CHANGING THE LEGAL STATUS OF NON-HUMAN ANIMALS:
AN ARGUMENT FOR THEIR TRANSITION FROM PROPERTY TO LEGAL PERSONHOOD

KENDRA FREW

Bachelor of Laws (LLB)
Murdoch University

This thesis is presented for the Honours degree of Bachelor of Laws of Murdoch University

November 2014
DECLARATION OF ORIGINALITY

I, Kendra Frew, hereby declare that this thesis is my own work and effort and that it has not been submitted anywhere for any award. Where other sources of information have been used, they have been acknowledged.

Kendra Frew
Dated: 3 November 2014
DEDICATION

In Memoriam of Sarah Meddin

This thesis is written in honour of fellow Murdoch University law student, Sarah Meddin. I did not know her personally, however, when I was awarded the Sarah Meddin Memorial Prize and discovered her story I was truly inspired by her commitment to equality, human rights and justice. I know that if we had met prior to her tragic passing we would have had much in common, especially our passionate fight for justice for those (both human and non-human) who are powerless in our community. I send my love and support to her mother, Barbara Meddin, and hope that she feels the spirit of her daughter emerge from the pages of the following thesis.

To all non-human animals

May one day your lives be your own
ACKNOWLEDGEMENTS

I would like to acknowledge my supervisor Robyn Honey for her excellent advice and assistance with the structure and argument of my thesis. Her guidance was invaluable.

I would also like to thank both of my additional supervisors: Steve Shaw for his superior editing skills and his ongoing interest in my topic and Anne Schillmoller for her thought provoking questions and her significant expertise in the field of Animal Law.

My thanks also go to the brilliant American legal scholar Professor Gary Francione who was the first animal rights advocate that spoke to both my heart and my head. His words inspired me to write this thesis.

Finally, I wish to thank my family (in particular my partner Greg Browning and my sister Ashley Frew) and all of my wonderful friends for their support and encouragement throughout this process. I could not have done it without them.
ABSRACT

In the West, it is a well-established legal notion that non-human animals are classified as the personal property of humans. This classification allows humans to use non-human animals as a resource. A non-human animals’ property status means they have no legal capacity or standing to sue and thus cannot protect their interests in court. This thesis argues that non-human animals are sentient beings who deserve equal consideration of their interests, hence they should not be treated like inanimate objects or mere property. In order for this to occur, the legal status of non-human animals must change from a classification of ‘property’ to a classification that more closely resembles ‘personhood.’ As legal ‘persons,’ non-human animals would be extended the same rights as humans, particularly the fundamental right not to be treated as the resource of another. This thesis reviews both primary and secondary sources, particularly those from Western countries outside of Australia, such as the United States, to determine how non-human animals may make this transition from within a legal context. This thesis identifies that an important first step is to abolish the property status of non-human animals. Due to the significance of such a change, removing the property status of animals can only be realistically achieved through incremental steps. Expanding the standing doctrine to include non-human animals so that they may sue in their own right is also a necessary legal change. In addition, non-human animals’ rights, or ‘dignity,’ must be given constitutional force and the resulting legislation must recognise their interests, minus any exemptions or exclusions that might diminish those interests. The judiciary, rather than being precedent bound, ought to embrace the flexibility of the common law and make decisions which incorporate modern science and changing societal values towards animals. Adopting these legal reforms will assist non-human animals’ transition from ‘property’ to ‘persons’ under law.
# CONTENTS

**I** INTRODUCTION .......................................................................................................................... 1

**II** CHAPTER 1: LEGAL STATUS OF NON-HUMAN ANIMALS ......................................................... 8
   A Non-Human Animals as Property ................................................................................................. 8
      1 The Origins of the Property Status of Animals - from a Western Perspective ........................................ 8
      2 Non-Human Animals Classified as ‘Things’ ................................................................................. 9
      3 The ‘Special’ Status of Companion Animals ............................................................................ 10
   B Human Primacy over Non-Human Animals ............................................................................... 11
   C The ‘Property Paradigm’ ............................................................................................................ 12
   D Protection in Property ................................................................................................................ 13
   E Why Non-Human Animals Should Not Be Classified as Property ............................................ 15
      1 Property Has Moral Limits ........................................................................................................ 15
      2 Non-Human Animals Are More than Inanimate Objects .......................................................... 18
      3 Equal Consideration: Like Cases Ought to Be Treated Alike ................................................. 20
   F Conclusion ................................................................................................................................... 22

**III** CHAPTER 2: LEGAL STANDING FOR NON-HUMAN ANIMALS ........................................... 23
   A Do Non-Human Animals Have Standing? .................................................................................. 23
      1 No Legal Standing in Their Own Right .................................................................................... 23
      2 Standing on Behalf of Non-Human Animals ........................................................................... 24
   B Standing for Artificial Persons ................................................................................................... 26
   C Conclusion ................................................................................................................................... 27

**IV** CHAPTER 3: LEGAL PERSONHOOD FOR NON-HUMAN ANIMALS ...................................... 28
   A Legal Personhood Defined ........................................................................................................... 28
   B Theories of Legal Personhood .................................................................................................... 30
      1 Habeas Corpus for Non-Human Animals .................................................................................. 30
      2 Guardianship ............................................................................................................................. 30
      3 Equitable Self-Ownership ......................................................................................................... 31
      4 Citizenship for Animals ............................................................................................................ 32
      5 Autonomy Equals Personhood .................................................................................................. 34
<table>
<thead>
<tr>
<th>C</th>
<th>Criticisms of Legal Personhood</th>
<th>35</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>‘Mere tinkering’ with Property Status</td>
<td>35</td>
</tr>
<tr>
<td>2</td>
<td>The Abolitionist Agenda</td>
<td>35</td>
</tr>
<tr>
<td>3</td>
<td>Human Rights vs Non-Human Animal Rights</td>
<td>36</td>
</tr>
<tr>
<td>4</td>
<td>A Feminist Critique of Legal Personhood</td>
<td>38</td>
</tr>
<tr>
<td>5</td>
<td>‘Personhood’ is an Inappropriate Lexis for Non-Human Animals</td>
<td>39</td>
</tr>
<tr>
<td>D</td>
<td>Conclusion</td>
<td>40</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>V</th>
<th>CHAPTER 4: MAKING THE TRANSITION TO LEGAL PERSONHOOD</th>
<th>41</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Is Legal Personhood Attainable for Non-Human Animals?</td>
<td>41</td>
</tr>
<tr>
<td>1</td>
<td>Flexibility of the Common Law</td>
<td>41</td>
</tr>
<tr>
<td>2</td>
<td>Legal Personhood for Non-Human Entities</td>
<td>43</td>
</tr>
<tr>
<td>B</td>
<td>Legal Requirements to Make the Transition</td>
<td>46</td>
</tr>
<tr>
<td>1</td>
<td>Enlightened Judicial Decision-Making</td>
<td>46</td>
</tr>
<tr>
<td>2</td>
<td>Constitutional Recognition</td>
<td>49</td>
</tr>
<tr>
<td>3</td>
<td>Legislative Change</td>
<td>52</td>
</tr>
<tr>
<td>4</td>
<td>Reconceptualising What Constitutes ‘Property’</td>
<td>54</td>
</tr>
<tr>
<td>5</td>
<td>Abolishing the Property Status through Incremental Steps</td>
<td>55</td>
</tr>
<tr>
<td>6</td>
<td>Expanding the Standing Doctrine to Include Non-Human Animals</td>
<td>56</td>
</tr>
<tr>
<td>7</td>
<td>Economic and Technological Considerations</td>
<td>58</td>
</tr>
<tr>
<td>C</td>
<td>Anticipating Resistance to Change</td>
<td>59</td>
</tr>
<tr>
<td>D</td>
<td>Conclusion</td>
<td>60</td>
</tr>
</tbody>
</table>

| VI | CONCLUSION | 61 |

<table>
<thead>
<tr>
<th>VII</th>
<th>BIBLIOGRAPHY</th>
<th>64</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Articles/Books/Reports</td>
<td>64</td>
</tr>
<tr>
<td>B</td>
<td>Cases</td>
<td>72</td>
</tr>
<tr>
<td>C</td>
<td>Legislation</td>
<td>75</td>
</tr>
<tr>
<td>D</td>
<td>Other</td>
<td>76</td>
</tr>
</tbody>
</table>
I INTRODUCTION

The past few decades have seen the issue of the treatment and use of non-human animals,\(^1\) both domestic and wild, attract vigorous and often heated debate. This thesis intends to extend the debate regarding the use, and more often abuse, of non-human animals beyond that which exists today. Specifically, this thesis will address the legal status of animals as property and demonstrate how their current status prevents them from being anything other than the object of human ownership and control. This thesis contends that nothing less than a classification into something that resembles ‘personhood’ will satisfactorily improve the lives of non-human animals. Put simply, this thesis argues that non-human animals should not be classified as property and instead should be classified as ‘persons’ under law. As ‘persons’, non-human animals should be extended the same rights as humans, including the fundamental right not to be used as a resource or as means to meet human ends. Essentially, this thesis adopts an ‘animal rights’ approach as opposed to an ‘animal welfare’ approach.\(^2\)

For the purposes of this thesis, any reference to the terms ‘non-human animal’ or ‘animal’ will include all sentient beings. Sentience is predicated on a living creature’s ability to experience pain and suffering, along with the ability to seek out pleasure. This thesis will therefore base its test of sentience on whether that being would recoil from painful stimuli or, alternatively, seek out pleasurable experiences to enhance its life. Sentient beings include, for example, an ant that recoils from a flame or a fish that struggles on a hook, as well as a lizard that seeks out the pleasurable heat of the sun on a rock. Therefore, every class of animal, from the largest to the smallest creature that can feel pain or seek out pleasure, is considered sentient for the purposes of this thesis. Consideration of any other ‘human-like’ characteristics is not required to meet the test of sentience. As Bentham puts it in his oft-quoted footnote, ‘the question is not, Can they reason? Nor, Can they talk? but, Can they suffer?’\(^3\) Any reference to a non-human animal will refer to any living being that can feel pain and/or pleasure, no

---

\(^1\) The term ‘non-human animal’ will be used throughout this thesis to reflect the position that we all belong to the animal species, but some of us are of the ‘non-human’ as opposed to the ‘human’ variety.

\(^2\) An ‘animal rights’ position is against the use of animals for any reason whatsoever whereas the ‘animal welfare’ position allows the use of animals so long as they are treated ‘humanely’ and experience as little suffering as possible in pursuit of that use.

matter how ‘like us’ these animals are. Accordingly, ‘humanness’ is irrelevant to the central premise of the argument proposed within this thesis.

The fundamental position of this thesis is that the use of non-human animals cannot be morally justified for any reason. This thesis refutes the widely held assumption that it is appropriate to use animals for food, clothing, sport, entertainment, recreation, protection, labour, medical research\(^4\) and even companionship. This thesis holds that the use of animals for these purposes is unnecessary and therefore unjustifiable. It is acknowledged that many disagree with this premise, some even vehemently, but it is also recognised that some wholeheartedly agree with it. The growing number of well-respected legal scholars and philosophers in this field attest to that fact.\(^5\) Not to mention the animal advocacy movements that are gathering momentum within local communities and also the changing opinions toward better treatment of non-human animals amongst wider society.\(^6\) As former President of the Australian Law Reform Commission, Professor David Weisbrot AM stated, animal protection may just be ‘the next great social justice movement.’\(^7\)

Unfortunately though, those who reject the use of non-human animals comprise the minority, with the majority of the population utilising animals for their own needs, regardless of whether they believe it morally wrong. The global ignorance displayed by the masses to the suffering of animals stems from the fact that the use of animals is so firmly entrenched in our everyday lives. Most people do not give it a second thought or, if they do, they are misinformed of the facts.\(^8\) For instance, from the time a person

\(^4\) There are some very rare exceptions in the case of medical research where animal use is justified, such as using animals to find cures for very serious human illnesses. See further Gary Francione, *Introduction to Animal Rights: Your Child or the Dog* (Temple University Press, 2000) 31-49.

\(^5\) United States university legal scholars such as Professor Gary Francione and Professor Taimie Bryant are two such scholars who will be heavily referenced in this thesis.

\(^6\) The recent protests in Western Australia concerning the Liberal Government’s shark cull policy are an example of the local community’s opposition to the infringement of a shark’s ‘right’ to exist in its natural habitat undisturbed and unharmed. See SBS News ‘Thousands Protests Against WA Shark Cull Policy’ February 1, 2014 <http://www.sbs.com.au/news/article/2014/02/01/thousands-protest-against-wa-shark-cull-policy>. See also Jeff Welty, ‘Foreword - Animal Law: Thinking about the Future’ (2007) 70(1) *Law and Contemporary Problems* 1, where it is held that the ‘explosive growth of the field of animal law provides some evidence that there is momentum for change.’


in our Western culture wakes up in the morning and conducts mundane tasks such as pouring milk on their cereal, or in their coffee or tea, or spreading butter on their toast (which might also accompany their eggs and bacon) they have already participated, most times unwittingly, in an industry - specifically the factory farming industry - which predicates its existence on the use and abuse of non-human animals.

This thesis recognises the significant shift that is required, from a societal perspective, for animals not to be used as a resource. For example, not only would humans need to recognise the inherent value of non-human animals, effectively removing the potential to use animals as a resource, but they would also need to sacrifice current aspects of their lifestyle, and even in some cases their livelihoods, in order to realise such a premise. This would mean giving up eating meat, along with all dairy products, eggs and honey. It also means not wearing wool, fur, leather or any other animal skins and refraining from hunting and fishing activities. Additionally it means not visiting or supporting zoos, circuses, rodeos, horse and dog racing venues, and not owning pets. These sacrifices are often too difficult for the average person which is why the agricultural, fur and animal entertainment and sporting industries still exist. Nevertheless, not using animals is doable as there are humans who have chosen to stop using animals in all aspects of their lives by adopting veganism. Vegans, however,


10 Francione states that ‘there is more suffering in a glass of milk than in a pound of steak.’ See Deb Olin Unferth, ‘Interview with Gary Francione’ The Believer, February 2011 <http://www.believermag.com/issues/201102/?read=interview_francione>


12 In order to produce the massive amounts of honey demanded worldwide, bees are also subject to abusive factory farming practices. See People for the Ethical Treatment of Animals (PETA) ‘Honey: From Factory-Farmed Bees’ accessed September 4, 2014 <http://www.peta.org/issues/animals-used-for-food/animals-used-food-factsheets/honey-factory-farmed-bees/>

13 The Inuit may be the only remaining culture that requires the protection of wearing animal skins to survive, however, this is also changing as modern clothing reaches these isolated people. See Countries and Their Cultures, ‘Inuit’ under ‘Clothing’ accessed September 7, 2014 <http://www.everyculture.com/we/Brazil-to-Congo-Republic-of/Inuit.html>

14 Overfishing is a major global issue with the frightful prediction that ‘if fishing rates continue apace, all the world's fisheries will have collapsed by the year 2048.’ See National Geographic, ‘Overfishing: Plenty of Fish in the Sea? Not Always’ accessed September 14, 2014 <http://ocean.nationalgeographic.com/ocean/critical-issues-overfishing/>.
comprise only a small percentage of the Western world’s total population\textsuperscript{15} which is unsurprising because the majority of people, including the vast number of vegetarians worldwide, still use animals and/or animal products in abundance.

Whilst this thesis recognises the momentous societal shift (along with the utmost necessity of such a shift) that would need to occur for non-human animals to no longer be used as a resource, the societal requirements will not be its main focus. Instead, this thesis will focus on the possible prospects for realising this premise from within a legal context. This, however, will not be an easy task considering the current existence of a legal framework that sanctions the widespread use, and often abuse, of non-human animals. The most obvious and blatant example of legally sanctioned abuse of animals occurs in the case of agriculturally produced animals. Today, humans are consuming more ‘food’ animals than ever before in human history.\textsuperscript{16} According to Francione, in the United States (US) alone, more than 8 billion animals a year are killed for food.\textsuperscript{17} That equates to the slaughter of approximately 23 million animals per day, or 950,000 per hour, or almost 16,000 per minute, or more than 260 every second.\textsuperscript{18} Undeniably these are staggering figures, with the sheer size of the numbers being almost incomprehensible. Unfortunately for food animals, these figures are reflected in many other countries throughout the world which adopt factory farming practices,\textsuperscript{19} including Australia.\textsuperscript{20} Thus, the worth of a food animal is based purely on their value as a resource for humans. The only way this can occur is because non-human animals

\begin{itemize}
\item \textsuperscript{15} The Vegan Research Panel estimate that in 2007 approximately 1% of people were vegan in the US: http://www.imaner.net/panel/statistics.htm#reveal. This also reflects the figures for Australia in 2010: http://www.vegetarianvictoria.org.au/going-vegetarian/statistics-on-vegetarianism.html. It is estimated that less than 1% of people adopted a vegan diet in the UK for the period between 2010 until 2012: https://www.vegsoc.org/sspage.aspx?pid=753. These figures vary though and are difficult to verify as there are many studies which report conflicting results. Nonetheless, it can be concluded that a very small percentage (around 1-2\%) of the Western world’s population have adopted a vegan diet. This, of course, would be higher in Eastern countries, such as India, due to their Hindu religious beliefs.
\item \textsuperscript{17} Ibid 26. These statistics do not include the billions of sea animals killed every year.
\item \textsuperscript{18} Ibid.
\item \textsuperscript{19} According to the \textit{Worldwatch Institute}, factory farming is not an exclusive phenomenon of rich Western countries as many poor developing countries are also adopting these practices. See Danielle Nierenberg, 'Factory Farming in the Developing World' (2003) 16(3) \textit{Worldwatch Magazine} 10.
\item \textsuperscript{20} In Australia, more than half a billion animals are raised for food production. See Australian Bureau of Statistics, ‘Livestock Slaughterings and Products’ \textit{Australian Farming in Brief}, 2013, Cat No 7106.0, Commonwealth of Australia, August 21, 2013 <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/7106.0Main+Features42013>.
\end{itemize}
are the *property* of humans. Of course, it is not only food animals that are property, but all other animals which are the subject of human use.

Chapter 1 of this thesis outlines the origins of the property status of non-human animals, describing how they were classified as ‘things’ under Roman law which could be owned via the simple act of possession. It also addresses the unique position of wild animals which, according to current laws, belong to no one until lawfully captured or killed. The ‘special’ status of companion animals is also discussed to highlight our ‘moral schizophrenia’ when it comes to the treatment of different types of animals.21 This chapter places particular emphasis on the concept of human primacy and the superior position humans believe they hold over non-human animals; a concept which forms the foundation of an animal’s status as property. The concept of the ‘property paradigm’ will be introduced to demonstrate the dominance of human interests (the property owner) over non-human animal interests (the property). To balance these arguments, theories that support the property status of non-human animals will also be recognised in this chapter. This chapter will end with arguments as to why non-human animals should not be considered the property of humans, but rather legal persons in their own right.

