



# MONASH University

## **To Be or Not to Be Property: Community Attitudes towards the Legal Status of Animals**

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## Abstract

In recent decades, a scholarly debate has surfaced about whether the legal status of animals as property should be abolished. However, evidence of community attitudes towards this status is scarce. This thesis makes a theoretical and empirical contribution to the abolition debate by examining whether the property classification of animals is consistent with contemporary attitudes in Australia, and whether an alternative legal status for animals would better reflect community attitudes.

Empirical research was undertaken in the state of Victoria, in order to measure the extent to which a small sample of people in Australia agree with the property classification of animals. A short quantitative survey of 287 respondents was carried out in Melbourne and regional Victoria to gain insight into a part of the Australian community's attitudes towards the property status of animals.

The empirical data obtained as part of this research indicated that classifying at least some animals as property is inconsistent with community attitudes. It further revealed that attitudes towards different kinds of animals are variegated. On this basis, it is proposed that the law is in need of reform to allow different kinds of animals to be legally categorised and/or treated differently. The non-personal subjects of law model is identified as the paradigm that has the greatest potential to reflect variegated community attitudes.

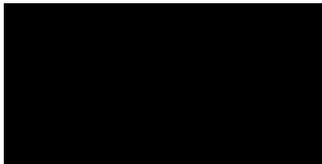
The conclusions of this research strengthen the arguments for abolishing the property status of at least some animals, and enhance our understanding of contemporary community attitudes towards the legal status of animals. These theoretical and empirical contributions not only inform policy, they also provide, through the identification of educational opportunities, guidance on how attitudes towards the legal status of animals are shaped.

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## Declaration

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

Signature:



Print Name: Geetashree Nandani Shyam

Date: 15 December 2018

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## Publications during enrolment

Geeta Shyam, 'The Legal Status of Animals: The World Rethinks its Position' (2015) 40(4) *Alternative Law Journal* 266

Geeta Shyam, 'Is the Classification of Animals as Property Consistent with Modern Community Attitudes?' (2018) 41(4) *University of New South Wales Law Journal* 1418.

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## Preface

The property status of animals is something that has felt counter-intuitive to me since I first became aware of it during my undergraduate studies. As I familiarised myself with the long history of this legal status, I started to wonder whether categorising animals as property is out of touch with modern attitudes. Indeed, when people asked me about my research, in social conversations, they would express surprise upon learning that animals are treated as property. Such responses piqued my curiosity. It is this wonder that prompted me to undertake this research.

This thesis has been an eight-year long journey, as I juggled part-time study with full-time work and family responsibilities. Notwithstanding these challenges, it has been a pleasure watching interest and scholarship in the area of animal law develop over these years. In the early stage of my research I struggled to find literature in this area, but I have been delighted to observe the extent and depth of research in this field grow steadily over the years. Seeing an increase in public education and awareness about the property status of animals has been greatly motivating.

When I initially started my research, I was a pessimist; I did not expect to see the legal status of animals change during my lifetime, given the deeply entrenched beliefs and habits of the society we live in. However, there have been some ground-breaking developments in recent times that have turned me into more of an optimist. There was a lot of personal excitement when Cecilia the chimpanzee in Argentina and Chucho the bear in Columbia were declared to be legal persons in 2016 and 2017, respectively. The Indian Uttarakhand High Court's decision in July 2018, declaring all animals as legal persons, also provided a good reminder of the fascinating times we currently live in. And I continue to be encouraged as the ongoing efforts to challenge the property status of animals gain momentum throughout the world.

I am now confident that this growing area of law will make a positive and significant impact in the lives of those who cannot raise a voice against the injustices they are routinely subjected to. And while I stand proud to have made a modest contribution in this endeavour, I certainly look forward to maintaining my involvement in this noble field.

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## Acknowledgements

I am immensely and forever grateful to my two inspiring research supervisors, Professor Paula Gerber and Dr Joanna Kyriakakis. They have not only guided me in this research but also instilled invaluable skills and qualities in me that I will carry for a lifetime. Thanks to their direction and wisdom, I have reached the finish line with a more open and humbled mind.

I am also grateful to my family and friends for the constant support, motivation and patience they have so generously provided me throughout the duration of my research. The value of the countless occasions to laugh and celebrate with them along the way cannot be overstated.



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# Chapter 1

## An Empirical Inquiry into the Legal Status of Animals

### 1.1 Introduction

### 1.2. Research Questions

### 1.3 Aims of Thesis

### 1.4 Situating this Study within Existing Research

1.4.1 The Growth of Animal Law in Australia

1.4.2 Contributing to a Scarce Pool of Evidence

### 1.5 Research Methodology

### 1.6 Significance and Limitations of Research

### 1.7 Structure of Thesis

### 1.8 Conclusion

## 1.1 Introduction

*It's surely our responsibility to do everything within our power to create a planet that provides a home not just for us but all life on earth.*<sup>1</sup>

Non-human animals (animals) in Australia are legally classified as 'property'.<sup>2</sup> In contrast to humans, who are as a general rule legally categorised as 'persons', animals share the same legal category as chairs, books, shoes and many other inanimate objects. This status of animals was originally adopted in Australia through the common law.<sup>3</sup> Today, the property status of animals is reflected in various pieces of Australian legislation (including state and territory legislation). Section 4 of the *Competition and Consumer Act 2010* (Cth), for example, includes animals within the definition of 'goods'. Section 73(7) of the *Crimes Act 1958* (Vic) also stipulates that '[w]ild creatures, tamed or untamed, shall be regarded as property'.

The property status of animals is somewhat counter-intuitive because animals can be differentiated from other forms of property in significant ways. Unlike other tangible but inanimate forms of property, such as chairs and cars, animals are sentient beings.<sup>4</sup> Scientific research now demonstrates that many different species of animals have the capacity to suffer and feel pain.<sup>5</sup> It is in recognition of this sentience that animal welfare laws have been enacted

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<sup>1</sup> BBC One, 'Episode 06: Cities', *Planet Earth II*, 11 December 2016 (David Attenborough).

<sup>2</sup> Lexis Nexis, *Halsbury's Laws of Australia*, (at 7 June 2016) 20 Animals, 'B Property in Animals and Statutory Conditions' [20-10]. Domesticated animals are subject to absolute property, while wild animals are subject to qualified property. The legal status of domesticated and wild animals is examined in Chapter 2 (see section 2.2).

<sup>3</sup> Steven White, 'Animal Protection Law in Australia: Bound by History' in Deborah Cao and Steven White (eds) *Animal Law and Welfare: International Perspectives* (Springer, 2016).

<sup>4</sup> The Australian Animal Welfare Strategy states that 'sentience' implies a level of conscious awareness, and states that a sentient being has the capacity to experience suffering and pleasure. See *Australian Animal Welfare Strategy and National Implementation Plan 2010-14* (2011) Australian Animal Welfare Strategy

<[http://www.australiananimalwelfare.com.au/app/webroot/files/upload/files/aaws\\_implementation\\_plan\\_updated.pdf](http://www.australiananimalwelfare.com.au/app/webroot/files/upload/files/aaws_implementation_plan_updated.pdf)>. However, the meaning of sentience is subject to some debate. See generally: Donald M Broom, *Sentience and Animal Welfare* (CABI, 2014) 5-7; Helen Proctor, 'Animal Sentience: Where Are We and Where Are We Heading?' (2012) 2 *Animals* 628; Robert C Jones, 'Science, Sentience and Animal Welfare' (2013) 28(1) *Biology & Philosophy* 1; Neil D Theise and Menas Kafatos, 'Sentience Everywhere: Complexity Theory, Panpsychism & the Role of Sentience in Self-Organisation of the Universe' (2013) 4(4) *Journal of Consciousness Exploration & Research* 378.

<sup>5</sup> See, eg: Marc Bekoff, 'Awareness: Animal Reflections' (2002) 419(6904) *Nature* 255; Alan Carter, 'Animals, Pain and Morality' (2005) 22(1) *Journal of Applied Philosophy* 17; Ralph L Kitchell and Howard H Erickson (eds), *Animal Pain Perception and Alleviation* (Springer, 1983); Michael J Gentle, 'Pain Issues in Poultry' (2011) 135(3) *Applied Animal Behaviour Science* 252; Robert W Elwood and Mirjam Appel, 'Pain Experience in Hermit Crabs?' (2009) 77(5) *Animal Behaviour* 1243. Evidence regarding the perception of pain in some species of animals is still limited, however. See, for example, J D Rose et al, 'Can Fish Really Feel Pain?' (2014) 15(1) *Fish and Fisheries* 97.

globally to minimise animal suffering, including in all Australian states and territories.<sup>6</sup> This type of protection is not afforded to other forms of property. While a few specific types of property, such as objects of historical or cultural significance, are also protected by legislation,<sup>7</sup> they seek to protect the interests of humans rather than the items of property. Animal welfare laws, on the other hand, are intended to protect the interests of the subject property itself in light of its unique ability to suffer and feel pain.<sup>8</sup>

Although animals are by their nature significantly different from other types of property, their categorisation as property under law is neither new nor unique to Australia. Animals in Australia, like in other western countries, have legally been classified as property since colonisation through adoption of the common law system.<sup>9</sup> The common law system itself was inspired by Roman laws, which divided everything into three categories: persons, things and actions.<sup>10</sup> Under Roman laws, animals were placed within the category of 'things'.<sup>11</sup>

The property categorisation of animals has been justified over time by Christian beliefs, particularly those that regarded humans as superior beings compared to other animals.<sup>12</sup> Eighteenth century philosopher, William Blackstone, for example, argued that animals were the property of men because God had given to humans dominion over everything on earth:

In the beginning of the world, we are informed by holy writ, the all-bountiful creator gave to

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<sup>6</sup> See for example, *Prevention of Cruelty to Animals Act 1985* (SA); *Animal Welfare Act 1999* (NT); *Animal Welfare Act 1992* (ACT); *Animal Care and Protection Act 2001* (Qld); *Animal Welfare Act 2002* (WA); *Prevention of Cruelty to Animals Act 1986* (Vic); *Prevention of Cruelty to Animals Act 1979* (NSW); *Animal Welfare Act 1993* (Tas).

<sup>7</sup> See for example, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), the purpose of which is to preserve and protect 'areas and objects that are of particular significance to Aboriginals': s 4. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) also contains numerous provisions for the protection of heritage properties.

<sup>8</sup> Animal welfare legislation often have the purpose of preventing cruelty to animals. See, for example, *Prevention of Cruelty to Animals Act 1986* (Vic) s 1. That is not to suggest, however, that animal welfare laws are not intended to serve human interests as well. Animal welfare laws have, especially in the past, also been justified on the basis that humans who are cruel to animals are less likely to be compassionate: Steven White, 'Legislating for Animal Welfare: Making the Interests of Animals Count' (2003) 28(6) *Alternative Law Journal* 277, 278.

<sup>9</sup> Deborah Cao, *Animal Law in Australia* (Thomson Reuters, 2<sup>nd</sup> ed, 2015), 70-1. There is relatively less literature on the legal status of animals in non-western countries. Countries that have inherited the British common law may possibly also categorise animals as property.

<sup>10</sup> Alain Pottage, 'Introduction: The Fabrication of Persons and Things' in Alain Pottage and Martha Mundy (eds) *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (Cambridge Studies in Law and Society, 2004) 1, 4; Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009), 48.

<sup>11</sup> This origins of the property status of animals is explored in greater detail in Chapter 2. See also: J A C Thomas, *Textbook of Roman Law* (North-Holland Publishing Co, 1976), 3; Pottage, above n 10, 4; Rafael Domingo, 'Gaius, Vattel and the New Global Law Paradigm' (2011) 22(3) *The European Journal of International Law* 627, 628.

<sup>12</sup> Ngaire Naffine, 'Legal Personality and the Natural World: On the Persistence of the Human Measure of Value' (2012) 3 *Journal of Human Rights and the Environment* 68, 68-69.

man “dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moves upon the earth.” This is the only true and solid foundation of man’s dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator.<sup>13</sup>

Prominent 17<sup>th</sup> century philosopher, John Locke, also believed that animals were created for the benefit of humans, and that the property categorisation was necessary to enable their appropriation. He stated:

[Y]et being given for the use of men, there must of necessity be a means to appropriate them some way or other, before they can be of any use, or at all beneficial to any particular man.<sup>14</sup>

It is not only religious beliefs that have sustained the property status of animals. Secular philosophies have also glorified the special status of humans, particularly by valuing human attributes such as autonomy.<sup>15</sup> Their conception of a legal person, which stands in contrast to the category of property, equates to rational beings or moral agents.<sup>16</sup> Together, these Christian and secular beliefs have underpinned the property status of animals.<sup>17</sup>

Since the inheritance of the property status of animals under Australian common law in the 19<sup>th</sup> century, this legal status had remained relatively unscrutinised until the late 20<sup>th</sup> century. The common law is by nature conservative and precedent-based,<sup>18</sup> so it is perhaps unsurprising that this status has not been modified. It does, however, raise questions about whether the property status of animals is consistent with modern attitudes. It is thus timely to investigate the extent to which attitudes towards animals have evolved.

Indeed, legal minds have started to question the appropriateness of the property status of animals. A debate has arisen about whether the property status of animals should be abolished, or whether the social condition of animals might be improved through non-abolitionist legal

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<sup>13</sup> William Blackstone, *Commentaries on the Laws of England* (A Strahan and W. Woodfall, 12<sup>th</sup> ed, 1794) Vol 2, 2.

<sup>14</sup> John Locke, ‘Second Treatise’ in Peter Laslett (ed), *Two Treatises of Government* (Cambridge University Press, 1988) 265, 288-289.

<sup>15</sup> Naffine, ‘Legal Personality and the Natural World’, above n 12, 68-69.

<sup>16</sup> *Ibid* 75. The meaning of a legal person, and the ambiguities surrounding this concept, is explored in Chapter 2 (see sections 2.3 - 2.5).

<sup>17</sup> *Ibid* 83.

<sup>18</sup> Martha C Nussbaum, ‘Book Review – Animal Rights: The Need for a Theoretical Basis’ (2001) 114 *Harvard Law Review* 1506, 1526.

reform (the abolition debate).<sup>19</sup> Francione,<sup>20</sup> Wise,<sup>21</sup> Pietrzykowski,<sup>22</sup> Garner,<sup>23</sup> and several other legal scholars and practitioners have been prominent in this debate. Francione and Wise, for example, are prominent advocates for the abolition of the property status of animals. Their approaches differ, as the former calls for the immediate abolition of the property status of all sentient animals while the latter focuses on those animals that are cognitively similar to humans. However, their overall argument is consistent in that they argue for the legal status of at least some animals to change. Those who oppose the property categorisation of animals are commonly referred to as abolitionists. Welfarists, on the other hand, see the abolitionist movement as a politically unachievable goal. Garner and Lovvorn,<sup>24</sup> for example, insist on strengthening animal welfare laws. Rather than removing animals from the category of property, they call for better regulation of animal use (and therefore better protection of animal welfare).<sup>25</sup>

While these scholars have made significant contributions to this debate, little attention has been given to this specific question in Australia. However, as animal law becomes increasingly recognised as a separate and legitimate area of law in Australia, participation in the debate is also growing.<sup>26</sup> This thesis seeks to make a modest contribution to this debate in the Australian context. In particular, it examines whether the property status of animals is consistent with contemporary attitudes in Australia, and whether those attitudes might support an alternative legal status for animals.

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<sup>19</sup> To clarify, a reference to ‘the abolition debate’ in this thesis refers to the debate about whether the property status of animals should be abolished. It does not cover the wider debate about whether animal use should be abolished.

<sup>20</sup> See Gary L Francione, *Animals, Property and the Law* (Temple University Press, 1995); Gary L Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press, 1996); Gary L Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Temple University Press, 2000); Gary L Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (Columbia University Press, 2008); Gary L Francione and Robert Garner, *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, 2010).

<sup>21</sup> See Steven M Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Publishing, 2000); Steven M Wise, *Drawing the Line: Science and the Case for Animal Rights* (Perseus Books, 2002).

<sup>22</sup> See Tomasz Pietrzykowski, *Personhood Beyond Humanism: Animals, Chimeras, Autonomous Agents and the Law* (Springer, 2018); Tomasz Pietrzykowski, ‘The Idea of Non-personal Subjects of Law’ in Visa A J Kurki and Tomasz Pietrzykowski (eds) *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer, 2017).

<sup>23</sup> See Robert Garner, ‘Political Ideology and the Legal Status of Animals’ (2002) 8 *Animal Law* 77; Francione and Garner, *The Animal Rights Debate*, above n 20.

<sup>24</sup> See Jonathan R Lovvorn, ‘Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform’ (2006) 12 *Animal Law* 133.

<sup>25</sup> The abolition debate is explored in greater detail in Chapter 3.

<sup>26</sup> See, eg, Steven White, ‘Companion Animals: Members of the Family or Legally Discarded Objects?’ (2009) 32(3) *University of New South Wales Law Journal* 852; Steven Tudor, ‘Some Implications for Legal Personhood of Extending Legal Rights to Non-Human Animals’ (2010) 35 *Australian Journal of Legal Philosophy* 134; George Seymour, ‘Animal and the Law: Towards a Guardianship Model’ (2004) 29(4) *Alternative Law Journal* 183; Stephanie D’Amelio, ‘Animal Law: The Moral Scope of Legal Personality: The Case to Recognise Nonhuman Animals’ (2018) 43 *Law Society of NSW Journal* 74; Rebekah Lam and Daniel Cung, ‘Rethinking the Boundaries of Legal Personhood’ (2015) 14 *Law Society of NSW Journal* 90.

The purpose of this chapter is to introduce the thesis topic and set out the research questions. Section 1.2 lists the research questions, while section 1.3 explains the overall aims of this thesis. Section 1.4 identifies an evidentiary gap in existing literature and situates the current research amongst other empirical studies undertaken in relation to the legal treatment of animals. Section 1.5 describes and justifies the various research methodologies adopted for this thesis. Section 1.6 then highlights the significance and limitations of this research. Section 1.7 outlines the structure of this thesis, before Section 1.7 provides a conclusion to this introductory chapter.

## **1.2 Research Questions**

1. Does the current legal status of animals in Australia reflect contemporary community attitudes? and
2. If not, which alternative legal status for animals might better reflect contemporary community attitudes towards the legal status of animals?

The first question stems from an evidentiary gap in the debate surrounding the legal status of animals (see discussion in section 1.4 below). It is designed to ascertain the extent to which the legal status of animals in Australia reflects community attitudes. To answer this question, an empirical study was undertaken as part of this thesis. In particular, a survey of a small sample of people in the Australian state of Victoria was undertaken whereby respondents were asked about their opinion and knowledge of the property status of animals, and related questions aimed at eliciting how they would categorise different kinds of animals.

As is explained in Chapter 4, the law is often influenced by community attitudes. Hence, an answer to this research question not only contributes to the debate about the legal status of animals, but also helps lawmakers understand whether abolishing the property status of animals could be politically achievable.

The second research question is related to the first question, as it is informed by an analysis of the results of the empirical research. In answering this question, inspiration is also obtained from existing literature within the abolition debate. In particular, alternative models for legally categorising animals are examined.

The answers to these two questions help realise the aims of this thesis.

### 1.3 Aims of Thesis

The central aim of this thesis is to make a modest contribution to the abolition debate by providing empirical evidence of the level of community knowledge of, and support for, the property status of animals in Australia. As identified in the next section, statistical data in relation to attitudes towards the legal treatment of animals is scarce. The intention of this thesis, therefore, is to add to the scarce pool of evidence in this space.

This thesis also aims to offer suggestions for legal reform based on the original empirical data collected as part of this doctoral research, as well as a review of existing scholarship within the abolition debate. After articulating the relationship between community attitudes and law reform in Chapter 4, this thesis seeks to assist Australian policymakers in determining whether a change in the legal status of animals may be appropriate and, if an alternative legal status is warranted, then which alternative status best reflects prevailing community attitudes.

### 1.4 Situating this Study within Existing Research

#### 1.4.1 The Growth of Animal Law in Australia

The research undertaken for this thesis falls within, and thus makes a contribution to, the area of animal law. Animal law is an emerging, but fast growing, area of law in Australia. The first animal law course in Australia was taught at the University of New South Wales in 2005.<sup>27</sup> In 2018, there are at least 14 universities offering animal law as either an undergraduate or postgraduate elective subject.<sup>28</sup> With a total of 39 law schools in Australia,<sup>29</sup> this represents over a third of Australian law schools. A few animal and veterinary science faculties have also started offering animal law as an elective unit.<sup>30</sup> Moreover, there are a growing number of students undertaking research degrees in the area of animal law.<sup>31</sup> Scholarship in the field advanced further with the introduction of the *Australian Animal Protection Law Journal* in 2008. While Australia remains behind the United States in animal law education, Australia appears to be ahead of other western jurisdictions, such as the United Kingdom, Canada and even Europe,

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<sup>27</sup> Peter Sankoff, 'Charting the Growth of Animal Law in Education' (2008) 4 *Animal Law Journal* 105, 147.

<sup>28</sup> Voiceless, *Study Animal Law* <<https://www.voiceless.org.au/animal-law/study-animal-law>>.

<sup>29</sup> Steven White, 'Animal Law in Australian Universities: Towards 2015' (2012) 7 *Australian Animal Protection Law Journal* 70, 70.

<sup>30</sup> Alexandra Whittaker, 'Animal Law Teaching in Non-Law Disciplines: Incorporation in Animal and Veterinary Science Curricula' (2013) 9 *Australian Animal Protection Law Journal* 113, 114.

<sup>31</sup> Jed Goodfellow, 'Animal Law Student Research in Australia' (2013) 9 *Australian Animal Protection Law Journal* 72; White, 'Animal Law in Australian Universities', above n 29, 72.

when it comes to teaching and research about animal law.<sup>32</sup> As White observes, the development of animal law education in Australia has been remarkable, as the number of tertiary institutions that offer the subject has grown significantly in a very short period of time.<sup>33</sup>

The growth of animal law in Australia is not restricted to the education scene. Animal law practice is also growing. The Barristers Animal Welfare Panel, for example, was initially formed, in Victoria, in 2006 and became a national panel in 2010. It has a membership of over 100 barristers.<sup>34</sup> The Animal Law Institute, Australia's first Community Legal Centre dedicated to animal welfare, was founded in 2014.<sup>35</sup> In Melbourne, the Animal Law Clinic, a joint initiative between Lawyers for Animals and the Fitzroy Community Legal Centre, has also started offering legal advice on animal law matters.<sup>36</sup> Even private firms specialising in animal law have started emerging, such as CNG Law,<sup>37</sup> Lawyers for Companion Animals,<sup>38</sup> and Melke Legal.<sup>39</sup> Additionally, advocacy and think tank organisations focusing on animal law have been formed, such as Voiceless<sup>40</sup> and Lawyers for Animals,<sup>41</sup> which were established in 2004 and 2007, respectively.

Animal law is a broad area of law, spanning numerous different human practices that involve animals. A glance through any Australian animal law textbook<sup>42</sup> reveals a wide range of practices, including farming and fishing, wildlife management, the use of animals in sport (for example, horse racing and greyhound racing), the use of animals in research, and the breeding, sale and keeping of companion animals. Animal law scholars concerning themselves with these practices dig deep into a variety of different legal issues, including the adequacy and fairness of animal welfare standards and the enforcement of such standards. Inevitably, they engage with other areas of law. Those researching and analysing farming practices, for example, may also delve into consumer protection laws, such as product labelling. In the context of the legal status of animals, property law is also relevant.

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<sup>32</sup> White, 'Animal Law in Australian Universities', above n 29, 70.

<sup>33</sup> Ibid.

<sup>34</sup> Barristers Animal Welfare Panel, *Who We Are* <<https://bawp.org.au/who-we-are/>>.

<sup>35</sup> The Animal Law Institute <<http://www.ali.org.au/>>.

<sup>36</sup> Lawyers for Animals, *Animal Law Clinic*, <<http://lawyersforanimals.org.au/clinic-2/>>. The establishment date of this clinic is not clear.

<sup>37</sup> CNG Law, *Animal Law*, <<https://www.cnglaw.com.au/animal-law/>>.

<sup>38</sup> Lawyers for Companion Animals, <<http://lawyersforcompanionanimals.com.au/>>.

<sup>39</sup> Melke Legal, <<http://www.doglawyer.com.au/>>.

<sup>40</sup> Voiceless, *About Us*, <<https://www.voiceless.org.au/about-us/>>.

<sup>41</sup> Lawyers for Animals, *About Us*, <<http://lawyersforanimals.org.au/>>.

<sup>42</sup> See, eg, Cao, above n 9; Peter J Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (The Federation Press, 2<sup>nd</sup> ed, 2013); Alex Bruce, *Animal Law in Australia: An Integrated Approach* (Lexis Nexis Butterworths, 2<sup>nd</sup> ed, 2017); and Mirko Bagaric & Keith Akers, *Humanising Animals: Civilising People* (CCH, 2012); Graeme McEwan, *Animal Law: Principles and Frontiers* (BAWP, 2011).

As the discipline of animal law grows and becomes established as a specialised area of law in Australia, the abolition debate is likely to develop within the local context. Challenges to the current legal status of animals as property are more likely to be mounted, as they have been in some international jurisdictions,<sup>43</sup> and avenues for legal reform in respect of the legal status of animals are likely to be explored to a greater extent. This research therefore makes a valuable and timely contribution to this discipline, particularly in relation to the abolition debate.

#### 1.4.2 Contributing to a Scarce Pool of Evidence

The abolition debate has so far been quite theoretical in nature. The arguments, explored in Chapter 2, largely involve engagement with legal jurisprudence, particularly with issues connected to legal personhood. A few contributors to the debate also make reference to studies and polls to support their arguments. Lovvorn, for example, in opposing abolitionist arguments, refers to various polls that suggest a lack of support for banning the use of animals in medical research, product testing, hunting and clothing.<sup>44</sup> Such data, however, is limited, especially in Australia.

There is a growing body of literature, including empirical studies, on community attitudes towards animal welfare issues in Australia. For instance, Coleman has studied public attitudes towards various animal welfare issues, such as cat containment and animal shelter practices.<sup>45</sup> A larger-scale empirical study, with a sample of 1,000 respondents, was commissioned by Voiceless in 2014 to explore attitudes towards animals and various welfare issues, such as the slaughter of kangaroos, live export and the level of protection afforded to farm animals.<sup>46</sup> Overall, these studies suggest that most Australians value the welfare of animals, although their behaviour is not reflective of this attitude.

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<sup>43</sup> These challenges are explored in Chapter 2 (see section 2.5).

<sup>44</sup> Lovvorn, above n 24, 136-7.

<sup>45</sup> See Grahame Coleman et al, 'Farmer and Public Attitudes Toward Lamb Finishing Systems' (2016) 19(2) *Journal of Applied Animal Welfare Science* 1; P Hemsworth and G Coleman, 'Animal Welfare in the Dairy Industry and Public Perception' (2001) 56(2) *Australian Journal of Dairy Technology* 130; Grahame Coleman et al, 'Public Attitudes Relevant to Livestock Animal Welfare Policy' (2015) 12(3) *Farm Policy Journal* 45; Samia R Toukhsati et al, 'Wandering cats: Attitudes and Behaviors Towards Cat Containment in Australia' (2012) 25(1) *Anthrozoos* 61; Kate Mornement et al, 'What Do Current and Potential Australian Dog Owners Believe about Shelter Practices and Shelter Dogs?' (2012) 25(4) *Anthrozoos* 457; Samia R Toukhsati et al, 'Behaviors and Attitudes Towards Semi-owned Cats' (2007) 20(2) *Anthrozoos* 131; Grahame Coleman, 'Public Animal Welfare Discussions and Outlooks in Australia' (2018) 8(1) *Animal Frontiers* 14.

<sup>46</sup> Humane Research Council, *Animal Tracker Australia* (June 2014) Voiceless <<https://www.voiceless.org.au/content/animal-tracker-australia-0>>.

Nevertheless, empirical evidence of community attitudes towards the legal treatment of animals remains scarce. This scarcity, and the implications of this scarcity, was highlighted in the Productivity Commission's report into the regulation of agriculture in March 2017:

In the area of animal welfare regulation, the objectives are unclear because they are tied to community expectations, and these are not well understood or articulated (nor are the welfare implications of various farming practices well understood by the community). Limited understanding and agreement about community values in this area has also contributed to conflicts in the development of animal welfare standards and guidelines, particularly between industry and animal welfare groups.<sup>47</sup>

Even more lacking is empirical data specifically relating the legal status of animals. One American study surveyed veterinary students' attitudes towards the legal status of companion animals.<sup>48</sup> The survey was completed by 151 third-year students at the Washington State University's College of Veterinary Medicine.<sup>49</sup> The researchers reported that over 80% of the respondents were of the opinion that dogs and cats are personal property, and that they should not have legal standing to bring lawsuits.<sup>50</sup> The results arguably show strong opposition to the idea of abolishing the property status of animals, although one should be mindful that the survey targeted a very small and non-representative cohort of the American population.

There are some local and international studies that measure support for 'animal rights'.<sup>51</sup> Such studies, however, do not measure the extent to which the respondents agreed with the property status of animals. Without such evidence, it is difficult to draw conclusions about what people think of the property status of animals.

In any case, given that the present study is intended to complement existing empirical data, the

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<sup>47</sup> Productivity Commission, *Regulation of Australian Agriculture*, Productivity Commission Inquiry Report No 79 (2016) 11 <<http://www.pc.gov.au/inquiries/completed/agriculture/report/agriculture.pdf>>.

<sup>48</sup> François Martin and Sylvia Glover, 'Veterinary Students' Views Regarding the Legal Status of Companion Animals' (2008) 21(2) *Anthrozoos* 163.

<sup>49</sup> *Ibid* 168.

<sup>50</sup> *Ibid* 170.

<sup>51</sup> See, eg, Adrian Franklin, 'Human-Nonhuman Animal Relationships in Australia: An Overview of Results from the First National Survey and Follow-up Case Studies 2000-2004' (2007) 15 *Society and Animals* 1; Adrian Franklin, Bruce Tranter and Robert White, 'Explaining Support for Animal Rights: A Comparison of Two Recent Approaches to Humans, Nonhuman Animals, and Postmodernity' (2001) 9(2) *Society and Animals* 127; Corwin R Kruse, 'Gender, Views of Nature, and Support for Animal Rights' (1999) 7(3) *Society and Animals* 179; Darryl Macer, 'Animal Consciousness and Ethics in Asia and the Pacific' (1998) 10 *Journal of Agricultural and Environmental Ethics* 249; David A Nibert, 'Animal Rights and Human Social Issues' (1994) 2(2) *Society and Animals* 115; CJC Phillips et al, 'Students' attitudes to animal welfare and rights in Europe and Asia' (2012) 21 *Animal Welfare* 87; Tania D Signal and Nicola Taylor, 'Attitudes to Animals in the Animal Protection Community Compared to a Normative Community Sample' (2006) 14(3) *Society and Animals* 265.

following discussion situates the present research within existing literature. In particular, existing studies that can shed some light on attitudes towards the legal treatment of animals in Australia are explored.

#### 1.4.2.1 Attitudes towards Animal Welfare Policy

In 2016, Chen, a political scientist, published a book examining public attitudes towards animal welfare policy in Australia.<sup>52</sup> He considers ‘the Australian public’s ideas about animals through the lens of public behaviour and opinion’. He found that:

The policy landscape may shift, but one thing is constant: Australians’ attitudes to animals are complex and contradictory. In 2013 Australians directly consumed hundreds of millions of animals as meat while lavishing money and affection on their companion animals, 25 million of whom reside in 5 million (or 66 per cent of) Australian households. Australians spend \$8 billion annually on this subclass of favoured animals – four times the total amount individuals gave to charitable causes.<sup>53</sup>

He further observed:

[I]t is clear that animals in Australia occupy a paradoxical position: they are treated as intimates, or as commodities. Many of our social norms about the treatment of animals depend on how different species are valued and perceived.<sup>54</sup>

Such inconsistencies and contradictory attitudes, according to Chen, frustrate activists, animal-using industries and policymakers.<sup>55</sup> The frustration is aggravated by the gap between the stated concerns of consumers and their spending habits.<sup>56</sup> These contradictions make policy-making in the field of animal welfare very difficult. Chen contends that this difficulty is intensified in light of the ‘scarcity of scholarship on policy-making pertaining to animal protection in this country’.<sup>57</sup>

In examining the political structures that affect the animal welfare policy domain, Chen takes into account public opinion. He explains the need to consider public opinion as follows:

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<sup>52</sup> Peter J Chen, *Animal Welfare in Australia: Politics and Policy* (Sydney University Press 2016).

<sup>53</sup> *Ibid* xvi.

<sup>54</sup> *Ibid* 47.

<sup>55</sup> *Ibid* xviii.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid* xvii.

For policy research, establishing public opinion is useful for a number of reasons. Understanding the relationship between public opinion and policy can tell us about the democratic responsiveness of the policy domain. Where opinion and policy are closely indexed, the policy domain is likely to be populist and to be structurally open to popular opinion and/or participation. Where opinion and policy are misaligned, the cause is commonly powerful entrenched interests resistant to popular participation, or disorganised social interests unconnected to policy-makers (such disorganised interests are known as 'latent interests' or 'potential groups').<sup>58</sup>

Chen then thoroughly reviews numerous empirical reports to study community attitudes towards animals in Australia. In one survey he references, just below a third of 1,000 respondents agreed with the statement that '[a]nimals deserve the same rights as people to be free from harm and exploitation'.<sup>59</sup> In another study he refers to, just over half of the 2,000 respondents agreed with the statement that 'animals should have the same moral rights as human beings'.<sup>60</sup> Twenty percent of the respondents in that study indicated that they did not hold an opinion on the matter or did not know.<sup>61</sup>

An analysis is then provided by Chen:

It is interesting to see the stated willingness of nearly one-third of the public to attribute considerable rights to animals, given the behavioural statistics [highlighting the extent of animal use]. This suggests either that a sizeable minority of Australians routinely engage in behaviours to which they morally object, or that they lack a coherent understanding of the language of ethics and its relationship to their own behavior.<sup>62</sup>

Chen's research sheds some light on community attitudes towards various issues within the animal law discipline. Such research can also provide useful insight within the abolition debate, since the data examined by Chen provides hints as to whether there might be sufficient support for the abolishment of the property status of animals. For example, empirical data on support for animal rights might give at least an approximate indication of the level of support for the

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<sup>58</sup> Ibid 40.

<sup>59</sup> Ibid 49. See Essential Research, *Treatment of Animals* (19 November 2012) Essential Report <<http://www.essentialvision.com.au/treatment-of-animals>>.

<sup>60</sup> Chen, above n 52, 50. See Franklin, 'Human-Nonhuman Animal Relationships in Australia', above n 51.

<sup>61</sup> Chen, above n 52, 50. See Franklin, 'Human-Nonhuman Animal Relationships in Australia', above n 51.

<sup>62</sup> Chen, above n 52, 48-49.

abolition of the property status of animals, particularly as the aim of many abolitionists is to assign legal rights to animals.<sup>63</sup>

Chen acknowledges at the outset that often the public has no opinion on complex or obscure policy issues, and they are forced to generate an opinion when prompted by pollsters or researchers while being ‘constrained by the limits and prejudices of their knowledge’.<sup>64</sup> This highlights the need for empirical research in this space to not only measure attitudes towards a specific issue, but also to ascertain whether respondents to the survey are actually aware of the issue.

#### **1.4.2.2 Attitudes Highlighting the Social Status of Companion Animals**

Franklin, in a sociological study, explores the status of companion animals in the lives of their owners. His focus is the social status of animals rather than their legal status. His Australian-based study found that most pet owners treat their pets as members of their family.<sup>65</sup> This finding was based on data highlighting the large number of pets who have access to lounge and family rooms, kitchens and bedrooms.<sup>66</sup> Franklin further reported that pet access to these intimate household spaces was higher than ever before, demonstrating a shift in community attitudes towards companion animals.<sup>67</sup>

Franklin’s study provides an insight into community attitudes towards companion animals, which could be used to argue that the property status of animals is inconsistent with contemporary community standards. His findings suggest that a majority of Australians view companion animals as more than property.

However, the evidence provided by Franklin’s study has obvious limitations in the context of the abolitionist debate. It does not focus on the legal status of animals, and represents opinions about only one of several categories of animals. It does not shed any light on community attitudes towards other kinds of animals, such as farm or wild animals. Further, while a sociological focus is helpful, it does not fill the evidentiary gap in the inquiry that is the subject of this thesis. The popular perception of companion animals as family members does not necessarily equate to popular support for an alternative legal status for animals. As the historic

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<sup>63</sup> Whether animals can or do have legal rights whilst property is explored in Chapter 2 (see section 2.6.1).

<sup>64</sup> Chen, above n 52, 39.

<sup>65</sup> Adrian Franklin, *Animal Nation: The True Story of Animals and Australia* (UNSW Press, 2006), 208.

<sup>66</sup> *Ibid* 210-11.

<sup>67</sup> *Ibid* 210.

legal treatment of women and children<sup>68</sup> demonstrates, it is possible for someone to be a member of a family while still being treated as property. A study that directly investigates community attitudes towards the legal status of animals thus remains necessary.

### **1.4.2.3 Attitudes towards the Legal Status of Companion Animals**

Steven White is one of the few legal academics in Australia to have scrutinised the legal status of animals. He employs a socio-legal approach and questions whether owners treat their companion animals as members of the family or as mere property.<sup>69</sup> In other words, he investigates whether the property status of companion animals, and the formal implications of this *legal* designation, is consistent with modern community attitudes. White finds that while companion animals may be regarded as family members, they also become 'discardable objects' as a consequence of their property status.<sup>70</sup> Reviewing data on animals surrendered to the RSPCA's animal shelters, including the reasons for surrender, White concludes that the property status of animals enables owners to relinquish title to their companion animals when the animals no longer suit their needs.<sup>71</sup>

White's investigation is based on empirical research, and his findings are enormously helpful in understanding social attitudes towards the legal status of animals. They reveal that, consistent with attitudes towards the legal treatment of animals generally, community attitudes towards the legal status of animals are paradoxical and contradictory. On the one hand, human owners view their companion animals as more than property. On the other hand, when the animals are no longer desired, they are discarded like objects.

As with Franklin's research, White's focus is upon companion animals only. This thesis builds on this existing research by examining community attitudes towards animals in order to further comprehend the extent to which the legal status of animals is consistent with contemporary attitudes.

## **1.5 Research Methodology**

Empirical research forms an important part of this research. As foreshadowed in section 1.2, a

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<sup>68</sup> Strictly, women were not legally classified as property. However, the rules of coverture had the effect of suspending the legal identity of married women. See William Coyle, 'Common Law Metaphors of Coverture: Conceptions of Women and Children as Property in Legal and Literary Contexts' (1992) 1 *Texas Journal of Women and the Law* 315.

<sup>69</sup> See White, 'Companion Animals', above n 26.

<sup>70</sup> Ibid 869.

<sup>71</sup> Ibid 877.

survey was undertaken in the Australian state of Victoria to answer the research questions of this thesis. The survey was designed to be exploratory, as it sought to gather data in relation to an under-researched subject. Consistent with this research approach, the survey was predominantly quantitative in nature and relied on convenience sampling. The survey was undertaken in the period between December 2013 and July 2014 and was completed by 287 Victorians over the age of 18. The methodology adopted for this empirical research is thoroughly described and justified in Chapter 5.

This thesis also consults primary (legislation and case law) and secondary legal sources to provide context to the existing legal framework and debate concerning the legal status of animals. These sources are examined extensively in Chapter 2 to provide an accurate account of the legal status of different kinds of animals, the historical foundations for the property status of animals, and the implications of that status. This review includes some international cases in light of recent challenges to the legal status of animals in several overseas jurisdictions and due to the lack of similar litigation in Australia. Secondary sources then play an essential role in ascertaining the key arguments in the abolition debate (see Chapter 3), and in identifying alternative legal models for categorising animals (see Chapter 7).

While this thesis primarily has a legal focus, it also engages with knowledge from other disciplines. In particular, political and sociological theories are employed to justify the need for the empirical research undertaken for this thesis. These theories are examined in Chapter 4 in order to expound the circular relationship between law reform and community attitudes, and to emphasise the importance of measuring community attitudes for law-making purposes. Thus, an interdisciplinary approach provides the theoretical foundation for this thesis.

## **1.6 Significance and Limitations of Research**

This research into the property status of animals – being the principal vehicle through which our legal interactions with animals are mediated – is important because it is something that has not, until relatively recently, been scrutinised by scholars. In Australia, the research and debate on the property status of animals has been particularly scarce. This thesis makes a modest contribution to the limited body of Australian literature in this area. Ultimately, it advances the extent and standard of scholarship in animal law within the Australian context by examining the legal status of animals in Australia and exploring alternative ways of legally classifying animals.

The specific focus of this thesis also helps to fill the evidentiary gap regarding our knowledge about community attitudes towards the legal status of animals. It does so by exposing, in one

geographical space, current levels of community awareness regarding the property status of animals. The empirical evidence collected by this research provides a further dimension to the debate surrounding the legal status of animals. It goes to the grassroots levels to identify whether the property status of animals is known and reflective of modern attitudes.

Additionally, this thesis offers a new approach that can be utilised in determining whether the property status of animals ought to be abolished. Previous surveys that have sought to identify community attitudes surrounding animal welfare and rights issues have not directly examined community attitudes towards the property status of animals. The empirical research undertaken for this thesis appears to be the first attempt to gather such evidence. If it were to be replicated on a larger scale, greater insight could be achieved into contemporary attitudes towards the legal status of animals. Such research, if undertaken at different intervals, could also help to identify changes in public opinion as they occur. The usefulness of this approach is not limited to Australia. Similar surveys could be undertaken in other jurisdictions to verify whether the legal status of animals in those countries are known and consistent with local community attitudes.

