, but there is an extra element where the person in charge of the dog is not the owner: recklessness with respect to status as a prescribed dog.⁵⁰ The purpose of this additional fault element is to exclude from the ambit of liability a person who is ‘unaware of the classification or status of the dog at the end of their leash’.⁵¹ The presence of this fault element is an acknowledgement that in some cases, the new offences may operate in a very harsh manner. It is a further objection to these offences that this requirement that the person in charge of the dog at least be reckless about the dog’s status does not extend to the owner of the dog. While it is less likely that the owner of a dog will be unaware of its status, it is not unthinkable. Particularly, the owner of a dog may be unaware that the dog is of a restricted breed.⁵²

The limited scope of the legislation in relation to prescribed dogs is somewhat problematic. It requires that the dog has previously been declared dangerous or menacing, or that it has been found to be of a restricted breed. An assessment that the dog is of a restricted breed may have been made previously by a council, or on the occasion of trial by the Court. If the dog does not fall within one of these categories, there can be no liability for the ss 319B and 319C offences. As was demonstrated in *Dundas v Monash City Council*,⁵³ the application of the gazetted standard may not be as straightforward as that standard’s high level of detail might suggest. Most dogs will not fall within the area of operation of ss 319B and 319C. Where a dog that is not a prescribed dog causes death, any charge brought must fall under the previously existing law of Victoria, whether as a form of manslaughter or one of the specific but much less serious offences in the DAA.⁵⁴ There may be no difference in the level of culpability actually demonstrated by the owner of a non-prescribed dog and a prescribed dog, but only the owner of the prescribed dog stands potentially liable under ss 319B and 319C.

It is acknowledged that limiting the application of the offences to dogs falling within the three prescribed types serves to exclude the majority of dog owners from potential liability for these serious offences. This restriction is similar to the requirement discussed above, that failure to control the dog causes death or the endangerment of life. Its purpose is to exclude from the operation of the legislation all but the most culpable instances of failing to control a dog. Further, it can be argued that requiring dogs to which the section applies be prescribed effectively places the owners of those dogs on notice should anyone be killed or life endangered. The notice argument is strengthened by the distinction between owners and others in charge of the dog in relation to fault for the status of the dog because a person, not being the owner, must be proved to have been reckless with respect to the status of the dog as a prescribed dog. Even having regard to this consideration, it is argued that confining the legislation to the three classes of prescribed dogs is unnecessary when proper regard is had to the objective standard at the heart of the offences.

⁵⁰ *Crimes Act 1958* (Vic) ss 319B(2)(a)(iii) and 319C(2)(b)

⁵¹ Explanatory Memorandum, Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011 (Vic) 4.

⁵² Questions of liability become quite thorny here. Whether a dog is a restricted breed, dangerous or menacing dog is a question at least in part, if not entirely, of law. Mistakes about law, no matter how reasonable, cannot defeat liability: *Ostrowski v Palmer* (2004) 218 CLR 493. Dangerous or menacing dog needs for an order to be made, in which case the owner is likely to know. All three classes are difficult to register, and there is no way a moderately prudent dog owner *should* be unaware that his or her dog falls into one of the three classes. That said, is the distinction justified?

⁵³ [2012] VSC 578 (29 November 2012)

⁵⁴ These offences are considered below under the heading ‘Comparable Law’.

Parliament obviously sought to confine the new offences to deaths caused by dogs which either had a history of aggression (dangerous and menacing dogs) or which should be viewed with caution because of general perceived characteristics of the breed (restricted breed). The fact that the legislative amendments only apply to dogs falling within one of these three classes acts as a limitation on the scope of potential liability. Presumably, Parliament has taken the view that it would be unduly harsh to expose to criminal liability owners or handlers of dogs that had never displayed any tendency towards dangerous or menacing behaviour in the event that such a dog escaped the owner's control and caused the death of another person. This is echoed in the need to prove knowledge that the dog is a prescribed dog where the person in question is not the owner.