The property status of non-human animals not only impacts their use and treatment, but also negates their legal capacity to sue as they do not satisfy the tests of standing; a matter which Chapter 2 of this thesis will explore. To be granted standing, one must first have the capacity to sue which equates to being recognised as a ‘person’ under law. As we know, a ‘person’ has capacity to sue regardless of whether they are a human or non-human (artificial) entity, such as corporations and governments. The ‘humanness’ of the entity is irrelevant so long as they are recognised as ‘persons’ by the courts. The problem for non-human animals is that they are classified as ‘property’ not ‘persons,’ therefore they do not have capacity to sue and hence must rely on humans to represent their interests in court. This representation creates a number of issues for humans, particularly those working in animal welfare organisations, in meeting the tests of standing as they must demonstrate that they have a personal stake

---

21 Francione coined this phrase to identify the profound disparity that humans display not only to the treatment of some animals over others, but between what we say we believe about animals, i.e. that we take their interests seriously, and how we *actually* treat them. See Francione, above n 16, 26-8.
or ‘special interest’ in the case and not merely a concern for the non-human animals they are representing. Chapter 2 delves further into these issues and provides arguments as to how standing can be extended to include non-human animals, just as it does for artificial persons.

Chapter 3 introduces the concept of legal ‘personhood’ as a possible means of removing the status of property of non-human animals. As Francione states ‘[t]o possess the basic right not to be treated as property is a minimal prerequisite to being a moral and legal person.’ Legal personhood is commonly understood to comprise a certain set of rights and obligations which are attached to a ‘person’ defined by law, such as the right not to be treated as the resource of another, or the obligation not to inflict unjustified pain and suffering on another. Chapter 3 will expand on these views and provide both a broad and narrow definition of legal personhood. This chapter will outline the various theoretical manifestations of legal personhood that may apply to non-human animals, such as guardianship, equitable self-ownership, and citizenship, to name a few. This chapter will then highlight the criticisms that these theories have attracted from various commentators, both from within the pro- and anti-animal rights factions. A brief critique of legal personhood from a feminist perspective, along with a short discussion of the term ‘personhood’ as an inappropriate lexis, will complete this chapter.

Chapter 4 will discuss the requirements for a non-human animal to transition from their status as property to a status that resembles, or has the characteristics of, legal personhood from within a legal context. This chapter will achieve this goal in two steps. First, it will address whether legal personhood is attainable for non-human animals. The flexibility of the common law and its ability to grant legal personhood to entities other than humans shows that it is. Second, it will identify the legal requirements of a non-human animal’s transition to legal personhood. These requirements include changes in legislation and constitutional amendments that truly recognise animals and their interests, along with the need for progressive and enlightened judicial decision-making. It also includes reconceptualising what, in fact, constitutes ‘property’ in the 21st Century. This second step also includes a discussion

---

22 Ibid 51 (emphasis in original).
on abolishing the property status of animals and addressing their lack of standing, as well as identifying the economic and technological considerations required to make this legal transition. Throughout this chapter, frequent reference will be made to legal personhood from within an international context, describing how it is dealt with in relation to non-human animals. From these international references the differences, apart from becoming obvious, will provide vital lessons for Australian legislators and courts, especially those that originate from countries considered more progressive in the ‘animal rights’ sphere, such as countries of the European Union. This chapter will adopt these lessons and apply them to the current Australian legal framework in order to develop a legal system which assists non-human animals’ to transition from a classification of property to one of legal personhood.

The methodology and theoretical classification of this thesis is reformist-based, with its primary focus on change from within an Australian legal framework. Whilst this thesis focuses predominantly on legal change, it also reviews change from a multi-disciplinary approach incorporating politics, philosophy, sociology and ethics. The majority of this thesis’ research is sourced from existing secondary sources, including journal articles, books and reputable animal advocate websites. Primary sources are also referenced, with frequently cited case law from the US. The heavy reliance on US case law is due to its abundance and its demonstrable worth in providing pertinent examples of the application of the common law to non-human animals. Unless specifically stated otherwise, all legislation referred to applies within Western Australia (WA). Although the laws of WA are mostly cited, these laws may be deemed, on the whole, representative of the laws from other Australian jurisdictions.
II CHAPTER 1: LEGAL STATUS OF NON-HUMAN ANIMALS

A Non-Human Animals as Property

1 The Origins of the Property Status of Animals - from a Western Perspective

The legal status of animals as the property of humans has remained largely unchanged for the past two thousand years. Its origins lie with the ancient Romans who developed systems of law which have had a significant impact on the way our legal systems in the West have evolved. This is particularly so for the area of property law whereby a person’s legal right to own and control animals as their property, that is, as a ‘natural’ right, is now a long-standing common law tradition. The idea that everything existed for the sake of humans was at the core of these ancient laws and was equally reflected in the religious and biblical testaments of the time. The Stoics embraced this idea and believed that non-human animals were literally made for humans. From their point of view, the savage beasts were created to foster their courage; the singing birds existed to entertain them; the living cows and sheep kept their meat fresh; the lobsters provided food and nifty body armour; and the lice made them adopt clean habits. This human-centric view has prevailed throughout Western history; resulting in the well-established legal notion that non-human animals are the ‘personal property,’ or even the ‘goods,’ of humans.

According to the ancient Romans, non-human animals were able to be acquired via different modes, the most common being *occupatio*, that is, by simply taking possession of it. This applied to any animal that was not, nor ever had been, the object

23 Like Peter Singer stated in his seminal works, *Animal Liberation* (Harper Collins Publishers, 1975) 185, this thesis will focus on the Western world, not because other countries are inferior - which they usually are not when it comes to treatment of their non-human animals - but because Western ideas have spread to most human societies world-wide, whether capitalist or communist, and thus are most relevant and applicable to the topic of this thesis.


27 Indeed, Man was designated by God ‘to rule over the fish of the sea, the fowl of the skies, the cattle, the earth, and all creatures that roam over the earth.’ *Genesis* 1:26, 28.


29 Section 4 of the *Competition and Consumer Act 2010* (Cth) defines animals, including fish, as ‘goods.’ See, eg, *Salter v Lake* [1978] 1 NSWLR 52 where domestic animals were held to be ‘property’; *Elder Smith Goldsbrough Mort Ltd v McBride* [1976] 2 NSWLR 631 where animals were held to ‘fall within the definition of goods’; *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* [2007] FCA 1535 where ‘goods’ under the *Trade Practices Act 1974* (Cth) was held to include animals.

30 Cao, Sharman and White, above n 24, 65.
of ownership, or, if formerly owned, had been abandoned by their owner.\textsuperscript{31} Codified in Roman law, Justinian’s \textit{Institutes} clearly state that ‘[w]ild animals, birds and fish, the creatures of the land, sea and sky, become the property of the taker as soon as they are caught.’\textsuperscript{32} The Romans believed that where something (including a non-human animal) has no owner, it is reasonable that the person who takes it should have it.\textsuperscript{33} This reflects our current laws which provide that animals in the wild belong to no one until lawfully captured or killed.\textsuperscript{34} Specifically, where a wild animal is not protected under laws which cover endangered species, such as ‘pest’ wild animals, and is captured and killed by a human, then it becomes the property of the captor.\textsuperscript{35} The Romans further stipulated that the owner of an animal also owns its offspring as well as the ‘fruits’ of the animal, such as the milk, hair and wool.\textsuperscript{36} Again, this is reflected in our current laws whereby the captor of an animal also owns the ‘eggs, larvae or semen’ and ‘carcass, skin, plumage or fur’ of the animal.\textsuperscript{37} Thus, human ownership of a non-human animal is considerably thorough.

2 \textit{Non-Human Animals Classified as ‘Things’}

The ancient Romans classified law into a trichotomy of persons, things and actions which has continued to prevail under our common law tradition.\textsuperscript{38} As Cao, Sharman and White recount, ‘under Roman law, a person had rights, but a \textit{thing} was the object of the rights of a person.’\textsuperscript{39} At that time, the Romans classified all those beings that they thought lacked free will as ‘things,’ such as women, children, slaves, the insane and non-human animals.\textsuperscript{40} Hence, a non-human animal was a ‘thing’ capable of being owned by a person as their property. Therefore, animals could be bought, sold, transferred, stolen\textsuperscript{41} and killed by their owner.\textsuperscript{42} Wise describes this legal ‘thinghood’

\begin{itemize}
\item \textsuperscript{31} Ibid. This ‘qualified’ right of ownership applies to wild animals, but not to domestic animals who escape from their owners as the property right still resides with the original owner, i.e. the owner maintains an ‘absolute’ right of ownership in the domestic animal. See \textit{Yanner v Eaton} (1999) 201 CLR 351 [80] (Gummow J).
\item \textsuperscript{32} Justinian’s \textit{Institutes} (P Birks and G McLeod, with the Latin text of P Krueger trans, Cornell University Press, 1987) 55-56.
\item \textsuperscript{33} Ibid.
\item \textsuperscript{34} \textit{Wildlife Conservation Act 1950} (WA) s 6. However, under s 22(1) of this Act, until such time when an animal is lawfully taken, property in the animal is vested in the Crown.
\item \textsuperscript{35} \textit{Wildlife Conservation Act 1950} (WA) s 16 where the taking of protected fauna is an offence.
\item \textsuperscript{36} Cao, Sharman and White, above n 24, 66.
\item \textsuperscript{37} \textit{Wildlife Conservation Act 1950} (WA) s 6.
\item \textsuperscript{38} Cao, Sharman and White, above n 24, 64.
\item \textsuperscript{39} Ibid (emphasis added).
\item \textsuperscript{40} Ibid 65.
\item \textsuperscript{41} Ibid.
\item \textsuperscript{42} Mike Radford, \textit{Animal Welfare in Britain: Regulation and Responsibility} (Oxford University Press, 2001) 100-2 quoted in Cao, Sharman and White, above n 24, 77-8.
\end{itemize}
as belonging to an entity which has no capacity for legal rights, and whose interests, if
even exist, are not required to be respected. As Balcombe suggests, ‘when
animals are categorised as “things” they cease to exist as autonomous individuals with
feelings and lives worth living’ and thus humans are free to do with them as they
wish. Even the terms we use when describing non-human animals reinscribes the
notion that non-human animals are mere ‘things,’ such as ‘whaling quotas,’ ‘fish
stocks’ or ‘livestock.’ As Wise succinctly puts it, ‘[l]egally, persons count; things
don’t.’ Therefore, as long as non-human animals remain the property of humans,
they will never count as anything other than things.

3 The ‘Special’ Status of Companion Animals

It is undeniable that companion animals enjoy a ‘special’ status over those animals
who are used for food and/or clothing, or in entertainment or for scientific experiments.
Today, it is not unusual to have a companion animal in the home for which their owners
have expended large amounts of money and time to ensure they are properly fed
(sometimes with meals that are considered gourmet), adequately exercised, amused
(with toys), medically treated when ill/injured and then respectfully buried upon their
deaths. Companion animals are frequently referred to as ‘family members’ and
sometimes are even the subject of custody disputes or identified as the beneficiaries of
large estates. Therefore, it appears that the type of animal, along with the relationship
humans have with that type of animal, is central to the value being accorded to it.

For example, it is not socially acceptable to eat dogs or cats or wear their fur in

43 Steven Wise, ‘The Legal Thinghood of Nonhuman Animals’ (1996) 23(3) Boston College
Environmental Affairs Law Review 471, 472.
45 Sharman, above n 8, 63.
46 Wise, above n 28, 25.
47 Rebecca Huss, ‘Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion
Animals’ (2002) 86 Marquette Law Review 47, 48-50. This, of course, is not the experience of all
companion animals, but it is most likely the experience of the vast majority. See also Cass Sunstein,
‘Introduction: What are Animal Rights?’ in Cass Sunstein and Martha Nussbaum (eds) Animal Rights:
Current Debates and New Directions (Oxford University Press, 2004) 3 who comments that at least
half of all owned companion animals receive birthday and Christmas presents.
48 Drake Bennett, ‘Lawyer for the dog: Inside the booming field of animal law, in which animals have
their own interests – and their own lawyers’ Boston Globe, September 9, 2007
<http://www.boston.com/news/globe/ideas/articles/2007/09/09/lawyer_for_the_dog/>; Mike Dogtime,
1993 provides legislation for ‘pet trusts.’ See Diane Sullivan and Holly Vietzke, ‘An Animal is Not an
iPod’ (2008) 4 Journal of Animal Law 41, 56. However, because there is no equivalent legislation in
Australia, pet trusts are unlikely to be established under the current legal framework. See Frances
49 Huss, above n 47, 51 (emphasis added).
countries such as Australia, the US and the United Kingdom. In comparison to farmed or research animals from these same countries (which includes dogs and cats), it appears that companion animals are viewed differently and treated better (in most cases) due to the value accorded to them by their human owners. However, as Bogdanoski affirms, this ‘special’ status does not necessarily guarantee a greater benefit for these non-human animals due to the inescapable fact they are still the property of humans who may revoke the ‘family’ status of their companion animals at any time. This is reflected in the alarmingly high rate of companion animals who end up in shelters when they are no longer convenient to their human owners’ needs or lifestyles. Thus, this ‘special’ status does not provide a companion animal with any further protection other than what their property status permits.

**B Human Primacy over Non-Human Animals**

The dominance of humans over non-human animals can be traced as far back as the creation of the universe. The Bible tells us that God made man in His own image and instructed man to go forth, procreate and subdue the earth and dominate all living creatures on it. Thus, this God-like image has allotted humans (particularly white males) a special position in the universe, placed at the pinnacle of creation, with God’s permission to kill and eat other animals. The Greeks went a bit further by retaining ‘some’ men (usually blacks), along with all animals, as property for their ‘masters.’ This created a ‘hierarchy of nature’ whereby those men with (perceived) higher reasoning capacities sat at the top of the hierarchy dominating those inferior humans (ie black men, women, children), with animals invariably sitting at the bottom. Hence, the superiority of the ‘wealthy white male’ emerged and has been reinforced within our society ever since.

---

50 Ibid.
51 Tony Bogdanoski, ‘A Companion Animal’s Worth: The Only ‘Family Member’ Still Regarded as Legal Property’ in Peter Sankoff, Steven White, and Celeste Black (eds) Animal Law in Australasia (The Federation Press, 2nd ed, 2013) 85. See also Taimie Bryant, ‘Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans’ (2008) 39 Rutgers Law Journal 247, 256-57 where it is suggested the claim that animals enjoy the same benefits and lifestyle as ‘family members’ is overstated.
53 Singer, above n 23, 186.
54 Ibid 187.
55 Ibid 188.
56 For example, Aristotle was well known for supporting slavery and referred to those inferior humans as merely a ‘living instrument’ for their masters. See Singer, above n 23, 188-89.
57 Ibid 189.
The Christians added another dimension to the superiority of humans by spreading the idea that every human life – and only human life – is sacred because only humans have immortal souls. Considering the significant influence of Christianity on Western culture, there is no wonder that the theories of preeminent saints such Saint Thomas Aquinas have survived until today. For example, in considering the treatment of non-human animals, Aquinas held the view that the only reason to take a stance against cruelty to animals is that it may lead to cruelty to human beings. Although not the only reason, this is an argument frequently used against animal cruelty today.

Thankfully, attitudes toward non-human animals tended to improve after the barbarity of Descartes’s era, although the practicality of how we act and how we treat non-human animals has not really changed. Modern arguments which hold that ‘humans must have primacy [because] human suffering will ultimately increase if we begin viewing ourselves on the same level as animals’ echo those religious-based arguments of our enduring past. Indelibly, humans remain at the ‘top of the tree.’

C The ‘Property Paradigm’

In reflecting on the priority given to the interests of non-human animals, Singer states that ‘[t]heir interests are allowed to count only when they do not clash with human interests. If there is a clash…the interests of the nonhuman are disregarded.’ This attitude forms the basis of the ‘property paradigm.’ Gary Francione, a well-respected law professor, legal philosopher and author in the field of animal rights, passionately argues that there is ‘no morally sound reason to continue to treat nonhumans as the property of humans.’ Francione frequently raises the property paradigm to illustrate the dominance of the interests of property owners over the interests of their animal

58 Ibid 191.
59 Ibid 196.
61 Philosopher Rene Descartes was infamous for his view that because animals do not have souls they are mere machines or ‘automata’ and therefore cannot experience pleasure or pain and thus could be inhumanely experimented on. Thankfully, these views were discredited by the theories of Jeremy Bentham and Charles Darwin. See Singer, above n 23, 200-11 for a detailed discussion of the change in attitudes towards animals.
63 Singer, above n 23, 212.
64 Francione, above n 26, 67.
property. For example, in reference to modern animal welfare laws for factory farmed animals, Francione argues that ‘these laws serve the interests of industrial agriculture and ensnare animals further in the property paradigm.’\textsuperscript{65} The result of this position, according to Francione, is that:

[t]he property status of animals renders completely meaningless any balancing that is supposedly required under the humane treatment principle or animal welfare laws, because what we really balance are the interests of property owners against the interests of their animal property… Such a balance will rarely, if ever, tip in the animal’s favour…\textsuperscript{66}

Therefore, Francione strongly advocates that we eliminate, not merely regulate with welfare laws, animal exploitation by abolishing their property status.\textsuperscript{67} Taimie Bryant, another prominent law professor in the field of animal law, agrees and holds that, ‘because the property status of animals is so far removed from a position of respecting animals, any attempt at animal law reform, whilst maintaining their status as property, is fruitless.’\textsuperscript{68} Bogdanoski provides a similar argument to Francione’s and Bryant’s above, but applies it in the context of companion animals. He holds that the ‘pets-as-property paradigm’ ignores a companion animal’s intrinsic worth and makes them mere commodities of their human owners.\textsuperscript{69} Bogdanoski argues that, even though it is typical for pet owners to assign ‘family’ status to their companion animal, under the current property paradigm the interests of the owner will always prevail over those of their pet.\textsuperscript{70} Thus the property paradigm has the potential to negatively impact, albeit not equally, the lives of all non-human animals.