This thesis is not only valuable to persons concerned with debates about the legal status of animals or animal rights. The results of the survey undertaken as part of this thesis also shine a light on attitudes towards animals in a general sense, that is, beyond just the legal status of animals. This is because the questions asked did not focus exclusively on the legal status of animals but also asked respondents how they perceived different categories of animals (see Appendix A for a copy of the survey). Accordingly, this research can help policymakers understand community attitudes towards animals generally, so as to ensure that current animal welfare standards meet community expectations.

The insight provided by this research is also valuable for advocacy groups and policymakers in Australia. Advocacy groups, especially those with the aim of abolishing the property status of animals, can learn from the findings of this research. In particular, they can identify educational opportunities in relation to the legal status of animals. They can also use the evidence and scholarly analysis presented in this thesis in their lobbying efforts, especially to highlight changing community attitudes towards the legal treatment of animals. Similarly, policymakers can take into account the evidence collected through this research when setting animal welfare standards. As highlighted in Chapter 4, policymakers do take into account community attitudes when developing policies and laws. Thus, the evidence and findings presented in this thesis can play an influential role in informing policies. However, as explained in Chapter 4, the influence of public attitudes on policy making should not be overstated. There are other factors and political players that play a greater role in shaping policies relating to animals, such as interest groups, industries that use animals and political parties. Moreover, it may not always be morally

appropriate for policy and law to reflect community attitudes.

Despite the significance of the research described above, its limitations should also be noted. This research does not provide findings that are representative of all Australians. This is because the small sample size (287) of the survey undertaken for this research does not justify the results being generalised across the Australian population as a whole. In any case, Australians cannot be described as a homogenous society that harbours identical attitudes.<sup>72</sup> Further, the survey is quantitative in nature and therefore does not provide as much insight as qualitative research would provide. These limitations relate to the methodology adopted for the survey undertaken as part of this research, and are explained in more detail in Chapter 5.

Because of the above noted limitations, this thesis does not suggest that the legal status of animals in Australia should be changed solely because of the data collected as part of this doctoral research. However, what this thesis does is explore attitudes that have rarely been surveyed before. It also provides a foundation for more systematic and extensive research in the future.

## **1.7 Structure of Thesis**

This thesis consists of eight chapters. Each contributes to answering the research questions.

Chapter One introduces the research questions and illuminates the aims of the research. It also highlights the evidentiary gap in existing literature to help explain the importance of this research. Finally, it describes the mixed research methods adopted in carrying out the research and provides an overview of the entire thesis.

Chapter Two provides the theoretical and historical context to this research by reviewing existing literature on the property status of animals. It begins by exploring the historical foundations that form the basis of the property status of animals, highlighting that the status originates from Roman Laws. In examining this history, it identifies a division between the legal categories of persons and things, which continues to influence modern Australian law. The traditional and contemporary meanings of the two categories are investigated, with reference to international judicial developments that highlight ambiguities surrounding the meaning of a 'person'. The implications of being classified as property are then explored, before the interaction between the property status of animals and the Australian animal welfare legislative

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<sup>72</sup> Chen, above n 52, 40.

framework is analysed.

Chapter Three provides further theoretical context for this thesis. It reviews the abolition debate, participants in which can broadly be divided into the abolitionist and welfarist camps. This chapter examines the specific arguments being presented for and against the property classification of animals. Amongst abolitionists, this chapter reviews the arguments of Francione, Wise and Pietrzykowski. It then examines the arguments of welfarists, such as Garner, Lovvorn and Cupp Jr, who oppose the need to change the legal status of animals. A common welfarist argument observed here is that such a change is unfeasible in light of current social attitudes. These contrasting positions provide the context for the abolitionist debate, and highlight a need for empirical data for the purposes of validating the respective arguments of abolitionists and welfarists.

Chapter Four lays the foundation for the empirical research undertaken as part of this thesis. It justifies the need to ascertain contemporary attitudes towards the legal status of animals. In doing so, it analyses how law and policy are influenced by community attitudes. The issue is examined from several different perspectives. In particular, legal, political and social theories are explored to uncover the relationship between law and society.

Chapter Five details the methodology adopted for the survey undertaken as part of this research. This chapter explains that this empirical research is exploratory in nature, as it is the first in Australia to measure the extent to which the community knows of, and agrees with, the legal status of animals. In light of this research approach and the need to obtain a high response rate, this chapter justifies why a short quantitative survey with a non-probability sample of 287 respondents was chosen. The chapter acknowledges the limitations of this methodology in respect of representativeness, but elucidates how the sample quality was improved by selecting the sample from a mix of metropolitan and regional Victoria. Additionally, this chapter explains the process followed for designing the survey, including obtaining ethical approval and conducting a pilot survey.

Chapter Six presents and analyses the results of the survey. It finds that most respondents were not aware of the property status of animals, and that most respondents did not agree with some or all animals being classified as property. While the chapter acknowledges that the results of the survey cannot be generalised to the entire Australian, or even Victorian, population, the results nevertheless expose an inconsistency between the property status of animals and modern attitudes. The results also reveal that most respondents do not perceive animals to be property, and that attitudes towards animals are variegated. Farm animals, for example, were

viewed predominantly as 'living beings different to humans', while pet owners regarded their companion animals as family members or friends.

Chapter Seven makes two recommendations for the legal status of animals on the basis of the survey findings. First it suggests that because the legal status of some animals is not consistent with community attitudes, some animals should no longer be legally classified as property. Second, this chapter proposes that to reflect variegated attitudes towards animals, the law should allow different kinds of animals to be categorised and/or treated differently. Chapter Seven then analyses six alternative models for defining the legal status of animals, including proposals for animal personhood and new legal categories and subcategories for specific kinds of animals. The extent to which the different models are aligned with the findings of the survey is considered, as are the ethical implications of the six models. The chapter concludes that the non-personal subjects of law model, which involves the establishment of a new legal category for sentient animals, carries the greatest potential to reflect community attitudes.

Chapter Eight draws conclusions from the research undertaken to answer the research questions posed by this thesis. In answering the thesis questions, this chapter concludes that the property status of some animals is not consistent with community attitudes, although it acknowledges that further empirical data is needed to identify the specific kinds of animals whose legal status is not in line with community expectations. This chapter further concludes that Pietrzykowski's 'non-personal subjects of law' model carries the greatest potential to reflect community attitudes. The implications of this research are also set out in this chapter. Aside from contributing to the theoretical debate and policy about the legal status of animals, this chapter identifies educational opportunities. Chapter Eight further provides directions for future, more comprehensive, empirical studies based on the lessons and experiences of this research. It also encourages further scholarly attention on certain theoretical aspects of this thesis, particularly in relation to the nature and implications of the categories of persons and property in Australia, and alternative ways of legally classifying animals.

There are also two appendices that appear after the concluding chapter, namely:

- **Appendix A**, which provides a copy of the survey questionnaire used for the empirical research undertaken as part of this thesis.
- **Appendix B**, which provides the complete set of data obtained from the survey.

## **1.8 Conclusion**

There is a dearth of empirical data in respect of community attitudes towards the legal status of animals. This scarcity can pose evidentiary challenges for an area of law that is still in its infancy in Australia. This thesis makes a contribution to this existing but limited pool of evidence with new empirical findings, particularly as it relates to the abolition debate. The scholarly analysis provided in this thesis will be of relevance to participants in the abolition debate, as it provides some clarity on whether abolition of the property status of animals is feasible. It will also be of interest to policymakers, as it offers suggestions for legal reform that are in line with contemporary attitudes. Additionally, the educational opportunities highlighted in this thesis will be insightful for advocacy groups that seek to challenge the property status of animals.

## Chapter 2

### Animals as Property

#### 2.1 Introduction

#### 2.2 The Legal Status of Animals

- 2.2.1 The Legal Status of Domestic and Wild Animals
- 2.2.2 Wild Animals are not the Property of the State or the People
- 2.2.3 How Property in Wild Animals is Acquired

#### 2.3 The History of Animals as Property

- 2.3.1 The Distinction Between *Personae* and *Res*
- 2.3.2 The Legal Status of Animals under Roman Law
- 2.3.3 The Continued Influence of the Roman Legal System

#### 2.4 The Contemporary Meaning of 'Property' and 'Persons'

- 2.4.1 What are 'Things' and 'Property'?
- 2.4.2 Who are 'Persons'?

#### 2.5 Animal Personhood Litigation

- 2.5.1 NhRP Cases in the US
- 2.5.2 Chucho the Polar Bear in Columbia
- 2.5.3 Cecilia the Chimpanzee in Argentina
- 2.5.4 Animals in Uttarakhand, India
- 2.5.5 The Value of Animal Personhood Litigation

#### 2.6 The Implications of Being Property

- 2.6.1 The Capacity to Possess Rights
- 2.6.2 Legal Standing
- 2.6.3 The Commodification and Objectification of Animals
- 2.6.4 The Interests of Animals Overlooked in Relationship Breakdowns
- 2.6.5 Pet Trusts are Unenforceable
- 2.6.6 Pain and Suffering of Human Owners Not Compensable

#### 2.7 How the Property Status of Animals Interacts with the Australian Animal Welfare Framework

- 2.7.1 The Three Layers of Animal Welfare Regulation in Australia
- 2.7.2 Key Features of the Australian Animal Welfare Framework
- 2.7.3 Animal Welfare Laws as Restrictions on Property Rights

#### 2.8 Conclusion

## 2.1 Introduction

*The more you know about the past, the better prepared you are for the future.*<sup>73</sup>

Animals are categorised as personal property under Australian law.<sup>74</sup> Australia inherited this status for animals when it adopted the British common law system upon colonisation.<sup>75</sup> However, the origins of the property status of animals date back to ancient Roman Laws, which created a conceptual division between ‘persons’ and ‘things’.<sup>76</sup> Today, this division between persons and things continues to be reflected in civil and common law systems, as does the categorisation of animals as things.<sup>77</sup> Yet, scientific, technological, environmental and social developments now pose practical and ethical challenges that blur the lines between the two categories.<sup>78</sup>

In more recent times, abolitionists have challenged the traditional categorisation of animals as property.<sup>79</sup> The past decade has seen strategic litigation that has sought to change the legal status of some or all animals from property to persons.<sup>80</sup> These challenges are affected, however, by conflicting definitions of a legal person. Personhood is sometimes defined broadly so that any entity can be declared by law to be a person, while at other times, a narrower view is taken that restricts personhood to humans or rational beings.<sup>81</sup>

Whether an animal is classified as property or person is important, because the two classifications carry very different legal ramifications. There is concern, for example, that the property status of animals disqualifies them from bearing legal rights.<sup>82</sup> The property categorisation of animals also allows animals to be commodified and objectified. In this sense, animals are recognised for their instrumental value, while their inherent value is undermined. The property status of animals also means that the welfare of companion animals is overlooked in the breakdown of human relationships, as the living arrangements of those animals are then

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<sup>73</sup> Theodore Roosevelt, quoted in David N Abdulai, *Chinese Investment in Africa: How African Countries Can Position Themselves to Benefit from China's Foray into Africa* (Routledge, 2017), Introduction.

<sup>74</sup> Lexis Nexis, above n 2, 20-10, 20-100. As explained below, however, wild animals, may not be owned by anyone. See section 2.2.

<sup>75</sup> White, ‘Animal Protection Law in Australia’, above n 3.

<sup>76</sup> Pottage, above n 10, 4; Naffine, *Law's Meaning of Life*, above n 10, 48.

<sup>77</sup> Domingo, above n 11, 628; Pottage, above n 10, 4.

<sup>78</sup> Pottage, above n 10, 4-5.

<sup>79</sup> See Chapter 3 for the arguments raised for abolishing the property status of animals, as well as the arguments for retaining the status.

<sup>80</sup> See section 2.5 below.

<sup>81</sup> See section 2.4.2 below.

<sup>82</sup> Francione, *Rain without Thunder*, above n 20, 177; Francione, *Animals, Property and the Law*, above n 20, 4; Wise, *Drawing the Line*, above n 21, 21; Wise, *Rattling the Cage*, above n 21, 4.

determined according to the rules of property distribution rather than in consideration of their best interests. Moreover, arrangements put in place for the care of animals following the death of their owners are unenforceable. Additionally, from a human-centric viewpoint, animal owners cannot recover damages for injuries negligently caused to the animals beyond the monetary value of the animal. Despite the close bonds shared between humans and their companion animals, animal owners cannot be compensated for their pain and suffering.

This chapter provides context to the research questions asked in this thesis. It does so by examining the current legal status of animals in Australia, with distinctions drawn between the status of domesticated and wild animals. An examination of the origins of the property status of animals provides further context, as the history situates the property categorisation of animals against the backdrop of the legal divide between persons and things. This chapter also explains the key concepts that need to be understood to gain a proper understanding of the legal status of animals. Thus, it explains the meaning and implications attached to the categories of property and persons. Additionally, to provide a complete understanding of the relevance and operation of the legal status of animals, this chapter explores the interaction between the property status of animals and the animal welfare framework in Australia.

This chapter begins by identifying the status quo; explaining the legal status of domesticated and wild animals in section 2.2. Section 2.3 then analyses the historical foundations for this status, highlighting the continuing influence of the traditional legal divide between ‘persons’ and ‘things’. The contemporary meanings of these legal concepts are examined in section 2.4, where ambiguity and inconsistency in the interpretation of legal personhood is observed. This ambiguity and inconsistency become evident when past and ongoing litigation relating to the legal status of some animals is examined in section 2.5. Section 2.6 then examines the implications that flow from being classified as property. Section 2.7 provides a summary of the animal welfare framework in Australia, and explains how it interacts with the legal status of animals. Finally, section 2.8 provides a conclusion, summarising the application and relevance of the current legal status of animals.

## **2.2 The Legal Status of Animals in Australia**

Animals in Australia are generally classified as personal property under the common law, although the law does distinguish between domesticated and wild animals.<sup>83</sup> While all

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<sup>83</sup> Steven White, ‘Exploring Different Philosophical Approaches to Animal Protection in Law’ in Peter Sankoff and Steven White (eds) *Animal Law in Australasia* (The Federation Press, 2<sup>nd</sup> ed, 2013) 31, 31; Bruce, above n 42, 76.

domesticated animals are personal property, the legal status of wild animals is not so straightforward. This is explained below.

### 2.2.1 The Legal Status of Domesticated and Wild Animals

Domesticated animals in Australia have been defined as ‘animals that are commonly kept and cared for in and about human habitations’.<sup>84</sup> These would clearly include companion and farm animals, as their living conditions are closely tied with human civilisations. Such animals are classed as personal property under the common law.<sup>85</sup> They are subject to absolute property.<sup>86</sup> Thus, even if a domesticated animal escapes from the control of the owner, the owner’s property rights are not extinguished.<sup>87</sup>

On the other hand, wild animals, as a general principle, belong to no one.<sup>88</sup> More specifically, animals living in a wild state and not subject to human control are not objects of property.<sup>89</sup> Qualified property can exist in wild animals, only if they are under direct human control.<sup>90</sup> To have qualified property in wild life, a person has to tame, confine or have some other means of control over the animals.<sup>91</sup> Qualified property means that the property right is defeasible.<sup>92</sup> Thus, property in the wild animal is lost if the animal leaves the control of the human.<sup>93</sup>

The legal status of dead wild animals also differs from that of living wild animals. Unlike the latter, absolute property exists in relation to dead wild animals.<sup>94</sup> The person who kills or takes the dead wild animal gets absolute property in the dead animal.<sup>95</sup>

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<sup>84</sup> *Attorney-General (SA) v Bray* (1964) 111 CLR 402, 425.

<sup>85</sup> White, ‘Exploring Different Philosophical Approaches to Animal Protection in Law’, above n 83, 31; Bruce, above n 42, 76.

<sup>86</sup> Lexis Nexis, above n 2.

<sup>87</sup> Cao, above n 9, 79.

<sup>88</sup> *Walden v Hensler* (1987) 163 CLR 561, 566; Cao, above n 1, 79; Dominique Thiriet, ‘Out of Eden: Wild Animals and the Law’ in Peter Sankoff, Steven White and Celeste Black (eds) *Animal Law in Australasia: Continuing the Dialogue* (The Federation Press, 2<sup>nd</sup> ed, 2013) 226, 226.

<sup>89</sup> Cao, above n 9, 79.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.* 82.

<sup>93</sup> *Ibid.* 79.

<sup>94</sup> *Ibid.* 82.

<sup>95</sup> *Ibid.* Criminal laws may exist, however, to prohibit the killing of wild animals. For example, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) prohibits the killing and taking of cetaceans (ss 229-229D) and any action that would have a significant impact on threatened or endangered species (ss 18 and 18A).

## 2.2.2 Wild Animals are not the Property of the State or the People

Some Australian jurisdictions, through legislation, vest the ownership of wildlife in the Crown.<sup>96</sup> The High Court, however, has cast doubt on the effect of such legislative provisions. In *Yanner v Eaton*,<sup>97</sup> the High Court examined whether s7(1) of the *Fauna Conservation Act 1954* (Qld)<sup>98</sup> (*Fauna Act*) vested absolute ownership of wild animals in the State of Queensland. In this case, the appellant was an Aboriginal person who hunted, killed and consumed two juvenile crocodiles. He was charged under the *Fauna Act* for taking fauna without a licence, permit, certificate or authority under that Act.

The appellant argued that his actions were the exercise of a native title right under the *Native Title Act 1993* (Cth) (the *Native Title Act*), which allowed him to hunt and carry out cultural and spiritual activities. He further argued that the *Fauna Act*, which was state law, was invalid under s 109 of the *Australian Constitution* so far as it prohibited or restricted the exercise of those native title rights (provided under Commonwealth law).<sup>99</sup> The Crown argued that before the *Native Title Act* took effect, s 7(1) of the *Fauna Act* had extinguished the native title rights of the appellant by stipulating that all fauna 'is the property of the Crown and under the control of the Fauna Authority'.<sup>100</sup> A central issue in this case was the effect of s 7(1) or the vesting of the property in native animals in the Crown.

A majority of the High Court confirmed that wild animals belong to no one. Chief Justice Gleeson and Gaudron, Kirby and Hayne JJ, in a joint statement, explained that s 7(1) was 'nothing more than "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource"'.<sup>101</sup> The High Court rejected the submission that s 7(1) gave 'full beneficial, or absolute, ownership' of the fauna to the Crown.<sup>102</sup> The Court further rejected the submission that the Crown's ownership of the fauna could be equated to an individual's ownership of domesticated animals. The common law position explained above was stated:

At common law, wild animals were the subject of only the most limited property rights. At

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<sup>96</sup> See for example, *Nature Conservation Act 1992* (Qld), s 83(1); *National Parks and Wildlife Act 1974* (NSW), s 97(2); *Wildlife Conservation Act 1950* (WA), s 22(1).

<sup>97</sup> (1999) 201 CLR 351 ('*Yanner v Eaton*').

<sup>98</sup> This Act has been repealed and replaced by the *Nature Conservation Act 1992* (Qld).

<sup>99</sup> Section 109 of the *Australian Constitution* provides that Commonwealth law will prevail where there is inconsistency between Commonwealth and State law.

<sup>100</sup> The exception was 'fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna': *Fauna Act*, s 7(1).

<sup>101</sup> *Yanner v Eaton*, [28], quoting Vinson CJ in *Toomer v Witsell* 334 USSC 385 (1948).

<sup>102</sup> *Ibid* [22].

common law there could be no "absolute property", but only "qualified property" in fire, light, air, water and wild animals. An action for trespass or conversion would lie against a person taking wild animals that had been tamed, or a person taking young wild animals born on the land and not yet old enough to fly or run away, and a land owner had the exclusive right to hunt, take and kill wild animals on his own land. Otherwise no person had property in a wild animal.<sup>103</sup>

Their Honours noted that in this case the subject of property could not clearly be identified, particularly as fauna could leave and re-enter the boundaries of the state.<sup>104</sup> Additionally, as the *Fauna Act* generally intended for the fauna to remain outside the possession of, and disposition by, humans, a majority of the Court concluded that s 7(1) did not intend to make the animals the property of the Crown.<sup>105</sup> Other provisions of the *Fauna Act* concerning the forfeiture of the animals and the liabilities of the Crown also led to the conclusion that 'it is an unusual kind of property and is less than full beneficial, or absolute, ownership'.<sup>106</sup> The High Court also considered the provisions requiring the payment of royalties to be significant. The majority suggested that the drafters of the legislation may have considered it necessary to vest ownership of the fauna in the Crown simply to facilitate the royalty system.<sup>107</sup>

Accordingly, the majority held that the property vested in the Crown was merely the aggregate of the Crown's various rights of control under the *Fauna Act*, including the rights to limit the taking and possession of fauna.<sup>108</sup> These rights of control were less than the rights of full beneficial or absolute ownership.<sup>109</sup> It was also clarified that although animals not subject to private ownership are sometimes spoken of as being owned by the people or by the state on behalf of the people, they are so construed merely for social purposes.<sup>110</sup> Such constructions are used to recognise the need to limit the acquisition of fauna to prevent their extinction.<sup>111</sup>

### 2.2.3 How Property in Wild Animals is Acquired

There are different ways in which qualified title in a wild animal can be obtained. The owner of land obtains qualified property in the young of wild animals so long as the newborns are unable

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<sup>103</sup> Ibid [24]. Justice Gummow also confirmed this position at [80].

<sup>104</sup> Ibid [22]

<sup>105</sup> Ibid [25].

<sup>106</sup> Ibid [26]

<sup>107</sup> Ibid [27], [98].

<sup>108</sup> Ibid [30], [86].

<sup>109</sup> Ibid [30]. Justices McHugh and Callinan disagreed at [43]-[57] and [135]-[147], respectively.

<sup>110</sup> Ibid [29].

<sup>111</sup> Ibid. See also Ron Levy, 'High Court Upholds Hunting Rights in Yanner Appeal: Yanner v Eaton' (2000) 4(26) *Indigenous Law Bulletin* 17; Roscoe Pound, *An Introduction to the Philosophy of Law* (Yale University Press, 1954), 111.

to leave the property (*ratione impotentiae et loci*).<sup>112</sup> Qualified property can also be acquired in wild animals by lawfully taking, taming or reclaiming the animals; in this case, the qualified title exists as long as the animals have the intention to return to the owner (*per industriam*).<sup>113</sup>

Additionally, a landowner has qualified property in wild animals on their property (for as long as the animals remain on the property) if the landowner has an exclusive right to hunt, take and kill wild animals on the property (*ratione soli*).<sup>114</sup> A landowner with an exclusive right to hunt, take or kill wild animals on their property can also grant (for example, through licensing) the right to hunt, take or kill the animals, in which case the grantee also obtains qualified property in the wild animals (*ratione privilege*).<sup>115</sup>

## 2.3 The History of Animals as Property

The property status of animals in Australia is a product of the colonial common law system.<sup>116</sup> The origins of this status, however, can be traced further back to ancient Roman Laws, which played an influential role in the establishment of the British common law.<sup>117</sup>

### 2.3.1 The Distinction Between *Personae* and *Res*

Ancient Roman laws established three separate categories within the area of private law – *personae* (persons), *res* (things) and *actiones* (actions).<sup>118</sup> In this tripartite system, persons were attached to things through legal procedures or transactions (actions).<sup>119</sup> Broadly, the law of persons provided ‘a catalogue of the classes of persons capable of being affected by the law’, while the law of things was ‘a list of rights and duties that such persons may have’.<sup>120</sup> In other words, persons were understood as the subjects of law, while things were understood as the objects of law.

The three categories of persons, things and actions were first conceptualised by Roman jurist,

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<sup>112</sup> Cao, above n 9, 80.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid 81-2.

<sup>115</sup> Ibid 82.

<sup>116</sup> Ibid 70-8.

<sup>117</sup> Ibid; Thomas, *Textbook of Roman Law*, above n 11, 3; Pottage, above n 10, 4; Domingo, above n 11, 628.

<sup>118</sup> Pottage, above n 10, 4; Naffine, *Law's Meaning of Life*, above n 10, 48.

<sup>119</sup> Pottage, above n 10, 4.

<sup>120</sup> Thomas, *Textbook of Roman Law*, above n 11, 66.

Gaius, in *Institutes*.<sup>121</sup> This categorisation was later adopted and institutionalised by Emperor Justinian in *Institutes* from AD 533.<sup>122</sup> When Gaius and Justinian wrote about the categories of *persona* and *res*, they did not define the terms or explain the differences between the two categories.<sup>123</sup> The meanings of these terms have remained elusive.

The bifurcation between persons and things under Roman Law was most likely not intended to create exclusive categories.<sup>124</sup> This supposition can be discerned from the treatment of slaves in Gaius' *Institutes*, who appear to have been categorised as both persons and things.<sup>125</sup> Slaves are listed as examples of corporeal things and described as things being susceptible to sale by mancipation.<sup>126</sup> At the same time, however, the law of persons outlined by Gaius was divided into free men and slaves.<sup>127</sup> The law of persons also allowed for the emancipation of slaves, upon which a slave would become a freedman.<sup>128</sup> A freedman would then be further classed as a Roman citizen, Latin or *dediticii*, and their treatment would differ according to how the person had been subcategorised.<sup>129</sup> Similarly, in Justinian's *Institutes*, slaves were classified as chattels but also dealt with under the law of persons.<sup>130</sup>

These interpretations of Gaius' and Justinian's laws suggest that the two categories did not necessarily stand in strict opposition to each other. That is, it was possible for an entity to be both, a person and a thing. This conclusion that there was no strict bifurcation can be supported by the treatment of animals during medieval times as well. Whilst animals were regarded as things, they were nevertheless held criminally liable for their actions and thus subjected to criminal trials as persons.<sup>131</sup> The provisions allowing for slaves to become freedman also

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<sup>121</sup> Domingo, above n 11, 628; Eric H Reiter, 'Rethinking Civil-Law Taxonomy: Persons, Things, and the Problem of Domat's Monster' (2008) 1(1) *Journal of Civil Law Studies* 189, 189-190.

<sup>122</sup> Domingo, above n 11, 628.

<sup>123</sup> J R Trahan, 'The Distinction Between Persons & Things: An Historical Perspective' (2008) 1 *Journal of Civil Law Studies* 9, 10; Visa A J Kurki, 'Why Things Can Hold Rights: Reconceptualizing the Legal Person' in Visa A J Kurki and Tomasz Pietrzykowski (eds) *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer, 2017) 69, 71.

<sup>124</sup> Visa Kurki, 'Animals, Slaves, and Corporations: Analysing Legal Thinghood' (2017) 18(5) *German Law Journal* 1069, 1072.

<sup>125</sup> *Ibid* 1072.

<sup>126</sup> Francis De Zulueta, *The Institutes of Gaius: Part I Text with Critical Notes and Translation* (Oxford University Press, 1946), 68-73.

<sup>127</sup> *Ibid* 5.

<sup>128</sup> *Ibid* 7.

<sup>129</sup> *Ibid* 5.

<sup>130</sup> J A C Thomas, *The Institutes of Justinian: Text, Translation and Commentary* (Juta & Company Limited, 1975), 14-15.

<sup>131</sup> See Katie Sykes, 'Human Drama, Animal Trials: What The Medieval Animal Trials Can Teach Us About Justice For Animals' (2011) 17 *Animal Law* 273; Melodie Slabbert, 'Prosecuting Animals in Medieval Europe: Possible Explanations' (2004) 10 *Fundamina: A Journal of Legal History* 159; E P Evans, *The Criminal Prosecution and Capital Punishment of Animals* (E P Dutton, 1906); Harry Hirschman, 'When Animals Were Criminals' (1939) 2 *Legal Chatter* 38.

suggests that categorisation as a thing did not imply a permanent classification.<sup>132</sup>

### 2.3.2 The Legal Status of Animals under Roman Law

Roman Law classified animals as *res*. As a result of this classification, Roman Law allowed animals to become the object of acquisition, transfer and theft, while the human owners of animals became the subjects of corresponding rights and liabilities.<sup>133</sup>

Roman Law also drew a distinction between wild and domestic animals.<sup>134</sup> Wild animals were classed as *ferae naturae*, meaning wild by nature.<sup>135</sup> Domestic animals were classed as *mansuetae naturae* or *domitae naturae*, meaning domestic by nature.<sup>136</sup> Whether an animal was considered wild or domestic depended on the species of the animal.<sup>137</sup> Lions, for example, were classified as wild animals, including lions that were kept as pets.<sup>138</sup> A dog, on the other hand, was considered a domestic animal, even if it was a savage dog.<sup>139</sup> This distinction was important because wild and domestic animals were the objects of different rules of property acquisition.<sup>140</sup>

Wild animals were *res nullius*, meaning they were owned by no one, until they were taken into possession by a person (*occupatio*).<sup>141</sup> The owner of land did not automatically own wild animals on their land if the animals were not possessed and controlled by the landowner.<sup>142</sup> A wild animal would remain the property of a person only as long as the animal remained in the control of that person.<sup>143</sup> Thus, upon the escape of the animal from the person's control, the animal would become *res nullius* again.<sup>144</sup> This position could be contrasted with that of ducks and geese, which were considered domestic in nature. These birds remained the property of the owner even if they flew out of the owner's sight and control.<sup>145</sup>

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<sup>132</sup> Toni Selkala and Mikko Rajavuori, 'Traditions, Myths, and Utopias of Personhood: An Introduction', (2017) 18(5) *German Law Journal* 1017, 1020.

<sup>133</sup> Cao, above n 9, 71.

<sup>134</sup> Ibid 72-3; Thomas, *Textbook of Roman Law*, above n 11, 167.

<sup>135</sup> Cao, above n 9, 73.

<sup>136</sup> Ibid.

<sup>137</sup> Thomas, *Textbook of Roman Law*, above n 11, 167.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Cao, above n 9, 73.

<sup>141</sup> Ibid 72-3. Birds and fish were also *res nullius*, which, upon capture, would become the property of the captor.

<sup>142</sup> Ibid 73-4.

<sup>143</sup> Ibid 72.

<sup>144</sup> Ibid 72, 74. The exceptions were bees, doves, peacocks, pigeons and other animals, which remained the property of a person so long as the animals had a habit of returning to the possession of that person.

<sup>145</sup> Ibid.

Roman Law also distinguished between animals that worked for households, described as beasts of draught and burden, and those that did not.<sup>146</sup> The former were called *res Mancipi*, and comprised only of horses, donkeys, mules and oxen.<sup>147</sup> All other animals were *res nec Mancipi*. Conveyancing of *res Mancipi* required a formal process or a ritual ceremony, whereas a simple delivery was sufficient for the conveyance of *res nec Mancipi*.<sup>148</sup>

### 2.3.3 The Continued Influence of the Roman Legal System

The Roman legal system, particularly the legal categories it established, continues to influence modern legal systems. Domingo describes the ongoing relevance of this categorical division in contemporary civil law and common law jurisdictions as follows:

This tripartite division of the law has provided order and structure to the teaching of both the *civil law* and the *common law* for centuries, serving as a theoretical paradigm or conceptual juridical milestone that has contributed to the striking development of the law in the West. Moreover, it has maintained a certain amount of unity within the genuine differences that otherwise exist when comparing the civil law and the common law traditions.<sup>149</sup>

Although the division between persons and things is more explicitly drawn in civil law traditions, the common law also assumes this division.<sup>150</sup> Thus, a legal divide between persons and property continues to be evident in Australian legal systems today.

Like the Roman legal system, it is suggested that the divide between persons and property under Australian law is not concrete. Corporations provide a contemporary example of an entity that does not fit exclusively within a single category, but rather enjoys a dual status.<sup>151</sup> On the one hand, the law gives corporations the status of a person. For instance, section 124(1) of the *Corporations Act 2001* (Cth) provides that a company has the same legal capacity and powers as an individual. The section further provides that a corporation has the legal capacity to enter into contracts and sue or be sued.<sup>152</sup> The Commonwealth *Criminal Code 1995* also provides for the application of the *Code* to corporations in the same way that it applies to individuals, and

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<sup>146</sup> Ibid 71.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid 71, 73. According to Cao, the transfer of *res Mancipi* was a complicated process requiring the presence of the transferor and transferee, a minimum of five witnesses, prescribed documentation and a set of scales.

<sup>149</sup> Domingo, above n 11, 628 (emphasis in original).

<sup>150</sup> Pottage, above n 10, 4.

<sup>151</sup> Naffine, *Laws Meaning of Life*, above n 10, 48.

<sup>152</sup> *Corporations Act 2001* (Cth), s 124(1).

makes it possible for corporations to be found guilty of committing an offence under the *Code*.<sup>153</sup> On the other hand, corporations do not enjoy all the legal rights and duties of a natural person. For example, the right against self-incrimination applies to natural persons but not to corporations.<sup>154</sup> Further, corporations retain certain peculiar characteristics that liken them to property and even trigger the operation of property laws. For example, although, strictly, corporations cannot be owned, human shareholders effectively own them. Titles to these shares can be bought and discarded. In this sense, corporations also carry the status of property.

Aside from suggesting that the division between persons and things is not exclusive, corporate personhood might also suggest that the meaning of personhood is context driven. It may be that the definition of personhood depends on the objectives of the relevant legal framework. Accordingly, there may be different approaches taken towards personhood in the context of corporations legislation and habeas corpus jurisprudence. This assertion, however, is merely a hypothesis that needs to be investigated and developed further. In any case, corporate personhood highlights how the law can and does adapt and innovate in diverse circumstances.<sup>155</sup>

While the categories of *personae* and *res* have continued to influence modern legal systems, scientific, technological and social developments have posed certain challenges that blur the lines between the two categories. Debates have arisen, for example, in relation to the legal status of the unborn, the dead, non-biological machines and nature.<sup>156</sup> Pottage explains:

With the advent of biotechnology patents, biomedical interventions, transgenic crops, and new environmental sensitivities, the distinction between persons and things has become a focus of general social anxiety. In each of these technological areas, persons become indistinguishable from things: gene sequences are at once part of the genetic programme of the person and chemical templates from which drugs are manufactured; embryos are related to their parents by means of the commodifying forms of contract and property, and yet they are also persons; depending on the uses to which they are put, the cells of embryos produced by in vitro fertilization might be seen as having either the 'natural' developmental potential of the human person or the technical 'pluripotentiality' that makes them such a valuable resource

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<sup>153</sup> *Criminal Code Act 1995* (Cth), Part 2.5.

<sup>154</sup> *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

<sup>155</sup> Johnson suggests that the classification of non-humans such as corporations as persons shows the flexible boundaries of personhood: Jenell Johnson, 'Disability, Animals, and the Rhetorical Boundaries of Personhood' (2012) 32(1) *JAC* 372, 374.

<sup>156</sup> See, eg, Selkala and Rajavuori, above n 132, 1018; Lisette ten Haaf, 'Unborn and Future Children as New Legal Subjects: An Evaluation of Two Subject-Oriented Approaches — The Subject of Rights and the Subjects of Interests' (2017) 18(5) *German Law Journal* 1091; Jannice Kall, 'A Posthuman Data Subject? The Right to be Forgotten and Beyond' (2017) 18(5) *German Law Journal*, 1145; Mika Viljanen, 'A Cyborg Turn in Law?' (2017) 18(5) *German Law Journal* 1277.

for research into gene therapies. In each of these cases, the categorisation of an entity as a person or thing is dependent upon a contingent distinction rather than an embedded division.<sup>157</sup>

Such developments indicate that the division between the categories of persons and things is not a natural or obvious phenomena. The categories come to be reviewed as societies progress. This is demonstrated by the evolution of the legal treatment of slaves. Changing community attitudes and the ensuing abolition of slavery meant that the category of persons had to be expanded to include former-slaves.<sup>158</sup> Such legal evolution indicates that the categories of persons and things are subject to ongoing review and modification by reference to the norms and values of a society. It supports the view that the categories are artificial or abstract legal constructs rather than natural divisions.<sup>159</sup> Hence, theoretically, the category of persons could be expanded further to include nonhumans, such as animals.

The distinction between wild and domesticated animals also continues, although the boundaries separating the two are arguably less clear.<sup>160</sup> Whether an animal is wild or domesticated no longer depends on species; rather, it depends on the setting in which the animal is found.<sup>161</sup> In fact, animals of the same species can be treated as either domesticated or wild. Thus, the status of a feral horse may differ from the status of a domesticated horse.<sup>162</sup> As Cao observes:

Wild animals are traditionally distinguished from domesticated animals, such as companion and farm animals, on the basis that domesticated animals are under the direct control of humans, while animals in the wild are 'free', in the sense of not being subject to ownership. However, this simple dichotomy cannot adequately describe the range of settings in which wild animals may be located. These categories overlap, so that the treatment and property status of the same type of wild animal may fluctuate according to the context (or jurisdiction) in which it is found.<sup>163</sup>

With the backdrop of such influences and deviations from Roman Law, it is timely and relevant to examine how persons and property are defined in contemporary times. Section 2.4 below analyses how personhood has been a controversial concept in recent times, with various competing meanings producing different outcomes when it comes to the legal status of animals.

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<sup>157</sup> Pottage, above n 10, 4-5.

<sup>158</sup> Jeffrey S Kerr et al, 'A Salve By Any Other Name Is Still A Slave: The *Tilikum* Case and Application of the Thirteenth Amendment to Nonhuman Animals' (2013) 19 *Animal Law* 221, 228.

<sup>159</sup> The fictional account of personhood is examined below in section 2.4.2.

<sup>160</sup> See Cao, above n 9, 234-6 for an account of the different ways in which wild animals may be defined.

<sup>161</sup> *Ibid* 234.

<sup>162</sup> *Ibid* 235.

<sup>163</sup> *Ibid* 234.

## 2.4 The Contemporary Meaning of 'Property' and 'Persons'

### 2.4.1 What are 'Things' and 'Property'?

In its original conception, the category of *res* included physical objects external to the human body (*res corporales*), as well as intangible rights and duties (*res incorporales*).<sup>164</sup> As noted above, however, the precise definition of things was not included within the original texts.

Kurki examines the definition of a legal thing, and concludes that it is best described in contemporary times as property.<sup>165</sup> He suggests it would be inaccurate to define things broadly to mean non-persons, as it would have the effect of catching abstract concepts such as numbers, ideas and quarks.<sup>166</sup> Such a definition, Kurki argues, would not serve any heuristic purpose within the law, because the category would not have a legally relevant common factor.<sup>167</sup> Kurki further rejects the suggestion that things are objects of rights and duties, as rights and duties do not always pertain to an object.<sup>168</sup> One's right not to be murdered, he points out, does not pertain to any physical or intangible object.<sup>169</sup> According to Kurki, it is more useful to define things as objects that can be owned. Conceiving of things in such a manner prompts one to assume that a certain array of legal rules will apply in regulating the sale, destruction and use of the thing.<sup>170</sup> Thus, Kurki defines things as property.

The concept of 'property' is often used in lay terms to refer to a physical object belonging to someone. In legal terms, however, the concept is difficult to define comprehensively.<sup>171</sup> Scholars have attempted to define the term in different ways, but consensus is yet to be reached on a satisfactory definition.<sup>172</sup> Nevertheless, what is accepted about the legal definition of property is that it does not refer to just a physical object.<sup>173</sup>

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<sup>164</sup> Trahan, above n 123, 11.

<sup>165</sup> Kurki, 'Animals, Slaves, and Corporations: Analysing Legal Thinghood', above n 124, 1069.

<sup>166</sup> Ibid 1082.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid 1083.

<sup>169</sup> Ibid 1084.

<sup>170</sup> Ibid 1085.

<sup>171</sup> Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *The Yale Law Journal* 16, 21.

<sup>172</sup> Derek Mendes Da Costa, Richard J Balfour and Eileen E Gillese, *Property Law: Cases, Text and Materials* (Emond Montgomery Publications Limited, 2<sup>nd</sup> ed, 1990), 1:5.

<sup>173</sup> R G Hammond, *Personal Property: Commentary and Materials* (Oxford University Press, 1990), 1; Rohan Price and Lynden Griggs, *Property Law: In Principle* (Lawbook Co, 2005), 2. It is rare for courts to define property, as opposed to discussing the incidents of particular forms of property, because the meaning of property is seldom the basis for the resolution of a dispute: Anthony P Moore, Scott Grattan and Lynden Griggs, *Australian Property Law: Cases and Materials* (Lawbook Co, 5<sup>th</sup> ed, 2016), 26.

Property is generally described as the legal relationship between a person and a subject matter.<sup>174</sup> In fact, it can represent many different kinds of relationships between a person and a subject matter.<sup>175</sup> Thus, more than one person can have property rights in the relevant subject matter.<sup>176</sup> Property rights include a right to exclude others, thus property can also be described as a set of relationships between people in respect of something.<sup>177</sup> In other words, the proprietary interests of the holder are protected against other persons (other than the grantor of that interest).<sup>178</sup>

Property has also been described as the degree of control or power that can be exercised over a particular thing or resource.<sup>179</sup> Gray and Gray suggest that ‘there may well be gradations of “property” in a resource’, thus more than one person can have property over something.<sup>180</sup> Accordingly, one person’s property rights in an object may be superior to the property rights of another person in the same object.<sup>181</sup>

DeLong observes that ‘although the meaning of property gets murky at the edges, the core is clear enough’.<sup>182</sup> Central to the law of property are the rights of ownership and possession. Ownership offers the strongest bundle of property rights, entitling a person to the fullest enjoyment of the relevant subject matter.<sup>183</sup> It also allows the person to freely alienate the rights attaching to the subject through, for example, sale, gifts and bequests.<sup>184</sup> Possession involves the actual control of the object of property.<sup>185</sup> It may indicate ownership, though possession can be independent of ownership.<sup>186</sup> It also provides protection against trespass, conversion and detinue.<sup>187</sup>

Property rights are legal rights, and the law protects these entitlements to varying degrees. Property rights are highly valued in western societies, including Australia, as is reflected by the

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<sup>174</sup> Price and Griggs, above n 173, 2.