This restriction is unnecessary and inconsistent with the purpose of the legislation. It is unnecessary because the dog's history, temperament and breed are all matters that should be considered by operation of s 319B(1)(c) and (2)(c), and the need for an objective assessment of risk to life in s 319C. Whether a reasonable person would realise that failure to keep a dog under control would expose others to an appreciable risk of death, or endanger life, will obviously depend on factors specific to that dog, such as temperament, history and breed characteristics: for example, a Rottweiler obviously poses a greater risk than a Chihuahua. It is this reasonableness requirement which also, in part, renders the limitation inconsistent with the purpose of the new offences. If the central question is one of adequacy of control and the prospect of death being caused, the breed of dog or its status as dangerous or menacing ought not matter, at least as a precondition to the imposition of liability. It is an artificial constraint on a legislative instrument directed at preventing deaths caused by a failure of dog owners to control their dogs.

By way of analogy, dangerous or culpable driving causing death is not confined to certain types of motor vehicles.⁵⁵ These are not offences that can only be committed in a V8 car, or a motorcycle with an engine capacity greater than 500CC, for example. They are not offences that require proof the driver had previously driven dangerously. What must be investigated is the manner of driving in a particular case: did that driving depart so far from the relevant standard as to amount to dangerous or culpable driving? The type of vehicle used in the commission of the offence will be relevant to an assessment of dangerousness, but is not a precondition to liability. In the case of dogs, the relevant question should be whether a reasonable person would recognise that a failure to control the dog would expose others to an appreciable risk of death. The dog's nature, as partially reflected in its designation as a dangerous or menacing dog, or restricted breed, is obviously a relevant consideration in answering this question, but should not be set up as a precondition to liability. The enquiry should be one directed towards the reasonably apparent risks posed by failure to control a particular dog in particular circumstances.

⁵⁵ *Crimes Act 1958* (Vic) ss 318–319.

VII SECTION 319B OVERVIEW

There is nothing in the legislation to suggest that any fault on the part of the owner is required in any way for the offence to be made out. It will be sufficient for conviction if the prosecution is able to prove that the owner or person in control of a prescribed dog failed, in some way, to maintain control of that dog, that failure resulted in the death of another person, and a reasonable person would recognise that failure would expose others to an appreciable risk of death. There is limited scope for a defence of reasonable mistake of fact, which will only be available where the defendant was reasonably mistaken about the fact the dog was not under control.

The central objection to the offence as currently framed is that it does not require proof of fault with respect to the dog being out of control. The defendant will be held liable for circumstances of which he or she may quite reasonably have been unaware. In such a case reasonable mistake of fact may afford no defence, as unawareness, no matter how reasonable, is likely to be characterised as ignorance rather than mistake.⁵⁶

VIII SECTION 319C

The main difference between the offences created by ss 319B and 319C is the result. One offence requires actual harm (death) to result, while the other needs only the risk of that harm to be created. Additionally, s 319C is not subject to the same objections in relation to fault for failure to control as s 319B.

Section 319C provides for a compound physical element consisting of conduct (failing to control) that produces a result or state of affairs (dog is out of control). Consideration of control as a physical element may differ from that required for s 319B. Section 319C refers to a person who 'recklessly engages in conduct so that the dog is not under control'. This formulation expressly requires that there be conduct, something absent from s 319B. This may mean that s 319C applies to a narrower range of incidents than s 319B, which would apply in circumstances where there is no conduct at all on the part of the defendant.

Section 319C expressly requires recklessness with respect to the conduct that causes the dog not to be under control.⁵⁷ It is unclear whether it also requires recklessness with respect to the fact that the lack of control places another person in danger of death. If the provision is to be interpreted consistently with the offence of reckless endangerment of life contained in s 22 of the Act, then this will be required. Section 22 provides a split objective/subjective approach to the question whether conduct endangered, or may have endangered, life. The prosecution must prove that a reasonable person engaging in the same conduct as the defendant would recognise they had endangered the life of another, and also that the defendant foresaw that engaging in that conduct would probably endanger the life of another.⁵⁸ Such a reading is open for s 319C, and would be consistent with the approach taken to s 22 by the Victorian courts.

⁵⁶ *Proudman v Dayman* (1941) 67 CLR 536. The defence of act of another may apply where the defendant was reasonably unaware the dog was out of control, but requires that there be an identifiable act from someone else to produce this state of affairs. There are also issues concerning voluntariness in relation to the dog being out of control. The intersection between omissions and voluntariness in this context is blurry.