D Protection in Property

Not everyone agrees that the property status of non-human animals leads to their exploitation and instead argue that their property status provides them with a benefit of protection that they would not otherwise receive. As White suggests, these arguments are usually based on the premise that ‘people tend to protect what they

\textsuperscript{66} Francione, above n 4, xxiv-v.  
\textsuperscript{67} Ibid.  
\textsuperscript{68} Bryant, above n 51, 253.  
\textsuperscript{69} Bogdanoski, above n 51, 84.  
\textsuperscript{70} Ibid. See also Brooke Bearup, ‘Pets: Property and the Paradigm of Protection’ (2007) 3 Journal of Animal Law 173.
own.’\textsuperscript{71} Epstein, an avid supporter of the property status of non-human animals, holds that assuming non-human animals suffer at the hands of their owners is incorrect. He argues that there is ‘no necessary conflict between owners and their animals’ particularly those that are treated as part of the owner’s ‘family.’\textsuperscript{72} Although Epstein acknowledges that human ownership may not always benefit animals, he claims that most of the time it does so by providing them with benefits in the form of access to food and shelter (and sometimes clothing) which creates long lives of ease and comfort.\textsuperscript{73} With regard to veterinary care, Epstein argues that ‘it’s better to be a sick cat in a middle-class US household than a sick peasant in a third-world country.’\textsuperscript{74}

While this may be true, White criticises Epstein’s arguments for being singularly focused on companion animals and for not considering the plight of non-human animals that are used in research or produced in factory farms.\textsuperscript{75} Most of Epstein’s arguments do, in fact, concern companion animals. However, White notes that when he does make (albeit brief) reference to cattle, he does so in relation to the way in which they are slaughtered, i.e., if the animal is killed in a way that spares them unnecessary anxiety, the amount and quality of meat that is left behind improves.\textsuperscript{76} It is unlikely that this is much of a concern for the soon to be slaughtered cow, who is most certainly not benefiting from its property status!

Sunstein is another legal scholar who argues for maintaining a non-human animal’s property status.\textsuperscript{77} His argument for keeping this status intact is based firmly on the protections provided by our legal system. He states that ‘where it is found that existing laws protecting animals are insufficient, an owner’s property rights can then be adjusted to counteract these insufficiencies.’\textsuperscript{78} However, as we have seen above, the property paradigm removes any prioritising of animal interests over human interests. Whilst Garner’s arguments appear in opposition to Epstein’s and Sunstein’s, he ultimately supports maintaining the property status of non-human animals. Specifically, Garner states that, whilst he believes abolishing the property status of

\begin{flushright}
\textsuperscript{71} Steven White, ‘Exploring Different Philosophical Approaches to Animal Protection in Law’ in Peter Sankoff, Steven White, and Celeste Black (eds) \textit{Animal Law in Australasia} (The Federation Press, 2nd ed. 2013) 53.
\textsuperscript{72} Richard Epstein, ‘Animals as Objects, or Subjects, of Rights’ in Cass Sunstein and Martha Nussbaum (eds) \textit{Animal Rights: Current Debates and New Directions} (Oxford University Press, 2004) 149.
\textsuperscript{73} Ibid 148 (emphasis added).
\textsuperscript{74} Ibid.
\textsuperscript{75} White, above n 71, 53.
\textsuperscript{76} Ibid.
\textsuperscript{78} Ibid.
\end{flushright}
non-human animals is necessary, he also maintains that significant improvements for animals can be achieved from within the existing property paradigm.\(^79\) He bases these beliefs on the idea that removing the property status of non-human animals is no guarantee that they will cease to be exploited.\(^80\) Instead he points to necessary changes in our current political and ideological climate, rather than changes to the legal status of animals, as major factors in protecting non-human animals from exploitation.\(^81\)

Garner uses the example of animals being significantly better protected in Britain compared with the lesser protected animals in the US to demonstrate the irrelevancy of property status. Garner bases his premise on the fact that non-human animals are considered the property of humans in both countries, yet they experience vastly different levels of protection. Notably, Garner holds that it is the political structure and social attitudes that exist within those countries which provide better protection for non-human animals.\(^82\) Garner points to the general reluctance to restrict the property rights of humans in the US as a factor contributing to the adoption of less stringent animal protection legislation than that which is adopted in Britain.\(^83\) Nevertheless, the level of protection becomes irrelevant in times of genuine conflict as the interests of non-human animals will almost always be subordinated by the human-centeredness of the law which puts the interests of the property owner above the interests of the non-human animal property.\(^84\)

E Why Non-Human Animals Should Not Be Classified as Property

1 Property Has Moral Limits

‘[T]he ultimate fact about property is that it does not really exist: it is mere illusion.’\(^85\) In order to sidestep the unattainable quality inherent in this notion, ‘property’ has commonly been conceptualised not as a ‘thing’ but as a ‘bundle of rights.’\(^86\) This


\(^80\) Ibid. Garner provides the example of unpossessed (or ‘free’) wild animals to demonstrate that, even though they are the property of no one whilst they are free, still do not possess greater rights than those which are the property of humans.

\(^81\) Ibid 85.

\(^82\) Ibid 86.

\(^83\) Ibid.

\(^84\) Francione argues that there can never be a ‘genuine conflict’ between the interests of the human and the non-human animal as the choice has already been predetermined by the property status of the non-human animal, i.e. human interests prevail. For further discussion, see Gary Francione, ‘Animals — Property or Persons?’ in Cass Sunstein and Martha Nussbaum (eds) Animal Rights: Current Debates and New Directions (Oxford University Press, 2004) 108-42.


\(^86\) Ibid.
‘bundle of rights’ enables humans to claim property in anything they wish, even the nothingness of thin air, so long as the resource, as Gray states, is ‘excludable.’ Gray explains that a resource is excludable only when a legal person can exercise control over the access by others to the resource’s inherent benefits. Obviously, non-human animals, under the control of humans, become their property in this way due to the ‘excludability’ of the animal’s inherent benefits from those who are denied access to these benefits. As has been discussed above, this proprietary right is ‘qualified’ when it applies to the property status of wild animals, ie they become excludable only when a human lawfully captures and/or kills the animal otherwise there is no ‘absolute’ proprietary right in the wild animal. Gray identifies the difference between the ‘propertiness’ of a resource as being ‘represented by a continuum along which varying kinds of “property” status may shade finely into each other.’ Thus, the concept of what constitutes ‘property’ is dynamic, not static, and depends largely on the social and moral conditions of the time.

The abolition of human slavery is a pertinent example of how a ‘resource’, ie a human, can change from being classified as property to being classified as not property as a result of changing social and moral conditions. Gray states that this occurs because property is not a ‘value-neutral phenomenon,’ thus property has moral limits whereby proprietary rights in a resource stop where the infringement of human rights begin. Therefore, as demonstrated by the history of slavery law, once it was recognised by civilised society that classifying (some) humans as property was an infringement of those humans’ fundamental freedoms, their property status was then abolished. Hence, the moral limits of human property were reached during the time of slavery, resulting in the abolition of what is now commonly considered as the morally abhorrent human ownership of other humans. Likewise, if non-human animals were granted the same rights as humans (ie not to be owned or used as a resource of another), it follows that the moral limits of animal property would also be reached by their human ownership and their use as a resource of humans.

87 Ibid 268.
88 Ibid.
89 Ibid 296.
90 Ibid.
91 Ibid 297 (emphasis added).
Francione equates the institution of human slavery with that of animal ownership stating that they are ‘structurally identical’ because the slave owner was able to disregard the slave’s interests due to their property status, just as animal interests are routinely disregarded. Francione draws many parallels, the most important being that, as chattel or ‘personal’ property, slaves could be bought and sold, willed, insured, mortgaged, and seized in payment of the owner’s debts, just as non-human animals are today. Slave owners could punish their slaves for reasons that benefited the owner, just as animal owners are permitted to do under our current laws. Those who intentionally or negligently injured another’s slave were liable to the owner in an action for damage to property, just as they would be if another’s animal was injured. Because of their property status, slaves could not enter into contracts, own property, sue or be sued, or live freely; again, just like non-human animals today. There were laws that ostensibly regulated the use and treatment of slaves, but they, just like our animal welfare laws, failed to protect the slave’s interests due to their many exemptions and exceptions. Hence, the slave owner’s interests always trumped the slave’s interests like, as we have seen in our discussions above, human interests always trump animal interests.

Therefore, the ownership of non-human animals and human slaves has subjected each to ruthless exploitation for many years. Although we tolerate varying degrees of exploitation, we no longer regard it as legitimate to treat any humans, irrespective of their particular characteristics, as the property of others. This mainly came about because the higher human values of fairness, equality and liberty espoused since Roman times could no longer co-exist with the inequity of slavery. As Francione states, we finally prohibited slavery because we realised that all forms of slavery

---

93 Francione, above n 16, 46.
94 Ibid.
95 Ibid. See Animal Welfare Act 2002 (WA) s 31(2) which provides a defence to inflicting cruelty on an animal if that person is a ‘prescribed’ person with a ‘prescribed’ thing used to inflict the cruelty.
96 Francione, above n 16, 46.
97 Ibid. The single difference here is that wild animals can ‘live freely’ until they are legally caught and/or killed.
98 Ibid. See, eg, State v Mann 13 N.C. (2 Dev) 263, 264 (1829) where the court held that the ‘cruel and unreasonable battery’ of one’s own slave is not indictable.
100 Francione, above n 16, 48-9.
101 Steven Wise, ‘Hardly a Revolution - The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy’ (1998) 22 Vermont Law Review 793, 907. Wise states that the fact that the exploitation of non-human animals has gone on for so long testifies only to the depth of the human capacity for greed, selfishness, self-deception, and rationalization.
allowed the interests of the slave to be ignored, particularly their interest in not suffering at the hands of their owners for their (the owner’s) benefit, as it is with non-human animals today. Thus slavery failed on all three of the moral grounds that humans hold in high regard, ie fairness, equality and liberty, and hence was subsequently abolished. Of course there still exists examples of human slavery in the world, but it is now considered an action so odious that no civilised nation can bear its existence. Thus there are strong prohibitions on all forms of slavery and an outright ban on the use of humans as commodities. If these prohibitions were extended to non-human animals, their exploitation would cease and their ‘property’ status would be removed.

2  Non-Human Animals Are More than Inanimate Objects

As Kelch states, ‘animals are not like inanimate objects . . . Animals feel pain, have emotions, give and return love, and some even have characteristics of reason and language.’ It is precisely these features that make an animal significantly different from, say, a couch or a car. In some circumstances, the common law has recognised this difference and has moved away from the hard-line rule that animals are mere property in both its judicial decisions and legislative enactments. For instance, claims for emotional distress for tortious injury or killing of an animal have found their way into the law. Also, some courts have moved away from always using a market value measure of damages for injuries to and killing of animals, as they would for any other type of property. For example, in Corso v Crawford Dog and Cat Hospital

---

102 Francione, above n 16, 49.
103 Ibid.
105 Ibid 537.
106 Ibid. See also Sonia Waisman, ‘Non-Economic Damages: Where does it get us and how do we get there?’ (2005) 1 Journal of Animal Law 7. See, eg, Amos v District of Columbia 231 F. Supp. 2d 109 (D.D.C. 2002) where non-economic damages were awarded for ‘emotional distress’ where officers entered plaintiff’s home without a warrant, searched the home and shot the plaintiff’s dog. Cf Krasnecky v Meffen 56 Mass. App. Ct. 418, 777 N.E.2d 1286 (2002) where the Court held that ‘emotional distress’ can only be awarded when the plaintiffs actually witness the injury or come upon it immediately after the incident. This did not occur in this case so the plaintiff’s claim was dismissed.
107 See Peter Barton and Frances Hill, ‘How Much Will You Receive in Damages from the Negligent or Intentional Killing of Your Pet Dog or Cat’ (1989) 34 New York Law School Law Review 411; Joseph H King, Jr, ‘The Standard of Care for Veterinarians in Medical Malpractice Claims’ (1990) 58 Tennessee Law Review 1. See also Murray v Bill Wells Kennels, Ltd Wayne County Circuit Court No. 95-536479-NO (Mich 1997) where Judge Tertzag held that ‘[t]he doctrine that damages are limited to the value of the dog (the chattel) has worn out its welcome in many states where it was once recognized. It is an outdated doctrine deserving neither respect nor devotion. Blind adherence to such a doctrine is unbecoming for an enlightened people.’
the question involved the proper measure of damages for mishandling the body of a dog that was euthanized. In this case, the Court stated that companion animals should be seen as occupying a status above that of ordinary property:

This court now overrules prior precedent and holds that a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property. [A] pet is not an inanimate thing that just receives affection; it also returns it.

This decision is not to be construed to include an award for the loss of a family heirloom which would also cause great mental anguish. An heirloom while it might be the source of good feelings is merely an inanimate object and is not capable of returning love and affection. It does not respond to human stimulation; it has no brain capable of displaying emotion which in turn causes a human response. Losing the right to memorialize a pet rock, or a pet tree or losing a family picture album is not actionable. But a dog - that is something else. To say it is a piece of personal property and no more is a repudiation of our humaneness. This I cannot accept.

The Court in this case held that the plaintiff was entitled to more than market value damages for the conduct of the defendant in losing the body of the dog and replacing it with a dead cat. Thus, some courts are now recognising that non-human animals have inherent value and are more than inanimate objects and should be recognised as such, along with recognising the special relationship that humans have with non-human animals.

St Pierre holds that the recognition of this value achieves two ends: first, it acknowledges the social significance of the human/non-human animal relationship; and second, it questions the property status of non-human animals. St Pierre’s ‘ends’ are verified in Morgan v Kroupa where the plaintiff finder of a dog was awarded possession after a year of caring for the animal; a judgement which the dog’s original owner appealed. The Court of Appeal affirmed the judgment that awarded possession

---

109 Ibid 183 (Friedman J).
110 Ibid. The Court also found that the plaintiff suffered shock, mental anguish and despondency due to the wrongful destruction and loss of the dog's body. See also Bueckner v Hamel 886 S.W.2d. 368, 370 (Tex. App. 1994) where the issue concerned the amount of damages to be awarded when the defendant shot two of the plaintiff's dogs. The Court in this case affirmed an award of both compensation and punitive damages after taking into account the dogs were loved companions.
112 702 A.2d 630, 634 (VT 1997).
of the dog to the finder and not to the original owner. Here, the Vermont Supreme Court acknowledged ‘[a companion animal’s] worth is not primarily financial, but emotional; its value derives from the animal's relationship with its human companions …courts must fashion and apply rules that recognize their unique status.’ Therefore, it is the way humans feel about an animal and their relationship with that animal which confirms that non-human animals are more than inanimate objects. Thus, non-human animals should no longer be treated in the same way that other inanimate objects are treated under law, that is, as the mere property of humans.

3 Equal Consideration: Like Cases Ought to Be Treated Alike

The principle of equal consideration applies the rule that we ought to treat like cases alike, unless there is a good reason not to do so. This principle is a necessary component of every moral theory, and any moral theory that maintains that it is permissible to treat similar cases in a dissimilar way would fail to qualify as an acceptable moral theory for that reason alone. Francione points to the capacity to suffer as the similarity that humans and non-human animals share and thus equal consideration should be given to both a human’s and animal’s interest in not suffering, unless there is a good reason not to do so. However, Francione disregards human characteristics as being a necessary pre-requisite for the application of equal consideration to non-human animals. He states that the ability to recognise oneself in a mirror or use symbolic language (ie displaying predominantly human characteristics - although some primates do display these traits) is not morally superior from the ability to fly unassisted or breathe naturally underwater (ie displaying predominantly non-human characteristics) and therefore should not be a factor in considering whether or not to apply equal consideration to non-human animals. Just because humans say these characteristics are better in order to justify their lack of consideration of a non-human animal’s interests does not mean that it is true and thus should be discounted for that reason.

113 Ibid 633 (emphasis in original).
114 Francione, above n 16, 44.
115 Ibid 45.
116 Ibid (emphasis added).
118 Francione, above n 16, 59.
119 Ibid. Jane Goodall typifies this point by asking the following question: ‘Who are we to say that the suffering of a human being is more terrible than the suffering of a nonhuman being or that it matters
In practice, equal consideration would follow one of three lines of argument: 1) where there is a conflict between human and animal interests, and the human interest weighs more, then the animal suffering is justifiable; or 2) where there is no conflict, or if there is a conflict but the animal interest weighs more, then we are not justified in using the animal; or 3) where there is a conflict, but the human and animal interests are weighed similarly, then we should treat those interests in the same way and impose suffering on neither or both unless there is some non-arbitrary reason that justifies differential treatment.\(^{120}\) Essentially these arguments require that an animal’s interest in not suffering be considered when making decisions that affect them. Unfortunately, the property status of non-human animals prevents any balancing of interests between humans and animals because the interests of the property owner always prevails. Thus, in order to apply the principle of equal consideration to non-human animals, their property status must be removed. This is exactly what occurred for human slaves when their interests were finally recognised as being morally significant, which lead to the equal consideration of their interests and the ultimate abolition of slavery.

Sentience is the most often cited reason by animal advocates for abolishing the property status and granting non-human animals’ equal consideration of their interests.\(^{121}\) Garner holds sentience in such high regard that he claims that non-human animals are entitled to be regarded as beneficiaries of justice as a direct result of their sentience.\(^{122}\) Francione describes a sentient being as one which uses sensations of pain and suffering to escape life threatening situations as well as pursuing sensations of pleasure to enhance their lives.\(^{123}\) This definition of sentience noticeably excludes other living things such as trees and plants, as well as inanimate objects such as rocks and dirt. In the case of inanimate objects, the reason for this exclusion is obvious (they cannot be sentient beings because they are incapable of feeling anything), but in the case of trees and plants the reasons are not as obvious. On the whole, though, it can be safely assumed that trees and plants, although alive, do not escape pain or seek out pleasure in the same way that humans and non-human animals do and therefore cannot

---

\(^{120}\) Francione, above n 16, 45.

\(^{121}\) Alex Bruce, Animal Law in Australia: An Integrated Approach (LexisNexis Butterworths, 2012) 44.


\(^{123}\) Francione, above n 16, 55.
be considered sentient beings as per the above definition.\textsuperscript{124} Hence, it is humans and non-human animals that display observable behaviours of sentience and so they should not be treated as property and their interests should be given equal consideration in matters that affect them. A common example used by animal advocates concerns the production of animals for food and fibre. They state that an animal’s interest in not suffering and experiencing continued life outweighs any human interest of consuming and wearing animals for pleasure and taste (animal advocates consider that carnivorous diets are not mandatory for human survival), thus factory farming should be eliminated.\textsuperscript{125} However, as mentioned above, for any consideration of an animal’s interests to even occur, the property status of non-human animals must first be removed so that their interests may be considered \textit{equally} with human interests.

\textbf{F Conclusion}

For centuries, non-human animals have been considered to be the property of humans. The supremacy of humanity from biblical times, combined with the Roman classification of non-human animals as ‘things,’ has endured until today. Even the familial inclusion of companion animals has not fundamentally altered their status as property. Thus, as with any form of property, there exists a ‘property paradigm’ whereby the interests of the property owner almost always prevails over the interests of their non-human animal property. Some suggest that there is protection in a classification of property as most property owners do not intentionally harm their property. This may be true, but only up to the point where human interests are not sacrificed or limited. When this occurs, the protections that a non-human animal’s property status might provide will be swiftly removed and replaced with human justifications for harm. Hence, it is vital that the property status of non-human animals be abolished so that they are treated, not as our slaves or in the same way as inanimate objects, but as sentient beings with interests that deserve equal consideration with human interests.