<sup>175</sup> Ibid 8.

<sup>176</sup> Joyce Tooher and Bryan Dwyer, *Introduction to Property Law* (LexisNexis Butterworths, 2008), 4.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid 7.

<sup>179</sup> Kevin Gray and Susan Francis Gray, ‘The Idea of Property in Land’ in Susan Bright and John Dewar (eds) *Land Law: Themes and Perspectives* (Oxford University Press, 1998) 15, 15.

<sup>180</sup> Ibid 16.

<sup>181</sup> At a more philosophical level, Gray describes property as a ‘vacant concept’, suggesting ‘it does not really exist: it is mere illusion’: Kevin Gray, ‘Property in Thin Air’ (1991) 50(2) *Cambridge Law Journal* 252, 252.

<sup>182</sup> James V DeLong, *Property Matters: How Property Rights Are Under Assault — And Why You Should Care* (The Free Press, 1997), 25.

<sup>183</sup> Tooher and Dwyer, above n 176, 18.

<sup>184</sup> Ibid.

<sup>185</sup> Ibid 19; Price and Griggs, above n 173, 20.

<sup>186</sup> Da Costa, Balfour and Gillese, above n 172, 2:1.

<sup>187</sup> Tooher and Dwyer, above n 176, 19.

extensive legal principles and legislation designed to recognise and protect such rights.<sup>188</sup> The institution of property acts as a barrier between individuals and the state.<sup>189</sup> The High Court applied and upheld the principle of the sanctity of private property in *Plenty v Dillon*<sup>190</sup> when awarding Plenty substantial damages against two police officers who had entered his property to serve a summons after Plenty had withdrawn any implied consent to enter the property. Justices Gaudron and McHugh noted that:

nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official. The appellant is entitled to have his right to property vindicated by a substantial award of damages.<sup>191</sup>

The extent to which property rights are protected by law depends on 'the cogency, significance and recognition, often left unstated, of various economic, moral, political or social factors'.<sup>192</sup> Further, changing economic, political and social conditions can instigate a change in the subjects and objects of property.<sup>193</sup> Again, the legal status of slaves demonstrates this point. While they were objects of property prior to the abolition of slavery, 'the modern view ... is that humans and human products such as human blood, babies and human organs should never be objects of property'.<sup>194</sup>

#### 2.4.2 Who are 'Persons'?

The term person originally derives from the Latin word *persona* and Greek word *prosopon*, both of which depict the mask worn by an actor whilst performing a certain role.<sup>195</sup> Its usage under Roman Law was an apt way to accommodate and regulate a rights-holder's different roles in society.<sup>196</sup> Over time, however, the meaning of personhood has evolved.<sup>197</sup> Today, there

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<sup>188</sup> David Grinlinton, 'Property Rights and the Environment' (1996) 4 *Property Rights and the Environment* 4, 4-5, 7; Lynden Griggs, 'The Concept of Property: Unresolved Tensions between the Individual and the Collective' (1999) 7 *Australian Property Law Journal* 1, 1.

<sup>189</sup> Tony Wilson, 'More than a Mouthful: Digesting the Meaning of Property' (2000) 14(6) *Australian Property Law Bulletin* 49, 49-50.

<sup>190</sup> (1991) 171 CLR 635.

<sup>191</sup> *Ibid* 655.

<sup>192</sup> Tooher and Dwyer, above n 176, 4-5.

<sup>193</sup> *Ibid* 5.

<sup>194</sup> *Ibid*. See for example, ss 38-39 of the *Human Tissues Act 1982* (Vic), which prohibits trade in human tissues.

<sup>195</sup> Thomas, *Textbook of Roman Law*, above n 11, 387; Jane Nosworthy, 'The Koko Dilemma: A Challenge to Legal Personality' (1998) 2 *Southern Cross University Law Review* 1, 3.

<sup>196</sup> P W Duff, *Personality in Roman Law* (Cambridge University Press, 1938), 3; R D Lumb, 'Corporate Personality' (1964) 4(4) *University of Queensland Law Journal* 418, 418; Bartosz Brozek, 'The Troublesome "Person" in Visa Kurki and Tomasz Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and Unborn* (Springer, 2017) 3, 4.

appears to be little consensus on the legal meaning of a person, causing inconsistency and uncertainty in its application.

Naffine identifies three different ways in which personhood is defined in contemporary jurisprudence across various common law countries.<sup>198</sup> She observes that some jurists and courts adopt a technical definition, which regards a legal person as a legal artifice or construct.<sup>199</sup> This can be described as the broadest or most inclusive definition of personhood, as it does not require an entity which is the subject of legal personality to comport with a particular metaphysical person or be a member of the human community.<sup>200</sup> The entity also does not require any particular moral or empirical content.<sup>201</sup> Accordingly, '[the legal person] can include animals, foetuses, the dead, the environment, corporations, indeed whatever law finds convenient to include in its community of persons'.<sup>202</sup> Personhood defined in this broad sense essentially works as a device that provides legal capacity to the relevant entity.<sup>203</sup> Given the potential for non-humans to be included within this definition, those who advocate for animal personhood prefer this approach. So far, however, this definition has rarely been successfully argued in favour of animal personhood.<sup>204</sup> Naffine explains:

There is absolutely no reason why animals cannot be ... persons [under this definition] and yet the well-accepted legal view is that they are not. It is difficult to find a single instance of a right invested in animals, and jurists have seemed to resist the idea of ever calling them persons. The legal resistance to the personification of animals strongly suggests that the term person is not in fact a slot that fits anyone or anything but rather a slot essentially designed for human beings because they are thought to possess a certain moral status.<sup>205</sup>

Thus, it seems, personhood has a more human-centric connotation in practice. A requirement for some link with the human species is evident and corresponds with the second definition of personhood identified by Naffine.<sup>206</sup> This definition of a person is connected to the biological and metaphysical characteristics of humanity.<sup>207</sup> Personhood, according to this definition, is acquired

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<sup>197</sup> P W Duff, above n 196, 3; Selkala and Rajavuori, above n 132, 1020.

<sup>198</sup> See Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 *The Modern Law Review* 346.

<sup>199</sup> Ibid 350. See for example, F H Lawson, 'The Creative Use of Legal Concepts' (1957) 32 *New York University Law Review* 907, 915.

<sup>200</sup> Naffine, 'Who are Law's Persons?', above n 198, 350.

<sup>201</sup> Ibid 351.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid 350.

<sup>204</sup> International litigation in respect of animal personhood demonstrates this point. See Section 2.5 below.

<sup>205</sup> Ibid 356.

<sup>206</sup> Ibid 357.

<sup>207</sup> Ibid.

at birth and lost at death.<sup>208</sup> ‘Persons’ and ‘human beings’ are used interchangeably in this context, and the approach is premised on the dignity of the human being.<sup>209</sup> The key issue of contention becomes the definition of a human being, requiring input from medical scientists and philosophers.<sup>210</sup> The implication of this definition is that animals cannot be brought within the ambits of personhood simply because they are not a member of the Homo sapiens species.<sup>211</sup> In this sense, it can be argued that this definition of personhood is speciesist in that it arbitrarily prefers the human species over others. It presumes that humans alone are worthy of being the subjects of the law.<sup>212</sup>

Some scholars push for an even narrower definition of personhood, which is the third definition of personhood identified by Naffine.<sup>213</sup> This definition requires a level of rationality and moral agency.<sup>214</sup> Accordingly, legal personality relates to the capacity to hold duties, to be capable of being held legally responsible for one’s actions. Additionally, persons must have the competency to wilfully assert and enforce their rights.<sup>215</sup> These requirements would call for certain cognitive abilities to be present, although the exact degree of cognitive ability is unclear. In any case, animals cannot fall within this meaning of personhood because they lack the capacity to assert rights. This definition of a person is narrower than the human-centric definition described above because it excludes many human beings, such as infants, young children and comatose patients, from the parameters of personhood.<sup>216</sup>

Broadest	Human-centric	Narrowest
Requirement that they be declared to be a person by law	Requirement that they be a member of the human species	Requirement of rationality

**Table 2.1 – Naffine’s typology of ‘person’**

<sup>208</sup> Ibid.  
<sup>209</sup> Ibid 358.  
<sup>210</sup> Ibid 357-358. What it means to be a human being is being more convoluted with the advancement of technology. See for example: Leslie Swartz, ‘Cyborg Anxiety: Oscar Pistorius and the Boundaries of What it Means to be Human’ (2008) 23(2) *Disability & Society* 187; Steve Fuller, *Humanity 2.0: What it Means to be Human Past, Present and Future* (Palgrave Macmillan, 2011).  
<sup>211</sup> This definition of personhood would also mean that fetuses and the natural environment cannot be regarded as persons: Naffine, *Who are Law’s Persons?*, above n 18, 361.  
<sup>212</sup> This argument was made in an Amicus Brief jointly submitted by 17 philosophers in the Court of Appeals of the State of New York. See <https://www.nonhumanrights.org/content/uploads/In-re-Nonhuman-Rights-v.-Lavery-Proposed-Brief-by-PHILOSOPHERS-74435.pdf>  
<sup>213</sup> Naffine, *Who are Law’s Persons?*, above n 198, 362.  
<sup>214</sup> Ibid; M H Kramer, ‘Do Animals and Dead People Have Legal Rights?’ (2001) 15(1) *Canadian Journal of Law and Jurisprudence* 29; Richard Tur, ‘The “Person” in Law’ in A Peacocke and G Gillett (eds), *Persons and Personality: A Contemporary Inquiry* (Oxford, 1987) 123; Michael Moore, *Law and Psychiatry: Rethinking the Relationship* (Cambridge University Press, 1984).  
<sup>215</sup> Naffine, ‘Who are Law’s Persons?’, above n 198, 363.  
<sup>216</sup> Ibid.

The broad definition of a person enables law to be innovative and adaptable.<sup>217</sup> Accepting this definition means that the concept of personhood does not require a scientific inquiry. It does not need a determination about whether an entity qualifies as a human being, or whether an entity possesses specific cognitive ability. This understanding of a person also comes closest to the Latin meaning of *persona*, because it focuses on the various roles that can be assumed by an entity. The two narrower definitions of personhood do require scientific input. Whether an entity is a human, or whether it possesses the requisite level of rationality, are scientific inquiries. The law therefore has a less independent role to play if the two narrower definitions of personhood are adopted, as in those scenarios, the law cannot settle the question of whether an entity qualifies as a legal person without reference to scientific evidence.

Theoretically and practically, the debate concerning the legal status of animals is affected by the ambiguous meanings and requirements of personhood. It is evident that personhood, though an intrinsic feature of the legal system, is an imprecise term without a settled meaning. Until the meaning of personhood is confirmed, the strength of the arguments for making animals legal persons remain clouded by uncertainty.<sup>218</sup> This is because the broad spectrum of definitions advanced for personhood have different implications for animals. Moreover, the manner in which animal personhood can and should be argued would be determined by the underlying legal theory of what a legal person is. The next section explores how the concept of legal personhood has been defined in the few cases around the world that have questioned the legal status of animals.

## **2.5 Animal Personhood Litigation**

The 21<sup>st</sup> century has seen litigation, in different parts of the world, that has sought legal personhood for animals. A central issue in these cases, which are explored below, revolves around the meaning of a legal person. The various outcomes of these cases highlight the lack of consensus in defining a legal person.

### **2.5.1 NhRP Cases in the US**

The ambiguity surrounding the meaning of the term ‘person’ in common law jurisprudence has become evident in the way different courts have dealt with the habeas corpus claims made by the Non-human Rights Project (NhRP) on behalf of four chimpanzees. The NhRP has made

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<sup>217</sup> In this context, the law has been likened to magic. See Alexis Alvarez-Nakagawa, ‘Law as Magic. Some Thoughts on Ghosts, Non-Humans, and Shamans’ (2017) 18(5) *German Law Journal* 1247.

<sup>218</sup> Chapter 7 explores two distinct models of animal personhood. See section 7.4.2.

several separate applications for the writ of habeas corpus on behalf of the four chimpanzees - Tommy, Kiko, Leo and Hercules.<sup>219</sup> These applications were made in the New York State Supreme Court, particularly in the Niagara, Fulton, Suffolk and New York counties. The NhRP sought the writs under Article 70 of the *Civil Practice Law and Rules*,<sup>220</sup> which provide a summary procedure for challenging the legality of a person's detention. Obtaining the writ would effectively recognise a right to liberty for the subject person. Article 70 does not define the term 'person' for the purposes of the writ, so the common law definition applied. The NhRP's task was to establish that the chimpanzees were persons for the purposes of the writ. After all original applications were dismissed, the NhRP filed appeals in the Appellate Division of the state Supreme Court.<sup>221</sup>

The Third Judicial Department dismissed the appeal in respect of Tommy in December 2014, on the basis of adopting a narrow definition of a person.<sup>222</sup> The Appellate Court first noted that there is no precedent where an animal has been considered to be a person for the purpose of the writ of habeas corpus.<sup>223</sup> It went on to observe that 'the ascription of rights has historically been connected with the imposition of societal obligations and duties', and that rights always correlate to duties.<sup>224</sup> Accordingly, it held that the ascription of rights was conditional upon moral agency and the ability to accept societal responsibility.<sup>225</sup> The court ultimately decided that because chimpanzees 'cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions', they cannot be conferred with legal rights.<sup>226</sup>

In a separate case, the Fourth Judicial Department denied the appeal filed on behalf of Kiko in January 2015, without providing any guidance on the meaning of a person.<sup>227</sup> It dismissed the appeal on the basis that the writ of habeas corpus can only be obtained where the subject person is entitled to immediate release from custody.<sup>228</sup> Here, the NhRP was seeking to place

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<sup>219</sup> See Nonhuman Rights Project, *Litigation: Confronting the Core Issue of Nonhuman Animals' Thinghood* <<https://www.nonhumanrights.org/litigation/>>.

<sup>220</sup> 70 NY CVP §§7002 (Thomson Reuters Westlaw, 2015).

<sup>221</sup> See *The People of the State of New York ex rel The Nonhuman Rights Project Inc, on Behalf of Tommy v Lavery* (NY App Div, 518336, 4 December 2014); *Nonhuman Rights Project Inc, on Behalf of Kiko v Presti* (NY App Div, CA 14-00357, 2 January 2015); *Nonhuman Rights Project Inc, on Behalf of Hercules and Leo v Stanley* (NY App Div, 152736/15, 29 July 2015).

<sup>222</sup> *The People of the State of New York ex rel The Nonhuman Rights Project Inc, on Behalf of Tommy v Lavery* (NY App Div, 518336, 4 December 2014).

<sup>223</sup> *Ibid* 3.

<sup>224</sup> *Ibid* 4-5.

<sup>225</sup> *Ibid* 4.

<sup>226</sup> *Ibid* 6.

<sup>227</sup> *Nonhuman Rights Project Inc, on Behalf of Kiko v Presti* (NY App Div, CA 14-00357, 2 January 2015)

<sup>228</sup> *Ibid* 2.

Kiko in a different facility.<sup>229</sup>

In July 2015, the Second Judicial Department took an approach to personhood that contrasted with the Third Judicial Department's definition of a person. Though the Second Judicial Department dismissed the appeal made on behalf of Hercules and Leo on the basis of the precedent set by the Third Judicial Department, it made comments that suggested that the court was amenable to a broader definition of personhood than that adopted in Tommy's judgment:

'Legal personhood' is not necessarily synonymous with being human. Nor have autonomy and self-determination been considered bases for granting rights.<sup>230</sup>

New and separate habeas corpus applications were then unsuccessfully made in respect of Tommy and Kiko in the New York County. Appeals were filed in respect of both decisions in the First Judicial Department of the Appellate Division of the New York State Supreme Court. In June 2017, the First Judicial Department dismissed both appeals in a combined decision.<sup>231</sup> The Appellate Court reiterated the lack of precedent to support personhood for chimpanzees.<sup>232</sup> Despite evidence of the cognitive and linguistic capabilities of chimpanzees provided by the NhRP, the First Judicial Department held that chimpanzees could not bear legal duties or be held accountable for their actions.<sup>233</sup> The argument that animals had been subject to criminal trials in medieval times failed to satisfy the court that animals could be held accountable for their actions, because the examples provided did not exist in modern times.<sup>234</sup>

The NhRP argued that the ability to bear a duty or be held responsible should not determine personhood.<sup>235</sup> To support this argument, it identified infants and comatose patients as examples of persons who do not comprehend their duties or responsibilities.<sup>236</sup> In response to the NhRP's submissions, the First Judicial Department stated that the 'argument ignores the fact that these are still human beings, members of the human community'.<sup>237</sup>

The NhRP referred to corporate personhood in advocating a broad construction of personhood

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<sup>229</sup> Ibid.

<sup>230</sup> *Nonhuman Rights Project Inc, on Behalf of Hercules and Leo v Stanley* (NY App Div, 152736/15, 29 July 2015) 21.

<sup>231</sup> See *Nonhuman Rights Project, on Behalf of Tommy v Lavery; Nonhuman Rights Project, on Behalf of Kiko v Presti*, 152 AD3d 74 ( NY App Div, 2017).

<sup>232</sup> Ibid 77.

<sup>233</sup> Ibid 78.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

that aligned with a fictional account of the concept.<sup>238</sup> The First Judicial Department rejected this line of reasoning, stating that the claim was ‘without merit’.<sup>239</sup> The court stressed that corporations laws ‘are referenced to humans or individuals in the human community’.<sup>240</sup> The First Judicial Department was also not persuaded by examples of rivers and religious objects that have been treated as persons, as they were foreign, rather than local, examples.<sup>241</sup> Thus, the First Judicial Department ultimately upheld a definition of ‘person’ that equated the term with humans. That is, a person can only be a human being or an entity made up of human beings.

<b>Appellate Division of the New York State Supreme Court</b>				
	<b>First Judicial Department</b>	<b>Second Judicial Department</b>	<b>Third Judicial Department</b>	<b>Fourth Judicial Department</b>
<b>County</b>	New York	Suffolk	Fulton	Niagara
<b>Plaintiff</b>	Tommy; Kiko	Hercules; Leo	Tommy	Kiko
<b>Decision</b>	Chimpanzees are not persons because only humans, or entities constituted by humans, can be persons.	The court was bound by the Third Judicial Department’s decision. However, it stated that personhood did not depend on membership in the human community, nor on autonomy or self-determination.	Chimpanzees cannot be persons because they do not have the ability to bear duties and responsibilities.	Court did not define a person.

**Table 2.2 – The different meanings of personhood adopted by different courts in the NhRP cases**

<sup>238</sup> Ibid 78-9.  
<sup>239</sup> Ibid 78.  
<sup>240</sup> Ibid 79.  
<sup>241</sup> Ibid.

As the table above illustrates, the approaches of the appellate courts in defining a legal person varied, highlighting the ambiguity associated with the meaning of a person.

The NhRP has also filed a series of petitions for the writ of habeas corpus on behalf of four elephants, all of which are currently awaiting decisions or subject to appeals.<sup>242</sup> In one of these cases, Bannister J of the Supreme Court of New York (County of Orleans) has issued an Order to Show Cause requiring the Bronx Zoo to establish why an order for the immediate release of a captive elephant named Happy should not be made.<sup>243</sup> A hearing to determine whether Happy should be released from the custody of Bronx Zoo is scheduled for 14 December 2018.<sup>244</sup> It is anticipated that in its decision, the court will address the issue of whether an elephant can be a legal person.

### 2.5.2 Chucho the Polar Bear in Colombia

The Colombian Supreme Court granted the writ of *habeas corpus* in respect of a polar bear, Chucho, in July 2017, after the court declared the bear a legal person.<sup>245</sup> The writ was sought under Article 30 of the Colombian *Constitution of 1991*, which protects a person from unlawful or unconstitutional confinement.<sup>246</sup> In this case, the court equated personhood with the capacity to hold rights, and focused on whether sentient beings could be right holders.

In determining whether animals could be holders of rights, the court observed that fictitious legal entities are also the subjects of rights, such as commercial societies, associations and public collectives.<sup>247</sup> Following this line of reasoning, the court held:

Undeniably, the other sentient beings are also subjects of rights. The point is not to grant them rights in every respect analogous to those that humans beings enjoy ... nor that the other elements of nature must bear the same prerogatives or guarantees that human beings possess, but rather those which correspond to, or are fitting to or suit their species, rank and

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<sup>242</sup> See Nonhuman Rights Project, *Client, Happy (Elephant)* <<https://www.nonhumanrights.org/client-happy/>>; Nonhuman Rights Project, *Clients, Beulah, Karen, Minnie (Elephants)* <<https://www.nonhumanrights.org/clients-beulah-karen-minnie/>>.

<sup>243</sup> *Nonhuman Rights Project Inc, on behalf of Happy v Breheny* (NY Sup Ct, 18-45164, 16 November 2018).

<sup>244</sup> Nonhuman Rights Project, *Client, Happy (Elephant)*, above n 242.

<sup>245</sup> *Rebuttal of ordinance issued in the context of the writ of habeas corpus filed by Luis Domingo Gomez Maldonado on behalf of the spectacled bear "Chucho"* [Corte Suprema de Justicia, Sala de Casacion Civil Bogota], AHC4806-2017, 26 July 2017 [Javier Salcedo trans, *Rebuttal of ordinance issued in the context of the writ of habeas corpus filed by Luis Domingo Gomez Maldonado on behalf of the spectacled bear "Chucho"*] <<https://www.nonhumanrights.org/content/uploads/Translation-Chucho-Decision-Translation-Javier-Salcedo.pdf>>.

<sup>246</sup> *Ibid* [2.2].

<sup>247</sup> *Ibid* [2.4.3].

group. The point is to include within the chain of life a universal morality, a public ecological global order and, in virtue of the interdependency and interaction that prevail between humans and nature, conferring to animals the safeguard they deserve against the irrational efforts of contemporary mankind to destroy our habitat.<sup>248</sup>

The Supreme Court stressed the need to move from an anthropocentric worldview to an ecological-anthropocentric one.<sup>249</sup> Accordingly, it explained there was a need to reconsider what a holder of rights is and to relax the principle that requires rights holders to be reciprocally bound to duties.<sup>250</sup> The court thus held that animals are sentient rights-holders who are free of duties, and that humans are the guardians, representatives and informal agents in charge of the care of animals.<sup>251</sup> As sentient beings, the court added, animals are entitled to:

freedom, to live a natural life, to prosper with the least possible pain and to lead a life with the standards that suit their status and condition, but essentially in a responsibly preserved habitat in the biotic chain.<sup>252</sup>

This decision was overturned shortly after. According to the NhRP, a panel of the Colombian Supreme Court ruled that:

the writ of habeas corpus is inappropriate in the present case, because it was designed for persons, rational animals, not for nonhuman or irrational animals, and the foundations of such a decision are incompatible with the purpose for which the writ was created.<sup>253</sup>

The proceedings relating to Chucho's case highlight the lack of agreement surrounding the meaning and pre-requisites for legal personhood. Similar to the US litigation considered above, the Colombian judiciary's take on legal personhood varies from the narrowest interpretation, requiring rationality, to the broadest, implying that the law can make anything a person.

### **2.5.3 Cecilia the Chimpanzee in Argentina**

In November 2016, the Third Court of Guarantees in Mendoza, Argentina, granted the writ of

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<sup>248</sup> Ibid [2.4.4].

<sup>249</sup> Ibid [2.4.2]. The Colombian Supreme Court clarified, however, that it was not promoting a purely ecological perspective.

<sup>250</sup> Ibid [2.4.5].

<sup>251</sup> Ibid.

<sup>252</sup> Ibid [2.4.5.4].

<sup>253</sup> Lauren Choplin, 'Nonhuman Rights in Colombia: An Interview with Luis Domingo Gomez Maldonado', *Nonhuman Rights Project* (10 November 2017) <<https://www.nonhumanrights.org/blog/nonhuman-rights-colombia-interview/>>. An English translation of this decision is currently unavailable.

habeas corpus in respect of a chimpanzee named Cecilia after declaring her 'a non-human legal person'.<sup>254</sup>

The Third Court of Guarantees held that the classification of animals as things was 'not a correct standard'.<sup>255</sup> It rejected the argument that animals could not be persons because they lacked the competence to exercise their rights, noting that human beings who lacked competency were not excluded from personhood.<sup>256</sup> Instead, the court stated that the rights of animal persons could be exercised by governmental or non-governmental organisations, or by other persons claiming collective interests.<sup>257</sup> The court also refused to entertain the argument that only humans can be persons, referring to scientific evidence highlighting the genetic similarity between humans and great apes.<sup>258</sup>

In reaching its decision, the Third Court of Guarantees emphasised the fact that animals are sentient beings, and accepted that protection against animal cruelty was not sufficient recognition of the legal status of animals.<sup>259</sup> It also held that there are ecological reasons for recognising the personhood of animals.<sup>260</sup> Additionally, the court observed that great apes, like humans, are 'flesh and bones', are born, have emotions and have a range of other cognitive abilities.<sup>261</sup> Accordingly, the court concluded that the category of persons should include the great apes, including orangutans, gorillas, bonobos and chimpanzees.<sup>262</sup> The court further recognised that such animals have 'the fundamental right to be born, to live, grow and die in the proper environment for their species'.<sup>263</sup>

Pursuant to the order of the Third Court of Guarantees, Cecilia was relocated to a sanctuary in Brazil that is affiliated with the Great Ape Project.<sup>264</sup> At this time, it is unclear whether other great

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<sup>254</sup> *Writ of habeas corpus presented by Abogados y Funcionarios de defensa Animal (AFADA)* [Tercer Juzgado de Garantías, Poder Judicial Mendoza], P-72.254/15, 3 November 2016 [Ana María Hernández trans, *Writ of habeas corpus presented by Abogados y Funcionarios de defensa Animal (AFADA) about the chimpanzee "Cecilia" - non-human individual*, 32 <[https://www.nonhumanrights.org/content/uploads/Chimpanzee-Cecilia\\_translation-FINAL-for-website-2.pdf](https://www.nonhumanrights.org/content/uploads/Chimpanzee-Cecilia_translation-FINAL-for-website-2.pdf)>].

<sup>255</sup> Ibid 23.

<sup>256</sup> Ibid 27.

<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid 25.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid 23-4; 28.

<sup>262</sup> Ibid 28.

<sup>263</sup> Ibid 27.

<sup>264</sup> Lauren Choplin, 'Chimpanzee Cecilia Finds Sanctuary: An Interview with GAP Brazil' *Nonhuman Rights Project* (20 April 2017) <<https://www.nonhumanrights.org/blog/chimpanzee-cecilia/>>; Carlos Meneses Sanchez, *Chimpanzee Cecilia back to nature in Brazil after misery of a jail-like zoo* (15 April 2017) *Grandes Primatas Proctecao aos* <<http://www.projetogap.org.br/en/noticia/chimpanzee-cecilia-back-to-nature-in-brazil-after-misery-of-a-jail-like-zoo/>>.

apes or animals have also become legal persons as a result of this decision. It is also yet to be seen whether similar proceedings are likely to be brought in Argentine courts in respect of other primates or species of animals.

#### 2.5.4 Animals in Uttarakhand, India

In July 2018, the High Court in the Indian state of Uttarakhand declared all animals as legal persons.<sup>265</sup> The petitioner in the case asked the court to restrict the movement of horse carts between India and Nepal, and to confer the status of legal persons on animals.<sup>266</sup> In relation to the issue of the legal status of animals, the High Court of Uttarakhand declared animals to be juristic persons.

The High Court of Uttarakhand took a broad view of personhood, so that any entity declared by the law can be a person. After referring to a series of Indian judicial authorities that recognised the personhood of some religious idols, the court accepted that the concept of juristic persons is an artificial construct that was developed to serve social needs.<sup>267</sup> It stated that ‘for a bigger thrust of socio-political-scientific development, evolution of a fictional personality to be a juristic person becomes inevitable’.<sup>268</sup> The court was of the opinion that any ‘subject matter’ can be attributed with legal personality.<sup>269</sup> It went on to acknowledge the damage caused to the environment and ecologies generally, as well as the loss of species.<sup>270</sup> In light of such issues, the High Court held:

New inventions are required to be made in law to protect the environment and ecology. The animals including avian and aquatics have a right to life and bodily integrity, honour and dignity. Animals cannot be treated merely as property.<sup>271</sup>

The High Court decided that the conferral of personhood on animals was necessary in this case to promote the welfare of animals.<sup>272</sup> Accordingly, the High Court made the following order (amongst others):

The entire animal kingdom including avian and aquatic are declared as legal entities having a

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<sup>265</sup> *Narayan Dutt Bhatt v Union of India* (High Court of Uttarakhand, No. 43 of 2014, 4 July 2018).

<sup>266</sup> *Ibid* [1].

<sup>267</sup> *Ibid* [72], [82].

<sup>268</sup> *Ibid* [82].

<sup>269</sup> *Ibid*.

<sup>270</sup> *Ibid* [84].

<sup>271</sup> *Ibid*. In recognising the rights of animals, the High Court noted that the Indian Constitution protected the rights of all forms of life, including animals.

<sup>272</sup> *Ibid* [98].

distinct *persona* with corresponding rights, duties and liabilities of a living person. All the citizens throughout the State of Uttarakhand are hereby declared *persons in loco parentis* as the human face for the welfare/protection of animals.<sup>273</sup>

Not only did the High Court declare animals to be persons, but it also declared human persons to be *persons in loco parentis*, that is, to stand 'in the place a parent'.<sup>274</sup> In other words, humans became responsible for animal persons in the state of Uttarakhand.

This decision was the first to make a wide-ranging declaration about the legal status of animals. Unlike other international cases where a writ of habeas corpus was sought in respect of individual animals, the Indian Court made a generic decision in respect of all animals. However, the practical implications of the Uttarakhand High Court's decision are still unclear. It certainly does not appear to have prohibited animal use given that the movement of horse carts in this case was not completely restricted. The scope of the rights of animals is unclear, and it is unknown whether different kinds of animals will possess different kinds and degrees of rights. Whether, as a result of their personhood, animals in the state of Uttarakhand now have legal standing to seek enforcement of their rights, is also yet to be seen.

### **2.5.5 The Value of Animal Personhood Litigation**

Although the legal world may be seen as divided between persons and things, it is unclear where the boundaries of a legal person lie. The international cases analysed above reveal that a standard definition for personhood is lacking. While some courts have associated personhood with humans and human capacities, a few have also supported a fictional account of personhood that allows the law to declare any entity a person. Perhaps as more cases seeking personhood for animals come before courts, the meaning of personhood will become refined overtime. Indeed, such cases bring to the forefront of judicial minds a fundamental legal concept that requires defining.

Not only are these cases prompting courts to examine the meaning of personhood, they are also forcing courts to reconsider the legal status of animals. The history of the property categorisation of animals demonstrates that the property status of animals has been uncontested for centuries. Thus, even though litigation has largely been unsuccessful in

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<sup>273</sup> Ibid [99].

<sup>274</sup> Perry A Zirkel and Henry F Reichner, 'Is the *In Loco Parentis* Doctrine Dead?' (1986) 15 *Journal of Law & Education* 271; Todd A DeMitchell, 'The Duty of Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students' (2002) 3(1) *Brigham Young University Education and Law Journal* 17.

obtaining a declaration of animal personhood, it has been valuable in forcing courts to deliberate on what has become a contentious issue. This litigation is forcing the legal system to engage with the legal status of animals.<sup>275</sup>

Unsuccessful litigation cases can also be useful in educating society about a particular legal issue and advancing reform goals.<sup>276</sup> Litigation publicises the matter and, as Staker argues, 'create[s] a normative environment that allows for a fundamental redefinition of our relationship with animals to occur'.<sup>277</sup> It may have the effect of creating a social momentum that will ultimately put further pressure on courts to seriously reconsider the legal status of animals.<sup>278</sup>

Ultimately, whether or not an animal comes within the meaning of a person is an important question needing resolution, because of the implications of being property. Section 2.6 examines the implications of the property classification of animals.

## **2.6 The Implications of Being Property**

The significance of the legal status of animals can only be fully comprehended if the implications of being classified as property are understood. These implications are explored below.

### **2.6.1 The Capacity to Possess Rights**

If a person is the subject of rights and obligations, and property is the object of those rights and obligations, then it follows that property cannot hold legal rights.<sup>279</sup> Indeed, one of the common arguments made in opposition to the property status of animals, or in support of animal personhood, is that the property status precludes animals from bearing rights.<sup>280</sup> That is, animals cannot have legal rights unless they become legal persons. However, this is a disputed area of legal philosophy. Some have argued that animals can still have rights as property and that the protection afforded to animals under animal welfare legislation can and does amount to

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<sup>275</sup> Alexia Staker, 'Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-Human Animals' (2017) 6(3) *Traditional Environmental Law* 485, 503.

<sup>276</sup> *Ibid.*

<sup>277</sup> *Ibid.* 503, 507.

<sup>278</sup> The relationship between community attitudes and legal reform is explored in greater detail in Chapter 4.

<sup>279</sup> Christine M Korsgaard, 'Personhood, Animals, and the Law' (2013) 12(34) *Think* 25, 25.

<sup>280</sup> See, eg, Francione, *Rain without Thunder*, above n 20, 177; Francione, *Animals, Property and the Law*, above n 20, 4; Wise, *Drawing the Line*, above n 21, 21; Wise, *Rattling the Cage*, above n 21, 4. The arguments of Francione and Wise are examined in Chapter 3.

rights. Favre takes this position.<sup>281</sup> He contends that at least some animals possess rights, such as the right to be free from pain and suffering, although the animals cannot assert those rights.<sup>282</sup> Rather, governments have to assert these rights on behalf of the animals.<sup>283</sup> According to Favre, the fact that these rights are often not asserted does not mean that the rights do not exist.<sup>284</sup>

The position one takes in relation to the question of whether animals possess rights whilst being classified as property seems to depend on the meaning attached to the concept of rights. Sunstein, for example, does not consider that the property status of animals should be abolished for the reason that it precludes animals from bearing rights.<sup>285</sup> He argues that animals already have rights '[i]f we understand "rights" to be legal protection against harm'.<sup>286</sup> Animals also have rights if the term is taken 'to mean a moral claim to such protection'.<sup>287</sup> Sunstein admits that the rights of animals are currently limited because of the limitations in enforcement and the large number of exceptions under animal welfare legislation.<sup>288</sup> He argues, however, that animals could be granted the right to enforce prohibitions against cruelty without their status as property being abolished.<sup>289</sup>

In contrast, Wise adopts Hohfeld's definition of a legal right, according to which legal rights consist of legal advantages and corresponding disadvantages that can only pertain to the legal relationship between two legal persons.<sup>290</sup> On this basis, Wise argues that things have no legal rights.<sup>291</sup> For Francione, 'a right is a particular way of protecting interests'.<sup>292</sup> He contends that the interests of animals are currently not legally recognised because '[w]e cannot simultaneously regard animals as resources and as beings with morally significant interests'.<sup>293</sup>

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<sup>281</sup> David Favre, 'Living Property: A New Status for Animals within the Legal System' (2010) 93 *Marquette Law Review* 1021, 1032.

<sup>282</sup> Ibid 1033-4.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid 1034.

<sup>285</sup> Sunstein does not deny, however, that valid arguments to abolish the property status of animals could be made on other basis. He argues, for example, that abolishing the property status may be rhetorically important in making the interests of animals count. He thus suggests that '[i]f getting rid of the idea that animals are property is helpful in reducing suffering, then we should get rid of that idea': Cass R Sunstein, 'The Rights of Animals' (2003) 70(1) *The University of Chicago Law Review* 387, 399-400. See also: Cass R Sunstein, 'Standing for Animals (with Notes on Animal Rights)' (2000) 47(5) *UCLA Law Review* 1333, 1362-6.

<sup>286</sup> Sunstein, 'The Rights of Animals', above n 285, 389; Favre appears to adopt a similar interpretation of 'rights'. See Favre, 'Living Property', above n 277, 1060.

<sup>287</sup> Sunstein, 'Animal Rights', above n 281, 389.

<sup>288</sup> Ibid 390-1.

<sup>289</sup> Ibid 399.

<sup>290</sup> Wise, *Rattling the Cage*, above n 21, 53-4.

<sup>291</sup> Ibid 54.

<sup>292</sup> Francione, *Introduction to Animal Rights*, above n 20, xxvi, 149.

<sup>293</sup> Ibid 147, 183.

He argues that legislation seeking to protect animals, such as animal welfare laws or endangered species legislation, do not recognise any value in animals other than as resources that ought to be preserved for human needs.<sup>294</sup> Accordingly, for Francione, animals do not have rights.

The meaning and source of legal rights is a complex topic in itself. This controversy cannot be settled within the limits of this chapter. It is also beyond the scope of this thesis to address this contentious issue, as a comprehensive analysis would distract from the research questions of this thesis. It is acknowledged that, for the purposes of this thesis, the relationship between rights and the two categories of persons and property is an important aspect of the overall abolition debate, and needs to be further investigated. A complete understanding of this relationship may shed light on the implications of the property status of animals and therefore affect the strength of the arguments made in support or opposition of the status quo.

### **2.6.2 Legal Standing**

Is lack of legal standing implied for those classified as property? Standing refers to the legal capacity to commence legal proceedings or to have a court adjudicate on one's complaint or issue.<sup>295</sup> To have legal standing in Australia, an applicant seeking to commence legal proceedings must be a legal person or a separate legal entity recognised by the law.<sup>296</sup> Because animals lack legal personality, they lack legal standing to seek enforcement of animal welfare laws. Even if it is accepted that animal welfare laws amount to some weak form of rights, the requirement for legal personality in establishing standing would disable animals from enforcing those rights.<sup>297</sup> For this reason, animals are merely the 'passive beneficiaries' of the duties imposed on humans under animal welfare legislation.<sup>298</sup>

### **2.6.3 The Commodification and Objectification of Animals**

Animals are placed within the category of personal property, which means they can be owned, sold, purchased, gifted or stolen.<sup>299</sup> In this sense, animals are treated like commodities. Such commodification is perhaps most obvious in animal farming and in the breeding, selling and

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<sup>294</sup> Francione, *Introduction to Animal Rights*, above n 20, 183.

<sup>295</sup> Bagaric and Akers, above n 42, 121.

<sup>296</sup> Ibid; Leslie A Stein, 'The Theoretical Bases of Locus Standi' in Leslie A Stein (ed) *Locus Standi* (Law Book Co, 1979) 3, 7.

<sup>297</sup> Bagaric and Akers, above n 42, 125.

<sup>298</sup> Tudor, above n 26, 135.

<sup>299</sup> Da Costa, Balfour and Gillese, above n 172, 2:1.

relinquishing of companion animals.<sup>300</sup> This legal commodification ‘enables the instrumental treatment [of animals] by others subject only to a *de minimis* standard of regulation’.<sup>301</sup> The property status of animals also effectively likens animals to inanimate objects. Even at a symbolic level, therefore, the property categorisation promotes the conception of animals as merely ‘things’ of instrumental value. The semantics imply that they are means to an end, not ends in themselves.<sup>302</sup>

Viewing animals as things of instrumental value may lead one to overlook the inherent interests or intrinsic value of animals.<sup>303</sup> The intrinsic value of animals is derived from a variety of perspectives. Zoocentrism locates the intrinsic value of animals in their subjectivity and sentience, while biocentric and ecocentric philosophies find intrinsic worth in animals because of a respect for all living forms or wider respect for all ecosystems on earth, respectively.<sup>304</sup> Regardless of the bases for establishing the intrinsic worth of animals, ‘property’ is arguably an inadequate way of recognising the true value of animals.

#### **2.6.4 The Interests of Animals Overlooked in Relationship Breakdowns**

In relationship breakdowns, animals fall within the wider pool of property and are treated according to the rules of property distribution.<sup>305</sup> In applying these property distribution rules (when deciding which spouse should get the pet, for example), the interests of the animals are not taken into account. This failure to consider the interests of the animals is seen as a shortcoming, so there have been calls for special provisions to be introduced with respect to decisions made in respect of animals.<sup>306</sup> As it currently stands, however, courts do not give animal interests any importance because they are required to treat animals like any other property of the separating couple. This is an example of how it is only through carving out exceptions to the way in which property is ordinarily regulated in law that the interests of animals in family matters could be given any weight in judicial determinations.

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<sup>300</sup> Steven White, ‘Standards and Standard-setting in Companion Animal Protection’ (2016) 38(4) *Sydney Law Review* 463, 469.

<sup>301</sup> Maneesha Deckha, ‘Vulnerability, Equality, and Animals’ (2015) 27(1) *Canadian Journal of Women and the Law* 47, 64.

<sup>302</sup> Tony Bogdanoski, ‘A Companion Animal’s Worth: The Only ‘Family Member’ Still Regarded as Legal Property’ in Peter Sankoff, Steven White, and Celeste Black (eds) *Animal Law in Australasia: Continuing the Dialogue* (The Federation Press, 2nd ed, 2013) 84.

<sup>303</sup> *Ibid* 84.

<sup>304</sup> Leena Vilkkä, *The Intrinsic Value of Nature* (Rodopi B V, 1997), 3-5, 38, 47, 61.

<sup>305</sup> *Downey & Beale* [2017] FCCA 316; *Jarvis & Weston* [2007] FamCA 1339.

<sup>306</sup> Eithne Mills and Keith Akers, “‘Who Gets the Cats...You or Me?’ Analysing Contact and Residence Issues Regarding Pets Upon Divorce or Separation’ 36 *Family Law Quarterly* 283; Tony Bogdanoski, ‘The Marriage of Family Law and Animal Rights: How Should Australian Family Law Approach the Rise of ‘Pet Custody’ Disputes?’ (2006) 31(4) *Alternative Law Journal* 216.