⁵⁷ *Crimes Act 1958* (Vic) s 319C(1), (2)(c).

⁵⁸ *R v Abdul-Rasool* [2008] VSCA 13 (12 February 2008), [19] (Redlich JA, Chernov JA and King AJA concurring); See also, *R v Nuri* (1990) 49 A Crim R 253, 256 (Young, Crockett and Nathan JJ).

However, such a reading would render this offence redundant, as it would be entirely subsumed within the existing s 22. Indeed, it would not only be entirely subsumed within s 22, but also subject to additional elements not required to be proved in order to secure a conviction for the s 22 offence, being proof that the dog was a prescribed dog, and that the person (if not the owner) was reckless with respect to the dog's status. Section 319C is better read as requiring only that the person recklessly engage in the conduct that results in the dog being out of control, coupled with an objective assessment that life has been endangered. That is, once the dog is out of control due to the defendant's recklessness, he or she is liable for all reasonably foreseeable risks to life, regardless of whether he or she actually foresaw any risk eventuating. It appears that the recklessness in this offence will go to whether the dog was under control, not whether life will be endangered. This seems to differ from the reckless endangerment offence, which requires intentional conduct and recklessness with respect to the fact that life will be endangered by that conduct. Construed this way, the offence will cover those who did not realise their conduct endangered life.

The differentiation in penalty between the s 22 offence and s 319C offence is also relevant to the question of construction. Section 22 provides for a maximum penalty of imprisonment for 10 years. Section 319C provides for a maximum penalty of imprisonment for five years. The lower the penalty, the more likely a court will be to construe a provision as not requiring proof of subjective fault.⁵⁹

One area where s 319C may be quite useful is the situation where failure to control a prescribed dog results in injuries to another person. The infliction of injury may serve as evidence that life was, or may have been, endangered. However, this will not cover every situation in which failure to control a prescribed class of dog results in injury. There may be no risk to life, though injury was an obvious potential outcome. This may be seen as a further instance of the new offences being confined to the worst class of possible cases. Most dog attacks will not result in death, nor will they endanger life.

IX COMPARABLE LAW

There are numerous offences already enacted in Victoria that may cover failure to control a dog resulting in death or injury. This is also the position in other Australian jurisdictions. Existing offences of general application will likely apply in almost any case in which ss 319B or 319C could be invoked.

All Australian jurisdictions other than South Australia provide general offences of causing harm (of varying degrees) through negligence.⁶⁰ In each of these jurisdictions, negligence must be gross for criminal liability to attach. New South Wales has a specific offence of causing dogs to attack where grievous bodily harm results.⁶¹ This offence is better seen as a specific form of assault, rather than an offence relating to negligence or failure to control a dog.

⁵⁹ *He Kaw Teh v The Queen* (1985) 157 CLR 523.

⁶⁰ *Crimes Act 1900* (ACT) s 25; *Criminal Code* (NT) s 174E; *Crimes Act 1900* (NSW) s 54; *Criminal Code* (Qld) ss 320, 328; *Criminal Code 1924* (Tas) s 172; *Crimes Act 1958* (Vic) s 24; *Criminal Code* (WA) s 304.

⁶¹ *Crimes Act 1900* (NSW) s 35A.

It can be argued that the Victorian offence of causing harm through gross negligence will cover the situation where a person fails to control *any* dog and that dog causes harm, as long as that failure amounts to gross negligence. In that sense, there is no need for a specific offence relating to harm caused by negligent failure to control a dog. This argument could also be put for causing death. Negligent manslaughter covers that situation, and unlawful dangerous act manslaughter may also apply if there is an underlying offence of failing to control a dog, and that offence is one which can be characterised as ‘unlawful’ for the purposes of unlawful dangerous act manslaughter.⁶² The difference between criminal negligence and the objective standard provided for in ss 319B and 319C draws a distinction between the new offences and those that already exist. However, it does not provide a particularly satisfactory answer as to why the offences are required in the first place.