\textsuperscript{124} However, some authors disagree and hold that trees and plants are indeed sentient beings. See Peter Tompkins and Christopher Bird, \textit{The Secret Life of Plants} (Harper and Row Publishers, 1973). See also the 1995 BBC nature documentary, ‘The Private Lives of Plants’ presented by David Attenborough, which demonstrates that trees and plants have the ability to move away from life threatening situations and seek out elements that make their lives better.

\textsuperscript{125} Bruce, above n 121, 52.
III CHAPTER 2: LEGAL STANDING FOR NON-HUMAN ANIMALS

A Do Non-Human Animals Have Standing?

1 No Legal Standing in Their Own Right

As Cao, Sharman and White suggest, the issue of standing and the legal status of non-human animals is closely related.\(^{126}\) Since non-human animals are the property of humans, they cannot hold legal standing in their own right.\(^{127}\) This is primarily because non-human animals are not considered ‘persons’ under law and therefore do not have any legal capacity to sue.\(^{128}\) As Wise simply states, ‘[w]ithout legal personhood, one is invisible to civil law. One has no civil rights. One might as well be dead.’\(^{129}\) Therefore, it is up to individuals and animal welfare organisations to bring suit on behalf of animals which are in need of protection.\(^{130}\) However, in doing so, these human plaintiffs must meet the tests of standing. Under Australian law, standing will only be available where the plaintiff has a ‘special interest in the subject matter of the action’.\(^{131}\) A special interest is to be distinguished from a ‘mere intellectual belief or concern’, which is not considered to be sufficient grounds for standing.\(^{132}\)

In most Western countries, to be granted *locus standi* the plaintiff must have a personal stake in the outcome of the case and not merely trying to protect the interests of third

---

\(^{126}\) Cao, Sharman and White, above n 24, 78.

\(^{127}\) Ibid. See also Cass Sunstein, ‘Can Animals Sue?’ in Cass Sunstein and Martha Nussbaum (eds) *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 251, 260 where Sunstein claims that animals in the US only lack standing because Congress has chosen not to grant it, even though they could chose to in order to make a public statement on whose interests are most directly at stake (see Cass Sunstein, ‘On the Expressive Function of Law’ (1996) 144 *University of Pennsylvania Law Review* 2021, 2044-45). Despite Sunstein’s claims, there are many examples of US cases where the court has chosen not to grant standing directly to non-human animals. See, eg, *Citizens to End Animal Suffering and Exploitation Inc v New England Aquarium* 836 F. Supp. 45 (D. Mass. 1993) where the District Court of Massachusetts held that a dolphin did not have standing under the *Marine Mammal Protection Act* to protest transfer of the dolphin from the aquarium to the Department of the Navy; *Sarah v Primarily Primates Inc* No. 04-06-00868-CV, 2008 WL 138080 (Tex. App. Jan. 16, 2008) where no standing was granted for either the primates or the human plaintiffs that were seeking relief on the primates’ behalf; *Tilikum et al v SeaWorld Parks & Entertainment Inc & SeaWorld, LLC*, No. 11 Civ. 2476 (S.D. Cal. 2011) which involved the first federal court suit seeking constitutional rights for members of an animal species (ie orcas). Here, standing was not granted and the case was dismissed.

\(^{128}\) Bryant, above n 51, 271. However, there are some species considered ‘endangered’ who have brought suit in their own right due to being wild, as opposed to domesticated, animals. See, eg, *Mt. Graham Red Squirrel v Yeutter* 930 F.2d 703 (9th Cir. 1991); *Northern Spotted Owl v Lujan* 758 F. Supp. 621 (W.D. Wash. 1991); *Northern Spotted Owl v Hodel* 716 F. Supp. 479 (W.D. Wash. 1988); *Palila v Hawaii Department of Land & Natural Resources* 639 F.2d 495 (9th Cir. 1981).


\(^{131}\) *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 527 (Gibbs J).

\(^{132}\) Ibid 530-31 (Gibbs J).
parties. This is why the issue of obtaining standing is a significant hurdle for animal welfare organisations when filing cases concerning non-human animals.\textsuperscript{133} For example, in \textit{Animal Liberation Ltd v Department of Environment and Conservation}\textsuperscript{134} Hamilton J, of the New South Wales Supreme Court, refused an application for an injunction to restrain aerial shooting of goats and pigs on New South Wales nature reserves. Justice Hamilton’s refusal was due to the lack of standing of Animal Liberation Ltd on the basis that it did not meet the necessary ‘special interest’ test under the general principles of standing, along with the fact that there was no sufficient evidence of cruelty.\textsuperscript{135} As a consequence, the current laws force these types of plaintiffs to generate bases for standing that are essentially unrelated to the relief sought.\textsuperscript{136} According to Magnotti, this creates a ‘legal fiction’ of the standing alleged in these cases, since the injury being pleaded is often not the injury with which the parties are typically concerned.\textsuperscript{137}

2 \textit{Standing on Behalf of Non-Human Animals}

There are many instances where a person may bring suit on behalf of another who is unable to do so themselves. A classic example is where a person acts as a guardian and brings suit on behalf of a child or the disabled.\textsuperscript{138} In these cases, the guardian is not required to claim any direct personal injury because the subject of the suit, that is the child or the person with the disability, holds their own legal personhood which is recognised by the courts.\textsuperscript{139} In cases involving non-human animals, the person or organisation bringing suit on their behalf is similarly trying to represent the animal’s interests within a legal setting. However, as we have seen above, non-human animals do not hold legal personhood and thus their human representatives must instead plead

\textsuperscript{134} \[2007\] NSWSC 221.
\textsuperscript{135} Cao, Sharman and White, above n 24, 80. Cf \textit{Animal Liberation Ltd v National Parks and Wildlife Service} [2003] NSWSC 457 where the same Court granted the plaintiff standing, along with the subsequent injunction sought, however this was due to the objective evidence of cruelty presented, which clearly violated welfare laws, along with the fact that the defendant in the case avowedly took no objection to the standing of the plaintiff to seek an injunction.
\textsuperscript{136} Magnotti, above n 130, 458.
\textsuperscript{137} Ibid.
\textsuperscript{138} Ibid 467. See also \textit{Bauchman v W High School} 132 F.3d 542, 545 (10th Cir. 1997) whereby a mother, as a guardian, brought suit alleging violations of her daughter's rights at high school under the US state and federal constitutions.
\textsuperscript{139} Magnotti, above n 130, 468. See also Harold Hannah, ‘Animals as Property – Changing Concepts’ (2001) 25 \textit{Southern Illinois University Law Journal} 571, 582 who claims that because companion animals usually hold the status of a ‘family member’ they should also have the same protections to that of a child or a ‘minor’ family member.
an injury to themselves that is independent from the injury to the animal in order to be granted standing.\textsuperscript{140}

Bryant therefore asks an obvious question, ‘if animals are the intended beneficiaries of laws that purport to protect them and it is animals themselves who are harmed when those laws are violated, why should a human have to show harm derived from the harm done to an animal?’\textsuperscript{141} According to Bryant, when seeking to address the harm to a non-human animal, ‘it makes more procedural sense to have the lawyer directly represent the harmed animal than have them represent the human that has been harmed from another human’s failure to prevent harm to the animal.’\textsuperscript{142} Bryant’s assertion does not discount the fact that the human may have indeed suffered harm, rather it emphasises that their injuries are distinguishable from that of the non-human animal’s, and thus they should both be granted standing in recognition of their respective injuries.\textsuperscript{143}

Fortunately for animals, the detriment suffered by the plaintiff human need not be significant to grant standing, as was found in \textit{Animal Legal Defence Fund Inc. v Glickman}.\textsuperscript{144} In this case, the US Court of Appeal granted standing to sue on behalf of mistreated apes held at the Long Island Game Farm Park and Zoo. Here, standing was granted because the human plaintiff had suffered personal distress and aesthetic and emotional injury as a result of witnessing the apes’ inhumane treatment.\textsuperscript{145} It is claimed by some that \textit{Glickman} represents a ‘small window for standing’\textsuperscript{146} while others recommend caution against making claims that the ruling has any effect in promoting the interests of non-human animals.\textsuperscript{147} Those who argue the latter invariably hold that, in order to overcome this limitation, the law should expand the standing doctrine to

\begin{footnotes}
\item[140] Magnotti, above n 130, 468. See also \textit{American Society for the Prevention of Cruelty to Animals v Ringling Bros. & Barnum & Bailey Circus} 317 F.3d 334, 336-38 (D.C. Cir. 2003) where the plaintiff elephant trainer pleaded that he had an aesthetic injury based on his emotional attachment to the individual elephants who were being mistreated. Standing was granted in this case based on the injury suffered by the handler and not on the suffering of the elephants.
\item[141] Bryant, above n 51, 254.
\item[142] Ibid (emphasis added).
\item[143] Ibid.
\item[144] 154 F.3d 426 (1998). See also \textit{Sierra Club v Morton} 405 U.S. 727 (1972) which is an early whale protection case where whale watchers were granted standing due to the fact they would be deprived of their enjoyment of picture taking if whales were extinguished.
\item[145] Bryant, above n 51, 254.
\item[146] Huss, above n 47, 81.
\item[147] Francione, above n 16, 92.
\end{footnotes}
recognise the interests of non-human animals, just as it does for other non-human entities.\textsuperscript{148} 

\section*{B Standing for Artificial Persons}

The issue of whether a non-human, or artificial, entity can be considered a ‘person’ for the purposes of granting standing is not new to the courts as there has been heated debate over this controversy for centuries.\textsuperscript{149} Teubner notes that the invention of the legal person was ‘law’s great cultural contribution to the organizational revolution in which attribution of action was expanded beyond natural people.’\textsuperscript{150} The judiciary and legislature have long recognised artificial entities as ‘persons,’ the most common being the corporation. Some less common examples of Australian courts granting standing to artificial persons include a union\textsuperscript{151} and an unincorporated Jewish Association.\textsuperscript{152} Thus, there are now a wide variety of non-human entities that have been granted the same rights and duties of human entities, without there being the requisite requirement of ‘humanness’ in order to be classified as a legal ‘person.’

Therefore, as White notes, the question then becomes: ‘[i]f ships, corporations and children are able to have actions brought on their behalf to secure their rights, then why not animals?’\textsuperscript{153} The underlying premise of this question was supported in obiter in a case in the US concerning whether dolphins and whales have standing. In this case, the Court noted that it saw nothing to prevent the legislature:

\begin{quote}
...authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.\textsuperscript{154}
\end{quote}

\begin{footnotes}
\footnotetext{148} Magnotti, above n 130, 459.
\footnotetext{151} See \textit{Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)} (1995) 183 CLR 552 (standing was granted due to the ‘special interest’ held by its individual members).
\footnotetext{152} See \textit{Executive Council of Australian Jewry v Scully} (1998) 51 ALD 108 (standing was granted due to its member organisations being ‘persons aggrieved’ by the alleged actions).
\footnotetext{154} \textit{Cetacean Community v Bush} 386 F.3d 1169 (9th Cir. 2004) 1176 [10]. However, in this case, standing was not granted as Congress had not actually passed a statute that enables animals to sue in their own right.
\end{footnotes}
Hence, it appears that a logical conclusion which may be drawn from precedent is that standing should be granted to the *injured party*, no matter if that party is either a human or non-human entity.155 However, it is unlikely that logic will prevail where non-human animals are concerned, especially since their status as property makes them almost invisible to the courts.

C Conclusion

At present, non-human animals are not recognised by the courts as having *locus standi*. Their current property status prevents them from being granted legal standing because they are not classified as ‘persons’ under law. Only legal ‘persons’ may sue, hence it is up to humans to prove they have a ‘special interest’ in a case that concerns non-human animals. Where they can achieve this, they will be granted sufficient standing to be able to sue on the non-human animal’s behalf. This is very ineffective as the injured party, ie the non-human animal, can only get their harm addressed in court by indirect means and thus their claim becomes secondary to the claim of the human plaintiff. In order to be more effective, the standing doctrine should be extended to include non-human animals so they may sue in their own right. This is certainly possible, especially considering that the courts have long recognised other non-human entities, such as corporations and ships, as legal ‘persons.’ Thus, it is up to the courts to do as they have done for other non-human entities and recognise non-human animals as legal ‘persons’ so that they may sue in their own right.

155 Bryant, above n 51, 329 (emphasis added).
IV CHAPTER 3: LEGAL PERSONHOOD FOR NON-HUMAN ANIMALS

A Legal Personhood Defined

Bryant proposes two definitions of legal personhood which encompass both a broad and narrow approach. The broad approach describes legal personhood as the ‘legal recognition of the extent to which animals should be considered “persons” entitled to inclusion in the moral community such that humans cannot commit acts on animals that humans cannot commit on equally situated humans.’ Bryant is critical of this broad approach as it requires the ‘endless, fruitless proofs that animals bear such substantial similarity to humans.’ For example, in order to be granted standing, which is integral to the rights of a legal ‘person,’ non-human animals must first pass the test of ‘humanness.’ Bryant believes that this requirement will only gain admission for a few select non-human animals, such as primates (apes) and cetacean (dolphins) and exclude all other non-human animals from protecting their interests in their own right. She also believes this broad approach will reinforce the hierarchy between humans and non-human animals and serve to oppress other animal species that have not gained entrance to the moral community. Additionally, Bryant believes that ‘such a broad approach will inevitably fail because humans are too heavily invested in defining themselves as different from, or in opposition to, non-human animals,’ as well as ‘using and consuming animals to meet their own needs’ with little or no consideration for the needs of the non-human animal.

Bryant is not alone in her criticisms of the broad approach to legal personhood. David Cassuto, a Pace University Law Professor who specialises in environmental and animal law, claims that, ‘[t]o date, no quintessentially “human” characteristic has emerged to definitively set humans apart from other animals… [and therefore] biology is a thin reed on which to hang one’s humanity and claim to personhood.’ Moreover,
when granting legal personhood to non-human animals, Cassuto believes that the broad approach is flawed, because ‘[r]egardless of how wide its scope, personhood will always define itself through contrast with an excluded other.’\textsuperscript{163} As long as non-human animals are considered anything ‘other’ than ‘human,’ legal personhood will unlikely be granted to them. Hence, any inclusion into the ‘personhood realm’ for non-human animals will be dependent upon whether the essence of their being sufficiently resembles our own, placing unjustified and unrealistic requirements on animals.\textsuperscript{164}

Therefore, Cassuto, like Bryant, contends that the umbrella or broad definition of legal personhood based on the ‘similarity to humans’ argument has its inherent limitations.

For these reasons, Bryant’s narrow approach to legal personhood provides a more achievable model for non-human animals. This approach focuses on granting legal standing for the ‘aggrieved person,’ whether that be a human or non-human animal.\textsuperscript{165} Bryant contends that pursuing ‘legal personhood in the form of legal standing [for non-human animals] need not result in the same attempted, fruitless proofs of animals’ similarity to humans’ when they are recognised as plaintiffs in their own right.\textsuperscript{166} However, Bryant qualifies this statement by noting that the narrow definition of legal personhood (which really equates to legal standing for animals) has ‘conceptual and instrumental meaning only if it interrupts the feedback loop between ideas of the superiority and entitlement of humans and the manifestation of those ideas in the legal status of animals as property.’\textsuperscript{167} Considering the current situation concerning the use of animals, particularly the consumption of ‘food’ animals, interrupting this ‘feedback loop’ appears unlikely due to the fact that humans are using and consuming more animals than ever before in human history.\textsuperscript{168} However, as Bryant explains, it really does not appear to matter much what definition is applied since:

\begin{quote}
[t]he idea of ‘legal personhood’ has considerable gravitational pull as a means for protecting animals because, regardless of the particular theory of legal personhood, the combination of words, at least, implies respect for animals as individuals who should receive more protection under the law than they currently receive.\textsuperscript{169}
\end{quote}

\begin{itemize}
\item[163] Ibid.
\item[164] Ibid.
\item[165] Bryant, above n 51, 253-54.
\item[166] Ibid 254.
\item[167] Ibid.
\item[168] Francione, above n 16, 9.
\item[169] Bryant, above n 51, 252.
\end{itemize}
B Theories of Legal Personhood

1 Habeas Corpus for Non-Human Animals

Wise recommends that non-human animals can be recognised as 'persons' through a writ of habeas corpus. Wise states that a writ of habeas corpus has the effect of releasing a ‘prisoner’ from ‘unlawful detention,’ which includes any detention that lacks sufficient cause or evidence.\(^{170}\) As Wise explains, non-human animals are able to access a writ of habeas corpus even though they have no legal capacity to sue.\(^{171}\) This is mainly due to the ‘unusual nature’ of the writ in that the beneficiary of the writ need no power to bring suit themselves.\(^{172}\) All that is required is for concerned citizens to seek out a writ to be issued on behalf of the unlawfully detained animal.\(^{173}\) Wise uses the famous 1772 English slavery case of *Somerset v Stewart*\(^ {174}\) as analogous to the method by which a writ of habeas corpus may be applied in the case of the unlawful detention of a non-human animal. In the *Somerset* case, Lord Mansfield granted a writ of habeas corpus to free James Somerset (an African male) from unlawful detention as a slave in England. In more current times, petitions for writs concerning unlawfully detained animals have been lodged. For example, on 8 October 2014, the Nonhuman Rights Project (founded by Wise) gave oral argument in the New York Supreme Court, Appellate Division, for the granting of a writ of habeas corpus on behalf of 26 year old chimpanzee ‘Tommy’ who the lawyers state is wrongfully imprisoned in a ‘shed’ in Gloversville, New York. The Court is expected to make its decision in mid-November 2014.\(^{175}\) Thus, a writ of habeas corpus may be a means by which non-human animals are granted freedoms similar to those of humans’ regardless of the fact that they do not possess the requisite power to sue in their own right.

2 Guardianship

Guardianship is considered a moderate way to alter the property status of animals so that they are no longer considered a ‘thing’ that is subject to human ownership.\(^ {176}\) This

\(^{170}\) Wise, above n 129, 49-50.

\(^{171}\) Ibid 59.

\(^{172}\) Ibid.

\(^{173}\) Ibid.

\(^{174}\) (1772) 98 ER 499.