## 2.6.5 Pet Trusts are Unenforceable

As property, strictly, animals cannot be beneficiaries of trusts.<sup>307</sup> Although pet trusts do exist, courts treat them as non-binding directions made to the executor of a will.<sup>308</sup> Courts will only enforce such trusts if the trustee appointed is willing to carry out its terms.<sup>309</sup> An unwilling trustee means that the animal is treated like other chattels and distributed with the rest of the property in the estate.<sup>310</sup> Animals could thus be left uncared for after the death of their owner.<sup>311</sup> Some international jurisdictions (such as California and New York) have made pet trusts enforceable through special legislative provisions that effectively provide an exception to the general rule.<sup>312</sup> This has so far not occurred in Australia.

## 2.6.6 Pain and Suffering of Human Owners Not Compensable

From a human-centric perspective, the property status of animals also means that the pain and suffering of human owners is generally not compensated beyond the market value of an animal when someone negligently harms the animal.<sup>313</sup> The emotional bond between a human owner and an animal is not taken into account when calculating damages, as emotional suffering is generally not compensable in respect of property damage.<sup>314</sup> Accordingly, the award of damages may fall short of the true value of the harm suffered by the human owner over the injury or death of an animal in their care, especially in the case of companion animals.<sup>315</sup>

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<sup>307</sup> Law Society of New South Wales, *Pets & Wills* <<https://www.lawsociety.com.au/sites/default/files/2018-04/PETS%20%26%20WILLS.pdf>>; The Law Society of New South Wales Young Lawyers, *What About Me? Your Pets & Your Will* <<https://www.lawsociety.com.au/sites/default/files/2018-04/What%20about%20me.pdf>>.

<sup>308</sup> Law Society of New South Wales, above n 307.

<sup>309</sup> Public Trustee and Guardian, *Factsheet: Pets and Wills*, 3 <<https://www.ptg.act.gov.au/images/pdf/ptg-fs-pets-wills.pdf>>.

<sup>310</sup> Law Society of New South Wales, above n 307.

<sup>311</sup> See also: Philip Jamieson, 'Trusts for the Maintenance of Particular Animals' (1987) 14(2) *The University of Queensland Law Journal* 175.

<sup>312</sup> See Christina M Eastman, 'For the Love of Dog: California Fully Enforces Trusts for Pet Animals' (2009) 40 *McGeorge Law Review* 543, 544.

<sup>313</sup> Bruce, above n 42, 77.

<sup>314</sup> *Ibid* 134.

<sup>315</sup> *Ibid* 77. See also: Lauren M Sirois, 'Recovering the Loss of a Beloved Pet: Rethinking the Legal Classification of Companion Animals and the Requirements for Loss of Companionship Tort Damages' (2015) 163(4) *University of Pennsylvania Law Review* 1199; William C Root, "'Man's Best Friend': Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for their Wrongful Injury or Death' (2002) 47(2) *Villanova Law Review* 423.

## 2.7 How the Property Status of Animals Interacts with the Australian Animal Welfare Framework

Having explored the implications of being classified as property, it is useful to understand how the legal status of animals interacts with the animal welfare legislative framework in Australia. Animal welfare regulation in Australia is complex and fragmented, as the area is regulated by three layers of government – the federal government, state and territory governments, and local governments.<sup>316</sup> A detailed description and analysis of the framework is beyond the scope of this thesis because an exhaustive critique is tangential to the research questions of this thesis. Nonetheless, a broad understanding of the framework is necessary to appreciate how the property status of animals fits within the framework.

### 2.7.1 The Three Layers of Animal Welfare Regulation in Australia

Animal welfare regulation is primarily a responsibility of the states and territories of Australia.<sup>317</sup> The *Australian Constitution*, which sets out the powers of the federal government, does not address matters relating to animal welfare.<sup>318</sup> Thus, it has remained within the powers of the state and territory governments to legislate on animal welfare issues. Each Australian state and territory has its own set of legislation regulating the welfare of animals. The primary animal welfare legislation for each jurisdiction is listed in Table 2.3.

State/Territory	Primary Animal Welfare Legislation
Australian Capital Territory	<i>Animal Welfare Act 1992</i> (ACT) <i>Animal Welfare Regulation 2001</i> (ACT)
New South Wales	<i>Prevention of Cruelty to Animals Act 1979</i> (NSW) <i>Prevention of Cruelty to Animals Regulation 2012</i> (NSW)
Northern Territory	<i>Animal Welfare Act</i> (NT) <i>Animal Welfare Regulations</i> (NT)
Queensland	<i>Animal Care and Protection Act 2001</i> (Qld) <i>Animal Care and Protection Regulation</i>

<sup>316</sup> Alex Bruce, above n 42, 74, 78.

<sup>317</sup> Ibid 74.

<sup>318</sup> Ibid 75. The *Australian Constitution* does empower the federal government to legislate in respect of fisheries under s 51(x): Cao, above n 9, 110.

	2012 (Qld)
South Australia	<i>Animal Welfare Act 1985 (SA)</i> <i>Animal Welfare Regulations 2012 (SA)</i>
Tasmania	<i>Animal Welfare Act 1993 (Tas)</i> <i>Animal Welfare (General) Regulations 2013 (Tas)</i>
Victoria	<i>Prevention of Cruelty to Animals Act 1986 (Vic)</i> <i>Prevention of Cruelty to Animals Regulations 2008 (Vic)</i>
Western Australia	<i>Animal Welfare Act 2002 (WA)</i> <i>Animal Welfare (General) Regulations 2003 (WA)</i>

**Table 2.3 – Australian state and territory animal welfare legislation**

Nevertheless, the federal government has played an increasingly influential role in the regulation of animal welfare in light of institutional demands for national and international cooperation.<sup>319</sup> Such regulation has been enabled by several indirect constitutional powers of the federal government, such as the power to make laws in respect of trade and commerce and external affairs.<sup>320</sup> As a result of these powers, the federal government has made various laws and developed policies in respect of the treatment of farm animals.<sup>321</sup> For example, the federal government has enacted legislation to implement a licensing scheme for the live animal export industry.<sup>322</sup> It has also developed standards for the export of livestock.<sup>323</sup> In addition, the federal government developed the Australian Animal Welfare Strategy, which committed to improving the welfare of animals and developing national systems to deliver consistent animal welfare outcomes.<sup>324</sup> The strategy was intended to guide state and territory approaches to animal

<sup>319</sup> Steven White, 'Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?' (2007) 35(3) *Federal Law Review* 347, 348; Bruce, above n 42, 74.

<sup>320</sup> Bruce, above n 42, 75.

<sup>321</sup> White, 'Regulation of Animal Welfare', above n 319, 348.

<sup>322</sup> See *Australian Meat and Live-stock Industry Act 1997 (Cth)*, *Australian Meat and Live-stock Industry Regulations 1998 (Cth)*, *Australian Meat and Live-stock Industry (Export Licensing) Regulations 1998 (Cth)*, *Export Control Act 1982 (Cth)*.

<sup>323</sup> Department of Agriculture, Fisheries and Forestry, *Australian Standards for the Export of Livestock (Version 2.3) 2011 and Australian Position Statement on the Export of Livestock*, Department of Agriculture and Water Resources, <<http://www.agriculture.gov.au/SiteCollectionDocuments/animal-plant/animal-welfare/standards/version2-3/australian-standards-v2.3.pdf>>.

<sup>324</sup> Department of Agriculture and Water Resources, *Australian Animal Welfare Strategy – AAWS* (4 March 2015) <<http://www.agriculture.gov.au/animal/welfare/aaws>>.

welfare regulation.<sup>325</sup>

The Primary Industries Ministerial Council, made up of federal, state and territory ministers responsible for agriculture, food, fibre, forests, fisheries and aquaculture, also endorsed several model codes of practice for the livestock industries.<sup>326</sup> These model codes of practice are progressively being reviewed and converted into Australian Animal Welfare Standards and Guidelines.<sup>327</sup> The codes have been adopted in some form by all Australian state and territories.<sup>328</sup> These codes and standards, however, do not have the status of law. That is, non-compliance with the codes or standards alone is not subject to prosecution.<sup>329</sup> The consequences of non-compliance depend on the extent to which the codes and standards have been adopted by a particular state or territory.<sup>330</sup> As Bruce observes, the codes and standards have been adopted inconsistently.<sup>331</sup> Compliance with the codes is mandatory in some jurisdictions and voluntary in others.<sup>332</sup>

The federal government has also legislated on wildlife protection matters, such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The objective of this Act, amongst other things, is to protect biodiversity.<sup>333</sup> It seeks to 'prevent the extinction, and promote the recovery, of threatened native species, and to ensure the conservation of migratory species.'<sup>334</sup>

Local government laws represent the third layer of animal welfare regulation. Such laws generally relate to domestic animal control. The local laws of the City of Monash, in Victoria, for example, regulate the number of animals that may be kept and conditions of animal housing.<sup>335</sup>

### 2.7.2 Key Features of the Animal Welfare Framework

The primary animal welfare legislation for each Australian jurisdiction (listed in Table 2.3 above) is not uniform in terms of scope, application and enforcement.<sup>336</sup> For example, some

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<sup>325</sup> Bruce, above n 42, 78.

<sup>326</sup> Ibid, 81.

<sup>327</sup> See Department of Agriculture and Water Resources, *Australian Animal Welfare Standards and Guidelines* (2 November 2018) <<http://www.agriculture.gov.au/animal/welfare/standards-guidelines>>.

<sup>328</sup> Bruce, above n 42, 81.

<sup>329</sup> Ibid 83.

<sup>330</sup> Ibid.

<sup>331</sup> Ibid.

<sup>332</sup> Ibid.

<sup>333</sup> S 3(1)(c).

<sup>334</sup> S 3(2)(e)(i).

<sup>335</sup> *Local Law No 3 – Community Amenity 2017* (City of Monash) cls (128)-(136).

<sup>336</sup> Bruce, above n 42, 74; White, 'Legislating for Animal Welfare', above n 8, 280.

jurisdictions define an ‘animal’ broadly to include fish and some invertebrates, while other jurisdictions exclude fish and invertebrates altogether (see Table 2.4). Similarly, the prescribed penalties vary across the jurisdictions, with maximum fines ranging from \$14,000-\$227,000 for individuals and \$70,000-\$500,000 for corporations.<sup>337</sup>

<b>Jurisdiction</b>	<b>Fish</b>	<b>Invertebrate</b>
Australian Capital Territory	Included	Live cephalopods included
New South Wales	Included	Crustaceans if offered for food (in restaurants or retail) included
Northern Territory	Included if in captivity or dependent on humans for food	Crustacean if offered for food (in restaurants or retail) included
Queensland	Included	Prescribed species of Cephalopoda or Malacostraca included
South Australia	Excluded	Excluded
Tasmania	Included	Excluded
Victoria	Included	Adult lobsters, crabs and crayfish included.  Adult cephalopods also included under Part 3 of POCTAA.
Western Australia	Excluded	Excluded

**Table 2.4 – Definition of ‘animal’ under primary animal welfare legislation**

Despite the variances, there are a number of features that are common in the different legislative frameworks, including, for example, the exemptions provided under primary animal welfare legislation. A large number of practices are generally exempted from the application of such legislation, removing a significant number of animals from the realm of cruelty offences.<sup>338</sup> For example, s 6(1) of the *Prevention of Cruelty to Animals Act* 1986 (Vic) provides that:

<sup>337</sup> Cao, above n 9, 154-155.

<sup>338</sup> White, ‘Legislating for Animal Welfare’, above n 8, 279.

This Act does not apply to -

- (a) the slaughter of animals in accordance with the Meat Industry Act 1993 or any Commonwealth Act; or
- (b) except to the extent that it is necessary to rely upon a Code of Practice as a defence to an offence under this Act the keeping, treatment, handling, transportation, sale, killing, hunting, shooting, catching, trapping, netting, marking, care, use, husbandry or management of any animal or class of animals (other than a farm animal or class of farm animals) which is carried out in accordance with a Code of Practice; or
- (c) any act or practice with respect to the farming, transport, sale or killing of any farm animal which is carried out in accordance with a Code of Practice; or
- (d) anything done in accordance with the Catchment and Land Protection Act 1994; or
- (e) the treatment of any animal for the purpose of promoting its health or welfare by or in accordance with the instructions of a veterinary practitioner; or
- (f) the slaughter of a farm animal on a farm if –
  - (i) it is slaughtered for consumption on that farm; and
  - (ii) it is slaughtered in a humane manner; and
  - (iii) it is not slaughtered for sale; and
  - (iv) it is not slaughtered for use in the preparation of food for sale; and
  - (v) it is not removed from that farm; or
- (g) any fishing activities authorised by and conducted in accordance with the Fisheries Act 1995.

Section 6(1B) and (1C) provide further exemptions in relation to wild animals:

(1B) This Act, except Part 3, does not apply to anything done in accordance with the Wildlife Act 1975.

(1C) If a traditional owner group entity has an agreement under Part 6 of the Traditional Owner Settlement Act 2010, nothing in this Act prevents any member of the traditional owner group who is bound by the agreement from carrying out an agreed activity in accordance with the agreement and on land to which the agreement applies.

Most Australian states provide similar exemptions.<sup>339</sup> The effect of a provision like s 6 is to render the Act inapplicable to the treatment of farm animals and wild animals.<sup>340</sup> Instead, the

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<sup>339</sup> For example, *Prevention of Cruelty to Animals Act 1985* (SA) s 43; *Animal Welfare Act 1999* (NT) s 79; *Animal Welfare Act 1992* (ACT) s 20; *Animal Care and Protection Act 2001* (Qld) s 40; *Animal Welfare Act 2002* (WA) s 25.

<sup>340</sup> Bruce suggests that this places most animals outside the reach of primary animal welfare legislation: Bruce, above n 42, 84.

treatment of farm animals and wild animals are subject to different regulatory regimes.<sup>341</sup> Farm animals are governed by legislation and standards or codes of practice specifically addressing farming practices and meat production.<sup>342</sup> The treatment of wild animals, on the other hand, is generally governed by environmental or nature conservation legislation.<sup>343</sup> Such legislation is generally 'concerned with animal species as elements of the broader environment', where environmental ethics plays a more influential role than animal ethics.<sup>344</sup>

These exemptions bring in inconsistencies and add complexities to the overall animal welfare legislative framework.<sup>345</sup> They effectively impose different standards of welfare for different kinds of animals. The standards and codes of practice applicable to farm animals, for example, fall below the cruelty standards found in animal welfare legislation.<sup>346</sup> Thus, farm animals are guaranteed a lesser standard of welfare in comparison to companion animals. A comparison of the laws regulating the export of live animals and laws regulating the welfare of native and endangered species also demonstrates this point, with the latter prohibiting cruelty without any qualifications.<sup>347</sup> This discrepancy is unsurprising given that the standards and codes of practice applicable to animal farming are developed with significant input from the industries that have a vested interest in how farm animals are used, with very little public scrutiny.<sup>348</sup> It is evident that just as the legal status of animals varies according to what kind of animal it is, the Australian animal welfare frameworks also differentiate between different kinds of animals when regulating for their welfare.

Another commonality in Australian primary animal welfare legislation is that the protections provided to animals in all Australian jurisdictions are qualified, so that the infliction of pain and suffering is prohibited only if it is 'unnecessary', 'unjustifiable' or 'unreasonable'.<sup>349</sup> The qualifications are apparent when examining provisions that prohibit cruelty, as set out in Table 2.5. The exact meaning of these qualifying terms is unclear because animal cruelty cases rarely go before the higher courts.<sup>350</sup> This means different lower-level courts may attach different

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<sup>341</sup> Separate laws may also relate to animals used in research, sport and entertainment: Cao, above n 9, 107.

<sup>342</sup> See, eg, *Livestock Management Act 2010* (Vic), which requires livestock operators to comply with prescribed livestock management standards (s 6).

<sup>343</sup> For example, the EPBC Act or the *Wildlife Act 1975* (Vic). See generally, Steven White, 'British Colonialism, Australian Nationalism and the Law: Hierarchies of Wild Animal Protection' (2013) 39(2) *Monash University Law Review* 452.

<sup>344</sup> Cao, above n 9, 234.

<sup>345</sup> Bruce, above n 42, 76, 82-5.

<sup>346</sup> White, 'Regulation of Animal Welfare', above n 319, 356, 359.

<sup>347</sup> *Ibid* 368.

<sup>348</sup> White, *Legislating for Animal Welfare*, above n 8, 279.

<sup>349</sup> *Ibid*.

<sup>350</sup> *Ibid*.

meanings to these terms.<sup>351</sup> The interpretation of those ambiguous terms may also allow a bias towards serving human interests.<sup>352</sup> Further, as White notes, ‘this test surreptitiously accepts that there is such a thing as reasonable, justifiable or necessary pain and suffering to which animals may be subject’.<sup>353</sup>

<b>Jurisdiction</b>	<b>Cruelty prohibited under:</b>	<b>Infliction of pain and suffering prohibited if:</b>
Australian Capital Territory	<i>Animal Welfare Act 1992</i> (ACT), s 6A	unjustifiable, unnecessary or unreasonable
New South Wales	<i>Prevention of Cruelty to Animals Act 1979</i> (NSW), s 4(2)	unreasonable, unnecessary or unjustifiable
Northern Territory	<i>Animal Welfare Act</i> (NT), s 9	unnecessary
Queensland	<i>Animal Care and Protection Act 2001</i> (Qld), s 18	unjustifiable, unnecessary or unreasonable
South Australia	<i>Animal Welfare Act 1985</i> (SA), s 13 <sup>354</sup>	unreasonable, unnecessary
Tasmania	<i>Animal Welfare Act 1993</i> (Tas), s 8	unreasonable and unjustifiable
Victoria	<i>Prevention of Cruelty to Animals Act 1986</i> (Vic), s 9	unreasonable
Western Australia	<i>Animal Welfare Act 2002</i> (WA), s 19	unnecessary

**Table 2.5 – Qualifications to protection from cruelty**

Additionally, enforcement of primary animal welfare legislation is predominantly left to a non-regulatory, charitable organisation – the Royal Society for the Prevention of Cruelty to Animals (RSPCA).<sup>355</sup> RSPCA inspectors generally investigate animal cruelty complaints, and most

<sup>351</sup> Ibid.

<sup>352</sup> Ibid.

<sup>353</sup> Ibid.

<sup>354</sup> *Animal Welfare Act 1985* (SA) uses the terminology ‘ill treatment’ rather than ‘cruel’.

<sup>355</sup> White, ‘Standards and Standard-setting’, above n 300, 466.

animal cruelty prosecutions are instituted by the RSPCA.<sup>356</sup> The numbers of prosecutions initiated in response to cruelty rates are actually quite low because the RSPCA, which is made up of eight private charitable associations, has limited funding.<sup>357</sup>

### 2.7.3 Animal Welfare Laws as Restrictions on Property Rights

The property classification of animals suggests, *prima facie*, that animals are subject to the property rights of humans and therefore can be treated in the same manner as other forms of property. This position is affected, however, by the existence of animal welfare laws. These laws seek to provide some level of protection to animals.<sup>358</sup> They essentially 'attempt to reconcile the intrinsic moral worth of animals with their legal status as objects of property'.<sup>359</sup>

As noted in section 2.6.1 above, there is some debate about whether animal welfare laws provide some weak form of legal rights to animals. Without further research, it cannot be said with certainty whether the effect of animal welfare laws is to create rights for animals. Nevertheless, animal welfare laws do have an impact on the property rights of humans.

In some ways, the situation of animals as property is analogous to land and resources being classified as property. Environmental protection and planning laws restrict private property rights by limiting, for example, the kinds of activities that can be carried out on land.<sup>360</sup> The protection of natural resources at the expense of private rights has been made possible, to some extent, due to changing social attitudes and responses to the environmental impacts of human conduct and diminishing resources.<sup>361</sup> That is, increased regulation of property rights in land and natural resources has been made possible as society has come to realise the finite nature of natural resources. The High Court expressed this sentiment when affirming the legitimacy of a regulation imposing a fee for controlling the taking of abalone from the sea:

In truth, [the right conferred by commercial licences to exploit a public resource for personal profit] is an entitlement of a new kind created as part of a system for preserving a limited public natural resource in a society which is coming to recognise that, in so far as such resources are concerned, to fail to protect may destroy and to preserve the right of everyone

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<sup>356</sup> Cao, above n 9,157.

<sup>357</sup> Ibid; Bruce, above n 42, 85; White, 'Legislating for Animal Welfare', above n 8, 280.

<sup>358</sup> Section 1 of the *Prevention of Cruelty to Animals Act 1986* (Vic), for example, states that the purpose of the Act is, amongst other things, to 'prevent cruelty to animals'.

<sup>359</sup> White, 'Standards and Standard-setting', above n 300, 467.

<sup>360</sup> Grinlinton, above n 188, 6.

<sup>361</sup> Ibid. See also: Vasilica Negrut, 'The Property Right and the Requirements of Environment Protection (2014) 10(3) *Acta Universitatis Danubius. Juridica* 5.

to take what he or she will may eventually deprive that right of all content.<sup>362</sup>

While such restriction on property rights is clearly not a new development, animal welfare laws can be contrasted from most other restrictions on property rights. This is because the intervention of animal welfare laws is intended to protect the property itself from harm, rather than protect the interests of the owners of the property.<sup>363</sup>

Of course, the extent to which the property rights of an animal owner are restricted depends on the kind of animal. As explained above, separate legal frameworks exist to protect the welfare of different kinds of animals. The degree of welfare guaranteed under these different frameworks varies. Companion animals receive the greatest level of protection under primary animal welfare legislation, and therefore, the rights of owners of companion animals are restricted to the highest degree. Conversely, the rights of persons (including corporations) who own farm animals are generally restricted to a much lesser extent.

Although animal welfare laws are needed to restrict the property rights of animal owners, it is unlikely that such laws will become redundant or unnecessary if animals are removed from the category of property. Laws exist to protect the wellbeing of human persons, such as work health and safety laws that restrict the rights of employers in respect of their workers. Similarly, it is foreseeable that laws will be necessary to protect the interests of animals if they are no longer classified as property. The scope and strength of animal welfare laws may require change to ensure compatibility with any new legal status of animals, but the necessity of such laws will remain. For instance, the list of entities who can assert the protections provided under animal welfare legislation may expand if animals were to become persons. Nevertheless, it would be false to assume that abolition of the property status of animals would automatically result in redundancy of animal welfare laws.

## 2.8 Conclusion

Domesticated animals and wild animals subject to human control are classified as property under Australian law. This property status of animals has been passed down to Australia at least from two other legal systems. The status carries with it a number of practical and symbolic implications, including, potentially, an inability to hold rights. Even if animals do have rights under the animal welfare frameworks, the rules of standing prevent them from being able to assert those rights. The property status of animals also facilitates the commodification and

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<sup>362</sup> *Harper v Minister for Sea Fisheries* (1989) 63 ALJR 687, 688.

<sup>363</sup> White, 'Standards and Standard-setting', above n 300, 467.

objectification of animals. Additionally, it creates some anomalies in laws affecting companion animals, particularly those relating to family disputes, wrongful injury and death, and pet trusts.

To overcome these anomalies, attention is shifting to animals' eligibility to become legal persons. There remains, however, ambiguity surrounding the definition of a legal person. Associating personhood with requirements for rationality or membership in the human species rules out the possibility of animal personhood. Only a broad interpretation of personhood, which recognises the concept as merely an artificial legal construction, would provide animals with the opportunity to be included in this category. A lack of consensus in defining legal personhood has become apparent in litigation in a variety of jurisdictions where the property status of animals has been challenged; in these cases, courts have taken different and conflicting views about personhood and animals' eligibility to become persons. Thus, whether animals can qualify as persons is still uncertain.

While animals remain classified as property, the property rights of humans are restricted to some extent by animal welfare laws enacted in each Australian jurisdiction. These laws, though fragmented and lacking in uniformity, attempt to protect the interest of animals despite their classification as property. The extent to which property rights are restricted, however, depends on the type of animal concerned because different legislative regimes apply to different kinds of animals, such as companion animals, farm animals and wild animals.

The long history and implications of the property status of animals has stimulated increasing scholarly attention on the appropriateness of the property status of animals. As a result, debate about whether the property status of animals ought to be abolished has ensued. The next chapter examines this debate, exploring the arguments for and against the property status of animals.

## **Chapter 3**

### **The Abolition Debate**

#### **3.1 Introduction**

#### **3.2 Abolitionists' Arguments for Abolishing the Property Status of Animals**

- 3.2.1 Francione's Arguments
- 3.2.2 Wise's Arguments
- 3.2.3 Pietrzykowski's Arguments
- 3.2.4 The 'Similarity Argument'

#### **3.3 Welfarists' Arguments for Retaining the Property Status of Animals**

#### **3.4 Conclusion**

### 3.1 Introduction

*It is better to debate a question without settling it than to settle a question without debating it.*<sup>364</sup>

As set out in Chapter 1, this thesis questions whether the current legal status of animals reflects community attitudes, and whether an alternative legal status would better reflect those attitudes. These questions were, in large part, inspired by the scholarly debate about whether the property status of animals ought to be abolished. The aim of this chapter is to review existing literature in respect of this debate because a broad understanding of the abolition debate, including the key reasons provided for each side, is essential for appreciating the context of this research.

This thesis uses the phrase ‘the abolition debate’ as a shorthand way of describing the debate about whether the property status of animals should be abolished. To clarify, this thesis does not address the wider debate about whether humans’ use of animals should change, but rather the narrower debate about the legal classification of animals. The legal classification of animals as property informs and/or facilitates how humans use animals. It is acknowledged, therefore, that the two debates are related and often overlap.

This chapter examines the debate between abolitionists, who call for animals’ property status to be abolished, and welfarists, who resist the calls to abolish the property status of animals. Francione,<sup>365</sup> Wise<sup>366</sup> and Pietrzykowski<sup>367</sup> all fall within the abolitionist camp, although their arguments and approaches vary. For example, while Francione and Pietrzykowski focus on sentient animals generally and identify sentience as the basis for rejecting the property status of animals, Wise limits his focus to cognitively advanced animals and identifies practical autonomy as the basis for challenging the property categorisation of animals. Further, unlike Francione and Wise, Pietrzykowski does not believe that animals are suited to the category of persons. Because of the distinct approaches of these abolitionists, the arguments of Francione, Wise and Pietrzykowski are reviewed separately.<sup>368</sup>

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<sup>364</sup> Joseph Joubert, quoted in Rosina L Hunt, ‘Natural Law v Positive Law: Interpreting Morality’ (1993) 28 *New England Law Review* 231, 259.

<sup>365</sup> See Francione, *Animals, Property and the Law*, above n 20; Francione, *Rain Without Thunder*, above n 20; Francione, *Introduction to Animal Rights*, above n 20; Francione, *Animals as Persons*, above n 20; Francione and Garner, *The Animal Rights Debate*, above n 20; Gary L Francione, ‘Animals – Property or Persons?’ (Faculty Paper No 21, Rutgers Law School, 2004).

<sup>366</sup> See Wise, *Rattling the Cage*, above n 21; Wise, *Drawing the Line*, above n 21; Steven M Wise, ‘Animals Rights, One Step at a Time’ in Cass R Sunstein and Martha C Nussbaum (eds) *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 19.

<sup>367</sup> See Pietrzykowski, *Personhood Beyond Humanism*, above n 22; Pietrzykowski, ‘The Idea of Non-personal Subjects of Law’, above n 22.

<sup>368</sup> Francione, Wise and Pietrzykowski also propose distinct models for defining the legal status of animals. These models are explored in Chapter 7.

On the other side of the debate, Garner,<sup>369</sup> Epstein,<sup>370</sup> Lovvorn<sup>371</sup> and Cupp<sup>372</sup> are among the most prominent welfarists who argue that the property status of animals should be maintained. These welfarists do not suggest that the law should not protect the interests of animals. Rather, they argue that the property status of animals does not have to be abolished in order to protect their inherent interests. They reject the need to abolish the property status of animals on the basis that the alternative, legal personhood, would be an ineffective way of protecting the interests of animals. They also argue that personhood for animals is inconsistent with community attitudes and therefore the goal is politically unachievable. It is partly in light of such arguments that a small-scale empirical research was undertaken as part of this research to determine community attitudes towards the property categorisation of animals.<sup>373</sup>

This chapter begins in section 3.2 by analysing the different arguments presented by abolitionists for abolishing the property status of animals, focusing on the work of Francione, Wise and Pietrzykowski. The 'similarity argument', an approach which features prominently in Francione's and Wise's work, is examined in depth. This is followed, in section 3.3, by a critique of the welfarist arguments for retaining the property status. It is observed that welfarists tend to doubt whether abolition of the property status of animals is consistent with community attitudes, thus suggesting that a change in the legal status of animals is not achievable. In section 3.4, the chapter concludes in light of the predominantly theoretical nature of the arguments made within the abolition debate that there is value in understanding attitudes towards the legal status of animals.

### **3.2 Abolitionists' Arguments for Abolishing the Property Status of Animals**

According to abolitionists, animals should not be legally classified as property. Francione was amongst the first to argue that the property status of animals should be abolished.<sup>374</sup> Since Francione, other scholars have put forward reasons for redefining the legal status of animals, including Wise and Pietrzykowski. This section dissects the arguments of Francione, Wise and Pietrzykowski, who are leading figures in the abolitionist camp.

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<sup>369</sup> See Garner, 'Political Ideology and the Legal Status of Animals', above n 23; Robert Garner, 'A Defense of a Broad Animal Protectionism' in Gary L Francione and Robert Garner (eds), *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, 2010) 103.

<sup>370</sup> See Richard Epstein, 'Animals as Objects, or Subjects, of Rights' in Cass R Sunstein and Martha C Nussbaum (eds) *Animal Rights: Current Debates and New Directions* (2004) 143.

<sup>371</sup> See Lovvorn, above n 24.

<sup>372</sup> See Richard Cupp Jr, 'Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals' (2016) 33 *Pace Environmental Law Review* 517.

<sup>373</sup> See chapters 5, 6 and 7 for the methodology, results and implications of this empirical research.

<sup>374</sup> See Francione, *Animals, Property and the Law*, above n 20.

This analysis reveals that although Francione, Wise and Pietrzykowski advocate for the same outcome – the abolition of the property status of animals – their approaches are significantly different. Francione and Pietrzykowski both argue that the sentience of animals makes their legal categorisation as property unsuitable, but only the former calls for personhood for animals. In contrast to Francione, Pietrzykowski believes that the category of persons is not suited to animals.<sup>375</sup> Wise, on the other hand, is more mindful of social, political and economic barriers to change, and therefore takes an incremental approach towards animal personhood. His arguments target a specific group of animals, namely those that have practical autonomy.

Despite the different underlying premises for their arguments, a commonality between Francione’s and Wise’s approach is that they both employ what has been described as ‘the similarity argument’.<sup>376</sup> That is, they both use specific human qualities as a benchmark (sentience and practical autonomy) and assert that animals that possess these characteristics should receive the same legal recognition on the basis of equitable principles. Pietrzykowski, on the other hand, acknowledges the differences between humans and animals and argues that animals should be neither persons nor property.

### 3.2.1 Francione’s Arguments

Francione argues for the abolition of the property status of animals in favour of personhood.<sup>377</sup> His argument stems from his absolute opposition to animal use; he disagrees entirely with the idea of regulating animal use.<sup>378</sup> He contends that there is ‘no moral justification for using nonhumans, however “humanely” we treat them’.<sup>379</sup> Francione opposes the use of sentient animals in particular, because he believes that they have an interest in living.<sup>380</sup> Sentience, Francione suggests, involves some level of self-awareness. A sentient being ‘recognizes that it is *that* being, and not some other, who is experiencing pain or distress’.<sup>381</sup> He argues:

Sentience, or subject awareness, is only a means to the end of continued survival for certain beings who have evolved in particular ways that have made sentience a characteristic to help them adapt to their environment and survive. A sentient being *is* a being with an interest in continuing to live, who desires, prefers, or wants to continue to live. When a nonhuman with

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<sup>375</sup> Pietrzykowski suggests that a separate legal category should be established for animals. See Chapter 7 section 7.4.4.

<sup>376</sup> Tamie L Bryant, ‘Similarity or Difference as a Basis for Justice: Must Animals Be Like Humans to be Legally Protected from Humans?’ (2007) 70 *Law & Contemporary Problems* 207, 208.

<sup>377</sup> Francione, ‘Animals – Property or Persons?’, above n 365, 125.

<sup>378</sup> Francione, *Animals as Persons*, above n 20, xiii.

<sup>379</sup> *Ibid* 10.

<sup>380</sup> *Ibid* 10-11.

<sup>381</sup> *Ibid* 142, 144 (emphasis in original).

subjective and perceptual awareness sees another nonhuman engaged in some activity, the former is aware that it is the latter, and not she, who is engaged in the activity. A sentient being is self-aware in that she knows that it is she, and not another, who is feeling pain and suffering. There is no basis for saying that only those who possess the sort of self-awareness that we associate with normal humans have an interest in continuing to live.<sup>382</sup>

No further cognitive abilities beyond sentience are relevant for Francione in determining who falls within our moral community.<sup>383</sup> Moreover, Francione suggests that a non-sentient animal does not have interests because ‘there is nothing that it prefers, desires, or wants’.<sup>384</sup> He estimates, however, that most animals used by humans are sentient:

Although whether a being is sentient may not be clear in all cases, such as those involving insects or mollusks, the overwhelming number of nonhuman animals we exploit are unquestionably subjectively aware and have an interest in continuing to exist, even if they do not have the same reflective self-awareness that we associate with normal humans.<sup>385</sup>

The implications of Francione’s position should be put into perspective, however. Emphasising the role of sentience in determining the interests of animals may actually exclude a very large number of animals from the moral community. There is currently scarce scientific knowledge about the sentience of invertebrates, which actually make up over 90% of the animal kingdom.<sup>386</sup> Because evidence of their sentience is lacking, invertebrates may actually be excluded from our moral community. It is also worth pointing out that the use of invertebrates is not rare. They are commonly killed as part of pest control, experimented upon and farmed for consumption.<sup>387</sup> In fact, invertebrates are increasingly seen as a viable and sustainable food source for a growing population, and therefore usage of invertebrates is expected to intensify.<sup>388</sup> Accordingly, it may be inaccurate to suggest that a majority of animals exploited by humans are sentient.<sup>389</sup>

It should also be pointed out here that whether an animal is sentient is an empirical question. It would require scientific inquiries to confirm whether animals are in fact sentient. This raises

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<sup>382</sup> Ibid 10-11 (emphasis in original).

<sup>383</sup> Ibid 11.

<sup>384</sup> Ibid.

<sup>385</sup> Francione, *Animals as Persons*, above n 20, 11. Francione does not define who ‘normal humans’ are.

<sup>386</sup> Heather Looy and John R Wood, ‘Attitudes towards Invertebrates: Are Educational “Bug Banquets” Effective?’ (2006) 37(2) *The Journal of Environmental Education* 37, 37; Helen S Proctor, Gemma Carder and Amelia R Cornish, ‘Searching for Animal Sentience: A Systematic Review of the Scientific Literature’ (2013) 3 *Animals* 882, 894.

<sup>387</sup> Proctor, Carder and Cornish, above n 386, 894.

<sup>388</sup> Ibid.

<sup>389</sup> Francione does not define ‘exploitation’.

separate ethical questions about whether it is wrong to subject animals to scientific inquiries in order to essentially determine whether they can be used or not. Questions also arise as to how sentience in animals is to be identified, and how scientific uncertainty should be dealt with.

In any case, Francione goes on to argue that the inherent interests of sentient beings is incompatible with their characterisation as property. His conception of property suggests that things classified as property do not have inherent interests that must be respected.<sup>390</sup> Animals, as property, therefore, 'are considered as having no inherent or intrinsic value'.<sup>391</sup> In treating animals as property, the law treats animals as means to human ends.<sup>392</sup> In other words, the law measures the value of animals in terms of their instrumental value to humans rather than in terms of the intrinsic value of animals.<sup>393</sup> Francione further argues that as personal property, animals cannot possess legal rights.<sup>394</sup> He considers it a 'fundamental premise of our property law that property cannot itself have rights as against human owners'.<sup>395</sup> Only persons can have rights and legally recognisable interests.<sup>396</sup>

Francione contends that the inherent interest of sentient animals in not suffering (which is already widely recognised), is an interest that animals share with humans.<sup>397</sup> If the interest is to be taken seriously, Francione argues, the moral principle of equal consideration ought to be applied.<sup>398</sup> This principle requires likes to be treated alike.<sup>399</sup> The principle would dictate that if humans and sentient animals both share an interest in not suffering from being used as resources, both interests must be treated in the same way unless a good reason exists for not doing so.<sup>400</sup> Thus, just as humans possess the basic right not to be treated as the property of others because of this interest, sentient animals too should possess the same right.<sup>401</sup> In other words, like humans, animals should possess the basic right not to be used as property (or

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<sup>390</sup> Francione, *Rain without Thunder*, above n 20, 180; Francione, *Animals, Property and the Law*, above n 20, 35.

<sup>391</sup> Francione, *Animals as Persons*, above n 20, 2, 135; Francione, *Introduction to Animal Rights*, above n 20, 54.

<sup>392</sup> Francione, *Rain without Thunder*, above n 20, 126; Francione, *Animals, Property and the Law*, above n 20, 24.

<sup>393</sup> Francione, *Animals, Property and the Law*, above n 20, 24, 102.

<sup>394</sup> *Ibid* 4; Francione, *Rain without Thunder*, above n 20, 177.

<sup>395</sup> Francione, *Animals, Property and the Law*, above n 20, 4, 113. As explained in Chapter 2, this is a disputed area of legal philosophy. Francione himself concedes that if the regulation of animal use does create legal rights for animals then his critique of the animal welfare model would have to be reformulated: Francione, *Animals, Property and the Law*, above n 20, 14, 91.

<sup>396</sup> *Ibid* 36, 110.

<sup>397</sup> Francione, *Introduction to Animal Rights*, above n 20, xxv-xxvi, 82, 99.

<sup>398</sup> *Ibid* xxv-xxvi, 99.

<sup>399</sup> *Ibid* xxv, 99.

<sup>400</sup> *Ibid* xxv-xxvi, 99.

<sup>401</sup> *Ibid* xxvi, 93-6, 99.

resources).<sup>402</sup>

In advocating for the right of sentient animals to not be treated as property, Francione essentially argues for animal personhood. He argues that the extension of the principle of equal moral consideration to animals would mean animals are no longer things.<sup>403</sup> The right to not be treated as property would remove animals from the category of things and place them within a class of entities that can have rights – persons.<sup>404</sup> He does not consider the definition of a person in depth, other than to suggest that a person is a being with morally significant interests, that the principle of equal moral consideration applies to the being, and that the being is not a thing.<sup>405</sup>

Francione suggests that the basic right not to be treated as property is a pre-requisite to all other rights, and does not preclude animals from being entitled to other rights.<sup>406</sup> He argues that the interest in avoiding suffering may not be the only morally relevant interest of animals, and they may be eligible for other rights in the future that correspond with those other interests.<sup>407</sup> He notes, however, that the granting of any other right, such as the right to liberty, would be completely meaningless unless the animal also possesses the right not to be treated as a resource of another.<sup>408</sup>

Although Francione's thesis is that animal use should be prohibited and the property status of animals abolished, he invests much effort in explaining why the regulation of animal use is inadequate in protecting the interests of animals. He is highly critical of laws that seek to prevent the unnecessary suffering of animals or that aim to promote the humane treatment of animals. Francione uses the term 'legal welfarism' to describe laws that seek to regulate, rather than prohibit, the use of animals.<sup>409</sup> A key component of legal welfarism, according to Francione, is the characterisation of animals as property.<sup>410</sup> He argues that this characterisation justifies the treatment of animals as means to human ends.<sup>411</sup> Accordingly, at a theoretical level, Francione

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<sup>402</sup> Ibid xxvi.

<sup>403</sup> Ibid 100-101.

<sup>404</sup> Francione, *Rain without Thunder*, above n 20, 179.

<sup>405</sup> Francione, *Introduction to Animal Rights*, above n 20, 100-101.

<sup>406</sup> Ibid 93; Francione, *Rain without Thunder*, above n 20, 110-178.

<sup>407</sup> Francione, *Rain without Thunder*, above n 20, 182.

<sup>408</sup> Francione, *Introduction to Animal Rights*, above n 20, 93.

<sup>409</sup> Francione, *Animals, Property and the Law*, above n 20, 4, 6, 11, 18. Francione clarifies that his critique of the animal welfare model is restricted to laws that regulate the use of animals, as opposed to laws that prohibit specific forms of animal use. He considers the prohibitory laws important, for they 'recognise that animals have at least some interests that may not be sacrificed': Francione, *Animals, Property and the Law*, above n 20, 14, 17.

<sup>410</sup> Francione, *Rain without Thunder*, above n 20, 8; Francione, *Animals, Property and the Law*, above n 20, 26.

<sup>411</sup> Francione, *Animals, Property and the Law*, above n 20, 26, 28.

opposes the welfare model because its underlying assumption is that the use of animals is justified.<sup>412</sup>

At a practical level, Francione contends that the regulation of animal use does not sufficiently protect animals.<sup>413</sup> He maintains that these laws, which employ utilitarian considerations and require the interests of humans and animals to be balanced, allow trivial human interests to override substantial animal interests.<sup>414</sup> Thus, the law permits animals to be hunted or used in rodeos, merely for the entertainment of humans.<sup>415</sup> Francione further reasons that this transpires because the welfare model requires the interests of property, which are not protected through legal rights, to be balanced against the interests of humans, whose interests are protected through rights.<sup>416</sup> He describes the flaw as follows:

When the legal system mixes rights considerations with utilitarian considerations and only one of two affected parties has rights, then the outcome is almost certain to be determined in favour of the rightholder.<sup>417</sup>

According to Francione, the animal welfare model allows animals to be subjected to treatment that would be defined as cruel in the ordinary sense of that word, or if the treatment was applied to humans.<sup>418</sup> He further opines that cruelty is only restricted to the extent that it fails to facilitate, or frustrates, animal exploitation.<sup>419</sup> Francione rejects the potential for reforms to the animal welfare model to lead to the abolition of animal use. He asserts that there is no empirical evidence to suggest such an outcome; it might in fact achieve the opposite result given that the growth of animal welfare laws has coincided with an increase in the exploitation of animals, such as through intensive or 'factory' farming practices.<sup>420</sup> Thus, the welfare model only reinforces the treatment of animals as property.<sup>421</sup>

Francione accepts that there is wide support in society for the principle that animals should not

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<sup>412</sup> Ibid 25; Francione, *Animals as Persons*, above n 20, 1, 7; Francione, *Introduction to Animal Rights*, above n 20, 55.