All jurisdictions other than Tasmania have minor offences of allowing or encouraging dogs to attack.⁶³ For the most part these offences are punishable by fine only, although some jurisdictions provide for relatively short terms of imprisonment. Penalties may increase where the dog in question is of a prescribed type, or where the attack results in some level of actual harm to the victim.

The Griffith Code states have an offence similar to negligent manslaughter, being the failure to exercise a proper standard of care in relation to dangerous things.⁶⁴ This offence most certainly can apply in relation to fatal dog attacks, but again requires a high degree of negligence.⁶⁵

The DAA contains offences which cover attacks on humans or other animals by dogs that are not prescribed dogs.⁶⁶ These offences are punishable by fine only, except where it is shown that death or serious injury resulted from the attack and the dog was a dangerous dog or restricted breed, in which case the maximum penalty is imprisonment for six months. This penalty applies both to the owner and any other person in apparent control of the dog.⁶⁷

The real objection to the new offences is to the disparity in maximum penalty between the offences in ss 319B and 319C and those offences contained in s 29 of the *Dangerous Dogs Act 1994* (Vic). That a fatal attack by a dog which is not in one of the three prescribed categories is punishable by fine only, whereas a fatal attack by a prescribed dog may attract a sentence of up to 10 years imprisonment, is so disproportionate as to amount to a serious

⁶² As discussed above at footnote 14, unlawful dangerous act manslaughter may only be available where the underlying offence involves an act, not an omission.

⁶³ *Domestic Animals Act 2000* (ACT) s 51: 50 penalty units; *Companion Animals Act 1998* (NSW) s 17: 200 penalty units or imprisonment for two years in the case of a dangerous or restricted dog that has bitten a person, 100 penalty units or imprisonment for six months in the case of a dangerous or restricted dog, and 20 penalty units for any other dog; *Summary Offences Act* (NT) s 75A: \$5,000 fine; *Animal Management (Cats and Dogs) Act 2008* (Qld) s 195: 300 penalty units if death or grievous bodily is caused, 50 penalty units if bodily harm is caused, and 20 penalty units in any other case; *Dog and Cat Management Act 1995* (SA) s 44: \$10,000 fine or imprisonment for two years, aggravated if the dog is dangerous or of a prescribed breed, in which case the maximum penalty is doubled; *DA Act* s 28: 120 penalty units or imprisonment for 6 months; *Dog Act 1976* (WA) s 33D(2): \$10,000 fine and imprisonment for 12 months.

⁶⁴ *Criminal Code* (Qld) s 289; *Criminal Code* (WA) s 266.

⁶⁵ *Pacino v The Queen* [1998] WASCA 335 (14 December 1998); Ian Macfarlane ‘R v Pacino: Extending the Limits of Criminal Negligence?’ (1998) 5 *Murdoch University Electronic Journal of Law* 9.

⁶⁶ *DA Act* s 29(1)–(8), which specifies eight separate offences depending on the class of dog, what the dog does (attacks or bites as opposed to rushes at or chases), whether the person is the owner or another person in apparent control of the dog, and the level of harm sustained by the victim.

⁶⁷ *DA Act* s 29(1)–(2).

injustice. It is true that the offences in the Act have different elements from those in s 29(3) and (4) of the *DAA*, particularly the reasonableness standard, but they are not so different as to make the Act offences 20 times more serious.⁶⁸

X CONCLUSION

In response to the death of a young child, the Victorian parliament passed two separate offences that extend the reach of the criminal law to dog owners who fail to take adequate precautions to ensure their dangerous, menacing or restricted breed dogs are under control. Neither offence requires full subjective fault, and the homicide offence contained in s 319B requires no subjective fault at all where the defendant is the owner of the dog. Section 319B is best compared with offences relating to causing death by the dangerous use of a motor vehicle, in that it renders a defendant liable for a homicide offence carrying a heavy maximum penalty without any proof of subjective fault, and with a lower threshold of culpability than gross negligence required.