\(^{176}\) Cao, Sharman and White, above n 24, 85.
change in nomenclature is becoming more popular in Western cultures, particularly in the case of companion animals. For example, in some jurisdictions in the US such as the State of Rhode Island and the cities of Boulder and San Francisco (to name only a few) companion animals are no longer considered ‘property’ and the people who were once their ‘owners’ are now their ‘guardians.’ It is believed by some that the movement from human ownership of animals to something like guardianship will continue to grow with regard to companion animals. This may be lucky for (some) companion animals, but not so lucky for all other animals that are owned and used by humans. For instance, it is unlikely that farmers would adopt such terminology and consider themselves ‘guardians’ as opposed to ‘owners’ of their livestock, especially considering the possible limitations that may be placed on their farming practices. However, according to Fagundes, farmers need not be too concerned as this change in nomenclature does not provide animals with any more rights or impose on guardians any more obligations than existed under previous law. Fagundes holds that such changes in nomenclature may alter the perception of animals, but is equally sceptical that these changes will have much effect on their actual treatment. He does concede though that changing the perception of non-human animals is ‘a step in the right direction, if only a marginal one.’

3 Equitable Self-Ownership

Favre’s equitable self-ownership model is based on a trust-like relationship between humans and non-human animals. The basis of his model is founded in the human (or human substitute, such as a corporation or a government) holding legal title to the animal and the animal holding equitable title in itself; creating an ‘equitably self-owned animal.’ Favre is a proponent of non-human animals’ property status, hence his model does not seek to remove this status. Rather it creates a new legal personality

178 Ibid 37.
179 Ibid 38.
180 Fagundes, above n 180.
181 Ibid. Indeed, there have been no reported cases challenging the proper guardianship of an animal in the 10 years that the State of Rhode Island has held these laws. See Gary Block, ‘Guardianship Revisited: Rhode Island Law Passes 10-Year Mark’ Humane Society Veterinary Medical Association, October 11, 2011 <http://www.hsvma.org/guardianship_rilaw#.U-whaGOkkn0>.
182 Fagundes, above n 180.
that sits ‘between being only property and being freed of property status.’\textsuperscript{184} This ‘intermediate’ status has the effect of recognising a non-human animal’s interests within the legal system without fully abandoning their property status.\textsuperscript{185} Favre contends that legal history supports the notion that equitable title can be separated from legal title, and thus, by transferring the equitable title to the animal itself, it is then possible to change the animal’s personhood status because it would be ‘self-owned.’\textsuperscript{186} Therefore, if a non-human animal has ‘self-owned’ status, it could be treated as a legal ‘person’ with legally-recognised interests including, inter alia, the ownership of property and tort law remedies.\textsuperscript{187} Favre admits that the critical hurdle for acceptance of this new status is the perceptions and beliefs of individuals; those who believe non-human animals are worthy of consideration in our moral and legal universe will readily accept self-ownership for animals and those who do not, will not.\textsuperscript{188}

4 \textit{Citizenship for Animals}

Kymlicka and Donaldson manifest legal personhood for non-human animals through the notion of citizenship.\textsuperscript{189} Granting citizenship to animals is a novel concept and, to some, offers a more plausible alternative to traditional animal rights theories.\textsuperscript{190} Kymlicka and Donaldson apply their citizenship model to domesticated animals only, with no other animals, such as wild animals or what they refer to as ‘liminal animals’ (wild animals living among us) being eligible.\textsuperscript{191} They differentiate between animals depending on the relationships humans have with these animals. For example, they compare our relationship with wild wolves and domesticated dogs, and hold that since we have brought dogs into our society through domestication, bred them to become dependent on us, and incorporated them into our schemes of social co-operation, we

\textsuperscript{184} Ibid 476.
\textsuperscript{186} Favre, above n 183, 476. See also Bogdanoski, above n 51, 85 who supports Favre’s concept of ‘equitable self-ownership’ for non-human animals.
\textsuperscript{188} Favre, above n 183, 484.
\textsuperscript{191} Kymlicka and Donaldson, above n 189, 202.
have created obligations to dogs that differ from those to wolves, despite their commonalities.\textsuperscript{192} Thus, Kymlicka and Donaldson believe that ‘domesticated animals should be viewed as members of a shared society with us, and hence as having rights of membership’ through citizenship.\textsuperscript{193} The authors do address our obligations toward other animals such as wild animals, by granting rights to their own territory through sovereignty, and liminal animals, by granting rights of residency without human interference through denizenship, but their main focus is on granting citizenship to those non-human animals we have domesticated, such as farm animals, animals in research laboratories, companion animals and service animals.\textsuperscript{194}

As Kymlicka and Donaldson explain, citizenship is typically understood to involve a bundle of rights and responsibilities.\textsuperscript{195} The \textit{rights} of citizenship include rights of residency; rights to protection;\textsuperscript{196} rights to health (veterinary) care; labour rights;\textsuperscript{197} and the right to have one’s interests taken into account in determining the common good, and in shaping the rules that govern our shared society and activities.\textsuperscript{198} The \textit{responsibilities} of citizenship include a duty of civility toward co-citizens and a duty of contribution.\textsuperscript{199} The authors do not see a problem with fulfilling either of these duties when it comes to domesticated animals especially since most are already socialised and contribute in a significant way to human society.\textsuperscript{200} The obvious contention with these duties, as the authors acknowledge, is that such socialisation can be inherently oppressive for the domesticated animal, especially by restricting their natural behaviours for the convenience of humans, and animal labour can be exploitative.\textsuperscript{201} Whilst this may be so, without civility and contribution there is no ‘shared society’ and no possibility for just relations between humans and domesticated

\begin{itemize}
\item \textsuperscript{192} Ibid.
\item \textsuperscript{193} Ibid.
\item \textsuperscript{194} Ibid 203.
\item \textsuperscript{195} Ibid 205.
\item \textsuperscript{196} Ibid. The authors include the right to be protected both from harm at human hands and from other threats, such as fire and flood, providing the example of Hurricane Katrina whereby the residents were ordered by emergency services to leave their companion animals behind. Most residents disobeyed this order, which resulted in a change in federal legislation that emergency services be trained and equipped to rescue companion animals.
\item \textsuperscript{197} Ibid. Such as the right not to work in an unsafe environment, along with disability and retirement benefits.
\item \textsuperscript{198} Ibid 205-06.
\item \textsuperscript{199} Ibid 206.
\item \textsuperscript{200} Ibid. For example, dogs are taught not to bite or jump up on humans, thus, fulfilling their duty of civility and those who serve such as guide dogs, guard dogs, police dogs, etc, are fulfilling their duty of contribution.
\item \textsuperscript{201} Ibid.
\end{itemize}
animals. Thus, a meaningful and successful relationship of co-citizenship would depend heavily on the good will of humans. Unfortunately, the self-interest that humans display when it comes to exploiting and using non-human animals makes the likelihood of citizenship working in our current society doubtful.

5 Autonomy Equals Personhood

Wise contends that legal personhood applies only to those beings considered to be ‘autonomous.’ Wise uses the term ‘practical autonomy’ to describe the characteristic required to be deemed a legal ‘person’ under law. According to Wise, practical autonomy has three elements: 1) cognitive complexity significant enough to have the ability to want something; 2) intentional actions which result in achieving one’s desires; and 3) a sense of self complex enough so that it matters whether one achieves one’s own goals. At the heart of practical autonomy lies sentience and consciousness; without these one cannot be autonomous. In order to afford legal personhood to animals, Wise has developed a scale of practical autonomy whereby the level of autonomy varies for different animals depending on their level of sentience and consciousness and similarity to humans. For example, chimpanzees would possess a higher level of practical autonomy because they display more conscious behaviours that are more like ours. Thus, according to Wise, ‘the basic liberty and equality rights of non-human animals should be recognised dependant on the level of autonomy possessed.’ Wise’s focus on autonomy is driven by the fact that common law judges recognise autonomy as a sufficient condition for legal personhood. However, there is disagreement amongst commentators as to whether non-human animals are in fact autonomous. Therefore, due to this disagreement, Wise’s scale of practical autonomy is at risk of becoming a meaningless measure of personhood and, hence, little help when promoting non-human animal interests.

202 Ibid.
203 Ibid 208.
205 Wise, above n 204, 1278.
206 Ibid 1283.
207 Ibid.
208 Wise, above n 28, 32-3.
209 Ibid.
210 Wise, above n 204, 1287.
211 See Alison Hills, Do Animals Have Rights? (Icon Books, 2005) 74-9 where she argues that animals are not autonomous and are thus not morally responsible for their actions like humans.
C  Criticisms of Legal Personhood

1  ‘Mere tinkering’ with Property Status

Bryant argues that legal personhood for non-human animals ‘cannot be pursued without addressing the status of animals as property’ and that ‘[m]ere tinkering’ with this status does nothing to ultimately improve the lives of non-human animals.212 Bryant explains that tinkering with a non-human animal’s property status effectively leaves this status intact which inevitably provides humans with a trump card that they may use any time human and non-human animal interests’ conflict.213 To demonstrate Bryant’s point, Francione provides an example where, if the rules of a slave owner were changed from allowing them to whip their slave three times a week rather than five times a week, this would be ‘tinkering at the edges’ of the owner’s permissible use of their slave without having any effect on the property status of the slave.214 Thus, because the slave remains the property of the owner, this ‘tinkering’ does nothing to recognise their moral or ‘personhood’ status; they are simply being whipped less. Nevertheless, both Francione and Bryant, amongst other scholars,215 understand this inclination to ‘tinker’ since a wholesale elimination of the property status of non-human animals is far too radical a proposition to contemplate in today’s animal-dependant world.216 Therefore, it has been suggested that taking incremental steps towards achieving legal personhood status is the preferred approach, as opposed to merely altering or ‘tinkering’ with the current property status of non-human animals.217

2  The Abolitionist Agenda

Francione identifies himself as an ‘abolitionist’ who maintains that the guiding principle for both humans and non-human animals is that they hold the fundamental right not to be treated as the property of others.218 Thus, Francione believes that theories of legal personhood, such as guardianship and equitable self-ownership, are

212 Bryant, above n 51, 293.
213 Ibid 293-94.
216 Bryant, above n 51, 294.
217 The incremental approach for abolishing the property status of non-human animals will be discussed further in Chapter 4 of this thesis.
‘ridiculous’ because, as he states, ‘[t]he bottom line is that those humans are still owners no matter what you call them. These “guardians” can still have their healthy animals “put down” (ie killed) or can dump them at a shelter.’ Bryant holds similar criticisms, particularly of Favre’s concept of equitable self-ownership for non-human animals. Bryant states that, because Favre’s theory does nothing to abolish a non-human animal’s status as property, it is difficult to see how it would incrementally improve their situation because a court would always rule in favour of human interests, with the exception of situations of purposeless infliction of harm on animals. Therefore, as the vast majority of harms inflicted on non-human animals can be justified by owners by reason of producing food and medicine, it is unlikely that any improvement in the treatment of animals will be achieved from ascribing a guardian-like relationship between the parties.

3 Human Rights vs Non-Human Animal Rights

Schmahmann and Polacheck are opposed to any form of legal personhood, or, more specifically, ‘rights’ for non-human animals. They argue that if non-human animals became bearers of rights, then human rights would suffer. They base their argument on their belief that, if there was no hierarchy between animals and humans, the rights of the individual animal would compete with the rights of the individual human. When the authors contemplate a world where there is no hierarchy, they envision a vast, bureaucratic and intrusive structure, specifically led by the government. This structure would put non-human animals’ interests above humans, effectively restricting and erecting barriers to human conduct based on animal interests. Thus, as the authors note, ‘no rat could be harmed, chicken cooked, or rabbit dissected without government permission or the prospect of government scrutiny.’ The authors make it clear that it is human interests that are the true measure of things, and ‘not any supposed interest in an anthropomorphized rat or a Disneyfied rabbit.’ The fact that there is legislation that exists which protects non-human animals from gratuitous

220 Bryant, above n 51, 293.
221 Ibid.
222 Schmahmann and Polacheck, above n 133, 752.
223 Ibid 760.
224 Ibid.
225 Ibid 761.
mistreatment and cruelty is sufficient for Schmahmann and Polacheck. They state that, even though this legislation balances human interests, humans still have a responsibility to treat non-human animals humanely, and thus it is not necessary to give non-human animals the same ‘rights’ as humans through legal personhood.

The subject of ‘competing rights’ between non-human animals and humans is a non-issue for some commentators. Cohen is one such commentator who strongly asserts that there is no competition for rights because non-human animals are incapable of having rights. He states that ‘[a]nimals cannot be the bearers of rights because the concept of rights is essentially human; it is rooted in and has force within a human moral world.’ In a debate on the issue of non-human animal rights with the well-known animal rights advocate Tom Regan, Cohen states that he believes humans have many obligations to animals, such as acting humanely toward them and not subjecting them to unnecessary pain. However, this does not mean, in his view, that non-human animals consequently possess rights in reciprocation of these obligations. Cohen states that if non-human animals did have rights then they must be respected, even at great expense to humans.

However, Cohen’s arguments, as is correctly pointed out by Regan in his reply, are based mostly on the drastic consequences of not using animals in medical research with little or no consideration for other animal use such as for food or fibre. Hence, his arguments against rights for non-human animals are limited to the most difficult choices, where animal use in experiments may be warranted in very special, and rare, circumstances. Nevertheless, Cohen’s conclusions are correct in that non-human animals do not possess any rights; not necessarily because they are not ‘human,’ but more because their property status precludes it. Put simply, ‘things cannot have

---

227 Ibid.
228 Carl Cohen, ‘Do Animals Have Rights?’ (1997) 7(2) Ethics and Behavior 91. Unsurprisingly, this notion creates some controversy in philosophical circles. Wikler states that ‘the thesis that humans should be ascribed rights simply for being human has received practically no support from philosophers.’ See Daniel Wikler, ‘Concepts of Personhood: A Philosophical Perspective’ in Margery W Shaw and Edward Doudera (eds) Defining Human Life: Medical, Legal, and Ethical Considerations (AUPHA Press, 1983) 12, 19. See also Wise, above n 101, 901 who holds that Cohen’s argument is logically flawed.
230 Ibid 27.
231 Ibid 266.
Thus, the achievement of rights for non-human animals is impossible, and any talk of it ‘senseless,’ so long as they remain the property of humans.

4 A Feminist Critique of Legal Personhood

In direct criticism of Wise’s theory of ‘practical autonomy,’ MacKinnon states that ‘[i]f qualified entrance into the human race on male terms has done little for women…how much will being seen as humanlike, but not fully so, do for other animals?’ MacKinnon acknowledges that ‘possessing some rights is better than possessing none,’ however, in her view, ‘the articulation of formal rights may result in little substantive change to the treatment and status of non-human animals, and ultimately be an exercise in futility.’ Freshman - although not writing from a strictly feminist perspective - uses parallels from other rights movements, such as those promoting equality for African-Americans, to demonstrate that little substantive change has occurred in terms of better education, wealth and income for many blacks even after their granting of formal equal rights.

MacKinnon uses the example of granting more rights to women to explain why granting legal personhood may not result in any better treatment for non-human animals. She states that even though women have rights per se, in their present form they have done ‘precious little to change the abuse that is inflicted on women daily.’ Additionally, as MacKinnon states, these ‘rights’ do little to alter the inferior status of women which makes the abuse possible. This is analogous with non-human animals who have ‘rights’ codified in anti-cruelty legislation, however, the exemptions set out in this legislation ensure that the majority of non-human animals, mostly those in the research and agricultural sectors, are subject to cruel and inhumane practices.

232 St Pierre, above n 111, 257.
235 Ibid.
237 MacKinnon, above n 234, 271.
238 Ibid.
239 See Animal Welfare Act 2002 (WA) ss 23, 25 which provide defences to the cruelty to animals provision under s 19(l) where ‘accepted animal husbandry practices’ are utilised for animals in farms, zoos, wildlife parks, breeding establishments or training venues. What constitutes ‘accepted animal husbandry practices’ is set out in the various Codes of Practice for different sectors and includes
is with women, non-human animals have long been referred to as inferior and placed at the bottom of the hierarchy. Put bluntly, ‘[p]eople dominate animals, men dominate women.’

Therefore, without a significant shift in the perception of non-human animals, granting them legal personhood would do little to raise their status or improve their treatment.

5 ‘Personhood’ is an Inappropriate Lexis for Non-Human Animals

Some commentators believe that classifying non-human animals as ‘persons’ is philosophically and ethically inappropriate as the use of the term ‘person’ reinstates human superiority over non-human animals. In addressing this issue, one commentator has developed a new category of property whilst another has developed a new category outside of property and personhood. Favre’s new category of property involves classifying non-human animals as ‘living property’ where their interests are recognised and protected under law, but they retain their property status. This new category has been criticised for compounding the problem of the use and abuse of non-human animals by further instilling the idea of animals as ‘property.’ Therefore, labelling non-human animals as ‘living property’ does little to progress their legal personhood status.

A new category which does not identify animals as either property or persons is what Wolfe has describes as ‘[t]he most realistic and simple category [of] “animals.”’ Wolfe explains that, under this category, non-human animals ‘would then be subject to their own set of laws – independent of those that apply to “property” or to “humans.”’ Wolfe holds that by categorising animals as ‘animals’ rather than ‘property’ this will result in the awarding of non-economic damages for their owners, and (she hopes) promote more respect for non-human animals as living creatures. However, upon review, Wolfe’s category of ‘animal’ does not differ greatly from Bryant’s narrow definition of personhood (ie legal standing for non-human animals),

castration, tail docking, dehorning, teeth grinding/clipping, beak trimming, toe removal, devoicing, wing clipping, and excess culling…just to name a few! For the current industry Codes of Practice in WA, see <http://archive.agric.wa.gov.au/PC_94969.html>.

240 MacKinnon, above n 234, 264.
244 Ibid.
245 Ibid
thus it appears this change in terminology is merely superficial. Therefore, despite claims of the inappropriate lexis of *personhood,* it matters little which term is used so long as non-human animals are *not* classified as *property* under law.

D Conclusion

Personhood for non-human animals refers to their inclusion into our moral community and being granted legal standing and rights equal to those of humans. Various legal professors and philosophers have developed theories that promote different forms of legal personhood for non-human animals. Some of these theories have been criticised as mere ‘tinkering’ with the property status of non-human animals and hence not achieving legal personhood at all. This is particularly so in relation to those theories that require a non-human animal to possess human qualities before they can qualify as a legal ‘person.’ Some critics of legal personhood are outright opposed to granting rights to non-human animals, while others go so far as to declare animals incapable of having any rights whatsoever. Some feminists hold that even if non-human animals were granted legal personhood, its practical application would do little to promote their interests, just as granting women more rights has done little to prevent women’s abuse. Hence, there is much debate as to what legal personhood looks like for non-human animals and whether they should be granted it at all. However, legal personhood is a vital requirement when asserting the right not to be used as the resource of another; a requirement that non-human animals ultimately need if changes to their current status are to occur. Therefore, being classified as a ‘person,’ as opposed to ‘property’ under law, will enable non-human animals to claim the fundamental right not to be used as a resource or as means to meet human ends.
V CHAPTER 4: MAKING THE TRANSITION TO LEGAL PERSONHOOD

A Is Legal Personhood Attainable for Non-Human Animals?