<sup>413</sup> Francione, *Introduction to Animal Rights*, above n 20, 55-70; Francione, *Animals as Persons*, above n 20, 2.

<sup>414</sup> Francione, *Introduction to Animal Rights*, above n 20, 55; Francione, *Animals, Property, and the Law*, above n 20, 18-9. Francione appreciates that there are different versions of utilitarian moral theory: Francione, *Animals, Property, and the Law*, above n 20, 6.

<sup>415</sup> Francione, *Animals, Property and the Law*, above n 20, 19.

<sup>416</sup> Francione, *Rain without Thunder*, above n 20, 126-7.

<sup>417</sup> Francione, *Animals, Property, and the Law*, above n 20, 107.

<sup>418</sup> Ibid 26; Francione, *Animals as Persons*, above n 20, 2, 137.

<sup>419</sup> Francione, *Introduction to Animal Rights*, above n 20, 75; Francione, *Animals, Property and the Law*, above n 20, 26, 29, 36.

<sup>420</sup> Francione, *Rain without Thunder*, above n 20, 126-7; Francione, *Animals as Persons*, above n 20, 136-7.

<sup>421</sup> Francione, *Rain without Thunder*, above n 20, 188-9.

be subjected to unnecessary pain.<sup>422</sup> He observes, however, that although animal welfare laws purport to reflect this concern, animals continue to be routinely subjected to ‘treatment that may be considered barbaric’.<sup>423</sup> Thus, a gap exists between ‘our social concern for the “humane” treatment of animals and the extreme animal abuse that is currently sanctioned by the law’.<sup>424</sup>

Francione is conscious of the wide-ranging implications of his arguments and admits they would lead to a radical outcome.<sup>425</sup> It would mean the prohibition of institutionalised exploitation of animals for food, biomedical experiments, entertainment and clothing.<sup>426</sup> It is certainly doubtful that the majority of society would be prepared for such drastic changes in the near future. Indeed, this is a criticism that is often raised by welfarists who oppose abolitionist arguments, with reliance on empirical data that highlights public support for various forms of animal use.<sup>427</sup> Despite the strength of Francione’s arguments, therefore, the implications of his rigid position may be inconsistent with community attitudes.

### 3.2.2 Wise’s Arguments

Wise takes a more cautious approach when challenging the property status of animals in favour of animal personhood, because he accepts that ‘progress is impeded by physical, economic, political, religious, historical, legal and psychological obstacles’.<sup>428</sup> Accordingly, Wise proposes an incremental approach whereby, to begin with, only a small class of animals would be entitled to personhood for the purposes of possessing a limited set of rights.<sup>429</sup> In particular, Wise focuses on liberty and equality rights for animals that are cognitively similar to humans.<sup>430</sup>

Wise’s personhood model, which is explored in greater detail in Chapter 7 (see section 7.4.2.2), is premised on the understanding that personhood is necessary for the protection of animals. He contends that law divides the physical world into persons and things, with the latter being objects of a person’s rights.<sup>431</sup> He further argues that it is personhood that protects humans from

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<sup>422</sup> Francione, *Animals, Property and the Law*, above n 20, 3, 17.

<sup>423</sup> *Ibid* 3-4, 17.

<sup>424</sup> *Ibid* 7.

<sup>425</sup> Francione, *Introduction to Animal Rights*, above n 20, xxix.

<sup>426</sup> *Ibid* 102.

<sup>427</sup> These welfarist arguments are explored in section 3.3 below.

<sup>428</sup> Wise, *Drawing the Line*, above n 21, 9; Wise, ‘Animals Rights, One Step at a Time’, above n 366, 19. Wise’s proposed model is explored in Chapter 7 section 7.4.2.2.

<sup>429</sup> Wise, *Drawing the Line*, above n 21, 25.

<sup>430</sup> Wise, *Drawing the Line*, above n 21, 25, 29; Wise, ‘Animal Rights, One Step at a Time’, above n 366, 30-33; Wise, *Rattling the Cage*, above n 21, 4.

<sup>431</sup> Wise, *Drawing the Line*, above n 21, 21; Wise, *Rattling the Cage*, above n 21, 4; Wise, ‘Animals Rights, One Step at a Time’, above n 366, 25.

human tyranny, and that one is helpless without personhood.<sup>432</sup> Accordingly, '[l]egally, persons count: things don't'.<sup>433</sup> It follows for Wise that '[u]ntil, and unless, a nonhuman animal attains legal personhood, she will not count'.<sup>434</sup>

Wise also supports the abolitionist position in light of changing values and new knowledge. After tracing the historical origins of the 'legal thinghood' of animals, Wise acknowledges that law is often borrowed from another age.<sup>435</sup> He accepts that the task of borrowing law from established systems is simpler than creating new law.<sup>436</sup> Borrowing law also has the advantage of providing continuity and stability.<sup>437</sup> Wise warns, however, of the dangers of borrowing law from the past:

But when we borrow past law, we borrow the past. The law of a modern society often springs from a different time and place, perhaps even from a culture that may have believed in an entirely different cosmology or belief about how the universe works. Legal rules that may have made good sense when fashioned may make little sense when transplanted to a vastly different time, place, and culture. Raised by age to the status of self-evident truths, ancient legal rules mindlessly borrowed may perpetrate ancient injustices that may once have been less unjust because we knew no better. But they may no longer reflect shared values and often constitute little more than evidence for the extraordinary respect that lawmakers have for the past.<sup>438</sup>

Wise relies on established common law principles to argue for personhood for animals in the context of entitlement for basic liberty rights and equality rights.<sup>439</sup> He focuses first, and more extensively, on liberty rights. He explains that liberty 'entitles one to be treated a certain way because of how one is constructed, especially one's mental abilities'.<sup>440</sup> The bundle of rights comprising of liberty include bodily integrity and bodily liberty.<sup>441</sup> He emphasises that there is no 'objective, rational, legitimate and nonarbitrary quality', which is possessed by every human and by no animal, that entitles all humans but not animals to basic liberty rights.<sup>442</sup> Wise contends that autonomy and self-determination are important aspects of liberty, qualities that differentiate

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<sup>432</sup> Wise, *Drawing the Line*, above n 21, 21; Wise, 'Animal Rights, One Step at a Time', above n 366, 25.

<sup>433</sup> Wise, 'Animal Rights, One Step at a Time', above n 366, 25.

<sup>434</sup> *Ibid.*

<sup>435</sup> Wise, *Rattling the Cage*, above n 21, 23-48.

<sup>436</sup> *Ibid.* 24.

<sup>437</sup> *Ibid.*

<sup>438</sup> *Ibid.* 24-5.

<sup>439</sup> Wise, *Drawing the Line*, above n 21, 25, 29; Wise, 'Animal Rights, One Step at a Time', above n 366, 30; Wise, *Rattling the Cage*, above n 21, 79. Wise refers to liberty rights as 'dignity rights' because they are usually premised on the dignity of human beings: Wise, *Rattling the Cage*, above n 21, 233-4.

<sup>440</sup> Wise, 'Animal Rights, One Step at a Time', above n 366, 30; See also Wise, *Rattling the Cage*, above n 21, 54-56.

<sup>441</sup> Wise, *Rattling the Cage*, above n 21, 80.

<sup>442</sup> Wise, 'Animal Rights, One Step at a Time', above n 366, 27.

persons from things.<sup>443</sup> He states: '[t]hings don't act autonomously. Persons do. Things can't self-determine. Persons can'.<sup>444</sup> Thus, for Wise, autonomy is central to eligibility for liberty rights.

Wise clarifies that 'full autonomy', which requires a being to be completely rational, is not necessary for a person to possess liberty rights.<sup>445</sup> He points out that many humans lack full autonomy, including infants, children, the severely mentally ill, the senile and those in a persistent vegetative state.<sup>446</sup> If rationality were necessary, these groups of people would be excluded from the legal category of persons.<sup>447</sup> To the contrary, Wise asserts:

[I]n courtrooms liberty rights often mean freedom to do the irrational, stupid, even the wrong. That is why judges routinely — though not always — honor nonrational, sometimes irrational, choices that may even cut against a decision maker's best interests. Self-determination may even trump human life. The determination of Jehovah's Witnesses to die rather than accept blood transfusions is nonrational. Yet judges accept them.<sup>448</sup>

According to Wise, less complex autonomies exist that provide a sufficient basis for personhood for the purposes of holding liberty rights.<sup>449</sup> He labels the lesser autonomies as 'practical autonomy'.<sup>450</sup> He argues that a being has practical autonomy, and is therefore entitled to personhood for the purposes of liberty rights, if they:

1. can desire;
2. can intentionally try to fulfill [their] desire; and
3. possesses a sense of self sufficiency to allow her to understand, even dimly, that [they are] a being who wants something and is trying to get it.<sup>451</sup>

For Wise, any animal that meets these requirements should be classified as a legal person entitled to basic liberty rights.<sup>452</sup> Conversely, animals who do not meet those requirements lack

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<sup>443</sup> Ibid 30-1.

<sup>444</sup> Wise, *Drawing the Line*, above n 21, 30; Wise, 'Animal Rights, One Step at a Time', above n 366, 31.

<sup>445</sup> Wise, *Drawing the Line*, above n 21, 30; Wise, 'Animal Rights, One Step at a Time', above n 366, 31; Wise, *Rattling the Cage*, above n 21, 246.

<sup>446</sup> Wise, *Drawing the Line*, above n 21, 31; Wise, 'Animal Rights, One Step at a Time', above n 366, 31.

<sup>447</sup> Wise, *Drawing the Line*, above n 21, 31; Wise, 'Animal Rights, One Step at a Time', above n 366, 31; Wise, *Rattling the Cage*, above n 21, 246.

<sup>448</sup> Wise, 'Animal Rights, One Step at a Time', above n 366, 31.

<sup>449</sup> Wise, *Drawing the Line*, above n 21, 32; Wise, 'Animal Rights, One Step at a Time', above n 366, 32; Wise, *Rattling the Cage*, above n 21, 247.

<sup>450</sup> Wise, 'Animal Rights, One Step at a Time', above n 366, 32. Wise originally referred to practical autonomy as 'realistic autonomy': Wise, *Rattling the Cage*, above n 21, 247.

<sup>451</sup> Wise, 'Animal Rights, One Step at a Time', above n 366, 32. Implied within Wise's conception of practical autonomy is consciousness (but not necessarily self-consciousness) and sentience.

<sup>452</sup> Ibid 33.

practical autonomy and are therefore not entitled to liberty rights.<sup>453</sup>

Wise recognises that practical autonomy is hard to measure and that a scale of autonomies exist.<sup>454</sup> He thus draws on the work of Griffin within the discipline of cognitive ethology in proposing a model for the purposes of ascertaining which animals qualify for personhood.<sup>455</sup> Wise's proposed model is examined in detail in Chapter 7. In summary, however, he proposes that the more the behaviour of an animal resembles human behaviour and the taxonomically closer they are to humans, the more probable it is that they possess desires, intentions and a sense of self like humans and are therefore entitled to liberty rights.<sup>456</sup> He attaches particular importance to the evolutionary distance between humans and different species of animals because, he argues, species who share close evolutionary relationships are more likely to have similar interests.<sup>457</sup>

Wise suggests animals with lower practical autonomy could be entitled to lesser rights, depending upon their abilities.<sup>458</sup> Thus, the strength of each animal's rights depends on the mental abilities that can be scientifically discerned in respect of the animal.<sup>459</sup> Where scientific uncertainty exists, Wise calls for the application of the 'precautionary principle' as borrowed from environmental law.<sup>460</sup> Application of this principle would require that when 'there is doubt and serious damage is threatened, we should err on the cautious side where evidence of practical autonomy exists'.<sup>461</sup> Wise suggests that at least great apes, Atlantic bottle-nosed dolphins, African elephants, and African grey parrots meet the requirements for personhood for the purposes of liberty rights.<sup>462</sup> As holders of liberty rights, they would be protected from being

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<sup>453</sup> Ibid 35.

<sup>454</sup> Ibid 33.

<sup>455</sup> Wise, *Drawing the Line*, above n 21, 35; Wise, 'Animal Rights, One Step at a Time', above n 366, 33. See Donald R Griffin, *Animal Minds: Beyond Cognition to Consciousness* (University of Chicago Press, 2001).

<sup>456</sup> Wise, 'Animal Rights, One Step at a Time', above n 366, 33-4.

<sup>457</sup> Ibid 40.

<sup>458</sup> Ibid 34; Wise, *Rattling the Cage*, above n 21, 86.

<sup>459</sup> Wise, 'Animal Rights, One Step at a Time', above n 366, 33-4.

<sup>460</sup> Ibid 34. The precautionary principle has been adopted in Australian environmental protection legislation. See, for example, s 391 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which requires the Minister to take account of the precautionary principle when making certain decisions under the Act. See also: Charmian Barton, 'The Status of the Precautionary Principle in Australia: Its Emergence in Legislation and as a Common Law Doctrine' (1998) 12 *Harvard Environmental Law Review* 509; Jorge E Vinuales, 'Legal Techniques for Dealing with Scientific Uncertainty in Environmental Law' (2010) 43 *Vanderbilt Journal of Transnational Law* 437, 449; Mariachiara Tallachhini, 'Before and beyond the precautionary principle: Epistemology of uncertainty in science and law' (2005) 207 *Toxicology and Applied Pharmacology* S645, S648; and Robert Goemmel, 'Legal and Societal Responses to Threats Resulting from Modern Science and Technology' (2009) 13 *New Zealand Journal of Environmental Law* 73, 101.

<sup>461</sup> Wise, 'Animal Rights, One Step at a Time' above n 366, 36.

<sup>462</sup> Ibid 41.

captured, tortured and killed.<sup>463</sup>

Wise is aware that the logical extension of his insistence on practical autonomy could mean the denial of liberty rights to some humans, including, potentially, infants, young children, the anencephalic, those suffering severe mental illness and those in a persistent vegetative state.<sup>464</sup> Indeed, Wise's approach has been criticised on the basis that 'over time, both the courts and society might be tempted not only to view the most intelligent animals more like we now view humans but also to view the least intelligent humans more like we now view animals'.<sup>465</sup>

Wise does not support the denial of rights to humans who lack practical autonomy, but he also rejects the argument that autonomy should not be a pre-requisite for liberty rights, stating:

Of course, it is always open to judges to sever autonomy from dignity. But only a foolish hydroelectric-plant manager would stem flooding in the control room by diverting the river that generates the electricity.<sup>466</sup>

Wise does not offer a resolution to the implications of his arguments for humans who lack practical autonomy, but this issue does lead him to a discussion of equality rights for animals. Equality, according to Wise, requires like to be treated alike.<sup>467</sup> It requires comparisons to be made between situations or beings.<sup>468</sup> Equality is violated 'if alikes are treated differently or if unalikes are treated the same way for no good and sufficient reason'.<sup>469</sup> Accordingly, if humans with lesser or no autonomy are entitled to basic liberty rights then animals with lesser or no autonomy rights should not be barred from such rights either.<sup>470</sup>

The right to equality poses some empirical challenges. In identifying how alike or different two beings are, lines have to be drawn somewhere.<sup>471</sup> Wise explains that this is a difficult task because '[a]ny two beings and any two situations are infinitely different and infinitely alike'.<sup>472</sup> In the measuring process, one can either emphasise similarities (lump) or emphasise differences (split).<sup>473</sup> Wise proposes that proportionality rights represent a form of equality. Proportionality

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<sup>463</sup> Wise, *Drawing the Line*, above n 21, 239.

<sup>464</sup> Wise, *Rattling the Cage*, above n 21, 255.

<sup>465</sup> Richard, Cupp Jr, 'Litigating Nonhuman Animal Legal Personhood' (2018) 50 *Texas Tech Law Review* 25, 46.

<sup>466</sup> Wise, *Rattling the Cage*, above n 21, 255.

<sup>467</sup> *Ibid* 82; Wise, *Drawing the Line*, above n 1, 232.

<sup>468</sup> Wise, *Drawing the Line*, above n 21, 232; Wise, *Rattling the Cage*, above n 21, 82.

<sup>469</sup> Wise, *Rattling the Cage*, above n 21, 82-3.

<sup>470</sup> *Ibid* 252-3.

<sup>471</sup> *Ibid* 83.

<sup>472</sup> *Ibid*.

<sup>473</sup> *Ibid* 83-5.

rights dictate that 'unalikes should be treated not just differently but *proportionately* to their unalikehood'.<sup>474</sup> Thus:

Anyone who possesses a quality that justifies a legal right should possess that right. However, the degree to which a being may *approach* having that quality can make that being eligible for some part of that right.<sup>475</sup>

Wise observes that the scope of rights of humans who are not fully autonomous vary proportionate to the extent to which their autonomies depart from full autonomy.<sup>476</sup> Humans who do not possess full autonomy may be entitled to fewer rights compared to someone with full autonomy.<sup>477</sup> Thus, children have the right to bodily liberty but not the right to vote. Individuals lacking full autonomy may also have narrower rights.<sup>478</sup> A young child may thus have a restricted right to movement, so that they can be prevented from walking alone in a public place. Additionally, humans lacking full autonomy may only enjoy partial elements of a complex right.<sup>479</sup> Thus, a person in a permanently vegetative state may have the right to bodily integrity but lack the right to waive their rights by, for example, refusing medical treatment. Similarly, Wise argues, the rights of animals should be proportionate to the extent of their autonomy.<sup>480</sup>

Whilst Wise does not deny that all animals should be respected and appreciated because of the unique qualities they might possess, he considers cognition to be a 'very big deal'.<sup>481</sup> He makes the claim that '[n]o one but a professor or a deep ecologist thinks that a language-using animal is not a bigger deal than island-building coral, soil-building earthworms, or photosynthesizing-bacteria'.<sup>482</sup> For Wise, the fundamental legal rights of animals is dependent on their cognition.<sup>483</sup> Wise does clarify, however, that his arguments are not intended to imply that the liberty rights to bodily integrity and bodily liberty are the only rights to which animals might be entitled to.<sup>484</sup> He therefore leaves open questions about whether animals should have the legal right to reproduce, to keep their offspring or to have a sufficient and proper habitat.<sup>485</sup>

By focusing only on the cognitively advanced animals, it can be argued that Wise's strategy is

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<sup>474</sup> Ibid 86 (emphasis in original).

<sup>475</sup> Ibid (emphasis in original).

<sup>476</sup> Ibid 256-7.

<sup>477</sup> Wise, *Drawing the Line*, above n 21, 44.

<sup>478</sup> Ibid 44.

<sup>479</sup> Ibid.

<sup>480</sup> Wise, *Rattling the Cage*, above n 21, 256-7.

<sup>481</sup> Ibid 236.

<sup>482</sup> Ibid.

<sup>483</sup> Ibid.

<sup>484</sup> Ibid 267.

<sup>485</sup> Ibid.

simply re-drawing the lines of the existing hierarchy that places humans in a superior position in comparison to other animals.<sup>486</sup> This would bar animals that lack the characteristics of practical autonomy, or who have not been scientifically proven to possess those cognitive abilities, from attaining personhood. However, Wise's focus on this small group of animals is not intended to preclude other animals from becoming legal persons and possessing legal rights. Wise indicates a preference for all sentient animals to be persons when he states that '[i]f I was Chief Justice of the Universe, I might make the simpler capacity to suffer, rather than practical autonomy, sufficient for personhood and dignity rights'.<sup>487</sup> Indeed, he clarifies that practical autonomy is sufficient, but not necessary, for the possession of legal rights.<sup>488</sup> He chooses this narrow-focused strategy as a stepping stone because he is conscious that there is significant resistance to seeking legal personhood for all sentient animals, particularly because of the impacts of a sentience-based strategy.<sup>489</sup>

Given that the direct implications of Wise's incremental approach are not as severe as Francione's approach, Wise's approach may be more socially acceptable in contemporary times than Francione's. That does not necessarily mean, however, that legal personhood for cognitively advanced animals is a popular idea. Public attitudes towards the NhRP cases explored in Chapter 2 certainly appear to be divided on the issue given the comments left on news reports of the cases, where many people express strong opposition to the NhRP's aims.<sup>490</sup> Therefore, without further empirical data, it cannot be confidently asserted that Wise's approach is more likely to be successful.

Wise's strategy for challenging the property status of animals is to rely on litigation. Thus, success requires a court to interpret personhood broadly so as to not require membership in the human species or the possession of rationality. That a court would make such a decision seems unlikely without the aid of legislatures, given that the specific implications of Wise's arguments are still unclear.<sup>491</sup> For example, questions arise as to how conflicts between the rights of

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<sup>486</sup> See, eg, Robert Garner, 'Animals, Ethics and Public Policy' (2010) 81(1) *The Political Quarterly* 123, 127.

<sup>487</sup> Wise, *Drawing the Line*, above n 21, 34.

<sup>488</sup> Steven M Wise, 'Rattling the Cage Defended' (2002) 43 *Boston College Law Review* 623, 650.

<sup>489</sup> Wise, *Drawing the Line*, above n 21, 32.

<sup>490</sup> See, eg, the public comments published in response to Alan Yuhas, 'Chimpanzees Are Not People, New York Court Decides', *The Guardian* (online), 5 December 2014 <<https://www.theguardian.com/world/2014/dec/04/court-denies-legal-personhood-of-chimpanzees>>; Karin Brulliard, 'Chimpanzees Are Animals. But Are They "Persons"?' , *The Washington Post* (online), 16 March 2017 <[https://www.washingtonpost.com/news/animalia/wp/2017/03/16/chimpanzees-are-animals-but-are-they-persons/?utm\\_term=.f0329a3abe8a](https://www.washingtonpost.com/news/animalia/wp/2017/03/16/chimpanzees-are-animals-but-are-they-persons/?utm_term=.f0329a3abe8a)>.

<sup>491</sup> Richard A Posner, 'Animal Rights: Legal, Philosophical, and Pragmatic Perspectives' in Cass R Sunstein and Martha C Nussbaum (eds) *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 51, 57.

humans and animal persons would be resolved, or whether animal personhood would require segregation between animals and humans.<sup>492</sup> As highlighted in Chapter 2 (see section 2.5), however, litigation seeking animal personhood has been initiated in several different countries, and in some cases with success. Such developments highlight that strategic litigation may indeed be a fruitful avenue for changing the legal status of animals.

### 3.2.3 Pietrzykowski's Arguments

Pietrzykowski also disagrees with the categorisation of sentient animals as things, but he proposes an innovative way to turn animals into subjects of law without granting them personhood. He defines sentience as 'the ability to consciously experience pain, distress, or any other kind of suffering resulting from the inability to satisfy natural needs'.<sup>493</sup> Sentience, Pietrzykowski maintains, gives rise to subjective interests that ought to be protected by the law because of the moral relevance of those interests and because the animals' ability to satisfy their interests is closely connected to the way humans treat them.<sup>494</sup>

Pietrzykowski sees the division between persons and things as equivalent to a division between subjects and objects of law.<sup>495</sup> In other words, the bifurcation is the 'legal counterpart of the classical subject-object dichotomy, a deeply ingrained worldview'.<sup>496</sup> Thus, the legal categorisation determines whether an entity is a subject or an object of the law. Pietrzykowski suggests it is the lawmaker who, in accordance with its norms or underlying values, ultimately determines who is to be a subject of law.<sup>497</sup>

Pietrzykowski's approach can be differentiated from the ones taken by Francione and Wise, in that Pietrzykowski argues that sentient animals do not belong to either of the categories of persons and things.<sup>498</sup> He asserts that animals are caught between the status of things and persons; their sentience makes their legal categorisation as things inappropriate, but their lack of capacity also makes it inappropriate for them to be categorised as persons.<sup>499</sup> Endeavouring to fit animals into either of the two categories is 'too crude to accurately address the situation and the actual properties of animals'.<sup>500</sup>

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<sup>492</sup> Ibid.

<sup>493</sup> Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 103.

<sup>494</sup> Ibid.

<sup>495</sup> Ibid 3. Pietrzykowski writes in the context of civil law jurisdictions, but his theory is also relevant to common law jurisdictions given that both systems have been influenced by Roman laws.

<sup>496</sup> Ibid.

<sup>497</sup> Ibid 21-23, 30.

<sup>498</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 56.

<sup>499</sup> Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 97.

<sup>500</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 56.

Pietrzykowski observes that the recognition of the sentience of animals has led some European countries to exclude animals from the legal category of objects.<sup>501</sup> He argues, however, that this approach is less than ideal since it places animals in a grey area where they are neither subjects nor objects of law.<sup>502</sup> Further, the approach has not led to any meaningful changes in the legal protection of animal interests.<sup>503</sup> Thus, Pietrzykowski asserts that merely removing animals from the category of things does not resolve the overall problem associated with the legal status of animals.<sup>504</sup> To address this deficiency in the legal status of animals, he contends that either the approach to personhood needs to be modified, or the conceptual division between persons and things must be revised.<sup>505</sup>

Pietrzykowski acknowledges that demand for animal personhood is on the rise. However, he contends that such proposals, including those of Francione and Wise, 'lack thoroughly examined and mature theoretical foundations'.<sup>506</sup> He explains:

Importantly, it is not entirely clear whether, thus understood, animal personhood should be a kind of natural ('physical') personhood or another type of legal ('artificial') personality. On the one hand, the demands for animal personification refer to moral arguments and relevance of the substantial similarities between the human brain and some animal brains. On the other hand, however, they often point to the common legal practice of conferring legal personhood on non-human entities, arguing that, seen in this light, the postulate of animal personification is far from revolutionary. This approach must be regarded as inconsistent in that conferring on animals the status of persons in law can in no way be seen as a strictly technical operation — unlike conferring legal personality on consortia or company divisions — because it refers not only, and not in the first place, to pragmatic criteria but to fundamental ethical considerations. Therefore, it undermines the very essence of the anthropocentric assumptions of legal personhood rather than proposes a revision of legal regulations so that they may more effectively realise various human interests.<sup>507</sup>

According to Pietrzykowski, personhood is currently founded on 'humanism', a philosophical stance that considers humans to be exceptional and fundamentally different to the rest of the

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<sup>501</sup> Pietrzykowski calls this the dereification of animals. Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 54; Tomasz Pietrzykowski, 'Animal Rights' (Paper presented at Rights for the 21<sup>st</sup> Century? Exploring the Need for 'New' Human Rights, Tallinn University, 22 September 2017), 3.

<sup>502</sup> Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 54.

<sup>503</sup> Ibid 54.

<sup>504</sup> Ibid 55.

<sup>505</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 56.

<sup>506</sup> Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 84-88.

<sup>507</sup> Ibid 88.

natural world.<sup>508</sup> Additionally, he observes, personhood has historically been tied with requirements for rationality and autonomy.<sup>509</sup> Thus, if animals are to be granted personhood, the concept needs to be broadened so that the category is no longer restricted to the human species only.<sup>510</sup> He rejects, however, the idea of making the criteria for personhood independent of species membership (he calls this the neutralistic approach).<sup>511</sup> He opposes the neutralistic approach because the criterion relating to species membership has played an important role in achieving and securing universal rights for all human beings.<sup>512</sup> Therefore, he cautions against abandoning species-membership as a criterion, as it could undermine the equal treatment of all humans.<sup>513</sup> Additionally, Pietrzykowski argues that the neutralistic approach fails to appreciate that differences do exist between humans and other species.<sup>514</sup> He argues that the more developed capacities of humans cannot be denied or ignored; to do so would result in a moral error that mirrors the error of ignoring the similarities between humans and animals.<sup>515</sup>

Pietrzykowski further argues that neither of the two subcategories of personhood, namely, natural persons and juristic (or artificial) persons (such as corporations), are appropriate for animals.<sup>516</sup> He recognises that though animals are the subject of their lives, they do not have properties that make them full-fledged persons.<sup>517</sup> Personhood would therefore not benefit animals in terms of assigning them rights that are typically associated with personhood.<sup>518</sup> On the other hand, Pietrzykowski contends that juristic personhood is based on instrumental considerations so as to promote human interests.<sup>519</sup> He argues that the underlying reason for conferring personhood on corporations has always been to further the interests of human beings.<sup>520</sup> He further asserts that, unlike natural persons (i.e. humans), juristic persons lack a

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<sup>508</sup> Ibid 28. See also, Tomasz Pietrzykowski, 'Law, Personhood, and the Discontents of Juridical Humanism' in Tomasz Pietrzykowski and Brunello Stancioli (eds) *New Approaches to the Personhood in Law: Essays in Legal Philosophy* (Peter Lang GmbH, 2014).

<sup>509</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 58.

<sup>510</sup> Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 101-102.

<sup>511</sup> Ibid 91.

<sup>512</sup> Ibid 93.

<sup>513</sup> Ibid 94.

<sup>514</sup> Ibid 91.

<sup>515</sup> Ibid 92.

<sup>516</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 57. It should be clarified that for Pietrzykowski, the concept of personhood 'cannot be reduced to the simple dualism of natural and legal persons'. He suggests that personhood manifests itself in institutionally defined roles under various branches of law. Thus, subjects under tax law may include taxpayers and tax administration organisations, while subjects under criminal law may be prosecutors, suspects, defendants etc: Tomasz Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 36.

<sup>517</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 58-59. Here, Pietrzykowski refers to Regan's concept of 'subject of a life'.

<sup>518</sup> Ibid 59.

<sup>519</sup> Ibid 57.

<sup>520</sup> Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 31-35, Pietrzykowski, 'Animal Rights', above n 501, 9.

moral claim to be regarded as subjects of law.<sup>521</sup> Pietrzykowski warns therefore that making animals juristic persons would stand in opposition to the goals of animal personhood, because the plight for animal personhood has been aimed at eliminating the instrumental treatment of animals.<sup>522</sup> Assigning animals a legal status that has been established to serve human ends would thus be contrary to the moral standing of animals. Accordingly, another respect in which Pietrzykowski's approach varies from Francione's and Wise's is that he does not push for a fictional account of personhood.

As personhood is not a possible or ideal legal status for animals, Pietrzykowski argues that the conceptual division between persons and things needs to be revised. The real issue, Pietrzykowski suggests, is the need for a status that allows animals to be holders of rights or subjects of law.<sup>523</sup> He argues that personhood is not the only way of facilitating this goal. That is, being a subject of the law does not necessarily require personhood.<sup>524</sup> Pietrzykowski asserts that the categories of persons and things are mistakenly taken to be exhaustive, when they are not.<sup>525</sup> It is from this belief that the suggestion of a new legal category emerges.

Pietrzykowski calls for the establishment of a new legal category, called non-personal subjects of law.<sup>526</sup> Such a model is explored in greater detail in Chapter 7 (see section 7.4.4). In summary, however, under this model, animals would be neither persons nor things. They would become subjects of the law and would possess a single right – the right 'to have one's own individual interests considered as relevant in all decisions that may affect their realisation'.<sup>527</sup> In this way, the subjective interests of animals could no longer be ignored.<sup>528</sup> The range of interests that count would depend on the specific animal in question and the particular circumstances.<sup>529</sup>

The model differentiates things from non-personal subjects of law on the basis that unlike the former, non-personal subjects of law would be capable of holding their own subjective interests or legal rights.<sup>530</sup> Non-personal subjects of law would also stand apart from persons on the basis of the kinds of rights that could be assigned to them.<sup>531</sup> Non-personal subjects of law

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<sup>521</sup> Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 35.

<sup>522</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 57.

<sup>523</sup> Ibid 57; Pietrzykowski, 'Animal Rights', above n 501, 10.

<sup>524</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 58.

<sup>525</sup> Ibid 56.

<sup>526</sup> Pietrzykowski, 'Animal Rights', above n 501, 12.

<sup>527</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 59.

<sup>528</sup> Ibid.

<sup>529</sup> Ibid.

<sup>530</sup> Ibid.

<sup>531</sup> Ibid.

would only hold a restrictive set of rights, in contrast to the broad sets of rights that persons have.<sup>532</sup> For example, non-personal subjects of law would not have rights that protect their freedom of choice, because such rights would not suit the biological nature and capabilities of animals.<sup>533</sup> Pietrzykowski contends that a new category would better reflect the similarities, as well as dissimilarities, between humans and animals.<sup>534</sup> Thus, it would respect diversity.<sup>535</sup>

Such recognition of diversity, however, does raise questions about whether sentience ought to be the only basis for rejecting the categorisation of animals as things. In other words, the question arises as to whether only sentient animals should qualify as the subjects of legal rights. As explained in respect of Francione's arguments for abolishing the property status of animals, which were also premised on sentience, the implication of a sentience-based approach is to exclude a vast majority of animals from our moral community whose sentience has not been subject to scientific studies.

A purely sentience-based approach may also be criticised from an eco-centric perspective on the basis that it does not recognise the importance of other capacities that non-sentient animals may have, especially in maintaining healthy ecosystems. The point of contention here arguably becomes whether non-sentient animals have intrinsic value.<sup>536</sup> It is not possible to address this issue within the limits of this chapter, but it is an issue that would benefit from further scholarly deliberation.

Nonetheless, again, Pietrzykowski's approach varies from the approaches of Francione and Wise. In particular, unlike the latter two, Pietrzykowski's views are not premised on the 'similarity argument', an approach that has been subjected to criticism.

### **3.2.4 The 'Similarity Argument'**

Francione's and Wise's approaches towards animal personhood have been criticised for employing the 'similarity argument'.<sup>537</sup> The similarity argument identifies specific human qualities

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<sup>532</sup> Ibid.

<sup>533</sup> Ibid; Pietrzykowski, 'Animal Rights', above n 501, 6.

<sup>534</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 59.

<sup>535</sup> To clarify, it is not being suggested that Francione and Wise ignore or deny the differences between humans and animals. Rather, it is contended that Pietrzykowski goes to greater lengths to ensure that the legal status of animals does not undermine the diverse capacities of different species of animals.

<sup>536</sup> Non-sentient entities may only have extrinsic, rather than intrinsic, value: Garner, 'Animals, Ethics and Public Policy', above n 486, 124.

<sup>537</sup> Bryant, 'Similarity or Difference as a Basis for Justice', above n 376, 208. Dechka similarly describes such arguments as the 'sameness logic' when she observes that '[a]rguments about why animals matter typically measure animals against human metrics of ethical worth such as whether or not they possess a

as the benchmark or criteria for successfully challenging the property status of animals. Because the principles of equity require like entities to be treated alike, the argument is that since animals possess capacities or capabilities similar to humans, they ought to be treated like humans in respect of those capacities or capabilities.<sup>538</sup> For Francione, the premise for redefining the legal status of animals rests upon animal sentience and the principle of equality. His argument is that animals who have the capacity to suffer and experience pain should, like humans who have the same capacities, be treated as persons rather than property. On the other hand, Wise contends that animals should be recognised as persons to the extent they exhibit cognitive abilities similar to humans.

Bryant suggests that similarity arguments are problematic because they can easily be rejected by those opposed to the idea of extending the boundaries of legal personhood to include animals.<sup>539</sup> As animal personhood would make the exploitation of animals difficult, if not impossible, humans can conveniently redefine themselves to counter such arguments.<sup>540</sup> Bryant observes:

Because there is much at stake, there are endless arguments about the attributes of animals that could give rise to legal recognition of 'personhood' and about the basic question of the worthiness of animals to be protected. Whatever characteristic of an animal that is put forth as justifying sufficient protection to make any meaningful difference to animals — cognitive ability, sentience, or multiple capacities — is countered by evidence that, after all, animals do not have those characteristics quite the way that humans have them.<sup>541</sup>

Thus, it has been asserted that the similarity argument is founded on anthropocentric premises.<sup>542</sup> While Francione and Wise clearly intend for the opposite and challenge human domination perceptions, there is a concern that the similarity argument reinforces attitudes that see the human species as superior and apart from animals.<sup>543</sup> Deckha admits that such

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sufficient capacity to reason, suffer, emote, use language, make tools, or exhibit some other trait presumed to define what it means to be human': Maneesha Deckha, 'Vulnerability, Equality, and Animals' (2015) 27 *Canadian Journal of Women and Law* 47, 48-9.

<sup>538</sup> Bryant, 'Similarity or Difference as a Basis for Justice', above n 376, 208.

<sup>539</sup> Tamie L 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, 263-4.

<sup>540</sup> Ibid. See also, Ani B Satz, 'Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property' (2009) 16 *Animal Law* 65.

<sup>541</sup> Bryant, 'Sacrificing the Sacrifice of Animals', above n 539, 264. See also, Tamie L Bryant, 'Animals Unmodified: Defining Animals/Defining Human Obligations to Animals' (2006) 1 *University of Chicago Legal Forum* 137, 164.

<sup>542</sup> Deckha, 'Vulnerability, Equality, and Animals', above n 537, 53-5, 61.

<sup>543</sup> In fact, Francione himself criticises what he calls the 'similar minds theory'. The similar minds theory, according to Francione, entails arguments for animal personhood based on the cognitive similarities between humans and animals. Wise's arguments would fall under this banner: Gary Francione,

arguments maybe persuasive in convincing 'a human audience steeped in liberal humanist values', but suggests that it would create a hierarchy among animals and potentially deprive animals lacking specific capacities from moral attention.<sup>544</sup>

Another criticism directed at the similarity argument is that it 'ignores the importance of the web of life within which *all* species are situated'.<sup>545</sup> Indeed, the survival of mammals, birds, fishes and amphibians depends on diverse kinds of invertebrates, such as insects, worms, crustaceans and corals.<sup>546</sup> Yet, because very little is known about their characteristics, such as sentience, the similarity argument is unlikely to apply to them.<sup>547</sup> By focusing on the similarities between humans and animals, therefore, the similarity argument undermines the role and importance of diversity.<sup>548</sup> The approach overlooks the ecological importance and interdependency of all species, and essentially makes the legal worth of animals dependent upon proximities to the human species.

There are also likely to be practical implications of the similarity argument. There are concerns, for example, that application of the similarity argument could be contrary to the goals of the abolitionist movement because scientific inquiry would be required to determine whether animals are in fact sentient or have the relevant cognitive abilities.<sup>549</sup> In other words, the similarity argument may have the unintended effect of justifying scientific experiments on animals.

It has also been suggested that deep hostilities towards the abolitionist movement can be provoked when the similarity argument is used to draw analogies between legal status of animals and slaves.<sup>550</sup> Logically, the abolitionist movement can draw inspiration from the legal history of slaves to argue that the property status of animals ought to be abolished. Comparisons between slaves and animals, however, can be derogatory and cause offence. Thus, such analogies may be '*politically improper*'.<sup>551</sup> Thus, rather than convince society about

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'Reflections on *Animals, Property, and the Law and Rain Without Thunder*' (2007) 70 *Law and Contemporary Problems* 9, 53-56.

<sup>544</sup> Deckha, 'Vulnerability, Equality, and Animals', above n 537, 53-4. Cf Posner, above n 491, 66-74, which highlights the strengths of the human-centric approach.

<sup>545</sup> Bryant, 'Sacrificing the Sacrifice of Animals', above n 539, 266 (emphasis in original).

<sup>546</sup> Edward O Wilson, 'The Little Things that Run the World (The Importance and Conservation of Invertebrates)' (1987) 1(4) *Conservation Biology* 344, 345. Wilson points out that vegetation and the structure of forests would also be adversely affected if invertebrates became extinct.

<sup>547</sup> Proctor, Carder and Cornish, above n 386, 894.

<sup>548</sup> Deckha, 'Vulnerability, Equality, and Animals', above n 537, 54; Tucker Culbertson, 'Animal Equality, Human Dominion and Fundamental Interdependence' (2009) 5 *Journal of Animal Law* 33, 36.

<sup>549</sup> Bryant, 'Similarity or Difference as a Basis for Justice', above n 376, 224.

<sup>550</sup> See Culbertson, above n 548; Angela P Harris, 'Should People of Color Support Animal Rights?' (2009) 5 *Journal of Animal Law* 15.

<sup>551</sup> Culbertson, above n 548, 34 (emphasis in original).

the need to change the legal status of animals, the similarity argument can have the opposite effect.

In light of the ethical and practical concerns that emanate from the similarity argument, alternative ways of guiding the legal treatment of animals have been suggested.<sup>552</sup> These approaches are not centered around specific characteristics of humans, such as sentience or autonomy. Instead, they seek to recognise the inherent qualities of different species of animals and emphasise the importance of diversity.

Bryant, for example, relies on anti-discrimination principles to emphasise the role of the law in fostering diversity and discusses how these might be extended to animals. Her anti-discrimination approach is 'based on the idea that a just society would prevent harm or exclusion that is based on superficial or irrelevant differences among people'.<sup>553</sup> Bryant asserts that a just society respects diversity and provides for the inclusion of differently situated entities as far as possible.<sup>554</sup> Thus, while the similarity argument would exclude those animals that are not sufficiently similar to humans, Bryant's approach would include animals within the model of justice irrespective of their physical and mental proximity to humans. According to Bryant, the anti-discrimination approach involves anticipating the needs of animals arising from differences, and accommodating those needs despite the burdens involved.<sup>555</sup> Bryant suggests that this approach endorses 'the values of diversity' rather than using human qualities as a metric tool for measuring the value of animals.