The offences suffer from being both too broad and too narrow. Imposing liability for the actions of a dog on a person without proof of subjective fault, or even of any voluntary conduct in the case of s 319B, is too harsh. On the other hand, limiting the offence to the three categories of prescribed dog means that equally culpable conduct from those in charge of other dogs will not be captured by the new offences. Further, the requirement that death result or life be endangered means that equally culpable conduct from those in charge of prescribed dogs will avoid sanction based on an outcome for which no fault needs be proven. The attribution of liability should not turn solely on proof of a prohibited outcome, regardless of how serious that outcome may be.

⁶⁸ Ashworth, above n 8, 37. While comparison of maximum penalties is a somewhat inexact means of ranking the relative seriousness of offences, it does give some insight.

BOOK REVIEW

LAW AND THE QUESTION OF THE ANIMAL: A CRITICAL JURISPRUDENCE YORIKO OTOMO AND ED MUSSAWIR (EDS)

ROUTLEDGE, 2013, ISBN 9870–415–68350–0

This new volume is a welcome addition to the *Law, Justice and Ecology* series published by Routledge. As the editors, Yoriko Otomo (School of Oriental and African Studies, University of London) and Ed Mussawir (Law School, Griffith University) note, there has been a striking growth in interest in the area of animal law. This has led to the expansion of literature in the field, much of it concentrating on an exploration of the laws which govern animals or treatments that advocate strongly for animal rights and welfare. In contrast, this book ‘introduces a somewhat different voice to the field’¹ by providing a theoretical analysis with, as the title suggests, a focus on jurisprudence. In doing so the book ‘seeks to fill a significant gap in the academic material dealing with the emerging discipline of animal law as well as the philosophical and critical theoretical engagement with the category of ‘the animal’.’²

The theoretical focus of the book is introduced by the editors in Chapter 1, and is facilitated by its organisation into three themes: genres, cases and habitats. In *The animal protagonist: representing ‘the animal’ in law and cinema*, Connal Parsley addresses human–animal relations and the representation of animals in the medium of cinema. He notes that ‘modern law and cinema are both important sites for the inheritance of a certain tradition of the representation of life, and particularly animal life towards the production of a specifically human form of life.’³ He notes that ‘[b]etter care for animals is now intimately a question of the extension of the person–rights paradigm to more and more forms of life.’⁴ In Chapter 3, Piyel Haldar explores some circumstances in which humans and non-human animals are treated equally: where they are both treated with a ‘lack of dignity that is based on the disavowal of the intellect.’⁵ The author uses the device of the witness giving evidence to further explore this area, stating that it is ‘only by rendering the human to the status of animal that the law is able to measure the very veracity of testimony.’⁶

Cressida Limon, in Chapter 4, considers the patentability of life and ‘the concept of invention... reconsidered in light of the invention of animals’.⁷ She raises the issue of the tension between the patentability of inventions versus natural reproduction. Limon notes the

¹ Yoriko Otomo and Ed Mussawir (Eds), *Law and the Question of the Animal: A Critical Jurisprudence*. (Routledge, 2013) 1.

² Ibid 9.

³ Ibid 16.

⁴ Ibid 29.

⁵ Ibid 36.

⁶ Ibid.

⁷ Ibid 55.

acceptance of biotechnological reproduction of animals but the exclusion of humans as patentable subject matter as a further example of the separation of human and non-human living beings. She usefully summarises the issues surrounding the point in time at which a human embryo comes into existence and the ethics of transgenic animal production, focusing on the ‘themes of invention and biological reproduction’.⁸ Limon points to inconsistencies between the patenting of transgenic non-human animals and the ban on patents of human reproduction.

In *Chimpanzees in court: what difference does it make*, one of the most readable contributions in the book, Cimea Barbato Bevilaqua explores ‘non-human beings as subjects of rights’⁹ through litigation involving chimpanzees. She examines these court cases from the perspective of challenging the concept of animals as things. Several arguments are advanced, including that chimps ‘possess the supposedly essential qualities that constitute and distinguish the human subset of entities encompassed by the legal category “person”’.¹⁰ This contribution thus addresses the question of ‘who are the living beings that can be considered subjects of rights and why’,¹¹ concluding with the conundrum of recognising that animals are not ‘things’, but also that they are not ‘human thus creating “another difference”’.¹² Chapter 6, by Ed Mussawir, examines another critical legal issue, legal liability for the damage caused by animals. He considers negligence and, in particular *scienter*, by which the quality of being an animal is ‘the element that may legally define its wrongfulness’.¹³ Civil liability for animals is therefore explored as another ‘approach to the elusive technical meaning that an animal has in jurisprudence.’¹⁴