1 Flexibility of the Common Law

From our previous discussion on the history of an animal’s property status it is more than evident that the common law has, for at least the last 200 years, effectively prioritised the rights of humans, as property owners, above those of non-human animals. But, as Kelch reasonably states, ‘the common law is not an impotent steed fenced by history; it has the liberty and, in fact, the duty to migrate to higher ground when facts and moral awareness dictate.’\textsuperscript{246} Thus the common law is a ‘ripe mechanism’ for changing the legal status of non-human animals as property, especially since previous legislative efforts to protect their interests have been largely ineffective.\textsuperscript{247} Indeed, the common law is not meant to be rigid, but instead should be flexible so that it may evolve over time.\textsuperscript{248} An early example of this flexibility was evident in the ruling of the infamous \textit{Oppenheim}\textsuperscript{249} case heard in the US. In this case the Court allowed a wife to make a claim for criminal conversation, an action previously denied a woman under the common law.\textsuperscript{250} Hence, it is now widely accepted in common law jurisdictions that the law must be flexible and adaptable in order to keep pace with societal change.\textsuperscript{251}

The basis for change in the common law has been identified by Professors Atiyah and Summers and summarised on three main grounds: 1) where changes in circumstances occur so that precedent becomes substantively obsolete; 2) where growing moral and social enlightenment shows that the substantive values underlying the law are no longer acceptable; or 3) where the precedent was substantively erroneous or badly

\textsuperscript{246} Kelch, above n 104, 532.
\textsuperscript{247} Ibid.
\textsuperscript{248} Ibid 545. See, eg, \textit{Ketelson v Stilz} 111 N.E. 423, 425 (Ind. 1916) (stating that the common law is flexible and expandable); \textit{Oppenheim v Kridel} 140 N.E. 227, 230 (N.Y. 1930) (stating that common law is flexible and like a living organism – this view was later followed in \textit{Rozell v Rozell} 22 N.E.2d 254, 257 (N.Y. 1939)); \textit{Lutvak v United States} 344 U.S. 604, 615 (1953) (stating that the common law is not immutable, but is flexible); \textit{Larsen v General Motors Corp}. 391 F.2d 495, 506 (8th Cir. 1968) (stating that the common law is not sterile and rigid, and serves the best interests of society by adapting to emerging and developing needs of our time).
\textsuperscript{249} \textit{Oppenheim v Kridel} 140 N.E. 227, 230 (N.Y. 1930).
\textsuperscript{250} Kelch, above n 104, 546.
\textsuperscript{251} Ibid.
conceived from the beginning.\textsuperscript{252} With reference to the first cause, changes in circumstances might include gradual changes in similar laws over the years, or a change in relationships between, for example, a husband and a wife, or within the family unit or between an employer and employee within the employment relationship; resulting in changes in the common law which reflect these new circumstances.\textsuperscript{253} The second cause concerns the changes in societal values which are usually reflected in public policy. An obvious example is the changing role of women in society which has resulted in frequent and ongoing changes in the common law primarily through the extension of more and more rights to women.\textsuperscript{254} As Kelch explains, ‘when the moral and social reasons for a rule have been rejected by society, so should the rule.’\textsuperscript{255} The third cause is self-explanatory and so it is a logical, and sometimes expected occurrence when these erroneous or badly conceived precedents become the subject of modification.

As one would expect, these causes are not distinct entities and thus they overlap with one another in effecting change in the common law.\textsuperscript{256} For example, there have been many changes in the world from the time when non-human animals were first considered to be the property of humans thousands of years ago. Some of the ancient laws have remained the same (ie animals remain the property of humans), but some have changed (ie despite what Descartes held, animals do in fact feel pain so they must be protected against ‘unnecessary’ suffering). The basis for these changes are three-fold: the first is based on a change in circumstances (cause one) such as an increase in scientific knowledge about animals; the second is based on a change in societal values (cause two) such as society’s view on the appropriate treatment of animals; the third is, as Kelch explains, based on the erroneous idea that animals are mere property (cause three) which is founded on concepts that modern science has disproved, such as the fact that they are more like us than not.\textsuperscript{257} Therefore, in reference to the treatment of

\textsuperscript{253} Kelch, above n 104, 547-48. Kelch provides many other examples of changes of circumstances which have led to a changes in the common law, such as the earlier maturation of children so they can testify at a younger age; faster transportation of goods; broader market places; and more accessible information via the internet.
\textsuperscript{254} Ibid 551.
\textsuperscript{255} Ibid.
\textsuperscript{256} Ibid 552.
\textsuperscript{257} Ibid 579. Wise agrees, and urges ‘a re-examination of this legal rule in light of the Darwinian revolution, modern scientific knowledge of the natures both of humans and of nonhuman beings, the decline of strict legal positivism, the post-World-War II rise of human rights both in domestic and international law, and the general principles of common law adjudication.’ See Wise, above n 43, 475.
non-human animals, the common law has adapted its laws to reflect the change in circumstances, particularly from the scientific realm, and the change in society’s expectations of how non-human animals should be treated; thus proving its inherent flexibility to adapt and change with the times. Hence, there is no conceivable or compelling reason, in terms of the laws ability, why legal personhood would not be attainable for non-human animals.

2 Legal Personhood for Non-Human Entities

In her article, Huss makes the claim that ‘it is possible to change the legal personhood status of non-human animals, just as it has been possible to change the status of other non-human entities such as corporations, ships, universities, government agencies and cities.’ In support of this claim, Huss, when interviewed before the ruling of the case concerning People for the Ethical Treatment of Animals (PETA) and Sea World, made the comment that ‘no one's [sic] established that animals are legal persons. It doesn't mean we couldn't ... it's just something that we as a society have not decided to do yet. If we can establish corporations as persons, why can't we establish whales as persons?’ Wise agrees and suggests that because the common law is exceedingly flexible and has the ability to recognise ‘things’ as ‘legal persons,’ there is no reason why animals cannot be afforded the same treatment. Indeed, the law is flexible enough to speak of a non-human entity, such as a corporation, as a ‘legal person’ and has done so for many years. This artificial entity is a ‘legal person’ which is the subject of rights and duties, capable of owning real property, entering into contracts, and suing and being sued in its own name; actions currently unavailable to non-human animals.

---

258 Huss, above n 47, 78. Huss also provides cases that have specifically considered the issue of an animal being treated as a person. See, eg, *Bass v State* 791 So.2d 1124 (Fla. Dist. Ct. App. 2000) where a dog was not found to be an ‘individual’; *Dye v Wargo* 253 F.3d 296, 300 (7th Cir. 2001) where a police dog was not found to be a ‘person.’


260 HuffPost ‘PETA’s SeaWorld Slavery Case Dismissed by Judge’ September 2, 2012.


262 Ibid, above n 149, 583.

263 Ibid.
As already mentioned, there has been heated debate for centuries between philosophers, political scientists, sociologists, economists, jurists and judges as to what constitutes the ‘essence’ of this ‘soulless and bodiless person.’ However, as Iwai explains, this debate has been, on the whole, declared ‘dead’ mostly as a result of John Dewey’s article published in 1926. In his article, Dewey succinctly states that “‘person’ signifies what law makes it signify.” This simple, but effective statement literally ended the century old debate on what constitutes a ‘person’ under law. Quite rightly too as it is well understood that the law has the flexibility, along with the authority, to create legal fictions such as corporate persons. In his article, Dewey went as far as actually dismissing the debate of what constitutes a ‘person’ as pointless, calling it a ‘confusion’ brought about by an unwarranted assumption that ‘there is in existence some single and coherent theory of personality and will, singular or associated.’ Therefore, because there is no one single theory of personality, non-human entities are able to be classified as legal persons under law.

As a starting point in his discussion of legal personhood, Dewey indicated that the juridical term ‘person’ might be used simply as a synonym for a ‘right-and-duty-bearing unit.’ He states that this unit, be it human or non-human, might be called a ‘person’ without any implications, except that the unit has those rights and duties which the courts find it to have. Whatever the term ‘person’ signifies in popular speech, or in psychology, or in philosophy or morals, is irrelevant. Just as irrelevant as it would be to argue that just because a wine is called ‘dry’ it has the properties of dry solids; or that, because it does not have those properties, wine cannot possibly be ‘dry.’ As Dewey explains, the term ‘dry’ as applied to a particular wine ‘has the kind of meaning, and only the kind of meaning, which it has when applied to the class of beverages in general.’ This argument holds true for the use of the term ‘person’ under law. To be classified as a legal person ‘humanness’ is not required, just as dry

---

264 Ibid.
266 Ibid.
267 Midgley famously states that the law ‘can, if it chooses, create persons...’ see Mary Midgley, ‘Persons and Non-Persons’ in Peter Singer (ed) In Defence of Animals (Blackwell, 1985) 52-62.
268 Dewey, above n 265, 673.
269 Ibid 656.
270 Ibid.
271 Ibid.
272 Ibid.
solids are not required for a wine to be ‘dry.’ Rather, the requirement of legal personhood is that the ‘person’ be the possessor of rights and bearer of duties at law.

Dewey states that because a legal person is a ‘right-and-duty-bearing unit,’ objects such as molecules, trees, or tables, cannot qualify as ‘persons’ under law. This is because, as Dewey explains, these objects are incapable of having ‘mutual relations’ with others which underlie the foundations of the rights and duties of the legal person.273 He states that these ‘mutual relations’ lead to social consequences which are controlled and modified by the beings that are the bearers of rights and duties.274 Dewey admits that ‘[m]olecules and trees certainly have social consequences; but these consequences are what they are irrespective of having rights and duties. [They] would continue to behave exactly as they do whether or not rights and duties were ascribed to them.’275 This sentiment is evident in environmental jurisprudence where it is typical for the promotion of legal rights to be ascribed to the environment, but not legal personhood, as the corresponding legal obligations are missing along with the ability for ‘mutual relations.’ As Christopher Stone points out in his highly influential article, it would take a ‘bold and imaginative lawyer’ to convince a court that an endangered river was a ‘person.’276

Non-human animals, however, are different in the sense that they are beings with the ability to have ‘mutual relations’ with other beings, be they human or other non-human animals, that lead to changing social consequences. For example, if non-human animals were ascribed the right not to be treated in a way that caused them pain and suffering for any reason (except where it was for the good of the animal in the case of emergency veterinary surgery), the social consequences would be significant in terms of the effect this would have on the viability of the agricultural, entertainment, and biomedical sectors; not to mention the changing relationship humans would have with non-human animals within these sectors, including the domestic environment (if animals existed in these environments at all!). Ascribing such rights to animals would significantly impact our ‘mutual relations’ resulting in a vastly different relationship between humans and non-human animals than the one that currently exists today.

273 Ibid 661.
274 Ibid.
275 Ibid.
It is important to note here that if non-human animals were classified as ‘persons’ it does not mean that they are the same as human persons or that they will have exactly the same rights as humans or, for that matter, the same rights as other non-human entities; rather they will be the possessors of rights that relate specifically to them.\(^{277}\) Similarly, non-human animals will not bear the same duties as humans (or other non-human entities) as their duties will be specifically relevant to them.\(^{278}\) This may work in a comparable way to how children and the disabled are treated under law. For instance, even though children and the disabled belong to the human species, they do not bear the same duties and obligations under law as fully competent adult humans.\(^{279}\) This is because law requires of them exactly what their competencies allow. Therefore, following along the lines of Dewey’s argument that “‘person’ signifies what law makes it signify,’ if the law decided to grant rights and impose duties on non-human animals then they could conceivably be declared ‘persons’ under law.

### B Legal Requirements to Make the Transition

#### 1 Enlightened Judicial Decision-Making

Judges are usually precedent bound, although, as we have seen above, the common law is flexible enough to overcome this restriction where there is sufficient cause. According to Wise, sufficient cause includes acknowledging the scientific discreditation of the ‘vertical cosmologies’ that created the ‘legal thinghood’ of non-human animals throughout our past history.\(^{280}\) The ruin of these beliefs has opened the possibility for judges to consider that non-human animals might transcend ‘legal thinghood’ as a matter of logic and normative principles; both essential elements in judicial decision-making.\(^{281}\) As Lord Atkin proclaimed in *United Australia Ltd v Barclays Bank Ltd*\(^{282}\) ‘[w]hen these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them

---

\(^{277}\) Francione, above n 16, 62. For example, non-human animals would not be (and, of course, should not be) given the right to vote or drive a car, for instance.

\(^{278}\) Indeed, Hohfeld’s ‘right – duty correlative’ of interests within a legal relationship may not be appropriate for the legal relationship between humans and non-human animals. See Joseph William Singer, ‘The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld’ (1982) 6 *Wisconsin Law Review* 975, 986-87. Therefore, a different legal alternative may need to be developed in order to more accurately reflect the human/non-human animal legal relationship.

\(^{279}\) Francione, above n 16, 65.

\(^{280}\) Wise, above n 43, 543.

\(^{281}\) Ibid.

\(^{282}\) [1941] AC 1 [29].
undeterred.’ Therefore, once an injustice has been brought to the attention of a judge, it is their duty to ensure that, in light of what they believe to be true facts and modern values, the rules are changed so that justice can be achieved in each case. Thus, judges are required to look beyond the arbitrary rules of the past and incorporate modern science and knowledge, along with the changing values of society, into their decision-making.

Dismantling thousands of years of legal rules that have upheld the property status of non-human animals will not be an easy task. Indeed, it will most likely be a long and difficult struggle, but as Wise contends, ‘[i]t is the nature of great change to stimulate great opposition.’ The question, then, is which judges will be fit for the challenge? More specifically, ‘[w]hich judges are likely to be the most intellectually and emotionally able and willing to see that it is possible and appropriate to extend dignity-rights beyond nonhuman beings, to think deeply about and understand this possibility, and to change their beliefs?’ Wise believes it is those judges who best understand and believe the basic principles of modern Darwinian evolution and ecology and who have the least personal or social investment in the wholesale exploitation of non-human animals. He also believes it will be those judges who are the least saturated with critical arguments against the notion of non-human animals having the same rights as humans, along with those who are the most strongly motivated to examine the data that supports a transition to legal personhood for non-human animals.

The conservative nature of the judiciary makes it more difficult to find such judges, but they do exist, especially in cases where the judge has gone against precedent and treated non-human animals as more than mere property. For instance, there are occasions when directions in a will regarding domestic animals are found to be repugnant to public policy. In these cases the courts have responded in favour of the

---

284 Ibid 16.
285 Wise, above n 101, 837. Wise identifies Lord Mansfield as an example of a judge who understands that the common law is a flexible living organism which changes as morality changes and when scientific facts and experiences come to light. See Wise, above n 204, 1288-1289.
286 Wise, above n 101, 837.
287 Ibid. Posner argues, with reference to the practical application of legal personhood in the courts, if judges are to be persuaded to change the law in the way advocated by Wise, they need to know the consequences of such changes, which has a significant impact on the way they make decisions. Posner believes this point has not been sufficiently addressed by Wise. See Richard Posner, ‘Animal Rights: Legal, Philosophical, and Pragmatic Perspectives’ in Cass Sunstein and Martha Nussbaum (eds), Animal Rights: Current Debates and New Directions (Oxford University Press, 2004) 51.
non-human animal by disregarding the owner’s wishes.\footnote{288}{Diane Sullivan, Holly Vietzke and Michael Coyne, ‘A Modest Proposal for Advancing Animal Rights’ (2008) 71 Albany Law Review 1129, 1132.} A pertinent example of this situation is the case of \textit{In re Estate of Howard H Brand}\footnote{289}{No 28473 (Vt. Prob. Ct., Chittenden County Mar. 17 1999).} where the testator directed that his perfectly healthy horses and mules be destroyed upon his death. The Court rejected that directive and noted that, ‘the unique type of “property” involved merits special attention. “Property” in domestic pets is of a highly qualified nature, possession of which may be subject to limitation and control.’\footnote{290}{Ibid \[3\] (quoting \textit{Morgan v Kroupa} 702 A.2d 630, 634 (VT 1997)). See also \textit{Bueckner v Hamel} 886 S.W2d 368 (Tex. Ct. App. 1994) where Justice Andell at 377-78 commented that that animals were more than \textit{mere} property and that the law should reflect this notion (emphasis in original); \textit{Capers Estate} 34 Pa. D. & C. 2d. 121, 141 (Orphan’s Ct, 1964) where the Court also denied a testator’s wish to have her two dogs destroyed. According to Bruce, there have been no reported cases in Australia involving the issue of willed euthanasia for companion animals. See Bruce, above n 69, 155.} Therefore, even though the judge in this case still considered the horses and mules to be ‘property’ they were a ‘unique type’ which deserved ‘special attention.’ This effectively rejects the historical notion that non-human animals are \textit{mere} property and recognises their inherent worth, along with their right not to be killed at the whim of their owner.

With regards to modern judicial decision-making, Wise notes that law-making in recent times has begun to reflect a shifting sense of appropriateness of the place of non-human animals.\footnote{291}{Wise, above n 101, 838.} He states that, ‘not only has the intrinsic value of human beings become more commensurable with other values, but non-human life has become infused with some intrinsic value.’\footnote{292}{Ibid.} This notion is reflected in the decisions made in the deceased estate cases, amongst others, outlined above.\footnote{293}{Cases concerning companion animals have also recognised the inherent worth of non-human animals. See, eg, \textit{Murray v Bill Wells Kennels, Ltd} Wayne County Circuit Court No. 95-536479-NO (Mich 1997) where Judge Tertzag stated that ‘the view equating a living, breathing animal to chattel is archaic and does not withstand the test of critical analysis. Slavish adherence to a worn-out doctrine without serious, critical analysis does the law no good and, indeed, engenders public disrespect for the law.’ \footnote{294}{Wise, above n 101, 908.}} Recognising the inherent worth of an animal is progressive, but not as enlightened as recognising full legal personhood rights for non-human animals, such as their right to fairness, equality, bodily integrity and bodily liberty.\footnote{295}{Ibid.} In other words, their right not to be treated as a resource for human ends.

Obviously, judges who make decisions concerning granting legal personhood rights to non-human animals will have to do so with certain practicalities in mind, similar to
those they would consider when dealing with the rights of children and the disabled. For example, the right to vote is usually restricted to those who are literate and can understand the voting procedure, so granting a person who is severely mentally disabled the right to vote would be inappropriate. Similarly, the rights of children to testify in court is usually only permitted if they can understand their obligation to be truthful, so allowing a child who does not understand this requirement to testify is also inappropriate. Therefore, granting a non-human animal the right to vote or the right to testify in court would be equally inappropriate. Thus, rights (and certainly duties) need to be judicially qualified for non-human animals. But the need for qualification does not disqualify them from eligibility to full legal personhood, rather it means that judges must be more flexible in the way they interpret what ‘personhood’ means for non-human animals and apply this to their decision-making.