Deckha's suggestions for improving the legal treatment of animals are premised around the vulnerability of animals, and she 'focuses on the dependence that embodiment engenders'.<sup>556</sup> She draws heavily from the vulnerability discourse, which according to Deckha, offers 'a better chance of respecting difference' and avoiding the pitfalls of the similarity argument.<sup>557</sup> For Deckha, the strength of the vulnerability approach lies in its theoretical traction and significant legal endorsement in the common law, making vulnerability-based arguments more palatable

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<sup>552</sup> To clarify, these suggestions relate to the legal treatment of animals generally and not specifically in relation to the legal status of animals.

<sup>553</sup> Bryant, 'Similarity or Difference as a Basis for Justice', above n 376, 210. Bryant does not propose the anti-discrimination approach for abolishing the property status of animals alone, but suggests that it could also be applied within the animal welfare framework.

<sup>554</sup> Ibid 250.

<sup>555</sup> Ibid 226-8.

<sup>556</sup> Deckha expresses her opinion that the property status of animals should be abolished, but her application of the vulnerability framework is not restricted to the legal status of animals. Instead, she applies the vulnerability framework to the legal treatment of animals more generally: Deckha, 'Vulnerability, Equality, and Animals', above n 537, 48, 64.

<sup>557</sup> Ibid 50.

for law markers.<sup>558</sup> She suggests that animals are vulnerable because they lead precarious lives and are denied legal subjectivity.<sup>559</sup> Further, their property status makes them subject to the dominion and control of humans, and they are unable to consent to the way they are treated by humans.<sup>560</sup> These vulnerabilities would be taken into consideration in determining the protections to be afforded to animals. Thus, the sentience of animals would be recognised not because humans also possess this ability, but because the quality makes animals vulnerable to suffering from human use.<sup>561</sup> Ultimately, Deckha contends, the vulnerability framework 'provides a language that can advance animals' interest in a non-instrumental fashion without suppressing animals' own array of differences or insisting on their similarities to humans'.<sup>562</sup>

Culbertson proposes that the law should be guided by the interdependency between humans and animals (and between different species of animals) rather than by an anthropocentric approach.<sup>563</sup> Influenced by the work of Bryant, Culbertson emphasises the point that the Earth functions as a whole and all elements within it are necessary for its optimal functioning.<sup>564</sup> To allow the planet to function optimally, therefore, the law should not divide the world into separate and disconnected elements that are inconsistently protected.<sup>565</sup>

An adequate critique of these alternative arguments cannot be provided within the limits of this chapter, especially because the scholars who oppose the similarity argument focus on the legal treatment of animals broadly rather than specifically on reasons for abolishing the property status of animals. It ought to be noted, however, that the implications of these alternative arguments for the legal status of animals are unclear as the theoretical frameworks remain under-developed in this specific context. For example, it is unclear whether such arguments can provide a sufficient basis for abolishing the property status of animals or for recognising animals as persons. Further, it is unclear what the practical implications of such arguments would be for different kinds of animals, such as for wild animals or animals that are considered pests. Thus, further exploration of the implications of these arguments is warranted before their potential to inform the abolition debate can be fully appreciated.

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<sup>558</sup> Ibid 57. Deckha gives the example of Canadian cases where courts placed emphasis on the concept of vulnerability, such as the vulnerability of sex workers.

<sup>559</sup> Ibid 61.

<sup>560</sup> Ibid 66.

<sup>561</sup> Ibid 68

<sup>562</sup> Ibid. Satz also suggests that the legal treatment of animals should be viewed through the lens of the vulnerability discourse. However, she does not specifically take an abolitionist position: See Satz, above n 540.

<sup>563</sup> Culberston, above n 548, 45.

<sup>564</sup> Ibid; Bryant, 'Animals Unmodified', above n 541, 173.

<sup>565</sup> Culberston, above n 548, 45. See also Gwendellyn Io Earnshaw, 'Equity as a Paradigm for Sustainability: Evolving the Process Toward Interspecies Equity' (1999) 5 *Animal Law* 113.

### 3.3 Welfarists' Arguments for Retaining the Property Status of Animals

Welfarists challenge the need to abolish the property status of animals and instead contend that meaningful improvements to the conditions of animals can be made within the existing animal welfare legislative framework. They do not necessarily oppose abolitionist goals but, unlike abolitionists, they place greater emphasis in the potential of the animal welfare system to protect the interests of animals. Welfarist arguments are also mindful of the practical feasibility of abolishing the property status of animals, at least in the current environment.

Garner is a prominent welfarist who contends that the benefits that would arise from the abolition of the property status of animals have been exaggerated.<sup>566</sup> He offers two reasons in support of this position. First, he argues that the abolition of the property status of animals would not guarantee the elimination of animal exploitation.<sup>567</sup> He provides the example of wild animals, and points out that although private citizens do not own them, the animals still do not possess rights and continue to be exploited for human-centric purposes such as food, tourism, entertainment and aesthetic pleasure.<sup>568</sup> Thus, Garner claims, 'it is clear that the abolition of animals' property status is not a guarantee of protection'.<sup>569</sup>

Garner also argues that the ascription of legal rights to an entity does not automatically eventuate in the elimination of exploitation.<sup>570</sup> Here, Garner points out that despite the efforts of governments throughout the world to secure human rights, human exploitation continues.<sup>571</sup> Overall, Garner's contention is that abolishing the property status of animals with a view to assigning them rights is not necessarily an effective means of improving the conditions of animals.

Garner's argument that the property status of animals should not be abolished because it would not eliminate the exploitation of animals can be described as controversial. If taken to its logical end, it could suggest that it is permissible to classify humans as property simply because personhood and legal rights have not prevented the exploitation of some humans. The question worth asking is not simply whether abolition of the property status of animals can eliminate their exploitation, but also whether the abolition can make meaningful improvements in the protection

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<sup>566</sup> Garner, 'Political Ideology and the Legal Status of Animals', above n 23, 77. Garner prefers to refer to himself as a protectionist instead of welfarist: Garner, 'A Defense of a Broad Animal Protectionism', above n 369, 104.

<sup>567</sup> Garner, 'Political Ideology and the Legal Status of Animals', above n 23, 78.

<sup>568</sup> Ibid.

<sup>569</sup> Ibid 80.

<sup>570</sup> Ibid.

<sup>571</sup> Ibid.

of animal interests. While the abolition of the property status of animals may not guarantee the protection of animals from exploitation, an alternative legal status for animals could still be justified if it can provide greater protection of animal interests than under the property paradigm.

Garner's second reason for opposing the abolition of the property status of animals rests on the assumption that the goals of the abolitionist movement are unachievable in the current political climate.<sup>572</sup> He distinguishes between what is ethical and what is politically achievable, and argues that moral arguments alone are not sufficient to end animal use.<sup>573</sup> According to Garner, the property status of animals is 'merely a reflection of wider societal attitudes'.<sup>574</sup> He argues that the standard of animal welfare laws is not determined by their legal status, but by social attitudes.<sup>575</sup> Further, he contends that if animal welfare standards are lacking, then it is because of political factors such as the 'prevailing political ideological climate'.<sup>576</sup> Thus, even if the property status of animals were to be abolished, changes in social attitudes would be required before the exploitation of animals would end.<sup>577</sup>

It should be clarified that Garner does not necessarily disagree with the idea of abolishing the property status of animals. He agrees that changing the legal status of animals would increase the potential to better protect animals, and accepts that animals cannot have rights as long as they are classified as property.<sup>578</sup> He also accepts that many animal welfare laws are inadequate.<sup>579</sup> Garner maintains, however, that the degree to which animals are protected ultimately depends on the extent to which the State and society are willing to allow interference with an individual's property rights.<sup>580</sup> In theory, he suggests, it is possible to have animal welfare laws that trump property rights.<sup>581</sup> In other words, Garner proposes that animal interests can be given greater weight within the existing animal welfare framework, without changing the legal status of animals.

To demonstrate, Garner points out that British animal welfare legislation is more effective in protecting the interests of animals than US animal welfare legislation, even though animals are

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<sup>572</sup> Garner, 'A Defense of a Broad Animal Protectionism', above n 369, 169; Robert Garner, 'Animals, Politics and Democracy' in Robert Garner and Siobhan O'Sullivan (eds), *The Political Turn in Animal Ethics* (Rowman & Littlefield International, 2016) 103, 104.

<sup>573</sup> Garner, 'A Defense of a Broad Animal Protectionism', above n 369, 105, 119.

<sup>574</sup> Garner, 'Political Ideology and the Legal Status of Animals', above n 23, 78, 80.

<sup>575</sup> Ibid.

<sup>576</sup> Ibid 80.

<sup>577</sup> Ibid.

<sup>578</sup> Ibid 81.

<sup>579</sup> Garner, 'Animals, Ethics and Public Policy', above n 486, 125.

<sup>580</sup> Garner, 'Political Ideology and the Legal Status of Animals', above n 23, 82.

<sup>581</sup> Ibid 83.

classified as property in both jurisdictions.<sup>582</sup> The different levels of protection afforded to animals in these countries cannot be explained by the legal status. Rather, it is explained by the political structures and social attitudes that influence political decisions.<sup>583</sup> Garner hypothesises that the animal-use industry has comparatively less political influence in Britain because 'public opinion is much more favourably inclined towards animal welfare in Britain'.<sup>584</sup> Further, Garner suggests that the ideology of liberalism is more prominent in the US; therefore there is greater reluctance within the US legal and political systems to constrain or limit the property rights of individuals.<sup>585</sup>

In light of existing animal-use practices, Garner's concerns about the political feasibility of abolishing the property status of animals are certainly legitimate. However, without an empirical investigation, it is difficult to assess the extent to which Garner's assumptions are correct. Garner's conclusions about social attitudes may be true, but that is not necessarily the case. It is theoretically possible that community attitudes may support the abolition of the property status of at least some animals. Thus, to verify Garner's assertions, a study of community attitudes towards the property categorisation of animals can be insightful.

Epstein also argues that the property status of animals should remain unchanged. He asserts that the property status of animals usually benefits them, as private ownership often means animals are provided with food, shelter and veterinary care.<sup>586</sup> Epstein further argues that many animals would be worse off in the wild where they could be attacked and killed by other animals.<sup>587</sup> Epstein rejects the argument that there is a conflict between the interests of owners and their animals, and contends that overall, ownership of animals has worked to the advantage of animals.<sup>588</sup> Epstein suggests that humans can engage in more humane practices for the killing of animals to reduce the fear and anxiety animals face before death.<sup>589</sup> He proposes that adopting more humane methods of killing animals should therefore be the priority.<sup>590</sup>

Whether it is actually the property categorisation of animals that benefits animals, however, can be disputed. It is not private ownership of animals that guarantees food, shelter and veterinary care for animals. Rather, these provisions are the result of the legal restrictions imposed on the property rights of animal owners. Additionally, the care provided to animals can also be the

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<sup>582</sup> Ibid 85.

<sup>583</sup> Ibid.

<sup>584</sup> Ibid.

<sup>585</sup> Ibid 86.

<sup>586</sup> Epstein, above n 370, 148.

<sup>587</sup> Ibid.

<sup>588</sup> Ibid 149.

<sup>589</sup> Ibid 156-7

<sup>590</sup> Ibid.

outcome of the emotional bonds that may be shared between humans and animals, or a reflection of community concerns about the wellbeing of animals. Indeed, the care and protection provided to children, including orphaned and adopted children, suggests that categorisation as property is not the only way of protecting one's interests.

Cupp raises a slippery slope argument, expressing concern about how far animal personhood would extend if adopted.<sup>591</sup> Critiquing the NhRP's arguments in the chimpanzee cases specifically, he predicts that animal personhood grounded on cognitive abilities would ultimately pave the way for personhood based on sentience.<sup>592</sup> He expresses concern about the practical implications this would have, including the disruption to society it would cause.<sup>593</sup> In fact, Cupp regards animal personhood as 'a threat to humanity' because it would undermine the uniqueness and sanctity of humans.<sup>594</sup>

Cupp does not address the issue of whether it is ethical to deny the rights of animals simply because they would disrupt the rights and lives of humans. However, his position appears to be premised on the belief that the human species is superior to other animal species because of humans' ability to exercise moral responsibility.<sup>595</sup> Cupp accepts that children and incompetent adults are also unable to exercise moral responsibility; however, he justifies their personhood and legal rights by arguing that they have the potential for full consciousness and autonomy, and by acknowledging the relationship the incompetent persons have with other competent humans.<sup>596</sup>

This stance is problematic because it could also be used to challenge animal welfare laws. In other words, it could similarly be argued that animal welfare laws should be abolished because they cause a disruption to society and curtail the rights of humans. Cupp does not make this argument; indeed, he recognises that the law should continue to develop legal protections for animals.<sup>597</sup> However, Cupp does not reconcile the ethical basis of his support for animal welfare laws and his opposition to animal personhood.

Cupp accepts that the move from agricultural to urbanised and industrialised societies has changed the nature of human-animal relations, particularly as more people now own animals for

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<sup>591</sup> Cupp, 'Focusing on Human Responsibility', above n 372, 537-538; Cupp, 'Litigating Nonhuman Animal Legal Personhood', above n 465, 48-9.

<sup>592</sup> Cupp, 'Focusing on Human Responsibility', above n 372, 538.

<sup>593</sup> Ibid.

<sup>594</sup> Richard L Cupp Jr, 'A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones toward Abolishing Animals' Property Status' (2007) 60(1) *SMU Law Review* 3, 27.

<sup>595</sup> Ibid 28.

<sup>596</sup> Ibid 29.

<sup>597</sup> Cupp, 'Focusing on Human Responsibility', above n 372, 541.

the emotional connections animals provide rather than for purely economic reasons.<sup>598</sup> He also predicts that public support for greater protections for animals would continue to grow.<sup>599</sup> He contends, however, that most people oppose the idea of legal personhood for animals.<sup>600</sup> He therefore questions whether it is appropriate for courts to change the legal status of animals, and warns courts to ‘demonstrate restraint and to respect the democratic process’.<sup>601</sup> In Cupp’s opinion, the law should continue to evolve to reflect societal attitudes, but it should do so within the existing welfare framework.<sup>602</sup> Like Garner, however, Cupp’s assertions about social attitudes need to be verified. He does not provide empirical support for the claim that most people would not support animal personhood.

Lovvorn opposes the abolitionist arguments in stronger terms, describing them as an ‘intellectual indulgence’.<sup>603</sup> According to Lovvorn, lawyers should not waste their time on ‘impractical theories while billions of animal[s] languish in unimaginable suffering that we have the power to change’.<sup>604</sup> Like Garner, Lovvorn asserts that reform to the legal status of animals is politically unachievable because society is not ready for the change.<sup>605</sup> To support this claim, Lovvorn refers to a number of polls suggesting a lack of support for banning the use of animals in medical research, product testing, hunting and clothing.<sup>606</sup> He suggests that ‘the law does not change society, society changes the law’.<sup>607</sup>

It should be noted though that while the evidence relied upon by Lovvorn provide helpful insights into attitudes towards issues such as the rights of animals and the humane treatment of animals, they do not provide direct evidence of attitudes towards the property status of animals. The evidence does not necessarily indicate community support for the categorisation of animals as property. Accordingly, while welfarists may question whether community attitudes would support a change in the legal status of animals, they do not question whether community attitudes are consistent with the property categorisation of animals.

There is a clear evidentiary gap here. Statistical data is needed to investigate whether the property status of animals is consistent with contemporary attitudes. Moreover, attitudes towards the legal status of animals may be quite nuanced. For example, community attitudes

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<sup>598</sup> Ibid 526.

<sup>599</sup> Ibid 539.

<sup>600</sup> Ibid.

<sup>601</sup> Ibid.

<sup>602</sup> Ibid 541.

<sup>603</sup> Lovvorn, above n 24, 139.

<sup>604</sup> Ibid.

<sup>605</sup> Ibid 136-7.

<sup>606</sup> Ibid.

<sup>607</sup> Ibid 149.

may support the property categorisation of some animals, but not others. Empirical data can be helpful in properly understanding these nuances in community attitudes. The presence of such data may indeed add weight to welfarist arguments, but without such evidence, it cannot be confidently said that current community attitudes are consistent with the property status of animals.

### **3.4 Conclusion**

The abolition debate has opened a dialogue about a legal status that was uncontested for centuries. It has prompted a rethink of the manner in which the law categorises and treats animals, as well as contributed to a wider debate about what it means to be a legal person. As the research questions posed in this thesis stem from the abolition debate, this chapter has described and critiqued the abolitionist and welfarist arguments. Accordingly, this chapter has provided the theoretical context for this thesis.

This chapter has highlighted that there are strong ethical arguments for abolishing the property status of animals. These arguments tend to be premised on some cognitive ability possessed by animals, such as sentience or practical autonomy. The arguments formulated by Francione, Wise and Pietrzykowski, however, prompt one to question what forms of legal re-classification would be acceptable to society. This is certainly a concern of some welfarists, who doubt that contemporary community attitudes align with the abolitionist movement. To verify the strength of the abolitionist and welfarist arguments, therefore, empirical research investigating community attitudes towards the property status of animals is needed. As such, this chapter has also highlighted an evidentiary gap that the empirical research undertaken as part of this thesis seeks to address.

Before presenting such empirical data, it is useful to understand the relationship between law and community attitudes. The next chapter examines this relationship to provide the foundation for this empirical research.

## **Chapter 4**

### **The Relationship between Law and Community Attitudes**

#### **4.1 Introduction**

#### **4.2 Terminology**

- 4.2.1 Attitudes and Values
- 4.2.2 Community and Society
- 4.2.3 Law

#### **4.3 The Relationship between Law and Community**

- 4.3.1 How Community Influences the Law
- 4.3.2 Rule by the People
- 4.3.3 Legitimacy of the Law

#### **4.4 The Relationship between Social Change and Legal Change**

- 4.4.1 What is Social Change?
- 4.4.2 Legal Change Follows Changes in Community Attitudes
- 4.4.3 Legal Change as a Catalyst for Social Change

#### **4.5 Limitations of Public Opinion Data**

#### **4.6 Implications for this Research**

#### **4.7 Conclusion**

## 4.1 Introduction

*It's not hard to make decisions when you know what your values are.*<sup>608</sup>

Arguments within the abolition debate are sometimes premised on the assumption that law does or should reflect community attitudes.<sup>609</sup> Such assertions, however, are often brief and not tested. Given that this thesis seeks to investigate the extent to which community attitudes towards animals are reflected in the property status of animals in Australia, it is necessary to take a closer look at the relationship between law and community attitudes. If law is a reflection of community attitudes, then empirical data such as that provided in this thesis can be used to support or critique abolitionist arguments.

'Law is a social phenomenon'.<sup>610</sup> Particularly in democratic societies, which are founded on the principle of 'rule by the people', it is expected that community expectations will have a major influence on the content of law. It would likewise be expected that social change and legal change would be inherently connected. It is on the basis of this relationship that questions are raised about whether or not a law is out of touch with community attitudes.

The aim of this chapter is to explore the connection between law and community attitudes. In doing so, the chapter highlights the value of the empirical research undertaken as part of this thesis. To explain the relationship between law and the community, the chapter engages with sociological and political disciplines. To illustrate the relationship, it provides various examples from animal law as well as other areas of law. By connecting the dots between law and the community, and between social and legal change, this chapter provides justification for measuring attitudes within the Australian population towards the legal status of animals.

This chapter begins, in section 4.2, by identifying some terminological nuances that should be kept in mind when reading this chapter. Section 4.3 then proceeds to explore the relationship between law and society. It investigates how and the extent to which the community influences the law, especially in democratic societies. It also examines how public perceptions towards the substantive content of law give legitimacy to the law. Section 4.4 then analyses the circular relationship between social change and legal change, describing how both forms of change interact with each other. Section 4.5 identifies some cautionary points to consider when

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<sup>608</sup> Roy Disney, quoted in Elizabeth A Minton and Lynn R Kahle, 'Religion and Consumer Behaviour' in Catherine V Jansson-Boyd and Magdalena J Zawisza (eds), *Routledge International Handbook of Consumer Psychology* (Routledge, 2017) 292, 292.

<sup>609</sup> See, eg, the welfarist arguments of Lovvorn and Cupp in Chapter 3 section 3.3.

<sup>610</sup> Sharyn L Roach Anleu, *Law and Social Change* (Sage Publications, 2000), 1.

interpreting or relying on public opinion data. Section 4.6 delineates the implications of the relationship between law and community attitudes in the context of the legal status of animals, before section 4.7 draws final conclusions for this chapter.

This chapter does not suggest that the law, and legal change, is influenced only by community attitudes. It is acknowledged that community attitudes are but one of many influential factors that shape the law.<sup>611</sup> Nor is it claimed that legal change should solely be grounded on community attitudes. Indeed, it is in light of such acknowledgements that Chapter 8 accepts that the conclusions of this thesis alone cannot be used to justify the abolition of the property status of animals.

## **4.2 Terminology**

Before assessing the relationship between law and the community, some terminological nuances should be clarified. While some terms used within ordinary language have a broad meaning, specialist disciplines may take a narrower definition. In light of this, this section clarifies the meaning of some key terms used in this chapter.

### **4.2.1 Attitudes and Values**

Before examining the relationship between law and community attitudes, it is important to first clarify that, for the purposes of this chapter, 'attitudes' is defined broadly so as to incorporate values. This is because it is difficult to draw a clear distinction between values and attitudes, and literature examining the relationship between the community and the law often fail to separate or differentiate between the terms. As former Chief Justice of the High Court, Sir Anthony Mason, observes:

The principal problem in discussing values and the law is that the term 'values' is a rag-bag expression which is used to embrace a number of different ideas – moral and ethical values, standards, policy considerations (which vary greatly) and attitudes.<sup>612</sup>

It is certainly recognised that values can be distinguished from attitudes. Braithwaite, for

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<sup>611</sup> Lawrence R Jacobs, 'The Contested Politics of Public Value' (2014) 74(4) *Public Administration Review* 480, 482; Thomas E Nelson, 'Policy Goals, Public Rhetoric, and Political Attitudes' (2004) 66(2) *The Journal of Politics* 581, 581.

<sup>612</sup> Anthony Mason, 'The Judge as Law-maker' (1996) 3 *James Cook University Law Review* 1, 12.

example, stresses the distinction between values and attitudes.<sup>613</sup> He claims that values are broad concepts representing a single belief, standard or an ultimate goal, such as equality and fairness.<sup>614</sup> According to Braithwaite, values generally do not change in a matter of years, although they may do so over decades or centuries.<sup>615</sup> Further, values are more likely to reflect a person's moral truth.<sup>616</sup> Braithwaite also asserts that values generally enjoy close to universal support.<sup>617</sup> Attitudes, on the other hand, represent a set of beliefs about a specific object or situation and are more prone to diversity and change.<sup>618</sup>

Values have also been described as the 'shared ideals of a culture' and high-level conceptions that may or may not be aligned to practices or norms.<sup>619</sup> It has further been suggested that values are abstract ideals, such as equality and diversity, whereas attitudes can be possessed in relation to abstract as well as physical objects (for example, the environment).<sup>620</sup>

For the purposes of this thesis, however, it is unnecessary to distinguish between values and attitudes. Values, if separated from attitudes, would provide little assistance in shaping the law with respect to controversial issues. This is because the same value may apply differently in different contexts. Thus, while broadly stated ideals may enjoy consensus in the community, the consensus might be lost once context is provided.<sup>621</sup> There might be consensus that men and women should be treated equally, for example, but there might not be consensus about whether homosexual and heterosexual couples should be treated equally.<sup>622</sup> Here, attitudes are more helpful.

The two concepts are also similar. Values and attitudes are both evaluative constructs; that is, they reflect how supportive or opposed one is to something.<sup>623</sup> Moreover, both are subjective, as they reflect how a person perceives the world rather than how the world actually is.<sup>624</sup> Values and attitudes are also similar in the sense that a person can hold both either consciously or

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<sup>613</sup> John Braithwaite, 'Community Values and Australian Jurisprudence' (1995) 17 *Sydney Law Review* 351, 353.

<sup>614</sup> *Ibid* 354.

<sup>615</sup> *Ibid* 372.

<sup>616</sup> *Ibid* 361.

<sup>617</sup> *Ibid* 372.

<sup>618</sup> *Ibid* 361.

<sup>619</sup> Michael Frese, 'Cultural Practices, Norms, and Values' (2015) 46(10) *Journal of Cross-Cultural Psychology* 1, 1-3.

<sup>620</sup> Gregory R Maio et al, 'Ideologies, Values, Attitudes, and Behaviour' in John DeLamater (ed) *Handbook of Social Psychology*, (Springer, 2006) 283, 284.

<sup>621</sup> Martin Krygier and Arthur Glass, 'Shaky Premises: Values, Attitudes and the Law' (1995) 17 *Sydney Law Review* 386, 390.

<sup>622</sup> *Ibid*.

<sup>623</sup> *Ibid*.

<sup>624</sup> *Ibid*.

subconsciously.<sup>625</sup> Additionally, values and attitudes are closely related because values influence attitudes and attitudes can also shape values.<sup>626</sup> Thus, the line dividing values and attitudes is a fine one.

In light of the similarities and this connectedness between values and attitudes, it is practical to adopt a broad understanding of attitudes for the purposes of this research. Preference is given to the terminology of 'attitudes' on the basis that the empirical study that is central to this thesis did not survey respondents about broad conceptions or ideals. In examining existing literature on the relationship between law and the community, however, the terminology used by the relevant scholars is retained to eliminate the possibility of misrepresentation.

It should also be clarified that this chapter does not equate values (and therefore attitudes) with behavior as they are not the same. Values are the underlying beliefs that guide a person's thoughts and behaviors, while behaviors are the choices made and actions taken by the individual.<sup>627</sup> Further, there can be inconsistency between one's values and one's behavior. For example, a 'value-action gap' has been identified in respect of environmental policy.<sup>628</sup> This means people who espouse green values often do not act consistently with those values.<sup>629</sup> Similarly, a person may feel that sentient animals have interests worth protecting, but they may continue consuming meat products knowing that animals suffer during the production process.<sup>630</sup>

This chapter also does not purport to suggest that attitudes are consistently and evenly held across a community. Indeed, there are often competing attitudes at play.<sup>631</sup> For example, in determining how wild animals ought to be protected, attitudes towards ecosystem or species protection often compete with attitudes towards the prevention of suffering in individual animals.<sup>632</sup> It is accepted in this chapter that modern societies such as Australia are pluralistic. A pluralist society exists where there is more than one belief system.<sup>633</sup> Australia is an example of

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<sup>625</sup> Ibid.

<sup>626</sup> Ibid.

<sup>627</sup> Tamie James Moore and Sylvia M Asay, *Family Resource Management* (Sage Publications, 3<sup>rd</sup> ed, 2017), 100, 112.

<sup>628</sup> Elizabeth Shove, 'Beyond the ABC: Climate Change Policy and Theories of Social Change' (2010) 42(6) *Environment and Planning A: Economy and Space* 1273, 1276.

<sup>629</sup> Ibid.

<sup>630</sup> Chen, above n 52, 49.

<sup>631</sup> Jacobs, above n 611, 581.

<sup>632</sup> Peter Sandoe and Christian Gamborg, 'Animal Welfare Impact Assessments: A Good Way of Giving the Affected Animals a Voice when Trying to Tackle Wild Animal Controversies' (2017) 30(4) *Journal of Agricultural and Environmental Ethics* 571, 572.

<sup>633</sup> Moira Rayner, 'Cultural Diversity: To What Extent Does the Law in Australia Reflect the Culture and Values of Different Groups Within Society? How Does the Law Deal with Discriminating behavior?' (2001) 13(3) *Legal Date* 1, 1.

a pluralist society, as different groups within the Australian society hold competing values.<sup>634</sup> Accordingly, contrary to expecting universalism with respect to shared values, pluralist societies 'are formed by excluding people, as much as by including others'.<sup>635</sup> Diverse values are bound to come into conflict in such communities.<sup>636</sup>

#### 4.2.2 Community and Society

In ordinary language, 'community' and 'society' tend to be used interchangeably. Literature on the relationship between law and society also often neglect to distinguish between the two terms. Cotterrell, however, sees a conceptual difference between a community and society; he prefers to describe the sociological study of law as a study of law and *community* rather than a study of law and *society*.<sup>637</sup> He explains:

The main motivation for invoking community is a sense that old concepts of 'law and society' or 'law in society' no longer adequately represent law as a social phenomenon. Society – understood typically as the politically organised society of the nation state – has become a less obviously useful concept in recent decades, with the growth of transnational networks of cultural and economic relations of many kinds, and with the development of multiculturalism. Community, appropriately conceived, can represent vital kinds of social relations that take the form of networks or groups not necessarily bounded by a 'society'; fluctuating, forming and reforming, crossing national or political boundaries, having overlapping memberships, conflicting, cooperating or merely co-existing.<sup>638</sup>

Cotterrell suggests the concept of society is no longer useful as communities are now pluralist in nature. 'Society' according to Cotterrell, suggests 'a unity, a social totality of some sort with boundaries separating it from other such totalities'.<sup>639</sup> He argues that what is commonly referred to as 'society' in the sociological study of law, is instead 'a vast, endlessly shifting diversity of interests, values, projects and commitments of individuals, expressed and pursued through multiple, transient memberships of collectivities of many different kinds'.<sup>640</sup>

The subject of this study is more aptly called a 'community', which provides a sense of identity

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<sup>634</sup> Ibid.

<sup>635</sup> Ibid

<sup>636</sup> Steven Vago and Steven E Barkan, *Law and Society* (Taylor & Francis Group, 11<sup>th</sup> ed, 2017), 5.

<sup>637</sup> Roger Cotterrell, *Law, Culture and Society* (Ashgate, 2006), 7.

<sup>638</sup> Ibid.

<sup>639</sup> Ibid 66.

<sup>640</sup> Ibid.

for the members within a bounded whole.<sup>641</sup> Accordingly, this chapter adopts the terminology of ‘community’, rather than ‘society’. However, again, the terminology used in existing literature concerning the relationship between law and the community is retained where relevant to eliminate the possibility of misrepresentation.

### 4.2.3 Law

In examining the relationship between law and community attitudes, this chapter only focuses on positive law. In other words, it only focuses on formal laws that have been made by authoritative institutions, such as by parliaments, courts and government or administrative bodies. While it is acknowledged that law can be defined more broadly (to include customary laws, for example), it is sufficient for the purposes of this thesis to focus exclusively on positive laws.

As mentioned in Chapters 1 and 2, the property status of animals is a product of the common law. It is also reflected in various pieces of legislation. Given that this thesis seeks to ascertain the extent to which community attitudes reflect the legal status of animals, it is not necessary to consider how community attitudes relate to laws beyond positive law.

## 4.3 The Relationship between Law and Community

Writing in the early parts of the 20<sup>th</sup> century, Dicey’s lectures explored how public opinion influenced legislation in England in the nineteenth century.<sup>642</sup> Since then, legal, social and political theorists have been studying the relationship between law and community.<sup>643</sup> Such theorists have studied the extent to which the community informs the content of the law, and the role of law in facilitating social change.<sup>644</sup>

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<sup>641</sup> Ibid 67. See also Philip Selznick, ‘The Jurisprudence of Communitarian Liberalism’ in Paul van Seters (ed), *Communitarianism in Law and Society* (Rowman & Littlefield Publishers Inc, 2006) 19, 23.

<sup>642</sup> A V Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (Macmillan and Co, 2<sup>nd</sup> ed, 1914). Dicey was not, however, the first scholar to deliberate on the relationship between law and public opinion: Dale Gibson, ‘Public Opinion and Law: Dicey to Today’ in Dale Gibson and Janet K Baldwin (eds) *Law in a Cynical Society? Opinion and Law in the 1980’s* (Carswell Legal Publications, 1985) 1, 1.

<sup>643</sup> See, eg, Eugene Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter Lewis Moll trans, Harvard University Press, 1936) [trans of *Grundlegung der Soziologie des Rechts* (first published 1913)]; Henry Summer Maine, *Ancient Law* (Dent, 1917); Roscoe Pound, *Social Control Through Law* (Transaction Publishers, 1942); Lon L Fuller, *The Morality of Law* (Yale University Press, 1964); John Monahan and Laurens Walker, ‘Twenty-Five Years of *Social Science in Law*’ (2011) 35 *Law and Human Behaviour* 72.

<sup>644</sup> Brian Tamanaha, *A General Jurisprudence of Law and Society*, (Oxford University Press, 2001), 1.

### 4.3.1 How Community Influences the Law

Talcott Parsons was one of the first contemporary social theorists to focus on the relationship between law and societal values. Parsons' sociological theories are no longer as popular as they were in the 1950s and 1960s, but his explanation of the relationship between law and society continues to be influential.<sup>645</sup>

Breaking down society's normative structure into a hierarchy of different elements, Parsons suggested that values are situated at the top of the structure.<sup>646</sup> Values then influence norms, which were placed second in the hierarchy of society's normative structure.<sup>647</sup> The laws of a society, according to Parsons, fall within the category of norms.<sup>648</sup> At the third level of society's normative structure, there are collectives, such as businesses, hospitals, universities and other institutions.<sup>649</sup> These institutions define the pattern of behavior required in specific circumstances based on norms.<sup>650</sup> Finally, individual roles appear at the bottom of the hierarchy.<sup>651</sup> These are expectations that govern individual action.<sup>652</sup> In essence, Parsons suggested that the content of law is determined by the values held by that society. Law then controls institutions and ultimately the actions of individuals. It followed for Parsons that if values change, norms will also change.<sup>653</sup>

Parsons also believed that norms (including laws) might change in response to pressures coming from the lower levels of the hierarchy. In other words, when roles of individuals change as a result of economic or environmental conditions, individuals will place pressure on collectives (such as political institutions) to respond. Changes at the institutional level will then lead to changes in norms, although Parsons asserts that such changes will not be drastic.<sup>654</sup> Changes in norms might lead to changes in values, but again, these will be subtle and slow.<sup>655</sup> In this sense, law responds to social change in order to reflect changes in roles.<sup>656</sup> Parsons clearly saw a strong relationship between law and values (and a less strong relationship

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<sup>645</sup> Richard Johnstone, 'Economic and Sociological Approaches to Law' in Rosemary Hunter, Richard Ingle and Richard Johnstone (eds) *Thinking about Law – Perspectives on the History, Philosophy and Sociology of Law* (Allen & Unwin, 1995) 61, 80.

<sup>646</sup> Ibid 82.

<sup>647</sup> Ibid.

<sup>648</sup> Ibid.

<sup>649</sup> Ibid.

<sup>650</sup> Ibid.

<sup>651</sup> Ibid.

<sup>652</sup> Ibid.

<sup>653</sup> Ibid 83.

<sup>654</sup> Ibid.

<sup>655</sup> Ibid.

<sup>656</sup> Ibid.

between law and social change).

An underlying assumption of Parson's theory is that society is consensus-based or a system with shared values, and this has exposed Parson's theory to criticism.<sup>657</sup> As modern societies are pluralist in nature, with different groups having different interests, there are likely to be competing values. In such societies, it would be unrealistic to expect value-consensus to exist.

Nonetheless, it continues to be widely accepted today that law mirrors the values of the community in which the law operates.<sup>658</sup> In other words, the content of law is influenced by the attitudes of the relevant community. Friedman, for example, observes in respect of western legal systems:

But it seems clear that — unlike (perhaps) traditional legal systems (and perhaps authoritarian legal systems) — 'public opinion' in the broadest sense, or those values, opinions, attitudes, and expectations that make up the legal culture, constitute fundamental building blocks of law.<sup>659</sup>

Elsewhere, Friedman states:

Legal systems do not float in some cultural void, free of space and time and social context; necessarily, they reflect what is happening in their own societies. In the long run, they assume the shape of those societies, like a glove that molds [sic] itself to the shape of a person's hand.<sup>660</sup>

Similarly, Vago asserts:

Every legal system stands in a close relationship to the ideas, aims and purposes of society. Law *reflects* the intellectual, social, economic, and political climate of its time.<sup>661</sup>

Dror also states:

One of the more important repositories and expressions of the values of any society is its law. By its very nature, law consists of a number of norms which constitute obligatory rules of

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<sup>657</sup> Ibid 80.

<sup>658</sup> Anleu, above n 610, 139; Selznick, above n 641, 29.

<sup>659</sup> Lawrence M Friedman, 'The Law and Society Movement' (1986) 38(3) *Stanford Law Review* 763, 771.

<sup>660</sup> Lawrence Friedman, 'Borders: On the Emerging Sociology of Transnational Law' (1996) 32 *Stanford Journal of International Law* 65, 72.

<sup>661</sup> Steven Vago, *Law and Society* (Englewood Cliffs, 1981).

behaviour for the members of the society. These legal norms are closely related to various social values, being either a direct expression of them or serving them in a more indirect way.<sup>662</sup>

Chief Justice Allsop of the Federal Court of Australia echoes the perspective that law is a reflection of societal values. He states:

Law is not just command; it is societal will amenable to rational and general expression, engendering loyalty and consent through its utility and practicality and through its characteristics of certainty, fairness and justice ...

Law is not value free. Law is not built and defined solely by rule making, by formulae or by inexorable command, but rather it is organised around, and derived from, inhering values (human values) and serves as an expression or manifestation of natural human and societal bonds of conduct.<sup>663</sup>

Although community attitudes do influence the content of law, the extent to which community attitudes influence the law should not be overstated.<sup>664</sup> Sometimes, gaps exist between law and community attitudes. Such gaps pressurise legal institutions to align laws with community attitudes. Edwards suggests, however, that certain 'intervening factors' can cause gaps to persist.<sup>665</sup> For example, the pressure for legal change can be relieved, despite a gap between law and social values, where selective enforcement is carried out. That is where legal institutions choose not to enforce laws in response to illegal behaviour because the behaviour is socially acceptable.<sup>666</sup> In such circumstances, it is not entirely true that law is a reflection of community attitudes.

Tamanaha provides a detailed critique of the claim that law is closely connected to social values. Tamanaha accepts that there is a connection between law and societal values; but identifies various contexts in which law may not reflect the values of the relevant society. He points out that many economic and administrative laws that exist today are not premised on societal values.<sup>667</sup> Rather, they are founded on economic interests.<sup>668</sup> For example,

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<sup>662</sup> Yehezkel Dror, 'Values and the Law' (1957) 17(4) *The Antioch Review* 440, 440.

<sup>663</sup> James Allsop, 'Values in Law: How they Influence and Shape Rules and the Application of Law' (Speech delivered at the 2016 Hochelaga Lecture, University of Hong Kong, 20 October 2016). See also: Gerald Postema, *Bentham and the Common Law Tradition* (Clarendon Press, 1986), 6-7.

<sup>664</sup> Tamanaha, above n 644, 1-3.

<sup>665</sup> Mark A Edwards, 'The Alignment of Law and Norms: Of Mirrors, Bulwarks, and Pressure Valves' (2014) 10(1) *Florida International University Law Review* 19, 19.

<sup>666</sup> *Ibid* 44.

<sup>667</sup> Tamanaha, above n 644, 87.

<sup>668</sup> *Ibid*.

corporations, securities and other complex commercial legislation is developed to accommodate business needs rather than to reflect social values. Tamanah explains:

Earlier manifestations of positive law may have allocated a substantial degree of attention to social customs and morality, when it was concerned with the affairs of everyday life in the village (along with enriching the rulers), but the kinds of things done with and through law have substantially changed in the last two hundred or so years. Administrative law and law related to the government itself, in particular, are relatively recent developments, at least in terms of their hefty bulk. Likewise, the scope and detail of economic-related law has exploded, matching the exponential growth in the pace and sophistication of economic activities. Accordingly, on a relative basis the amount of lawmaking today directly connected to custom or substantive moral rules has markedly diminished.<sup>669</sup>

Additionally, alien societies can have a strong influence on the laws of a particular state through the transplantation of laws. Laws are often transplanted, either voluntarily or involuntarily, from other societies.<sup>670</sup> Many Commonwealth countries, for example, were forced, as part of colonisation, to adopt colonial law.<sup>671</sup> The motives and powers of the Commonwealth in those circumstances outweighed the influences of local attitudes or customary laws.<sup>672</sup> The British legal model, for example, was set up in Australia without any acknowledgement of the values and laws of the country's Indigenous peoples.<sup>673</sup> Tamanaha suggests that rather than reflecting society, colonial law was designed for political domination and economic exploitation in the colonies.<sup>674</sup>

Tamanaha further argues that the influence of lawmakers or the legal profession may reduce the extent to which the law reflects social values.<sup>675</sup> This is because legal knowledge and discourse is monopolised by a discrete group, which predominantly controls the legal apparatus and access to the law.<sup>676</sup> Additionally, as law becomes more specialised, it starts to have its own internal logic that may not be understood or shaped by society.<sup>677</sup> Accordingly, the law may

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<sup>669</sup> Ibid 88.

<sup>670</sup> Ibid 106.

<sup>671</sup> Ibid 115 .

<sup>672</sup> In fact, the concept of legal pluralism was formulated as legal anthropologists studied the laws of colonised states: Tamanaha, *A General Jurisprudence of Law and Society*, above n 644, 115.

<sup>673</sup> Rayner, above n 633, 1.

<sup>674</sup> Tamanaha, above n 644, 113. This is evident in the context of the legal status of animals in Australia. As noted in Chapter 2, the property status of animals was inherited from British Law, which was inspired by Roman Law (see Section 2.3). Wise too discusses the dangers of 'borrowing law' from other established legal systems (See Chapter 2 section 3.2.2).

<sup>675</sup> Tamanaha, above n 644, 71-76. See also: Alan Watson, *The Evolution of Law* (John Hopkins University Press, 1985), 118.

<sup>676</sup> Tamanaha, above n 644, 72-3.