This consideration of animals before the law is complemented by Chapter 7, *Dressing the sow and the legal subjectivation of the non-human animal*, in which Victoria Ridler touches on the animal trials of the Middle Ages before exploring other instances where animals have been personified in law. She notes the offensiveness of categorising non-human animals as property, which fails ‘to reflect our moral sentiments’ and pre-supposes ‘a hierarchy ... in which the human animal held *dominium* over all other beings’.¹⁵ In Chapter 8, Dinesh Joseph Wadiwel examines the history of whipping of humans by humans (eg, slavery and military punishment) and the arguments put forward to support its continued use in horse-racing (ie, the lower sensitivity of animals and/or the lesser significance of their suffering).¹⁶ He opines that in the context of horse-racing it is a ‘regulated form of violence’¹⁷ and ‘sovereign domination’.¹⁸ This issue is explored further with the author concluding that ‘disarmament of human sovereignty is as important as recognition of animal sovereignties’.¹⁹

The book then turns to ‘place’ with Marc Trabsky, in *Law in the marketplace*, exploring another form of violence on animals – the slaughterhouse – through a spatial history of the Queen Victoria Market premises in Melbourne. This site has been used as a human burial

⁸ Ibid 56.

⁹ Ibid 75.

¹⁰ Ibid 76.

¹¹ Ibid 77.

¹² Ibid 85.

¹³ Ibid 96.

¹⁴ Ibid 99.

¹⁵ Page 113.

¹⁶ Ibid 119.

¹⁷ Ibid 117.

¹⁸ Ibid 120.

¹⁹ Ibid 129.

ground, a slaughterhouse and later as a place for trade of animal products. Andreas Philippopoulos-Mihalopoulos, in *The normativity of an animal atmosphere*, explores a conception of animal law through the study of nomadic shepherds and their flocks, and 'hunger'.²⁰ In the final chapter, Yoriko Otomo explores animals as endangered species, common heritage and a common concern. The author contends that current international environmental law efforts to conserve endangered species enable 'the commodification of all remaining animal life that has not been domesticated'.²¹ Significantly, Otomo draws attention to the incongruence of current legal frameworks which at once recognise biodiversity as having marketable true value as well as priceless intrinsic value.

The volume thus covers a variety of issues from an equally diverse range of authors and perspectives. These topics range from animal rights and welfare issues, to sovereignty as an alternative to those approaches; animals as the object and subject of law, invention and commodification, and animals before the law. A key theme running through the volume, and a gap which the book seeks to fill, is the animal rights movement's neglect of jurisprudence. In this sense, the book is not what would traditionally be expected of a text on animal law but this appears to be precisely what the editors intended. The book does address animal rights and welfare issues by exploring case studies of animals as property and their treatment as recipients of welfare concerns. The collection, however, goes much further by providing a range of contributions addressing theoretical, philosophical and ethical foundations of animal law of importance now and for the future. In particular, it explores the link between the lack of recognition of animals as the subjects of rights and issues surrounding humans being given such rights.

This book no doubt makes an important contribution to the field of animal law. The only criticism relates to the readability of the volume. Despite each chapter being of manageable length, several are quite dense. This is unfortunate as it will make parts of the book inaccessible to broad audiences including those unfamiliar with the field. However, this is not uniform and other chapters, particularly those in the middle of the book, are more readable. The volume may have benefited from some early chapters explaining the underlying concepts and critical issues in the field for those new to the area of animal law.

Nevertheless, by exploring issues in animal law from a variety of, and in some cases novel, perspectives this collection makes a significant contribution to the literature in this area. The book includes highly theoretical and philosophical discussions, complemented by thought-provoking case studies. The style is likely to suit philosophers rather than practitioners of animal law, of which, undoubtedly, there is a growing number.

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²⁰ Ibid 156.

²¹ Ibid 167.