2 Constitutional Recognition

A country’s constitution identifies ‘the fundamental set of rules governing matters pertaining to its organisation, including delineation of the powers of its separate organs, and the rights and duties of its citizens.’ Anything contained within a country’s constitution maintains substantial influence over how those within its jurisdiction are treated under law. Therefore, it is significant that several European countries, including Switzerland, Germany, Austria and Slovenia, have enacted legislation to include animal welfare in their national constitutions. For example, Article 80 of the Federal Constitution of the Swiss Confederation of 18 April 1999 provides for the following:

Art. 80 Protection of animals

1 The Confederation shall legislate on the protection of animals.

2 It shall in particular regulate:

295 As bizarre as it sounds to us now, throughout the Middle Ages, non-human animals were subjected to litigious proceedings, then usually sentenced, in both secular and ecclesiastical courts across continental Europe. For examples of these animal ‘trials’ see Wise, above n 43, 505-13. Of course, today these trials are no longer practiced, but some commentators believe they have been replaced by the actions of the local animal shelter where animals are executed for ‘crimes’ such as ‘homelessness’ and ‘aggression’ without any form of legal representation. See Piers Beirne, ‘The Law is an Ass: Reading E P Evans’ The Medieval Prosecution and Capital Punishment of Animals’ (1994) 2(1) Society and Animals 27, 43-44 quoted in Bruce, above n 121, 19.

296 Wise, above n 101, 908.

297 Trischa Mann and Audrey Blunden (eds), Australian Law Dictionary (Oxford University Press, 2010).

a. the keeping and care of animals;
b. experiments on animals and procedures carried out on living animals;
c. the use of animals;
d. the import of animals and animal products;
e. the trade in animals and the transport of animals;
f. the slaughter of animals.

3 The enforcement of the regulations is the responsibility of the Cantons, except where the law reserves this to the Confederation.

From Article 80 above, it is evident that the Swiss Constitution provides significant detail on areas of animal welfare on which the country will regulate.299 This is in contrast to other European countries which acknowledge that they will regulate on animal welfare, but provide no details of how this will be achieved. For example, Article 72 of the Constitution of the Republic of Slovenia of 23 December 1991 dedicates only one line to non-human animals: ‘The protection of animals from cruelty shall be regulated by law.’ Similarly, the German Constitution does not provide much guidance on animal protection by combining their protection with that of nature in a single Article,300 whilst the Austrian Constitution excludes hunting and fishing from its Federal animal protection legislation.301 Nevertheless, as Goetschel states, including non-human animals in a nation’s constitution effectively ensures that animal welfare is recognised and valued in the same way that other constitutional rights are valued, such as rights concerning property ownership and protection, freedom to conduct trade and commerce and the freedom of religion.302

The Swiss have gone even further than simply outlining how they regulate animal protection in their constitution. In 1992, Switzerland was the first country in the world

299 Switzerland is also progressive in terms of recognising the rights of non-human animals in their Animal Protection Act 2008, as well as explicitly stating that ‘[a]nimals are not objects’ in art 641a of the Swiss Civil Code. This delivers an important message that Swiss law recognises animals as sentient beings and not just inanimate objects like cars or sofas. See Margot Michel and Eveline Schneider Kayasseh, ‘The Legal Situation of Animals in Switzerland: Two Steps Forward, One Step Back - Many Steps to Go’ (2011) 7 Journal of Animal Law 1, 20.
300 Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany] art 20a.
302 Goetschel, above n 298, 32.
to recognise the ‘dignity’ of animals in their constitution; the purpose of which was to protect non-human animals against the abuses of gene technology.\textsuperscript{303} Article 120 is now a constitutional principle recognised as having general validity throughout the whole Swiss legal system as well as one that guides State action.\textsuperscript{304} This demonstrates the power of including non-human animals in a nation’s constitution. Although there is still much controversy surrounding the proper meaning of ‘dignity’ and how it translates to non-humans and their treatment under law, it is encouraging that these types of conversations are being held amongst their politicians.\textsuperscript{305} This is more than can be said for most other countries throughout the Western world. Michel and Kayasseh state that the prevailing legal opinion of the inclusion of the ‘dignity’ of animals in their Swiss Constitution is that there is ‘a respect for the inherent value of animals… [which] is neither based upon nor exhausts itself in considerations as to what use animals can be put to by humans; rather, it respects animals in their own being and otherness.’\textsuperscript{306} In addition, the highest court of Switzerland, the Swiss Federal Supreme Court, made comment as to the constitutional inclusion and held that the principal of the ‘dignity’ of non-human animals means that they should ‘at least to a certain degree, be regarded and valued as beings of equal stature with humans.’\textsuperscript{307}

It is apparent that the inherent value of non-human animals is not being recognised by the Federal parliaments of countries such as Australia and the US, especially when these countries make no reference to non-human animals in either of their respective anthropocentric constitutions.\textsuperscript{308} Thus, in order for non-human animals to be eventually recognised as ‘persons’ in countries such as Australia and the US, a vital first step is to include them in the country’s constitution. Just as the Aboriginal and Torres Strait Islander peoples of Australia are calling for their inclusion and recognition in its constitution,\textsuperscript{309} so too should non-human animals be included.

\textsuperscript{303} The Constitutional Article 120 was passed by way of national referendum recognising the ‘dignity of the Creature,’ see Michel and Kayasseh, above n 299, 3.

\textsuperscript{304} Ibid.

\textsuperscript{305} Ibid 4-11.

\textsuperscript{306} Ibid 9.

\textsuperscript{307} Swiss Federal Supreme Court, decision No. 135 (2009) II385 et seq. 403, quoted in Michel and Kayasseh, above n 299, 10 (emphasis added).

\textsuperscript{308} Even though the \textit{Australian Constitution} does not provide express power to the Commonwealth Government to regulate on non-human animals, it does provide indirect powers under s 51 (i) trade and commerce power; s 51 (ix) quarantine power; s 51 (x) fisheries power; and s 51 (xx) external affairs power.

Hence, in a similar vein to the Swiss Constitution, a suggested amendment for the 
Australian Constitution is the recognition of the ‘dignity’ of non-human animals, along 
with the added inclusion of their right not to be used as a resource by humans. If only 
the addition of the recognition of a non-human animal’s dignity were included, as it is 
in Swiss law, the inherent value of an animal will become a legally protected interest 
with constitutional force.  

3 Legislative Change

The world’s first animal protection laws were enacted by the Puritans of the 
Massachusetts Bay Colony in their 1641 Body of Liberties. This enactment declared 
to protect the colonists’ fundamental rights, including those for women, children, 
 servants and non-human animals. Article 92 stated that ‘[n]o man shall exercise any 
Tirranny or Crueltie towards any bruite Creatures which are usuallie kept for man’s 
use.’ Article 93 made it lawful to those leading or driving ‘Cattel’ to rest them if they 
were weary, hungry, sick, or lame ‘in any open place that is not Come, meadow, or 
inclosed for some peculiar use.’ As important as the Puritans' laws were to the 
protections of those exploited, their fundamental failure was that they did not alter the 
ultimate predicament of non-human animals to be used by humans for food and 
labour. This was to be expected, particularly since the Puritans were guided by 
biblical sentiment that placed human interests above the interests of non-human 
animals. Nevertheless, these laws planted the seed that led to the anti-cruelty statues 
which most countries throughout the world have enacted; each espousing varying 
degrees of protection for non-human animals.

In the past, anti-cruelty laws were primarily concerned with the effect that cruelty 
might have on public sensibilities or on its encouragement of cruel acts towards other 
humans, rather than a concern about actual cruelty to animals. This is less likely to 
be the case today, especially considering the recognition that non-human animals can

---

aboriginal-torres-strait-islander-people#top>, In the past, Indigenous Australians have been regarded as 
“local fauna” which is indicative of their non-inclusive status and highlights the importance of 
recognising and including them in our nation’s constitution. See Zuzana Kocourkova, ‘Why Do Animals 
310 Michel and Kayasheh, above n 299, 11.
311 Wise, above n 43, 539.
312 Ibid.
313 Ibid 540.
314 Ibid.
315 Francione, above n 16, 34.
feel pain and do suffer, hence their interests should be protected.\textsuperscript{316} Indeed, the fact that anti-cruelty laws are criminal laws suggests that we take animal interests seriously enough to punish violations with the social stigma of a criminal penalty.\textsuperscript{317} However, aside from prohibiting acts such as the torture, torment, unjustifiable injury, overdrive, overload, cruel beating, and needless mutilation of non-human animals, these anti-cruelty laws still allow such cruel practices when they are deemed ‘necessary,’ for example in medical experiments, in agricultural practices, or during hunting.\textsuperscript{318} Therefore, these laws, although appearing to protect the interests of non-human animals, do no such thing when there is an economic benefit to the human in using the animal, or the practice is accepted or customary on the part of the animal owner.\textsuperscript{319}

St Pierre asserts that, if language recognising the interests of the non-human animal was inserted into legislation, then there would be less room for compromise in interpreting statutes and more room to argue for the expansion of animal interests.\textsuperscript{320} Until this happens though, the law will continue to require that a non-human animal’s interests be observed only when there is some reciprocal human benefit to be gained.\textsuperscript{321} This has even proven to be true for countries that have a greater moral concern for their animals, such as Britain and other European countries.\textsuperscript{322} For example, Britain has more restrictions on animal use than does the US, but when these differences are analysed they prove to be more formal than substantive, especially since both countries utilise cruel factory farming practices.\textsuperscript{323} Ultimately then, for non-human animal interests to be legitimately considered and recognised in legislation, it is their property status that must first change.

On a more optimistic note, authors such as Kelch take comfort in the fact that past legislative exertions which attempt to address the interests of non-human animals, although primarily ineffective, demonstrate a trend of increasing concern toward

\begin{itemize}
\item \textsuperscript{316} Wise, above n 101, 911-12.
\item \textsuperscript{317} Francione, above n 16, 35.
\item \textsuperscript{318} Ibid 39.
\item \textsuperscript{319} Ibid.
\item \textsuperscript{320} St Pierre, above n 111, 270. Silversteen suggests that recognising animal interests in legislation may also have the effect of raising social consciousness of the issues, gaining valuable publicity, educating the masses and mobilising the animal advocacy movement. See Professor Helena Silversteen’s comments during a debate at the 5\textsuperscript{th} Annual Conference on Animals and the Law, September 25, 1999. For transcript see: ‘The Legal Status of Nonhuman Animals’ (2002) 8 Animal Law 1, 68.
\item \textsuperscript{321} Francione, above n 16, 43.
\item \textsuperscript{322} Ibid.
\item \textsuperscript{323} Ibid.
\end{itemize}
Indeed, society’s views on practices such as the wearing of fur, testing of cosmetics on animals, and the use of battery cages and sow stalls has shifted dramatically over the past few decades making these practices highly objectionable. These changes in society’s views have, in turn, resulted in changes to public policy on these issues. Lovorn refers to this as the ‘sweet spot’ of public policy toward animals. He describes this as the space in between current practices and where current polling data suggests society is ready to go in terms of legal reform concerning the treatment of non-human animals. This, according to Lovorn, is the place where lawyers and legislators should focus their efforts in order to eventually achieve the final goal of granting legal personhood to non-human animals.

4 Reconceptualising What Constitutes ‘Property’

Jacoby suggests that ‘just as the commodification of the non-human animal models that of human slavery, so can the destruction of human slavery model for the destruction of the commodification of non-human animals.’ This is not out of the realm of possibilities especially considering the dynamism of property. What constitutes property today may not constitute property in the future, just as it was with human slaves. Indeed, Gray suggests that ‘the task of the immediate future is, in part, to reconceive the law of property for the 21st century’ which may conceivably place non-human animals outside the realm of what currently constitutes ‘property’ for both moral and equitable reasons. If humans were to apply the higher moral principles of fairness, equality and liberty to all sentient beings then non-human animals could no longer be considered to be the property of humans as doing so would violate these principles. Just like humans, non-human animals have a desire not to be treated as the resource of another and to have their interests considered, particularly their interest in not suffering at the hands of their owners for their (the owner’s) benefit. Therefore

---

324 Kelch, above n 104, 579.
325 Garner, above n 122, 89. In agreement with Garner, Radford notes that the power of public opinion or public pressure cannot be underestimated in terms of its effectiveness in achieving better treatment of non-human animals (eg the banning of battery cages in the EU is a prime example of this). See Professor Michael Radford’s comments during a debate at the 5th Annual Conference on Animals and the Law, September 25, 1999. For transcript see: ‘The Legal Status of Nonhuman Animals’ (2002) 8 Animal Law 1, 72.
327 Ibid.
328 Ibid.
330 Gray, above n 85, 207.
humans, as members of a civilised society, should recognise that classifying non-
human animals as property is an infringement of their fundamental desire to live free
from suffering, hence the property status of non-human animals should be abolished,
as it was for human slaves.

5 Abolishing the Property Status through Incremental Steps

It is common for animal rights advocates, such as Tom Regan, to demand that there be
an immediate and complete cessation of all types of animal exploitation, including the
immediate abolition of the property status of non-human animals. Francione, although an avid animal rights advocate, argues that this ‘all-or-nothing’ proposition is unrealistic in the light of ‘increasingly reactionary political and legal systems.’ Instead, Francione proposes that a more realistic approach in achieving the eventual abolition of animal exploitation and their property status is through incremental steps. The cornerstone of Francione’s incremental approach is the rejection of the principle of animal welfare (ie that it is permissible to use animals as long as they are treated ‘humanely’) and the adoption of a deontological norm that satisfy three fundamental conditions.

The first condition that must be satisfied in applying Francione’s incremental approach is that the norm must recognise a non-tradable interest. This goes specifically against the principle of animal welfare where all animal interests are regarded as ‘tradable.’ The second condition is that the norm must prohibit, rather than regulate, the conduct that constitutes a violation of the non-tradable interest. At present there is very little conduct toward animals that is prohibited outright, apart from cockfighting or dogfighting. The third and final condition is that the norm must not prescribe an alternative form of exploitation to counter-act the prohibition of the non-tradable interest. Francione admits that, although animals will be beneficiaries of such prohibitions, they may still be subject to other exploitation because the incremental approach, by its definition, has the potential to leave institutionalised exploitation

331 See Regan, above n 204, 127.
332 Francione, above n 233, 52. To be fair to Regan, he does recognise, toward the end of his book, the economic calamity that would occur if animal exploitation were to cease immediately, particularly within the meat industry, and states that, due to the significant impact of such cessation, it is more likely that change will come incrementally. See Regan, above n 204, 347.
333 Francione, above n 233, 56.
334 Ibid.
335 Ibid.
For example, prohibiting the dehorning of steers may meet the animals’ interest in not being dehorned, but they may still end up being killed for food. Nevertheless, the true benefit of this approach lies in the fact that each incremental step taken erodes, albeit gradually, the status of non-human animals as property.  

6 Expanding the Standing Doctrine to Include Non-Human Animals

St Pierre holds that the most significant step in the direction of granting legal personhood to non-human animals is by expanding the standing doctrine to include them so that they (via human representatives, of course) may litigate to promote and protect their own interests. As Francione states, ‘standing is a prerequisite for the enforcement of rights.’ Thus, in order for the interests of non-human animals to be protected, it is vital that non-human animals are recognised by the courts so that they may sue in their own right. Because non-human animals need human assistance to achieve this, some European countries have implemented ‘qualified animal advocates’ to represent non-human animal interests in the course of administrative and criminal proceedings. For example, in Austria, an Animal Welfare Ombudsman has been implemented to represent animal interests in each state.

Section 41 of the Austrian Animal Welfare Act 2008 sets out the tasks of the Animal Welfare Ombudsman, particularly that of representing the interests of animal welfare. Notably, s 41(4) states that the ‘ombudsman shall have the status of a party in administrative proceedings’ which enables them to act on behalf of the animal plaintiff. There is also a constitutional provision of professional independence which states that the ombudsman ‘is not subject to any instructions in exercising his [sic] duties.’ There are some significant restrictions, however, to the scope of the role of the Austrian Animal Welfare Ombudsman, such as being constrained from filing appeals in courts of Public Law and limited to filing those proceedings which fall within the regime of the Animal Welfare Act 2008 (which excludes provisions

336 Ibid 57.
337 Ibid.
338 St Pierre, above n 111, 270.
339 Francione, above n 26, 49.
340 St Pierre, above n 111, 271.
341 Binder, above n 301, 110.
342 Ibid 111. Until recently (2010) Switzerland also employed an ‘animal welfare attorney’ who was tasked to represent animal interests, or be the ‘animal’s voice,’ in court. See Goetschel, above n 298, 35.
343 Animal Welfare Act 2008 (Austria) s 41(3).
344 Ibid s 41(5).
concerning animal transportation and experimentation).\textsuperscript{345} Despite these limitations, employing an advocate in such a position would be more effective in addressing the harm to the non-human animal than having a lawyer represent the \textit{human} that has been harmed, as Bryant states, \textit{from another human’s failure to prevent harm to the animal}.\textsuperscript{346} Therefore, it is more effective for the non-human animal to represent itself via a human representative such as an ombudsman, than suing through a third party.

Bryant identifies three main arguments for expanding the standing doctrine to include non-human animals.\textsuperscript{347} Bryant’s first argument recognises that, by expanding the doctrine, the correct victim, i.e. the non-human animal, will be accurately identified, as it is the animal who has suffered the injury and not the human. Therefore, no ‘legal fictions’ will be created from expanding standing to the subject animal. Bryant’s second argument highlights that, where legal standing is granted in the name of the individual that alleges the harm (even if it is an animal), the tests for standing are better met than expanding standing to humans that are claiming injury by virtue of injuries to another. In other words, the ‘special interest’ test is more easily satisfied whenever an injured party acts as the plaintiff. Bryant’s third argument holds that, when deciding whether to grant standing, a direct route is always preferable as it addresses the actual harm suffered by the victim and not a secondary harm suffered by a third party.\textsuperscript{348}

In making these arguments, Bryant also concedes that there are some inevitable negative consequences that may result from expanding the standing doctrine.\textsuperscript{349} Specifically, any litigation which proceeds in the name of non-human animal plaintiffs will most likely result in fruitless debates and arguments about the characteristics of animals which are ‘human’ enough to warrant their recognition as ‘persons.’\textsuperscript{350} Bryant contends that the fundamental problem with these arguments is that they are not able to be resolved completely and hence this uncertainty may inadvertently affect the decision about whether or not to grant standing to a non-human animal plaintiff.\textsuperscript{351}

\textsuperscript{345} Binder, above n 301, 111-12.
\textsuperscript{346} Bryant, above n 51, 254 (emphasis added).
\textsuperscript{347} Ibid 276.
\textsuperscript{348} Ibid.
\textsuperscript{349} Ibid 277.
\textsuperscript{350} Ibid.
\textsuperscript{351} Taimie Bryant, ‘Similarity or Difference as a Basis for Justice: Must Animals Be Like Humans to Be Legally Protected from Humans?’ (2007) 48 Law and Contemporary Problems 207, 211. Other commentators have weighed in on this debate producing a plethora of theories without any agreement on the topic of the similarity of animals to humans. See, eg, John Rawls, ‘Outside the Scope of the Theory of Justice’ in Paul Clarke and Andrew Linzey (eds) \textit{Political Theory and Animal Rights} (Harvard
Thus, the real issue of granting non-human animals standing gets lost in the endless debate about how ‘like us’ animals are when what really should be at issue is how their legal status prevents them from having their day in court. Nevertheless, with the inevitable advances in scientific knowledge it is likely these debates will lessen and eventually the interests of non-human animals will be recognised by courts so that ultimately they will have the capacity to sue in their own names. The appointment of a legal advocate or ombudsman to represent non-human animals in court will undoubtedly speed up this process.