<sup>677</sup> Ibid 73-4.

reflect the values of the legal profession more than the values of society. Globalisation, incorporating a transnational legal culture, has also been a powerful influence in the formation of laws. For instance, member states are forced to introduce certain laws to be a part of international organisations or agreements (such as the European Union or the General Agreement on Tariffs and Trade).<sup>678</sup> Tamanaha observes that globalisation has stretched the boundaries of a society, which was traditionally limited by state territorial borders.<sup>679</sup>

Tamanaha also contends that direct consent for substantive law may be less prevalent in democratic societies. He suggests that there are too many steps between the election of parliamentary representatives and the actual law making process 'to lend plausibility to the claim that there is direct consent for the substantive content of law'.<sup>680</sup> Tamanaha makes the following distinction between custom and democracy as sources of law:

In both cases consent for law is claimed, but of a qualitatively different kind. The consent of custom was direct and substantive, in the sense that the *content* of positive law norms were (supposedly) taken directly from prevailing customs. The consent of democracy, in contrast, is indirect and procedural or formal, in the sense that (except for instances of lawmaking referenda) the populace does not vote directly for the content of laws, but rather elect through a formal (vote counting) procedure the people authorised to make the laws, who then use a formal (vote counting) procedure to enact the laws.<sup>681</sup>

The criticisms raised by Tamanaha highlight some distance between law and the community, but the understanding that law mirrors society is not completely shattered by his critique. Tamanaha's thorough work does not suggest that community has no influence over laws. While it may be true that communities no longer have direct influence over the laws that govern them, an indirect influence still exists. This may be through the consciousness of lawmakers or through elected representatives in parliament. Even the more specialised economic and administrative legislation are arguably, ultimately, founded on shared values of justice and fairness. Thus, community attitudes and awareness of these attitudes still matter, even if it is accepted that there is no direct or simple correlation between community attitudes and the law.

#### **4.3.2 Rule By the People**

Democratic countries are premised on the principle of self-governance, or 'rule by the

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<sup>678</sup> Ibid 129-130.

<sup>679</sup> Ibid 130.

<sup>680</sup> Ibid 96.

<sup>681</sup> Ibid 95 (emphasis in original).

people'.<sup>682</sup> It is considered a fundamental principle in democracies 'that the people should have the sole power to enact laws'.<sup>683</sup> In other words, the government is run by the will of the people. The rationale for this principle is that if people are ruled by the laws of their own making then they are free.<sup>684</sup> Thus, citizens are not coerced into complying with the legal order; instead they freely give consent to be bound by it.<sup>685</sup> Democracy, ultimately, is regarded as a necessary feature of a legitimate government.<sup>686</sup>

The theory is that a society is self-governed when the 'decisions implemented on its behalf reflect the preferences of its members'.<sup>687</sup> This happens through representative government.<sup>688</sup> Eligible members of a society decide who will govern the country, and those eligible members have the choice at certain intervals to elect different representatives to govern the country.<sup>689</sup> In a representative democracy, therefore, the will of a majority of the people is enforced through representative governments and the election process.<sup>690</sup>

While self-government is an ideal of democratic systems, pluralism again poses a challenge to this ideal.<sup>691</sup> The ideal originally had a logical premise so far as everyone had the same preferences for legal order.<sup>692</sup> In fact, '[r]epresentative government was born under an ideology that postulated a basic harmony of interests in society'.<sup>693</sup> However, the assumptions of homogeneity collapsed 'in the manifest ubiquity of conflicts over values, interests, or norms'.<sup>694</sup> In the wake of pluralism, self-governance came to mean that 'the reins of government should be handed to those who command more support than do any of the competing individuals or teams'.<sup>695</sup> Given the conflicting attitudes of people, a government could only represent some people, not all.

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<sup>682</sup> Adam Przeworski, *Democracy and the Limits of Self-Governance* (Cambridge University Press, 2010), 17; Nicolaus Tideman, 'Capacities and Limits of Democracy' (1994) 84(2) *AEA Papers and Proceedings* 349, 349.

<sup>683</sup> Baron de Montesquieu, *The Spirit of Laws* (Thomas Nugent trans, Batoche Books, 2001), 104 [trans of: L'Esprit des lois (first published 1748)].

<sup>684</sup> Przeworski, above n 682, 19.

<sup>685</sup> Allan Komberg and Harold D Clarke, *Citizens and Community: Political Support in a Representative Democracy* (Cambridge University Press, 1992), 5-6; George P Fletcher, *Basic Concepts of Legal Thought* (Oxford University Press, 1996), 110.

<sup>686</sup> Tideman, above n 682, 349.

<sup>687</sup> Przeworski, above n 682, 18.

<sup>688</sup> David Plotke, 'Representation is Democracy' (1997) 4(1) *Constellations* 19, 28.

<sup>689</sup> Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, 2013), 272.

<sup>690</sup> Plotke, above n 688, 19, 28-9.

<sup>691</sup> Przeworski, above n 682, 20.

<sup>692</sup> *Ibid* 17.

<sup>693</sup> *Ibid* 20.

<sup>694</sup> *Ibid* 18.

<sup>695</sup> Schumpeter, above n 689, 273.

It is not a surprise then that the role of the legislatures is to balance and juggle conflicting public views. The role of the legislature, according to Madison, is:

to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.<sup>696</sup>

Some contemporary theorists deny that modern democratic systems are democratic in the true sense because popular participation in democracies is now merely episodic.<sup>697</sup> Collective decision making procedures often involve negotiations and agreements between groups representing social forces (such as unions) and political parties.<sup>698</sup> Political parties, which are meant to be representative of the public, seek compromises amidst conflicting interests rather than simply represent the will of the people. Additionally, political parties have greater control over the actions of elected representatives than voters.<sup>699</sup> Moreover, political parties and individual representatives are motivated by self-interest.<sup>700</sup> In light of these realities, the role of voters is arguably reduced to a minimum.<sup>701</sup>

Nevertheless, a modern representative democracy like Australia still 'represents as many as possible'.<sup>702</sup> As Przeworski contends, it is 'still a system of collective decision making that best reflects individual preferences and that makes as many of us as free as possible'.<sup>703</sup> This does mean that 'some people must live at least some of the time under laws they do not like'.<sup>704</sup> All eligible citizens are, however, required (or, in some countries, given the opportunity) to cast a vote and therefore to have their preferences taken into account. It has even been argued that the modern form of representative democracy is actually a more accomplished form of democracy because it allows a two-way, discursive dialogue to occur overtime between elected

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<sup>696</sup> James Madison, 'No 10: The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection (Continued)' in Alexander Hamilton, John Jay and James Madison (eds) *Federalist Papers* (Cosimo Classics, first published 1787, 2006 ed), 53, 59.

<sup>697</sup> Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (University of Chicago Press, 2006), 2.

<sup>698</sup> Norberto Bobbio, *Democracy and Dictatorship: The Nature and Limits of State Power* (Oxford University Press, 1989), 116.

<sup>699</sup> Ibid.

<sup>700</sup> Ibid.

<sup>701</sup> Ibid.

<sup>702</sup> Przeworski, above n 682, 29.

<sup>703</sup> Ibid 31.

<sup>704</sup> Ibid 32.

representatives and citizens whilst still allowing for deliberation amongst representatives.<sup>705</sup>

It should also be appreciated that the agenda of policymakers within a representative government system is determined by the salience of an issue. That is, policymakers are more likely to focus on social issues that are considered important by their constituents.<sup>706</sup> Health, inflation, family relationships, tax reform and education have been identified as some of the most salient issues in Australia.<sup>707</sup> In contrast, the salience of animal welfare issues has been relatively low.<sup>708</sup> Accordingly, even though animal welfare laws may not be consistent with community attitudes, policymakers may be less likely to act on animal welfare issues. Nevertheless, if political priorities are determined by the salience of an issue, it becomes important to understand and monitor public attitudes towards issues such as animal welfare.

Even if the principle of rule by the people remains only partially true, the need to study public attitudes remains important. As Komberg and Clarke explain, the democratic system is based to a large extent on 'voluntary public conformity – undergirded by a fund of positive feelings'.<sup>709</sup> These feelings, according to Komberg and Clarke, are dynamic and therefore may increase or decrease, mobilise or remain quiescent. They argue, therefore, that '[m]apping such variations and their causes and consequences ... is at the core of the study of political support'.<sup>710</sup> It follows that empirical data can play an important role in facilitating the responsiveness of governments to their constituents and thus furthering the goal of rule by the people.

#### 4.3.3 Legitimacy of the Law

Public attitudes are also linked to the legitimacy of law. Here, a distinction can be drawn between procedural legitimacy and substantive legitimacy.<sup>711</sup> A law is procedurally legitimate if the law is perceived to have been made by an authorised institution (such as a democratic institution) using proper procedures.<sup>712</sup> Substantive legitimacy arises where the law is perceived

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<sup>705</sup> Urbinati, above n 697, 2.

<sup>706</sup> Lee Epstein and Jeffrey A Segal, 'Measuring Issue Salience' (2000) 44(1) *American Journal of Political Science* 66, 66-7.

<sup>707</sup> Chen, above n 52, 66.

<sup>708</sup> Ibid 66-7. Chen relies on data from 2006 to make this assertion. It is possible that the salience of animal welfare issues has improved since, particularly in light of the protests that have since been carried out against live export and greyhound racing. However, animal welfare issues still do not feature as key policies in election campaigns in Australia. Furthermore, Chen's assertion is supported by more recent data. The Animal Tracker survey found that most Australians hear about or discuss animal-related issues 'only rarely or not at all': Humane Research Council, above n 46, 5.

<sup>709</sup> Komberg and Clarke, above n 685, 19.

<sup>710</sup> Ibid.

<sup>711</sup> Luc J Wintgens, 'Legitimacy and Legitimation from the Legisprudential Perspective' in Luc J Wintgens and Philippe Thion, *Legislation in Context: Essays in Legisprudence* (Ashgate, 2007) 3, 7.

<sup>712</sup> Ibid.

by the community to be consistent with community attitudes.<sup>713</sup> Thus, procedural legitimacy concerns the law-making process, whereas substantive legitimacy concerns the rational justifications for the law.

Tyler's longitudinal psychological research suggests that people are more likely to comply with laws because of their perceptions of just and moral behaviour and their perceptions of authorities.<sup>714</sup> He labels this as the normative perspective for explaining why people obey laws.<sup>715</sup> People voluntarily choose to obey the law where they feel the law accords with their beliefs about how they should behave.<sup>716</sup> Alternatively, they may comply with the law because they perceive the law-making authority to be legitimate.<sup>717</sup> Tyler essentially differentiates between substantive legitimacy and procedural legitimacy by separating compliance motivated by moral values and compliance motivated by the perceived legitimacy of law-making institutions.

The normative perspective can be contrasted with the instrumental perspective, which suggests that people comply with the law out of fear of the consequences of non-compliance, or because of the deterrence measures stipulated by law.<sup>718</sup> Tyler illuminates further on the normative perspective:

According to a normative perspective, people who respond to the moral appropriateness of different laws may (for example) use drugs or engage in illegal sexual practices, feeling that these crimes are not immoral, but at the same time will refrain from stealing. Similarly, if they regard legal authorities as more legitimate, they are less likely to break any laws, for they will believe that they ought to follow all of them, regardless of the potential for punishment.<sup>719</sup>

According to Tyler, a normative perspective implies the need to focus on 'people's internalised norms of justice and obligation'.<sup>720</sup> Thus, he suggests, there is a need to explore and understand citizens' thoughts and values.<sup>721</sup> Tyler and Darley assert in a later paper that 'focusing upon the social values held by the public is one key component of an effort to create and sustain a legal order, the effectiveness of which is linked to the consent and cooperated of

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<sup>713</sup> Ibid.

<sup>714</sup> See Tom R Tyler, *Why People Obey the Law* (Yale University Press, 1990).

<sup>715</sup> Ibid 3.

<sup>716</sup> Ibid.

<sup>717</sup> Ibid 4.

<sup>718</sup> Ibid 3.

<sup>719</sup> Ibid 4.

<sup>720</sup> Ibid.

<sup>721</sup> Ibid.

citizens'.<sup>722</sup> They argue that for legal authorities to enhance the convergence of law and legitimacy, they must identify areas of discrepancy between people's personal moral values and the law.<sup>723</sup> This point is echoed by Blumenthal:

[I]f it is in fact the case that laws, and courts' interpretation of those laws, *should* reflect the attitudes of a populace, or of a majority thereof, then it is essential to measure, and measure accurately, the extent to which they *do* so. If they do not, whether through change over time, misperceptions on the part of courts or law and policy-makers, or some other reason, then such laws may lose their moral and legal legitimacy. In turn, such loss may lead to non-compliance with and disobedience of laws seen as illegitimate.<sup>724</sup>

Some proponents of procedural legitimacy do not consider the legitimacy of law to be dependent upon its substantive merits.<sup>725</sup> Rather, law is legitimate as long as an authoritative institution has made the law.<sup>726</sup> A law making institution could therefore enact unfair or oppressive laws and the laws would still be legitimate. An oppressive law that privileges the elite community over others, for example, would be procedurally legitimate if the law is made by an authoritative institution. Yet, it would not be substantively legitimate because of its oppressive content. Something can therefore be procedurally legitimate whilst not being substantively legitimate.<sup>727</sup>

Conversely, if legitimacy is based solely on its substantive content, then a pluralistic society poses practical challenges in determining which values are to be preferred.<sup>728</sup> A decision-making procedure is thus necessary to deal with conflicting values.<sup>729</sup> Ideally, therefore, a law ought to be both procedurally and substantively legitimate. In other words, the two models of legitimacy are not necessarily incompatible with each other.

Marmol suggests that when considered apart, procedural sources of legitimacy are superior to

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<sup>722</sup> Tom R Tyler and John M Darley, 'Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law' (2000) 28(3) *Hofstra Law Review* 707, 708.

<sup>723</sup> *Ibid* 726.

<sup>724</sup> Jeremy A Blumenthal, 'Who Decides – Privileging Public Sentiment about Justice and the Substantive Law', (2003) 72 *University of Missouri-Kansas City Law Review* 1, 2 (emphasis in original).

<sup>725</sup> Lars Vinx, *Hans Kelson's Pure Theory of Law: Law and Legitimacy* (Oxford University Press, 2007), 59; Wintgens, above n 711, 42.

<sup>726</sup> *Ibid*.

<sup>727</sup> Jose Luis Marti Marmol, 'The Sources of Legitimacy of Political Decisions: Between Procedure and Substance' in Luc J Wintgens (ed) *The Theory and Practice of Legislation: Essays in Legisprudence* 257, 262.

<sup>728</sup> Tyler and Darley, above n 722, 734; Mike Vuolo, 'Incorporating consensus and conflict into the legitimacy of law' (2014) 62(2) *Crime, Law and Social Change* 155, 156-162.

<sup>729</sup> Procedural legitimacy is also independently crucial for the rule of law, as otherwise, laws could be made arbitrarily without being subject to any constitutional checks and balances on power.

legitimacy based on substantive qualities.<sup>730</sup> He proposes, however, that a democratic deliberative process would incorporate both procedural and substantive legitimacy, and thus provide the best source of legitimacy for political decisions.<sup>731</sup> According to Marmol, deliberative democracy requires law making to be based on deliberation rather than negotiation.<sup>732</sup> He explains:

The deliberative process itself, according to a common interpretation of it, is committed to the exchange of arguments in order to improve the epistemic quality of our collective judgments. That is the reason why democratic deliberation can be seen as the ultimate source of political legitimacy... In short, a political decision is legitimate when we have given the best reasons to support it.<sup>733</sup>

Further, procedural legitimacy cannot entirely be separated from substantive judgments. As noted above, democracy is premised on the principle of 'rule by the people', whose will is enforced by elected representatives. Ultimately, then, '[t]he only political authority is ... the people itself'.<sup>734</sup> It follows that procedural legitimacy also has a substantive component, though indirect and restricted to the ambits of legislative and executive decisions (that is, distinct from the judicial law making process). In theory, therefore, procedural legitimacy in a democratic society enables community attitudes to be represented.<sup>735</sup>

#### **4.4 The Relationship between Social Change and Legal Change**

Given that laws can and should reflect the views of the community in which it operates, how do laws interact with social change? Before answering this question, it is necessary to first understand what is meant by social change.

##### **4.4.1 What is Social Change?**

Social change comes about when the patterns of relationships and behaviours within a society change in response to new situations triggered by, among other things, new technologies, new ways of making a living and new social values.<sup>736</sup> Vago defines social change to mean:

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<sup>730</sup> Marmol, above n 727, 273.

<sup>731</sup> Ibid.

<sup>732</sup> Ibid.

<sup>733</sup> Ibid.

<sup>734</sup> Ibid 261; Joshua Cohen, 'Reflections on Habermas on Democracy' (1999) 12 *Ratio Juris* 385, 407.

<sup>735</sup> See also: Wojciech Sadurski, 'Law's Legitimacy and "Democracy-Plus"' (2006) 26(2) *Oxford Journal of Legal Studies* 377.

<sup>736</sup> Vago and Barkan, *Law and Society*, above n 636, 208; Stuart S Nagel, 'Overview of Law and Social Change' (1970) 13(4) *American Behavioral Scientist* 485, 486.

modifications in the way people work, rear a family, educate their children, govern themselves, and seek ultimate meaning in life. It also refers to a restructuring of the basic ways people in a society relate to each other with regard to government, economics, education, religion, family life, recreation, language, and other activities.<sup>737</sup>

Social change in modern societies occurs at a more rapid rate compared to traditional societies.<sup>738</sup> Technological changes have played a significant part in sparking social change, but attitudinal changes have also been responsible for social change.<sup>739</sup> The question that then arises is whether, and how, the law can and should respond to such social changes.

#### **4.4.2 Legal Change Follows Changes in Community Attitudes**

Given that the law in representative democracies such as Australia do, at least to some extent, reflect community attitudes, it comes as no surprise that changes in community attitudes can prompt legal changes. Lawmakers thus try to ensure that the law reflects changing social patterns and attitudes.

One of the best examples of legal change being driven by social change is the evolution of marriage laws. Since their inception under British law, marriage and divorce laws have undergone significant reform to reflect changing attitudes towards the institution of marriage.<sup>740</sup> There are many '[h]istorical examples (that) provide evidence that the institution of marriage is capable of being moulded by the state to meet the perceived needs of society'.<sup>741</sup> It is impossible and unnecessary to adequately cover all those changes here, but some of the key changes since the enactment of federal marriage laws in the 1950s are sufficient to demonstrate how the law has evolved to reflect changing social attitudes, including through the introduction of no-fault grounds for divorce, the abolishment of immunity for marital rape and the redefining of marriage to include same-sex couples.

The *Matrimonial Causes Act 1959* (Cth), which was the first federal Act in Australia to legislate on divorce, allowed divorce on 14 grounds, including adultery, desertion, cruelty, habitual drunkenness and insanity.<sup>742</sup> Only one of the grounds did not require fault to be established,

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<sup>737</sup> Vago and Barkan, *Law and Society*, above n 636, 208.

<sup>738</sup> Alvin Toffler, *Future Shock* (Random House, 1970), 11.

<sup>739</sup> Vago and Barkan, *Law and Society*, above n 636, 208.

<sup>740</sup> Lisa Young et al, *Family Law in Australia* (LexisNexis Butterworths, 9<sup>th</sup> ed, 2016), 1.

<sup>741</sup> Charlotte Frew, 'The Social Construction of Marriage in Australia: Implications for Same-sex Unions' (2010) 28(1) *Law in Context* 78, 79.

<sup>742</sup> *Ibid* 19.

which was separation for five years.<sup>743</sup> The need to establish fault to obtain a divorce reflected a time when the sanctity of marriage was given much importance in society.<sup>744</sup> Further, marriage was considered to be the building block of a family, which was considered the foundational unit of society.<sup>745</sup>

Since the 1960s, however, the role-driven nature of marriage became more fluid and less predictable,<sup>746</sup> with a move towards reciprocal financial obligations between husbands and wives.<sup>747</sup> These changing ideas of marriage corresponded to other social changes, such as women's increasing participation in the workforce and the greater role of fathers in rearing children.<sup>748</sup> Eventually, the Australian community no longer considered it appropriate to enquire into the cause of a marital breakdown.<sup>749</sup> The *Family Law Act 1975* (Cth) was introduced to respond to these changing circumstances and attitudes.<sup>750</sup> Under section 48 of the *Family Law Act*, divorce became available on the basis 'that the marriage has broken down irretrievably'. All that the court had to be satisfied of was that the parties seeking the divorce had separated and been living separately for at least 12 months.<sup>751</sup> The introduction of these provisions resulted in a sudden spike in the rate of divorce, evidencing that this change was much desired in the Australian community.<sup>752</sup>

The common law also evolved to reflect changes in community expectations relating to married relationships. In 1991, the High Court overturned a long-accepted principle that a wife provided irrevocable consent to intercourse by her husband, which effectively provided immunity to a husband for raping his wife.<sup>753</sup> In *R v L*, the High Court, in obiter, rejected the proposition that this principle still applied under common law. In doing so, Mason CJ and Deane and Toohey JJ jointly stated that 'if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.'<sup>754</sup> Their Honours' joint judgment denied the existence of the immunity on the basis of modern social

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<sup>743</sup> Lawrie Moloney, Ruth Weston and Alan Hayes, 'Key Social Issues in the Development of Australian Family Law: Research and its Impact on Policy and Practice' (2013) 19(2) *Journal of Family Studies* 110, 121.

<sup>744</sup> Young et al, above n 740, 4.

<sup>745</sup> Ibid 11.

<sup>746</sup> Moloney, Weston and Hayes, above n 743, 121.

<sup>747</sup> Susan B Boyd, 'Legal Regulation of Families in Changing Societies' in Austin Sarat (ed) *The Blackwell Companion to Law and Society* (Blackwell Publishing, 2004) 255, 255.

<sup>748</sup> Moloney, Weston and Hayes, above n 743, 121.

<sup>749</sup> Young et al, above n 740, 20.

<sup>750</sup> Moloney, Weston and Hayes, above n 743, 121.

<sup>751</sup> *Family Law Act 1975* (Cth) s 48(2). Section 49(1) provides that the parties to a marriage may have been separated 'notwithstanding that the cohabitation was brought to an end by the action or conduct of only one of the parties'.

<sup>752</sup> Moloney, Weston and Hayes, above n 743, 121; Young et al, above n 740, 21.

<sup>753</sup> *R v L* (1991) 174 CLR 379 ('*R v L*').

<sup>754</sup> Ibid [19].

values:

In any event, even if the respondent could, by reference to compelling early authority, support the proposition that is crucial to his case, namely, that by reason of marriage there is an irrevocable consent to sexual intercourse, this Court would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage.<sup>755</sup>

Justice Dawson similarly stated that the presumptions underlying the immunity granted to husbands had become a fiction for present times:

[W]hatever may have been the position in the past, the institution of marriage in its present form provides no foundation for a presumption which has the effect of denying that consent to intercourse in marriage can, expressly or impliedly, be withdrawn. There being no longer any foundation for the presumption, it becomes nothing more than a fiction which forms no part of the common law.<sup>756</sup>

Later, in *PGA v The Queen*,<sup>757</sup> the High Court confirmed that the immunity was not part of the common law, with the majority referring to the immunity as a 'legal fiction' that could not be maintained in present times.<sup>758</sup> Thus, the principle that a wife provided irrevocable consent to intercourse by her husband was overturned because it offended contemporary attitudes towards the relationship between a husband and wife.

More recently, the institution of marriage in Australia was opened up to same-sex couples. This change was expressly grounded upon community attitudes. In 2017, the Federal Government conducted a postal survey asking Australians 'Should the law be changed to allow same-sex couples to marry?'.<sup>759</sup> The then Prime Minister, Malcolm Turnbull, promised that if a majority of people completing the survey responded with a 'yes', legislation allowing same-sex couples to marry would be introduced into the federal parliament, and this is what ultimately happened.<sup>760</sup> The definition of marriage in the *Marriage Act 1961* (Cth) was amended, notwithstanding the

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<sup>755</sup> Ibid [19].

<sup>756</sup> Ibid [4].

<sup>757</sup> [2012] HCA 21.

<sup>758</sup> *PGA v The Queen* [2012] HCA 21, [29]-[30] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

<sup>759</sup> Australian Bureau of Statistics, *1800.0 - Australian Marriage Law Postal Survey, 2017* (11 December 2017) <<http://www.abs.gov.au/ausstats/abs@.nsw/mf/1800.0>>.

<sup>760</sup> Ibid.

non-binding nature of the survey results.<sup>761</sup>

Thus, marriage laws have undergone significant changes over the past four decades, in a large part to reflect changing community attitudes. The Government and judiciary have been required to redefine marriage and what it entails, in order to keep up with the changing attitudes of the Australian community.

It follows that if legal changes are inconsistent with prevailing community attitudes, the law may fail. The ill-fate of the Australia Card is an example of a legislative measure that failed because it was inconsistent with community attitudes. The Hawke Government made three attempts to establish the national identity card scheme in Australia between 1985 and 1987.<sup>762</sup> Under the proposed law reform, all Australians would have been provided with a photo-identity card; this card would have amalgamated all government identification systems and allowed the government to monitor tax evasion and health and welfare fraud.<sup>763</sup> The Senate twice rejected the proposal Bill.<sup>764</sup> On the third attempt, the Government abandoned the proposed scheme after facing significant opposition from the public and the Senate.

The defeat of the *Australia Card Bill 1986* (Cth) was attributable to several different factors. It was dealt a fatal blow after Ewart Smith, a retired public servant, picked up a drafting flaw in the Bill.<sup>765</sup> However, the fact that the Government chose not to correct the drafting error and reintroduce the Bill into parliament suggests that 'something more than a mere legal loophole had intervened'.<sup>766</sup>

According to Greenleaf, '[w]hat had occurred was one of the most massive shifts in public opinion seen in recent Australian politics'.<sup>767</sup> Public opinion polls initially showed support for the Australia Card Scheme.<sup>768</sup> However, as awareness of the breadth and pervasiveness of the proposed scheme grew, public attitudes turned against the scheme.<sup>769</sup> Polls reported a

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<sup>761</sup> Prior to the plebiscite, scholars kept emphasising that the pre-existing definition of 'marriage' under the *Family Law Act 1975* (Cth) 'depart[ed] significantly from the cultural reality present in our society': Adam Reynolds, 'Marriage: Time for a New Legal Definition?' (2002) 16(2) *Australian Family Lawyer* 1, 2.

<sup>762</sup> Roger Clarke, 'Just Another Piece of Plastic for Your Wallet: The "Australia Card" Scheme' (1987) 5(1) *Prometheus* 29, 31.

<sup>763</sup> Graham Greenleaf and Jim Nolan, 'The deceptive history of the "Australia Card" (1986) 58(4) *The Australian Quarterly* 407, 411.

<sup>764</sup> Graham Greenleaf, 'Lessons from the Australia Card: deux ex machina?' (1988) 3(6) *The Computer Law and Security Report* 6, 6.

<sup>765</sup> See Ewart Smith, *The Australia Card: The Story of its Defeat* (Sunbooks, 1989), 108-168.

<sup>766</sup> Graham Greenleaf, above n 764, 7.

<sup>767</sup> *Ibid.*

<sup>768</sup> *Ibid.*; Roger Clarke, above n 762, 31.

<sup>769</sup> Roger Clarke, above n 762, 32.

significant drop in support for the scheme, while newspapers were flooded with letters from members of the public opposing the scheme.<sup>770</sup>

Over 550 petitions were submitted to the Senate during the relevant parliamentary session in 1987, with close to a total of 200,000 signatures opposing the scheme.<sup>771</sup> The Governor-General's office and local members of parliament also received a large volume of petitions and letters from the public.<sup>772</sup> Many members of the public participated in radio talkback and television shows to oppose the Bill.<sup>773</sup> The role of public opinion in defeating the Australia Card, has been called the 'foremost in the achievements of the ordinary people'.<sup>774</sup> No doubt, media coverage and organised interests groups such as the Australian Privacy Foundation, played an important role in informing and mobilising the public response.<sup>775</sup> Nonetheless, the public response demonstrated was significant and effective.

The Australia Card experience shows that the success of law-making rests to a large extent on public attitudes. That does not mean, however, that legal change cannot be an effective means of instigating social change.

#### 4.4.3 Legal Change as a Catalyst for Social Change

Law can also be an 'engine for social change'.<sup>776</sup> That is, law can play a role in effecting, rather than reflecting, attitudinal and behavioural changes. Research suggests, for example, that the regulation of smoking and the supply of tobacco products changed attitudes towards smoking.<sup>777</sup> Smoking bans in Australian workplaces also resulted in a reduction of cigarette consumption.<sup>778</sup>

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<sup>770</sup> Graham Greenleaf, 'Lessons from the Australia Card', above n 764, 7.

<sup>771</sup> Smith, above n 765, 165.

<sup>772</sup> Ibid 100, 165.

<sup>773</sup> Ibid 98, 100.

<sup>774</sup> Ibid 150.

<sup>775</sup> Ibid 98, 150-8.

<sup>776</sup> Lawrence M Friedman, 'General Theory of Law and Social Change' in Jacob S Ziegel (ed) *Law and Social Change* (Osgoode Hall Law School, York University, 1973) 17, 20. See also: Paula Castro, 'Legal Innovation for Social Change: Exploring Change and Resistance to Different Types of Sustainability Laws' (2012) 33(1) *Political Psychology* 105.

<sup>777</sup> See K Michael Cummings, 'Programs and Policies to Discourage the Use of Tobacco Products' (2002) 21(48) *Oncogene* 7349; Sheina Orbell, 'Social Cognitive Beliefs, Alcohol and Tobacco Use: A Prospective Community Study of Change Following a Ban on Smoking in Public Places' (2009) 28(6) *Health Psychology* 753; Cristina Lidón-Moyano, 'Impact of the Spanish Smoking Laws on Tobacco Consumption and Secondhand Smoke Exposure: A Longitudinal Population Study' (2017) 75 *Addictive Behaviours* 30.

<sup>778</sup> Kerryn Riseley, *Report on Smoke-Free Policies in Australia*, World Health Organization, 8 <[http://www.who.int/tobacco/training/success\\_stories/en/best\\_practices\\_australiaSmokefree\\_policies.pdf](http://www.who.int/tobacco/training/success_stories/en/best_practices_australiaSmokefree_policies.pdf)>; Brian Hocking et al, 'A Total Ban on Workplace Smoking is Acceptable and Effective' (1991) 33(2)

For Friedman, 'law is intimately involved in social change, both as cause and effect'.<sup>779</sup> He contends that law is a product of general social forces, which moves along with social forces and interacts with society at every point.<sup>780</sup> Most legal changes do not bring about social change, as many of the changes relate to housekeeping of the legal system or are technical in nature.<sup>781</sup> Nevertheless, Friedman argues that the social change effect of legal change can be planned as well as disruptive.<sup>782</sup> Further, such effects are not only a result of legislative changes but also judicial developments. For this reason, litigation can also be used strategically to influence social change.<sup>783</sup>

However, law reform is not always an effective vehicle for social change. Stoddard, a legal and political advocate for gay rights in the United States, visited New Zealand in 1996 expecting to find a society that was tolerant and accommodating of gay people.<sup>784</sup> His expectations were based on the formal legal protections that had been introduced to protect gays.<sup>785</sup> What Stoddard found, however, was that New Zealand was culturally behind many large cities in the United States in terms of accepting the gay community.<sup>786</sup> He found that gay people in New Zealand still hesitated to 'come out' despite the legal protections that had been put in place.<sup>787</sup> Stoddard explained the disjunction between law and culture in New Zealand on the basis that 'rule-shifting' had preceded 'culture-shifting'.<sup>788</sup> In other words, Stoddard argued that legal change alone cannot engineer social change.

Rosenberg challenges the idea that courts can bring about social change.<sup>789</sup> He suggests that courts can only produce significant social reform 'when political, social and economic conditions have become supportive of change'.<sup>790</sup> In other words, the social climate must be habitable for

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*Journal of Occupational Medicine* 163; N Owen and R Borland, 'Delayed Compensatory Cigarette Consumption After a Workplace Smoking Ban' (1997) 6(2) *Tobacco Control* 131.

<sup>779</sup> Friedman, 'General Theory of Law and Social Change' above n 776, 20.

<sup>780</sup> *Ibid.*

<sup>781</sup> *Ibid* 21.

<sup>782</sup> *Ibid* 25.

<sup>783</sup> *Ibid* 27-32. The chimpanzee habeas corpus cases in the US (see Chapter 2) pursue such goals. One of the objectives of the NhRP is '[t]o foster understanding of the social, historical, political, and legal justice of our arguments and the scientific discovery of other species' cognitive and emotional complexity that informs them'. See Nonhuman Rights Project, *Our Mission* <<https://www.nonhumanrights.org/who-we-are/>>.

<sup>784</sup> Thomas B Stoddard, 'Bleeding Heart: Reflections on Using the Law to Make Social Change' (1997) 72(5) *New York University Law Review* 967, 967-9.

<sup>785</sup> *Ibid* 967.

<sup>786</sup> *Ibid* 969.

<sup>787</sup> *Ibid* 970.

<sup>788</sup> *Ibid* 990.

<sup>789</sup> Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 2<sup>nd</sup> ed, 2008).

<sup>790</sup> *Ibid* 31.

the legal change to be effective in reforming society. Likewise, Mandelker contends that judicial response to modern social controversies is minimal, and therefore courts play a very limited role in major social reform.<sup>791</sup> He observes that judicial decisions have a narrow focus within areas of social conflict as they are confined to the issues subject to immediate dispute.<sup>792</sup>

There are thus limitations on the extent to which law can drive social change. It may not be a successful instrument for social change, for example, if elite or powerful members of the society do not back the legal change.<sup>793</sup> Moreover, it may not be successful if the law conflicts too much with prevailing values and moral ideals that predominate in a society.<sup>794</sup> Resistance can also come from social factors (for example, opposition from vested interests and organised groups), psychological factors (for example, habits), cultural factors (for example ethnocentrism and superstition), and economic factors.<sup>795</sup> These factors can influence whether or not a change in the law will lead to social change.

Rather than likening the relationship between legal and social change to the 'egg or chicken?' conundrum, however, the interdependencies between the two need to be appreciated. The relationship between legal change and social change is better described as having a 'push and pull effect', such that both occur in tandem and influence each other.<sup>796</sup> This collaborative relationship between society and lawmakers is referred to as *demosprudence*. In particular, *demosprudence* 'emphasises the role of informal democratic mobilisations and wide-ranging social movements that serve to make formal institutions, including those that regulate legal culture, more democratic'.<sup>797</sup>

The 'push and pull effect' of legal and social change was demonstrated in New South Wales after the Australian Broadcasting Corporation televised an exposé of the Australian greyhound racing industry in February 2015.<sup>798</sup> After the broadcast, which followed undercover investigations carried out by Animals Australia and Animal Liberation Queensland, public outrage prompted the New South Wales Government to launch a Special Commission of Inquiry

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<sup>791</sup> Daniel R Mandelker, 'The Role of Law in Social Change' (1970) 8(2) *Osgoode Hall Law Journal* 355, 355.

<sup>792</sup> *Ibid.*

<sup>793</sup> Vago and Barkan, *Law and Society*, above n 636, 222.

<sup>794</sup> *Ibid.* 224.

<sup>795</sup> *Ibid.* 225-231.

<sup>796</sup> Adiva Sifris, 'Lesbian Parenting in Australia: *Demosprudence* and Legal Change' in Paula Gerber and Adiva Sifris (eds) *Current Trends in the Regulation of Same-sex Relationships* (Federation Press, 2010) 8.

<sup>797</sup> Lani Guinier, 'Courting the People: *Demosprudence* and the Law/Politics Divide' (2009) 89 *Boston University of Law Review* 539, 545.

<sup>798</sup> *Making a Killing* (Directed by Dave Everett, Australian Broadcasting Corporation, 2015).

into the Greyhound Racing Industry in New South Wales.<sup>799</sup> The Inquiry found many failings in the management and governance of the New South Wales greyhound racing industry; it also found that the industry had lost its 'social licence to operate'.<sup>800</sup> The Commission was of the view that 'the industry has lost the integrity-based trust of the community'.<sup>801</sup> Accordingly, in June 2016, the Commission recommended the state parliament to 'consider whether the industry has lost its social licence and should no longer be permitted to operate in NSW'.<sup>802</sup>

In response to the Commission's recommendation, the New South Wales Government announced its intention to shut down the greyhound racing industry in the state.<sup>803</sup> The *Greyhound Racing Prohibition Bill 2016* (NSW) was thus passed by the state government in August 2016. However, the ban, which was to take effect from 1 July 2017, faced significant opposition from the regional communities affected by the ban as well as the industry. This led the New South Wales Government to revoke the ban in October 2016. Premier Mike Baird explained that although the Government still believed in banning greyhound racing, it had 'misjudged the community's response to that report'.<sup>804</sup> Baird stated:

It's clear the community agrees that the cruelty must end, but we underestimated the community's desire to give the greyhound industry one last chance to reform and conform to the highest standards of animal welfare.<sup>805</sup>

These events attracted significant media coverage, keeping the issue in front of the public eye.<sup>806</sup> As debates about the future of the greyhound racing industry continued, it became clear

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<sup>799</sup> *Special Commission of Inquiry into the Greyhound Racing Industry in New South Wales* (15 June 2016) <<https://www.greyhoundracinginquiry.justice.nsw.gov.au>>.

<sup>800</sup> New South Wales, Special Commission of Inquiry into the Greyhound Racing Industry in New South Wales, *Report* (2016) vol 1, 18 [1.113]. The Special Commission noted the difficulty in precisely defining 'social licence', but accepted that the concept involves community acceptance and expectations that can shift overtime.

<sup>801</sup> *Ibid.*

<sup>802</sup> *Ibid.* 22.

<sup>803</sup> Mike Baird, 'Greyhound Racing to be Shut Down in NSW' (Media Release, 7 July 2016).

<sup>804</sup> Mike Baird, 'Greyhound Racing Given One Final Chance Under Toughest Regulations in the Country' (Media Release, 11 October 2016).

<sup>805</sup> *Ibid.*

<sup>806</sup> See, eg, Melissa Davey, 'New South Wales to Ban Greyhound Racing from Next Year after Live-baiting Scandal', *The Guardian* (Online) 7 July 2016 <<https://www.theguardian.com/australia-news/2016/jul/07/new-south-wales-to-ban-greyhound-racing-from-next-year-after-cruelty-investigation>>; Cath Hanrahan, 'Explained: Why NSW is Banning Greyhound Racing', *ABC News* (Online) 20 July 2016 <<https://www.abc.net.au/news/2016-07-20/greyhound-racing-ban-nsw-explained/7622052>>; Jason Tin, 'Legislation Overtakes Greyhound Racing Ban', *The Daily Telegraph* (Online) 6 April 2017 <<https://www.dailytelegraph.com.au/news/nsw/legislation-to-kill-off-the-greyhound-ban-almost-through/news-story/4c5fc49f187b129d019da51354844a6e>>; Adam Pengilly and James Robertson, 'NSW Premier Mike Baird Announces Ban on Greyhound Racing after Special Commission of Inquiry', *The Sydney Morning Herald* (Online) 7 July 2016 <<https://www.smh.com.au/sport/nsw-premier-mike-baird-announces-ban-on-greyhound-racing-after-special-commission-of-inquiry-20160707-gq0fw3.html>>;

that legal change was still required. Eventually, although the ban was revoked, significant reforms were introduced for the industry. In particular, a new regulatory framework was introduced by the *Greyhound Racing Act 2017* (NSW) in April 2017.<sup>807</sup> The new regime established the Greyhound Welfare & Integrity Commission as a new and independent regulator of the industry. The objectives of this regulator include the promotion and protection of the welfare of greyhounds, and maintenance of public confidence in the industry.<sup>808</sup> The GRNSW continued to be responsible for the commercial aspects of greyhound racing under the reformed framework, but it was given additional responsibilities in relation to programs for the rehoming of retired greyhounds.<sup>809</sup> Penalties for cruelty offences were also strengthened as part of the reforms, including the introduction of life bans for persons who commit live baiting offences.<sup>810</sup>

These series of events demonstrate that the relationship between legal change and social change is not linear. Social movements and community attitudes prompted lawmakers to introduce legal change, while legal change also played an important role in informing and shaping community attitudes. The outcome was a more stringent regulation of the greyhound racing industry, as well as greater community expectations with respect to that regulation. The relationship between social change and legal change is therefore circular, with both elements working in tandem.

In summary, therefore, social change and legal change have a reciprocal relationship. Lawmakers aim to reflect changing community attitudes in the law. At the same time, legal change can also be used to bring about social changes, including attitudinal ones. Social engineering initiatives may not always be successful, especially where prevailing attitudes are strongly opposed to the change or where significant economic interests operate in the same space. Nonetheless, legal change and social change tend to influence and reinforce each other. Thus, legal and social changes constantly interact with each other.<sup>811</sup>

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'Greyhound Racing Ban: Barnaby Joyce Criticises Mike Baird Decision', *The Australian* (Online) 13 July 2016 <<https://www.theguardian.com/australia-news/2016/jul/07/new-south-wales-to-ban-greyhound-racing-from-next-year-after-cruelty-investigation>>.

<sup>807</sup> The reforms reflected the recommendations of the Greyhound Industry Reform Panel, which was established after the ban was revoked.

<sup>808</sup> *Greyhound Racing Act 2017* (NSW) s 11.

<sup>809</sup> Department of Industry, *Greyhound Racing* <<https://www.industry.nsw.gov.au/about/our-business/department/racing/greyhound-racing>>.

<sup>810</sup> *Prevention of Cruelty to Animals Act 1979* (NSW).

<sup>811</sup> Wolfgang Friedmann, *Law in a Changing Society* (University of California Press, 1959) 22.