7 Economic and Technological Considerations

Whilst not specifically a legal requirement, Charlesworth, Chinkin and Wright suggest that economics and technology also play a major role in effecting legal change.352 The authors use the example of slavery to demonstrate that its abolition did not occur until it was assisted by economics and technological considerations.353 In support of their views they quote the famous French international jurist, Georges Scelle (1878-1961):

The struggle against slavery, the protection of the bodily freedom of individuals only began in international law when it is was clearly demonstrated that slave labour has economic drawbacks and that the progress of modern technology allows it to be replaced. Whenever human manpower has not been replaced, slave labour and forced labour still exist, despite all efforts made to proscribe it. This proves that a moral conviction, even if of a general character, does not override the necessities of economic life in the formation of legal rules.354

These points are analogous to the position of non-human animals and their current place in society. In the (slightly altered) words of Georges Scelle, ‘when it is clearly demonstrated that [animal] labour has economic drawbacks and that the progress of modern technology allows it to be replaced’ then the use of non-human animals for labour will cease. We have seen that this has already occurred with the introduction of modern farming machinery replacing non-human animal labour in most Western countries. This statement can also be applied to the production of animals for food. For example, when it is too costly to produce meat, both from an economic and


353 Ibid.

environmental perspective, and modern technology allows meat to be replaced through the manufacture of in vitro or synthetic meat, then non-human animals will no longer be used as a food resource for humans. As Georges Scelle states, it takes more than a moral conviction of the masses to make such a significant legal change, thus the economic and technological considerations of such change cannot be ignored.

C Anticipating Resistance to Change

Even in a situation where the societal, economic, environmental and technological elements are supportive of legal change, there will always be resistance to change itself. In his highly influential article promoting legal rights for the environment, Stone anticipated this resistance. He noted that ‘[t]hroughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable…each time there is a movement to confer rights onto some new “entity,” the proposal is bound to sound odd or frightening or laughable.’ This is because until the entity in question is recognised as having rights, ‘we cannot see it as anything but a thing for the use of “us” - those who are holding rights at the time.’ This is as true for nature, as it was for slaves, women and children at different points in history. It is also true for non-human animals as they exist in our society today. It was not until three decades after Stone published his article that lawmakers and communities began to take his thesis seriously as a novel and potentially powerful means to protect the environment. So too will it take decades before non-human animals are recognised as sentient beings who have the right not to be treated, in Stone’s words, as ‘a thing for the use of “us.”’ Despite this resistance, any positive changes for non-human animals which are enshrined in law will provide them with the protections they need to be regarded as legal ‘persons’ in their own right.

---

355 In his book, Francione discusses the tremendous inefficiencies and resulting costs to our planet of animal agriculture. For example, ‘food’ animals consume more protein than they produce so that, for every kilogram of animal protein produced, animals consume an average of 6 kilograms of plant protein from grains and over 100,000 litres of water (it only takes 900 litres of water to produce the same kilogram of wheat). See Francione, above n 16, 36-7.

356 Stone, above n 278, 450.

357 Ibid 453-55.

358 Ibid 455 (emphasis in original).


360 Ibid.

361 Lovron suggests that it may take longer than three decades to achieve legal personhood for non-human animals due to our major reliance on animals. He states that this change would most likely run the same course as the abolition of slavery (ie approximately 150 years) with the achievement of personhood for non-human animals occurring around the mid twenty-second century (assuming a start date of 1970). See Lovorn, above n 326, 141.
D Conclusion

Legal personhood is attainable for non-human animals through the inherent flexibility and adaptability of the common law, combined with its long standing recognition of personality in other non-human entities, such as corporations and governments. Greater social awareness and increased activity toward the better treatment of animals indicates that society’s views are changing in relation to non-human animals. Whilst societal change drives legal change, it is legal reform that is required in making legal personhood a reality for non-human animals. Therefore, legal reform in the form of constitutional and legislative changes are required in order to recognise the inherent value or ‘dignity’ and particular interests of non-human animals. Additionally, a progressive and enlightened judiciary is required to recognise those interests, including a non-human animal’s interest to sue in their own right. Before any reforms are effective in protecting animal interests, their property status must first be abolished. According to Francione, this may only be achieved through incremental steps due to the significant impact such a change would have on society. Reconceptualising the concept of property to exclude non-human animals will assist in abolishing their property status. Economic and technological factors must also be considered in effecting legal change for non-human animals. Thus, by implementing the above reforms, non-human animals will be legally able to transition from their status as property to a status that more closely resembles or characterises legal personhood, despite any resistance that these changes will most likely attract.
VI CONCLUSION

Our current legal framework concerning non-human animals in Australia reflects the values of the majority of Australian society. Centuries of human supremacy, in combination with the continued ownership of animals, has resulted in the everyday requirements of society being heavily dependent upon the use (and abuse) of non-human animals. Today our society relies on non-human animals to fulfil a variety of wants and desires such as food, clothing, entertainment, protection, health and companionship. However, most of society are unaware that, by using non-human animals for these purposes, they are subjecting them to unnecessary suffering. Thankfully, this level of unawareness is changing within society. Now, more than ever, people are questioning the way non-human animals are treated, particularly in farming practices, but also in other areas such as medical experimentation and within the entertainment industries. This questioning has led to some minor changes to the way non-human animals are treated under law. However, more significant reforms are required in order to fully protect their interests.

This thesis based its argument on the premise that the use of non-human animals cannot be morally justified for any reason. The use of non-human animals is currently permissible because they are the property of humans who may do with them as they wish. As the property of humans, non-human animals have no recognisable interests or ‘rights’ which means they are subject to the ‘property paradigm’ whereby their interests are always subordinated to human interests. Their property status also means they are not recognised by the courts as legal ‘persons’ and thus have no legal capacity to protect their interests and sue in their own right. This thesis has provided arguments from commentators that state that animals are better off as the property of humans due to the protections they are afforded. These protections do indeed apply to a few (select) companion animals, but on the whole, the property status of non-human animals means that they are mere property of which humans have ultimate control. This thesis has argued that non-human animals should not be considered the property of humans, because they are more than inanimate objects. Instead, they are sentient beings that can feel pain and seek out pleasure, just like humans. Thus their interests deserve equal consideration with human interests. Additionally, humans can no longer be justified in treating non-human animals like human slaves were once treated, and hence humans’ proprietary rights in non-human animals have reached their moral limits.
In order to be recognised as a legal ‘person,’ and thus be afforded the rights of this classification, the legal status of non-human animals must transition from being ‘property’ to a classification that resembles legal ‘personhood.’ There have been many attempts at developing theories that resemble legal personhood, but most have been criticised as merely ‘tinkering’ with the current property status of non-human animals. Some critics even contend that if non-human animals are granted the same rights as humans, then human rights would suffer. Others doubt there is any competition of rights between humans and non-human animals because they believe that non-human animals cannot be granted the same rights as a person for the simple fact that they are not ‘human.’ This theory is quickly discounted when the ‘personhood’ of non-human entities, such as corporations, has been made possible under law and subsequently accepted by the judiciary and society. If corporations can be granted similar rights to humans and are considered legal ‘persons’ then so too can non-human animals be granted the same status. This thesis finds that there is no compelling reason why these rights cannot be granted, hence, legal personhood is attainable for non-human animals.

Therefore, due to the flexibility of the common law and its ability to classify other non-human entities as legal ‘persons,’ more can be done from within a legal context to assist non-human animals transition from property to legal personhood. For example, legislative provisions which truly acknowledge an animal’s interests, without any reference to exemptions or exceptions that benefit humans, will result in the recognition of a non-human animal’s right not to be treated as a resource. Constitutional amendments that recognise the ‘dignity’ of non-human animals will ensure that animals are valued in the same way that other constitutional rights are valued, resulting in legally protected interests for non-human animals. In the past there have been examples of progressive judicial decision-making whereby judges go against precedent in the pursuit of justice for non-human animals. However, these cases are rare. Hence, more enlightened judicial decision-making which incorporates the current knowledge and science surrounding non-human animals, along with society’s changing views, is needed for animals’ to transition to being recognised as legal ‘persons’ and not just mere property under law.
However, all this law reform is ‘fruitless’ unless we change the legal status of non-human animals.\(^{362}\) Therefore, to effectively transition to a classification of legal ‘persons,’ non-human animals’ must be reconceptualised as ‘non-property’ and their property status abolished; just as the property status of human slaves had to be abolished for slavery to end. Because abolishing the property status of non-human animals is a significant legal and societal change, it can only realistically be achieved through incremental steps which ultimately lead to the total abolition of their property status. Francione states that, although it has its failings, the incremental approach will be more politically and socially acceptable, even where it is not welcomed by animal exploiters.\(^{363}\) Thus, despite its failings, taking incremental steps toward the total abolition of the property status of non-human animals is the most achievable approach to adopt in our highly animal-dependant world. Expanding the standing doctrine to include non-human animals will also move non-human animals closer to their recognition as legal ‘persons,’ as will the effective representation of non-human animals in court through an advocate or ombudsman.

It is generally accepted that change is rarely openly received and thus resistance should be anticipated, especially where such change has a significant impact on people’s lives. Abolishing the property status of non-human animals would have considerable consequences for humans, even more so for those humans who depend heavily on using non-human animals for their livelihood. Therefore, it is likely there would be substantial push-back from many members of society with regard to changing the legal status of non-human animals. With this in mind, it is not surprising that non-human animals have not yet been declared ‘persons’ under law. This, of course, does not mean society cannot, it just means that it has not decided to do so yet. Indeed, this thesis has demonstrated that the common law is more than able to implement such a change if society were willing. Therefore, notwithstanding any resistance to change, by implementing the suggested legal reforms in combination with growing social awareness and the current economic, environmental and technological conditions that exist today, non-human animals can transition from being the mere ‘property’ of humans to the undoubtedly more equitable status of legal ‘persons.’

\(^{362}\) Bryant, above n 51, 253.

\(^{363}\) Francione, above n 233, 58.
VII BIBLIOGRAPHY

A Articles/Books/Reports


Barton, Peter, and Frances Hill, ‘How Much Will You Receive in Damages from the Negligent or Intentional Killing of Your Pet Dog or Cat’ (1989) 34 New York Law School Law Review 411


Beirne, Piers, ‘The Law is an Ass: Reading E P Evans’ The Medieval Prosecution and Capital Punishment of Animals (1994) 2(1) Society and Animals 27


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


Bryant, Taimie, ‘Similarity or Difference as a Basis for Justice: Must Animals Be Like Humans to Be Legally Protected from Humans?’ (2007) 48 *Law and Contemporary Problems* 207

Cao, Deborah, Katrina Sharman and Steven White, *Animal Law in Australia and New Zealand* (LawBook Co, 2010)

Charlesworth, Hilary, Christine Chinkin and Shelley Wright, ‘Feminist Approaches to International Law’ (1991) 85(4) *American Journal of International Law* 613

Cohen, Carl, ‘Do Animals Have Rights?’ (1997) 7(2) *Ethics and Behavior* 91


Dewey, John, ‘The Historical Background of Corporate Legal Personality’ (1926) 35 *Yale Law Journal* 655


Goodall, Jane ‘Chimpanzees – Bridging the Gap’ in Paola Cavalieri and Peter Singer (eds) The Great Ape Project: Equality beyond Humanity (Fourth Estate limited, 1993)


Hills, Alison, Do Animals Have Rights? (Icon Books, 2005)


Justinian’s Institutes (P Birks and G McLeod, with the Latin text of P Krueger trans, Cornell University Press, 1987)


Mann, Trischa, and Audrey Blunden (eds), Australian Law Dictionary (Oxford University Press, 2010)


Midgley, Mary, ‘Persons and Non-Persons’ in Peter Singer (ed) In Defence of Animals (Blackwell, 1985)


Radford, Mike, Animal Welfare in Britain: Regulation and Responsibility (Oxford University Press, 2001)


Rollin, Bernard, ‘Animal Ethics and Legal Status’ in Marc Hauser, Fiery Cushman and Matthew Kamen (eds) People, Property, or Pets? (Purdue University Press, 2006)


Stone, Christopher, ‘Should Trees Have Standing – Towards Legal Rights for Natural Objects’ (1972) 45 *Southern California Law Review* 450


Waisman, Sonia, ‘Non-Economic Damages: Where does it get us and how do we get there?’ (2005) 1 Journal of Animal Law 7

Weisbrot, David, ‘Comment’ (2007/2008) 91 Reform 2


White, Steven, ‘Companion Animals: Members of the Family or Legally Discarded Objects?’ (2009) 32(3) University of New South Wales Law Journal 852


Wise, Steven, ‘Dismantling the Barriers to Legal Rights for Nonhuman Animals’ (2001) 7 Animal Law 9

Wise, Steven, ‘Dyson Lecture on Nonhuman Rights to Personhood’ (2013) 30 Pace Environmental Law Review 1278


Wise, Steven, Rattling the Cage: Toward Legal Rights for Animals (Perseus, 2001)

B Cases


Animal Liberation Ltd v Department of Environment and Conservation [2007] NSWSC 221


Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493


Bauchman v W High School 132 F.3d 542, 545 (10th Cir. 1997)

Bueckner v Hamel 886 S.W.2d. 368, 370 (Tex. App. 1994)

Capers Estate 34 Pa. D. & C. 2d. 121, 141 (Orphan’s Ct, 1964)

Cetacean Community v Bush 386 F.3d 1169 (9th Cir. 2004)


Corso v Crawford Dog and Cat Hospital Inc 415 N.Y.S.2d 182 (N.Y. Civ. Ct. 1979)

Dye v Wargo 253 F.3d 296, 300 (7th Cir. 2001)

Elder Smith Goldsborough Mort Ltd v McBride [1976] 2 NSWLR 631


In re Estate of Howard H. Brand No 28473 (Vt. Prob. Ct., Chittenden County Mar. 17 1999)

Ketelson v Stilz 111 N.E. 423, 425 (Ind. 1916)

Larsen v General Motors Corp. 391 F.2d 495, 506 (8th Cir. 1968)

Lutwak v United States 344 U.S. 604, 615 (1953)

Morgan v Kroupa 702 A.2d 630, 634 (VT 1997)

Mt. Graham Red Squirrel v Yeutter 930 F.2d 703 (9th Cir. 1991)

Murray v Bill Wells Kennels, Ltd Wayne County Circuit Court No. 95-536479-NO (Mich 1997)

Northern Spotted Owl v Lujan 758 F. Supp. 621 (W.D. Wash. 1991)

Northern Spotted Owl v Hodel 716 F. Supp. 479 (W.D. Wash. 1988)

Oppenheim v Kridel 140 N.E. 227, 230 (N.Y. 1930)

Palila v Hawaii Department of Land & Natural Resources 639 F.2d 495 (9th Cir. 1981)

Rozell v Rozell 22 N.E.2d 254, 257 (N.Y. 1939)

Rural Export & Trading (WA) Pty Ltd v Hahnheuser [2007] FCA 1535

Saltoon v Lake [1978] 1 NSWLR 52


Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA) (1995) 183 CLR 552

Sierra Club v Morton 405 U.S. 727 (1972)

Somerset v Stewart (1772) 98 ER 499
State v Mann 13 N.C. (2 Dev) 263, 264 (1829)

Tilikum et al v SeaWorld Parks & Entertainment Inc & SeaWorld, LLC, No. 11 Civ. 2476 (S.D. Cal. 2011)

United Australia Ltd v Barclays Bank Ltd [1941] AC 1

Yanner v Eaton (1999) 201 CLR 351

C Legislation

Animal Protection Act 2008 (Switzerland)

Animal Welfare Act 2002 (WA)

Animal Welfare Act 2008 (Austria)

Australian Constitution

Bundesverfassung [Federal Constitution of the Swiss Confederation of 18 April 1999]

Bundes-Verfassungsgesetz [Federal Constitutional Law, Austria, 1 October 1920]

Competition and Consumer Act 2010 (Cth)

Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany]

Marine Mammal Protection Act 1972 (US)

Trade Practices Act 1974 (Cth)

Uniform Trust Code 1993 (US)
Ustava Republike Slovenije [Constitution of the Republic of Slovenia of 23 December 1991]

Wildlife Conservation Act 1950 (WA)

Zivilgesetzbuch [Swiss Civil Code of 10 December 1907]

D Other

Alan Yuhas, ‘The Rise of the Planet of the Legal Persons Formerly Known as Apes’ The Guardian, October 9, 2014

<http://www.theguardian.com/science/2013/aug/05/synthetic-meat-burger-stem-cells>


Associated Press, ‘PETA files case against Sea World claiming killer whales treated as slaves’ The Australian (online), February 7, 2012
<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/7106.0Main+Features42013


Catherine Wolfe, ‘Legal Re-Classification of Animals is Long Overdue,’ paper presented at the Mid-Atlantic Animal Law Symposium, 2010


Cynthia Hodges, ‘The Link: Cruelty to Animals and Violence towards People’  


Drake Bennett, ‘Lawyer for the dog: Inside the booming field of animal law, in which animals have their own interests – and their own lawyers’ *Boston Globe*, September 9, 2007  

Gary Block, ‘Guardianship Revisited: Rhode Island Law Passes 10-Year Mark’  
*Humane Society Veterinary Medical Association*, October 11, 2011  
<http://www hsvma.org/guardianship_rilaw#.U-whaGOkkn0>


Peter Burdon, ‘What if trees could sue?’ *ABC Environment*, May 17, 2011
<http://www.abc.net.au/environment/articles/2011/05/17/3216161.htm>

SBS News, ‘Thousands Protests Against WA Shark Cull Policy’ February 1, 2014

<http://www.youtube.com/watch?v=jv4-01DwB-w>

<http://www.imaner.net/panel/statistics.htm#reveal>


Vegetarian Victoria, ‘Statistics on Vegetarianism’ accessed August 6, 2014