#### 4.5 Limitations of Public Opinion Data

Public opinion data plays an influential role in policy-making.<sup>812</sup> Policymakers pay attention to public opinion when making and implementing policies, even though they may not be elected bodies or representatives (such as the administrative arm of the government).<sup>813</sup> They may refer to public opinion surveys or undertake their own public consultations in the policy-making process. Doing so allows policymakers to identify priorities among competing attitudes as well as gain insight into possible reactions to new policies.<sup>814</sup> Public opinion data can also help policymakers identify successful types of policy implementation strategies.<sup>815</sup> If there is a gap between public policy and public opinion, the public can become antagonist to the government.<sup>816</sup> In this sense, public perceptions act as constraints on policymakers.<sup>817</sup>

Whilst public opinion surveys are helpful in shedding light on community attitudes, their limitations should be recognised when interpreting such data. Public opinion surveys may not paint an accurate picture where the public does not hold any opinion on the relevant issues.<sup>818</sup> This is especially the case for complex policy issues that the public may not have previously thought of, or issues that they do not have sufficient knowledge about.<sup>819</sup> Rochefort and Boyer point out that 'the level of knowledge that informs an opinion response tends to decline in direct relation to the specificity of the question'.<sup>820</sup> Respondents may be compelled to form an opinion when prompted by a survey or poll, notwithstanding that they do not have a strongly held, or indeed any, opinion on the issue. Accordingly, survey results can provide a false representation of public opinion, and can even mislead policy development.

The varying depths or intensity of opinions held by individuals also need to be considered when

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<sup>812</sup> See generally, Robert Y Shapiro and Lawrence R Jacobs, 'The Relationship between Public Opinion and Public Policy: A Review' in Samuel Long (ed) *Political Behaviour Annual* (Westview Press, 1989) vol 2 149; Sanel Susan, 'How Does Public Opinion Influence the Law?' (2013) 22 *Nottingham Law Journal* 167; Jeff Manza and Clem Brooks, 'How Sociology Lost Public Opinion: A Genealogy of a Missing Concept in the Study of the Political' (2012) 30(2) *Sociological Theory* 89.

<sup>813</sup> See Edith J Barrett, 'The Role of Public Opinion in Public Administration' (1995) 537 *The Annals of the American Academy of Political and Social Science* 150.

<sup>814</sup> David A Rochefort and Carol A Boyer, 'Use of Public Opinion Data in Public Administration: Health Care Polls' (1988) 48(2) *Public Administration Review* 649, 649.

<sup>815</sup> *Ibid* 650.

<sup>816</sup> Paul A Reichelt, 'Public Policy and Public Opinion Toward Sex Education and Birth Control for Teenagers' (1986) 16(2) *Journal of Applied Social Psychology* 95, 103.

<sup>817</sup> Richard A Pride, 'Public Opinion and the End of Busing: (Mis)Perceptions of Policy Failure' (2000) 41(2) *The Sociological Quarterly* 207, 207.

<sup>818</sup> Paul Burstein, 'Why Estimates of the Impact of Public Opinion on Public Policy Are Too High: Empirical and Theoretical Implications' (2006) 84(4) *Social Forces* 2273, 2285.

<sup>819</sup> Chen, above n 52, 39.

<sup>820</sup> Rochefort & Boyer, above n 814, 656.

interpreting the results of public opinion surveys.<sup>821</sup> Gibson explains that a person tends to hold many opinions on various different topics, but only a small percentage of these opinions are so entrenched that the person would support them with action.<sup>822</sup> This is especially the case where the action, if aligned with the opinion, would deliver unpleasant consequences.<sup>823</sup> While some surveys attempt to accommodate the varying depths of opinions by employing intensity scales,<sup>824</sup> Gibson argues that these methods may not be able to distinguish opinions that influence behaviour from those that do not.<sup>825</sup> Gibson further suggests that some opinions held by a person may not be firmly held and may therefore be open to persuasion.<sup>826</sup> Even opinions that are firmly held may not be considered worth fighting for.<sup>827</sup>

The timing of public opinion surveys is also relevant when relying on public opinion data. According to Gibson, 'long-term shifts in attitude are the product of many shorter-range fluctuations which in themselves are indicative of very little'.<sup>828</sup> Current events can arouse intense but momentary passions.<sup>829</sup> A survey conducted shortly after a high-profile horrifying crime, for example, may reveal significant support for the death penalty.<sup>830</sup> However, after passions have cooled, opposite trends may emerge.<sup>831</sup> Accordingly, it is important to be mindful of the timing of public opinion surveys when interpreting the results.

#### **4.6 Implications for this Research**

The above analysis highlights the importance of understanding and tracking community attitudes. Law reflects, at least to some extent, the attitudes prevailing in a community. Therefore, legal change often follows social change. Such connection between law and community attitudes is considered important, as the law ultimately gains legitimacy by reflecting the values of a community. This is especially expected in democratic societies, where the principle of rule by the people is held in high regard. In light of this relationship between law and community attitudes, there is benefit in measuring and monitoring community attitudes towards specific issues, such as the legal status of animals.

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<sup>821</sup> Gibson, above n 642, 13.

<sup>822</sup> Ibid.

<sup>823</sup> Ibid.

<sup>824</sup> Eg asking respondents to indicate whether they "agree strongly", "agree", "disagree strongly", or "disagree" on a particular proposition.

<sup>825</sup> Ibid.

<sup>826</sup> Ibid.

<sup>827</sup> Ibid.

<sup>828</sup> Ibid 14.

<sup>829</sup> Ibid 14-5.

<sup>830</sup> Ibid.

<sup>831</sup> Ibid.

Chapter 2 documented that the legal classification of animals as property is a legacy of British colonial law (which was inspired by Roman Law).<sup>832</sup> At a more general level, the history of Australian animal welfare laws can also be traced back to British laws.<sup>833</sup> Thus, it is timely to question whether the property categorisation of animals reflects contemporary attitudes. In the long history of the property categorisation of animals, attitudes towards animals may have changed. It is impossible to make this claim with certainty, given the lack of longitudinal data regarding how public opinion about animal welfare issues has evolved over time.<sup>834</sup> Nevertheless, scientific research developments have helped communities understand the complex mental states of animals and has prompted calls for better protection of animals.<sup>835</sup> This suggests that attitudes with respect to the legal treatment of animals have indeed changed over time.

To the extent that public opinion informs policymakers, empirical studies can provide valuable tools in understanding current attitudes towards the legal status of animals and in monitoring changes in such attitudes. Empirical studies designed to measure community attitudes towards the legal status of animals can be helpful in determining whether their categorisation as property is consistent with Australian community attitudes and therefore substantively legitimate. Aside from informing policymakers directly, such data can also be helpful for advocacy groups. In particular, it can assist advocacy groups in designing awareness raising campaigns and in planning their lobbying efforts, which can shape community attitudes and ultimately influence policies.

Such empirical data could also inform policymakers when developing animal welfare policies more broadly. Indeed, the value of such data in relation to the regulation of farm animal welfare was highlighted in a 2016 Productivity Commission Report, which recommended that an independent statutory body should be established that would be responsible for ‘developing national farm animal welfare standards using rigorous science and *evidence of community values for farm animal welfare*’.<sup>836</sup>

#### 4.7 Conclusion

Law and community attitudes are intimately connected. The content of laws are derived from the

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<sup>832</sup> See section 2.3 of this thesis. Cf White, ‘British Colonialism, Australian Nationalism and the Law’, above n 343, which explores how changing attitudes influenced the evolution of wildlife protection laws in Australia.

<sup>833</sup> Cao above n 9, 66-7.

<sup>834</sup> Chen above n 52, 67.

<sup>835</sup> Ibid 29.

<sup>836</sup> Productivity Commission, above n 47, 2 (emphasis added).

attitudes of a community, though there are also other influences involved. In a representative democratic community, the 'rule by the people' principle operates to ensure that the will of the citizens, or at least a majority of the citizens, should ideally be reflected in the laws of that community. Such reflection provides legitimacy to those laws.

Corresponding to this relationship between law and community attitudes is the relationship between legal change and social change. Lawmakers seek to ensure that legal changes reflect social changes, and in some cases, use law as an instrument to effect social change. In fact, the relationship between legal change and social change is reciprocal. The two forms of change feed from and into each other.

This relationship between law and community attitudes justifies empirical research that measures contemporary attitudes towards the property status of animals. Such empirical data can help lawmakers ensure that the legal status of animals reflects the attitudes of modern communities. Such empirical evidence can also provide useful insight for policymakers and advocacy groups into changes in perceptions towards animals.

Having established the usefulness of measuring community attitudes towards the legal status of animals, the next chapter sets out and explains the methodology behind the empirical research undertaken for this thesis.

# **Chapter 5**

## **Research Methodology**

### **5.1 Introduction**

### **5.2 Research Approach**

### **5.3 Research Objective and Research Questions**

### **5.4 Quantitative Research**

### **5.5 Survey**

5.5.1 Design of Questionnaire

5.5.2 Survey Questions

### **5.6 Population and Sampling**

5.6.1 Population

5.6.2 Sampling

### **5.7 Ethics Approval**

### **5.8 Piloting of Survey**

### **5.9 Administration of Survey**

### **5.10 Conclusion**

## 5.1 Introduction

*Judge a man by his questions rather than by his answers.*<sup>837</sup>

The previous chapter highlighted the importance of studying public attitudes in the context of law. It did so by establishing the relationship between law and community attitudes, particularly in democratic societies. In particular, it explained that the law is often a reflection of prevailing community attitudes, and this provides substantive legitimacy to the law in a democracy. Data obtained from public opinion surveys can be used to check whether existing laws are consistent with community attitudes, and whether legal change is warranted.

In light of this relationship between law reform and public attitudes, this thesis attempts to ascertain whether the legal status of animals is consistent with contemporary community attitudes. It does so by conducting empirical research. The term 'empirical' denotes something in the real world that is observable.<sup>838</sup> Thus, in an empirical study, observable, real-world experience, evidence or information is used to develop and test ideas.<sup>839</sup> That evidence and information is also referred to as data.<sup>840</sup>

A survey was conducted in the state of Victoria to collect quantitative data on attitudes towards animals, especially in relation to their legal status. A sample of 287 Victorians over the age of 18 was surveyed between December 2013 and July 2014. The sample was chosen from metropolitan Melbourne as well as two regional parts of Victoria – Gippsland and Ballarat. The overall aim of this empirical research was to provide a snapshot of contemporary attitudes in Victoria towards the legal status of animals, given the dearth of statistical data in this space.

The purpose of this chapter is to detail the research methods adopted in conducting the empirical research. It provides insight into the basis and reliability of the data presented in this thesis. This chapter begins by identifying the research approach undertaken in section 5.2. In particular, this section highlights the exploratory and descriptive nature of this research. Section 5.3 sets out the research objective and the three research questions that emanate from that objective. Section 5.4 explains the quantitative nature of this research. Section 5.5 then identifies the survey as the specific method chosen for undertaking this quantitative research. In

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<sup>837</sup> Voltaire, quoted in Maire Simington, 'The Power of Why?' (2015) 95(2) *Phi Kappa Phi Forum* 25, 25.

<sup>838</sup> Keith F Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (SAGE Publications, 2<sup>nd</sup> ed, 2005), 27; Roger Gomm, *Key Concepts in Social Research Methods* (Palgrave Macmillan, 2009), 110.

<sup>839</sup> Punch, *Introduction to Social Research*, above n 838, 27; Gomm, above n 838, 110.

<sup>840</sup> Punch, *Introduction to Social Research*, above n 838, 27.

this section, the thought-process behind the questionnaire is explained. Section 5.6 details the sampling method and sample size of the survey, including their limitations. Section 5.7 describes the ethics approval process, while section 5.8 summarises the actions taken following a pilot study. Section 5.9 explains how the survey was administered. Finally, section 5.10 provides a conclusion to this chapter.

## 5.2 Research Approach

The empirical research component of this thesis is best described as exploratory in nature. Exploratory research refers to research where little is known about the subject or no one has explored the subject yet.<sup>841</sup> It allows one to become familiar with some basic facts, settings and concerns, thus creating a general mental picture of existing conditions.<sup>842</sup> It is a first stage of inquiry designed to formulate more precise questions for more systematic and extensive research in the future.<sup>843</sup>

As highlighted in Chapter 1, attitudes towards animals have not been explored sufficiently in Australia. Empirical data in relation to the legal status of animals in particular is non-existent. In fact, there is little data on this topic internationally.<sup>844</sup> In light of this lack of statistical information, the intention of this research is to provide a snapshot of current attitudes towards the property status of animals. The research is also intended to lead the way for further social research in this space by identifying questions that are worth asking in future, more comprehensive studies.

The research is also more descriptive than explanatory. Descriptive research focuses on ascertaining what a situation is, while explanatory research intends to find reasons for those situations.<sup>845</sup> This purpose of this research is to ascertain the extent to which the respondents agree with the property status of animals rather than to explain why they hold such beliefs. While descriptive research may be considered of lesser value than explanatory research, descriptive research is useful for exploratory studies in new areas of research.<sup>846</sup> The data obtained from such descriptive research can then identify the factors that need to be explored in further depth in later explanatory studies.<sup>847</sup>

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<sup>841</sup> W Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Pearson, 2011), 38.

<sup>842</sup> Ibid.

<sup>843</sup> Ibid.

<sup>844</sup> See Martin and Glover, above n 48.

<sup>845</sup> Punch, *Introduction to Social Research*, above n 838, 15; Thomas R Black, *Understanding Social Science Research* (SAGE Publications, 2<sup>nd</sup> ed, 2002), 43.

<sup>846</sup> Punch, *Introduction to Social Research*, above n 838, 15.

<sup>847</sup> Ibid.

### 5.3 Research Objective and Research Questions

The objective of this research project was to measure the extent to which a small sample of people in Victoria know that animals are legally treated as property, and the extent to which this status may or may not reflect their attitudes.

Guided by this objective, this research project sought to answer the following specific research questions:

1. To what extent is the community aware that animals are legally classified as property?
2. Does the community think that all or at least some animals should legally be classified as property?
3. Does the community perceive animals to be property?

These research questions are slightly different to the overall thesis questions stated in Chapter 1, and are intended specifically to map out the scope of the empirical research.

The nature of the research questions ideally determines the research method to be employed.<sup>848</sup> Where the research method stems from the research questions, a good and logical fit between the research questions and method is achieved.<sup>849</sup> Where a survey is being conducted, the questionnaire is also guided by the research questions<sup>850</sup>. The research questions allow the question development stage to be systematic and controlled.<sup>851</sup> In other words, the research questions play a crucial role in the research.

To answer the above research questions, measurement in numerical form was required. Accordingly, the decision was made to use a quantitative research method.

### 5.4 Quantitative Research

Quantitative research predominantly involves the measurement of social patterns.<sup>852</sup> It views

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<sup>848</sup> Ibid 19; Keith F Punch, *Survey Research: The Basics* (SAGE Publications, 2003), 7.

<sup>849</sup> Punch, *Introduction to Social Research*, above n 838, 20.

<sup>850</sup> Punch, *Survey Research*, above n 848, 30.

<sup>851</sup> Punch, *Introduction to Social Research*, above n 838, 20.

<sup>852</sup> Alan Bryman, *Social Research Methods* (Oxford, 3rd ed, 2008), 21.

social reality as objective and uses natural scientific methods to test theories.<sup>853</sup> The unit of analysis in quantitative research is numbers rather than words or visual images.<sup>854</sup>

Measurement allows for the identification of fine differences between people in terms of a particular characteristic.<sup>855</sup> In other words, while it is easy to distinguish people in terms of extreme categories, quantitative research can highlight subtle variations in people's attitudes and beliefs. For instance, people could arguably be differentiated according to how they view animals in general. However, a quantitative study such as the present one can reveal nuances in their opinions. By carefully designing the survey questions, how different species of animals are perceived can be understood. These finer details are important in the present context, as they can help shed light on whether an alternative legal status for animals is warranted and whether a uniform legal status should apply to different kinds of animals.

Quantitative research also 'provides the basis for *more precise estimates of the degree of relationship between concepts*'.<sup>856</sup> For example, this study attempts to explain the relationship between concepts such as how Australians perceive animals and their knowledge of the legal status of animals. It also tries to measure how likely someone is to agree or disagree with the legal status of animals when they are aware that animals are legally classified as property. These findings can reveal how consistent community attitudes are on these subjects, as well as how informed the community is in respect of the current legal status of animals in Australia.

## 5.5 Survey

A survey was chosen as the specific method for research because of the ease with which it could be administered to a relatively large group of people (for example, to 300 respondents). This method of data collection involves a defined group of individuals being asked an identical set of questions.<sup>857</sup> Surveys provide a numeric description of attitudes or opinions of a population.<sup>858</sup> Thus, surveys provide a panoramic view of a situation by casting a wide net to achieve an inclusive coverage of the population being investigated.<sup>859</sup> Given that this research project seeks to provide a snapshot of attitudes towards the legal status of animals, a survey was considered the most convenient method of collecting data. Indeed, given the exploratory

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<sup>853</sup> Ibid 22.

<sup>854</sup> Martyn Denscombe, *The Good Research Guide: For Small-scale Social Research Projects* (Open University Press, 6<sup>th</sup> ed, 2017), 6.

<sup>855</sup> Bryman, above n 852, 144; Black, above n 845, 43.

<sup>856</sup> Bryman, above n 852, 144 (emphasis in original).

<sup>857</sup> Therese L Baker, *Doing Social Research* (McGraw-Hill College, 3<sup>rd</sup> ed, 1998), 201.

<sup>858</sup> John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (SAGE Publications, 3<sup>rd</sup> ed, 2009), 145.

<sup>859</sup> Denscombe, above n 854, 12.

nature of this research, a survey was considered an ideal method of data collection.<sup>860</sup>

One of the dangers of using a survey is that it assumes that respondents interpret words in the same way.<sup>861</sup> Moreover, it assumes that respondents have knowledge or interest in the matter, when that may not be the case.<sup>862</sup> Additionally, surveys can tend to lack depth.<sup>863</sup> This survey, for example, measured attitudes towards the legal status of animals but did not collect data on the extent to which respondents supported practices that are facilitated by the legal status of animals. These factors can skew the results and/or affect the reliability of the data obtained. To overcome these limitations, the survey questions were designed in a manner that allowed respondents to express their lack of knowledge. It also included an open question that allowed for a more in-depth response. These methods of overcoming the limitations are elaborated upon in section 5.5.1.

### 5.5.1 Design of Questionnaire

The survey was conducted through a self-administered questionnaire, provided in Appendix A. A questionnaire is a specific instrument designed to elicit information.<sup>864</sup>

The questionnaire for this survey consisted of 11 questions. The relatively small number of questions was chosen in order to minimise the time imposition on participants and thereby achieve a high response rate.<sup>865</sup> Ten out of the 11 questions were closed questions, where respondents had to select a response from a given number of options provided.<sup>866</sup> By requiring responses to fit into pre-defined categories, closed questions have the effect of structuring answers.<sup>867</sup> The objective behind including mostly closed questions in this survey was to obtain quick and unambiguous responses.<sup>868</sup> Further, closed questions tend to be more likely to be completed.<sup>869</sup> The closed questions in this survey were phrased, and the options ordered,

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<sup>860</sup> Earl Babbie, *The Basics of Social Research* (Thomson Wadsworth, 4<sup>th</sup> ed, 2008), 270.

<sup>861</sup> Bryman, above n 852, 159; Christina Hughes and Malcom Tight Loraine Blaxter, *How to Research* (Open University Press, 2nd ed, 2001), 179.

<sup>862</sup> See Chapter 4 section 4.5, which pointed out the limitations of public opinion data.

<sup>863</sup> Denscombe, above n 854, 30.

<sup>864</sup> Babbie, above n 860, 272.

<sup>865</sup> Martin Brett Davies, *Doing a Successful Research Project Using Qualitative or Quantitative Methods* (Palgrave Macmillan, 2007), 74; Catherine Dawson, *A Practical Guide to Research Methods: A user-friendly manual for mastering research techniques and projects* (How To Books, 2nd ed, 2006), 95; Don Dillman, *Mail and Internet Surveys: The Tailored Design Method* (John Wiley & Sons, Inc., 2nd ed, 2000), 305.

<sup>866</sup> Baker, above n 857, 209; Babbie, above n 860, 272.

<sup>867</sup> Denscombe, above n 854, 194.

<sup>868</sup> Bill Gillham, *Developing a Questionnaire* (Continuum, 2000), 6; Babbie, above n 860, 272.

<sup>869</sup> Baker, above n 857, 209.

neutrally to eliminate the possibility of the results being skewed due to personal bias.<sup>870</sup>

Closed questions, however, have some limitations. They allow little scope for respondents to express their exact feelings, which may not fit into the range of options listed in the questionnaire.<sup>871</sup> The complexities and intricacies of opinions may therefore not be identified. It therefore becomes important to ensure that the options provided as part of closed questions are exhaustive.<sup>872</sup> In this survey, options such as 'other' and 'don't know' were included where appropriate (see 5.5.2 for detail) to ensure the exhaustiveness of the responses.<sup>873</sup> Additionally, one open question was added (see 5.5.2) to add variety and prevent the respondents from becoming bored or frustrated in answering closed questions.<sup>874</sup>

Open questions allow respondents to decide the wording and detail of their answers.<sup>875</sup> Only one question in the questionnaire was an open question. Open questions were deliberately kept to a minimum in line with standard quantitative research methodology.<sup>876</sup> Such questions can be time-consuming to administer and analyse, as the responses require accurate recording as well as proper coding before they can be analysed.<sup>877</sup> Additionally, because open questions demand more time and effort on the part of the respondents, they can deter participation in the survey.<sup>878</sup>

A more detailed explanation of the objective of each of the survey questions is provided below.

### 5.5.2 Survey Questions

Question 1 was designed to ascertain where the respondents lived so that differences in attitudes between regional and Melbourne-based respondents could be observed. Such data would help establish whether attitudes towards animals are held homogeneously across parts of Victoria, or whether geographical factors play an influential role in shaping attitudes towards animals.

Question 2 asked whether respondents had pets.<sup>879</sup> The question also asked respondents to list

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<sup>870</sup> Gillham, above n 868, 26; Dawson, above n 865, 91.

<sup>871</sup> Denscombe, above n 854, 194.

<sup>872</sup> Baker, above n 857, 209.

<sup>873</sup> Babbie, above n 860, 273.

<sup>874</sup> Denscombe, above n 854, 195.

<sup>875</sup> Ibid 194; Baker, above n 857, 209; Babbie, above n 860, 272.

<sup>876</sup> Davies, above n 865, 75.

<sup>877</sup> Bryman, above n 852, 232; Gillham, above n 868, 36.

<sup>878</sup> Denscombe, above n 854, 194; Baker, above n 857, 210.

<sup>879</sup> The survey referred to companion animals as 'pets' as the latter was thought to be more familiar to members of the community.

the kinds of animals they kept as pets. The response to this question determined whether they were required to answer Question 3. Another purpose of this question was to provide some indication of the extent to which the respondents interacted with companion animals on a regular basis.

Question 3 asked respondents who owned companion animals about how they perceived their pets. They were asked to select one of five options, which comprised of 'friends', 'family members', 'property', 'living beings different to humans' and 'other'.

Question 4 asked respondents to indicate how they perceived farm animals, and was directed at all respondents. Examples of farm animals were provided to assist respondents in understanding the question. Again, respondents were asked to select one of five responses, which were the same as those listed for Question 3.

Question 5 sought to ascertain the respondents' perceptions towards wild animals. Respondents were again asked to select one of five options, although the options for this question were comprised of 'important national treasures', 'vermin', 'property', 'living beings different to humans' and 'other'.

The aim of questions 3-5 was to obtain an answer to Research Question 3 (see 5.3). That is, the questions sought to ascertain whether the perceptions of animals as property, or as something other than property, depended upon the category of animal under consideration. Accordingly, 'property' was an option that respondents could select for each of Questions 3, 4 and 5. To avoid a personal bias in the results, it was not listed as the first option that respondents could select.<sup>880</sup> Rather, this option appeared in the middle of all the other options. Further, it was recognised that respondents' perceptions may not necessarily be restricted to the specific options listed in the survey. Therefore, respondents were given the option of selecting 'other'.

Pet animals, farm animals and wild animals were chosen as the focus of Questions 3-5. These categories are admittedly broad and potentially ambiguous. This simplistic approach was taken, however, to keep the questionnaire short and simple. There are many ways in which animals can be categorised. They can be categorised narrowly, for example, based on their biological features such as species, genus or family. They can also be categorised broadly based on common ways in which humans interact with animals or on the uses to which animals are put.

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<sup>880</sup> Gillham, above n 868, 91.

Categorising animals narrowly based on biological features would arguably have made the survey more complicated to design and answer. Projecting a complicated impression of the survey may have accordingly deterred respondents from participating in the survey. Instead, the three categories were chosen because they were assumed to be easily recognisable to the public. Further, they broadly reflect the three separate legal regimes that operate in Australia in respect of the treatment of animals.<sup>881</sup>

To clarify, Questions 3-5 did not ask respondents about their perceptions towards the legal status of animals. The decision to ask general questions about respondents' perceptions of different kinds of animals before asking respondents about their opinion of the legal status of animals was carefully thought-out. In particular, the intention was to determine, first, how respondents would intuitively group or classify particular kinds of animals and, second, whether those intuitive classifications matched their attitudes towards the legal status of animals. Asking respondents about their opinion of the property status of animals first could have potentially influenced how they answered questions about their perceptions of different kinds of animals.<sup>882</sup> Moreover, questions concerning the legal status of animals were considered more complex, and therefore, the decision was made to not begin with these questions. Doing so would have carried the potential risk of deterring respondents from participating or completing the survey.<sup>883</sup>

Question 6 asked respondents to indicate what influenced their perceptions towards animals. Respondents were given five options to select from, which were 'your education', 'religious and cultural teachings', 'television', 'your own personal experience with animals', and 'other'. Those who selected 'other' were asked to specify what those influences were. Respondents were allowed to select more than one option as their response to this question on the assumption that more than a single factor can influence attitudes towards something. The aim of this question was to get an understanding of the role that education, personal experience and religious and cultural teachings play in influencing attitudes towards animals.

Question 7 then sought to find an answer to Research Question 1 (see 5.3). It asked respondents whether they knew that animals are legally classified as property. Only two options were provided for this question, being 'yes' and 'no'.

Question 8 was designed to answer Research Question 2 (see 5.3) by asking respondents whether they thought animals should legally be classified as property. The options that

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<sup>881</sup> See generally, White, 'Regulation of Animal Welfare', above n 319; Cao, above n 9, Ch 8-9.

<sup>882</sup> Denscombe, above n 854, 193.

<sup>883</sup> Ibid; Baker, above n 857, 210; Babbie, above n 860, 282.

respondents could select from were 'yes', 'no', 'some animals' and 'don't know'. As flagged above, the latter two options were provided to detect the intricacies and complexities in respondents' attitudes. It was expected that many respondents did not know that animals are legally classified as property. Therefore, it was recognised that respondents may not have an opinion about whether animals should be property. Further, given that different kinds of animals can be treated differently, it was anticipated that respondents' opinion of the legal status of animals may vary depending on the particular kind or specie of animal.

Question 9 was an open question. It asked respondents to explain what they thought it means to classify animals as property. The question was designed to shed some light on the extent of existing knowledge, understanding, support or concern that might be held by a respondent on the question of the legal status of animals. It also aimed to get an indication of the respondent's awareness (or unawareness) of the policy implications and functional purposes of the legal characterisation of animals. While this was an open question, respondents were still given the option of selecting 'don't know' as their response. This recognised the possibility that respondents may not have thought about, or simply not known or felt capable of hypothesising about, the implications of this legal status.

Questions 10 and 11 were designed to obtain demographic data. Question 10 asked respondents to indicate whether they were 'male' or 'female'. Question 11 asked respondents to identify the broad age brackets they fell within, which were '18-35', '36-60' and '60+'. It is common practice to keep requests for demographic data at the end of the questionnaire as the 'dull' nature of the questions can make respondents disinterested in participating in or completing the survey.<sup>884</sup>

## **5.6 Population and Sampling**

### **5.6.1 Population**

The population group of this survey comprised of all Victorians aged 18 and over. This demographic was chosen to restrict the population to those individuals who are eligible to vote and therefore have a say in law-making. Clearly, this is a very large population for the purposes of empirical research. According to the Australian Bureau of Statistics, there were 4,942,129

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<sup>884</sup> Babbie, above n 860, 282.

persons aged 18 and over in Victoria as at 30 June 2017.<sup>885</sup> This data provides a good indication of the size of the population that is the subject of this study.

## 5.6.2 Sampling

Large populations are tedious, time-consuming and expensive to survey.<sup>886</sup> To overcome these limitations, researchers tend to work with samples that are selected from the relevant population.<sup>887</sup> A sample is a selection of members from the population, or a subset of a population, that is used to make statements about the whole population.<sup>888</sup> Sampling reduces the costs, time and resources required to conduct the research, thereby increasing the practical feasibility of conducting the research.<sup>889</sup> As this study was constrained by time and resourcing factors, a sample was selected for this survey.

### 5.6.2.1 Sampling Method

Working with a sample brings certain complexities into data analysis. To be able to make generalisations from the data, the sample has to be reflective of the population from which it was drawn. An ideal sample, according to Blaikie, would be 'one that provides a perfect representation of a population, with all the relevant features of the population included in the sample in the same proportions'.<sup>890</sup> This ideal, however, is difficult to achieve in practice.<sup>891</sup> Sampling practices are also demanding of administrative and planning tasks in comparison to saturation surveys, which involves a complete coverage of the relevant population.<sup>892</sup>

This study employs convenient sampling, where participants are chosen at selected locations with no or very little control exercised over the selection or composition of the sample.<sup>893</sup> As the name suggests, this method is a convenient means of obtaining participants. It essentially means that the sample is selected based on the accessibility of the members.<sup>894</sup> For the

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<sup>885</sup> Australian Bureau of Statistics, *Australian Demographic Statistics* (22 March 2018) <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/8B46E5DBE0FC9549CA2582570013F721/\\$File/31010\\_sep%202017.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/8B46E5DBE0FC9549CA2582570013F721/$File/31010_sep%202017.pdf)>.

<sup>886</sup> Norman Blaikie, *Analyzing Quantitative Data* (SAGE Publications, 2003), 160.

<sup>887</sup> Ibid.

<sup>888</sup> Ibid 161; Thomas Piazza, 'Fundamentals of Applied Sampling' in Peter V Marsden and James D Wright (eds) *Handbook of Survey Research* (Emerald Group Publishing, 2<sup>nd</sup> ed, 2010) 139, 139.

<sup>889</sup> Blaikie, above n 886, 161; Sotirios Sarantakos, *Social Research* (Macmillan Publishers, 2<sup>nd</sup> ed, 1998), 139-140; Clive Seale and Paul Filmer, 'Doing Social Surveys' in Clive Seale (ed) *Researching Society and Culture* (SAGE Publications, 1998) 125, 135.

<sup>890</sup> Blaikie, above n 886, 161.

<sup>891</sup> Ibid.

<sup>892</sup> Sarantakos, above n 889, 139-140.

<sup>893</sup> Davies, above n 865, 56.

<sup>894</sup> Byrman, above n 852, 183.

purposes of this thesis, respondents were randomly accessed in public spaces, in particular at train stations, tram stops and bus stations in Melbourne City, Ballarat and Warragul. Ballarat is a regional city located in central Victoria. Warragul is a town located in the Gippsland region of Victoria (in the south-east of Victoria). These rural locations in Victoria were chosen because large-scale animal farming activities are carried out in these places.

Convenient sampling is a non-probability sampling method, and thus does not require the identification of individual members of the entire population.<sup>895</sup> In contrast to probability sampling methods, a convenient sample is unlikely to be representative of the population group.<sup>896</sup> Indeed, the sample selected for this research cannot be described as representative because participation was dependent upon a person being present at the relevant locations when the survey was being conducted.<sup>897</sup> Those who generally do not travel on public transport, for example, were unlikely to have been a part of the survey. Those who do not visit the specific locations, either because they live and work in other locations or do not work, likewise were not provided with a chance to participate in the survey. Even those who normally visit these locations but did not do so on the days the survey was being conducted would not have had the chance to participate. Sampling bias results from these limitations. Sampling bias occurs where some members of the population have little or no chance of being selected as part of the sample.<sup>898</sup> In convenient sampling, there is no way of controlling how representative the sample is or knowing whether there is any sample bias.<sup>899</sup> These limitations then impact on the validity of the generalisations made at the conclusion of the study.<sup>900</sup>

In contrast to non-probability sampling, a probability sample provides every member of the population with a known, equal and non-zero chance of being selected.<sup>901</sup> It therefore offers a high degree of representativeness and enables more reliable generalisations to be made.<sup>902</sup> Although desirable, probability samples are expensive, time consuming and complicated because they require large sample sizes and the sample units (members of the population) are usually widely scattered.<sup>903</sup> Employing a probability sampling method was not viable for this study because of the size of the population involved, resource limitations and time and

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<sup>895</sup> Davies, above n 865, 56.

<sup>896</sup> Ibid; Sarantakos, above n 889, 141; Anthony Graziano and Michael Raulin, *Research Methods: A process of inquiry* (Pearson, 6th ed, 2007), 325.

<sup>897</sup> Bryman, above n 852, 169.

<sup>898</sup> Ibid.

<sup>899</sup> Davies, above n 865, 56; Peter Lynn, *Principles of sampling* (Arnold, 2nd ed, 2002), 189.

<sup>900</sup> Davies, above n 865, 62.

<sup>901</sup> Blaikie, above n 886, 161; Martin Frankel, 'Sampling Theory' in Peter V Marsden and James D Wright (eds) *Handbook of Survey Research* (Emerald Group Publishing, 2<sup>nd</sup> ed, 2010) 83, 86.

<sup>902</sup> Sarantakos, above n 889, 141.

<sup>903</sup> Ibid.

geographical constraints.

Nevertheless, Davies suggests that sampling quality in non-probability sample-based studies can be improved by gathering equal sized subsamples from separate locations:

Even if the geographical area that you can target is restricted, there are ways in which you can improve sampling quality. One step would be for you to gather two equally sized subsamples from separate locations – say the inner city for one and an outer suburb or a nearby small town for the other. Not only does this expand the range of the population from which you have drawn the sample but it enables you to carry out a statistical comparison between the findings from the two subsamples. If they don't differ, this is hugely reassuring for the conclusions you may want to draw; if they do differ in some ways, you will be expected to discuss why that might be and what it might mean for your conclusions.<sup>904</sup>

For this research, subsamples were gathered from metropolitan and regional areas. In particular, a subsample of 139 respondents was achieved in Melbourne City, while a total subsample of 146 respondents was achieved in Ballarat and Warragul (75 and 71 respectively). The primary reason for splitting the sample in this manner was to detect differences (if any) in attitudes between respondents living in Melbourne and respondents living in regional communities where large-scale animal-farming activities are carried out. Moreover, this exercise had the function of improving the quality of the sample in the manner described by Davies above.

Another limitation of non-probability sampling is that inferential statistical analysis cannot be used for such samples.<sup>905</sup> In probability samples, there are some statistical inference techniques that can be applied to enable the projection of sample results to larger populations.<sup>906</sup> In non-probability samples, however, the validity of the inferences drawn cannot be assured or tested.<sup>907</sup>

Non-probability sampling is, however, well suited to exploratory research.<sup>908</sup> As this is the first study of its kind in Australia, convenient sampling was considered appropriate and sufficient. Its findings will provide an opportunity for further research in due course to build upon this study.

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<sup>904</sup> Davies, above n 865, 55.

<sup>905</sup> Blaikie, above n 886, 161.

<sup>906</sup> Frankel, above n 901, 83.

<sup>907</sup> Ibid.

<sup>908</sup> Sarantakos, above n 889, 151.

### 5.6.2.2 Sample Size

A sample of 287 members from the population was achieved for this research. In light of resourcing limitations, and given that the research did not intend to provide a representative sample, the sample size was determined based upon what was practically achievable.

### 5.7 Ethics Approval

Approval for a low risk project involving humans was obtained from the Monash University Human Research Ethics Committee (MUHREC) after the survey was designed and before the survey was piloted.

Following a pilot study (see section 5.8), some changes were required to the survey questionnaire and the manner in which the survey was to be conducted. As a result, a Request for Amendment was submitted to MUHREC after the pilot study. The amendments proposed in the form were approved by MUHREC.

### 5.8 Piloting of Survey

The quality of a survey is essential because surveys often have a policy or political objective.<sup>909</sup> Piloting helps ensure the quality of the survey.<sup>910</sup> In particular, the pilot allows the survey questions to be tested for comprehension, clarity and ambiguity.<sup>911</sup> It allows the researcher to ascertain whether the respondents can quickly and easily respond to the questions directed at them.<sup>912</sup> A pilot also enables the researcher to test the length of the survey and thereby ascertain the amount of time it takes for a person to complete the survey.<sup>913</sup> Additionally, a pilot allows the data collection process to be tested.<sup>914</sup>

To ensure the quality of the design of this survey, and to test the response rate,<sup>915</sup> the survey was piloted on 10 individuals at the Flinders Train Station in Melbourne City. It became apparent after the pilot study that some changes to the questionnaire and the administration of the survey were required.

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<sup>909</sup> Davies, above n 865, 70.

<sup>910</sup> Ibid.

<sup>911</sup> Punch, *Survey Research*, above n 848, 34.

<sup>912</sup> Ibid.

<sup>913</sup> Ibid.

<sup>914</sup> Ibid.

<sup>915</sup> Gillham, above n 868, 42; Dawson, above n 865, 97.

Respondents chosen for the pilot study were asked the survey questions (in their original form) and their verbal responses were recorded by the researcher on Survey Monkey using an iPad. The environment in which the survey was being conducted was quite noisy. It was observed that some respondents had difficulty in following the questions and options being read out to them. They would read the options by themselves before choosing a response. Completion of the survey thus became more time-consuming. The body language of some respondents also indicated that they preferred reading and answering the survey questions themselves. To prevent delays and to make the process easier for respondents, it was decided that respondents should be given a self-completion questionnaire in paper format instead.

In its original form, the questionnaire did not ask respondents to identify where they lived or their gender. The need to collect this demographic data became apparent during the pilot study, as diversity became very evident at the location of the study. Thus, the two additional questions were added to the survey (Question 1 and Question 10).

Question 9 of the Pilot Survey asked: 'What do you think are the implications of the legal classification of animals?'. It was realised during the pilot study that this qualitative question needed to be redrafted. This was because the question did not specifically ask respondents to express their understanding of the property classification of animals. Thus, the question was rephrased as 'What do you think it means to classify animals as property?' An option to choose 'Don't know' was also added as the behaviour of some respondents demonstrated that they struggled to answer this question.

Some respondents questioned what 'farm animals' were when asked about their perceptions towards farm animals. As a result, some examples of farm animals were added as part of this question.

Some respondents chose more than one response for the survey questions during the pilot. An explanation was therefore added at the top of the questionnaire advising respondents that they were to pick only one response unless otherwise stated. Where respondents were asked to identify the factors that influenced their perceptions of animals, an extra line was added to explain that more than one response could be chosen for this question.

## **5.9 Administration of Survey**

As mentioned above, the survey was conducted through a self-administered questionnaire. The questionnaire was designed and printed on paper. Participants were approached in person and

asked to complete the questionnaire themselves. This method was adopted over an email survey in order to achieve a higher response rate, as although face-to-face surveys are more costly and time-consuming, they tend to achieve a higher response rate.<sup>916</sup> There were also concerns that an email survey may not capture members of the population who do not have the Internet or who are not computer-literate.<sup>917</sup> Postal surveys and telephone surveys were also not utilised because of the costs involved.<sup>918</sup>

Upon approaching individual respondents, the researcher introduced herself and asked whether they would be interested in completing a short anonymous survey about animals. Where respondents agreed to complete the survey, they were handed the questionnaire. The presence of a researcher during the completion of a survey can result in social desirability bias, as respondents in such circumstances tend to answer questions according to what society considers desirable.<sup>919</sup> To prevent this bias, the questionnaire was kept anonymous and the researcher consciously chose to turn away from the respondent while they completed the survey.

Respondents were provided with an Explanatory Statement after they completed the survey. The Explanatory Statement informed the respondents of the purpose and nature of the research, how the data was being stored and the contact details of the researcher and MUHREC. While Explanatory Statements are generally provided to respondents before the survey is conducted, in this instance it was necessary to provide the Explanatory Statement at the end of the survey because it would otherwise have made the respondents aware of the property status of animals. This would have potentially affected their responses to the survey questions.

The responses obtained on the paper questionnaires were then manually entered into Survey Monkey. Survey Monkey is an online platform that allows researchers to design their surveys, administer them via email and analyse and store data. It simplifies the data analysis process because it automates analytical tools such as charts and graphs. The results can also easily be exported.<sup>920</sup> This method was adopted for convenience and automation, as computerised systems are capable of handling large amounts of data.<sup>921</sup>

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<sup>916</sup> Denscombe, above n 854, 12-6.

<sup>917</sup> Ibid 16.

<sup>918</sup> Ibid 12-6.

<sup>919</sup> Bryman, above n 852, 211; Babbie, above n 860, 274, 277.

<sup>920</sup> Survey Monkey, *How It Works*, <<http://www.surveymonkey.com/mp/take-a-tour/>>.

<sup>921</sup> Black, above n 845, 70.

## 5.10 Conclusion

The empirical research undertaken as part of this research project aims to determine whether the current legal status of animals in Australia is consistent with community attitudes, and whether an alternative legal status for animals would better reflect contemporary attitudes. The reliability of such empirical data depends on the methodologies adopted for the research. This chapter therefore detailed the methodological processes adopted as part of the empirical research.

The empirical study set out to find answers to three specific research questions. First, it sought to find out the extent to which the community is aware that animals are classified as property. Second, it aimed to find out whether the community thinks that all or some animals should be classified as property. Third, it intended to find out whether the community intuitively perceives animals to be property. These objectives and research questions guided the methodologies adopted for the empirical research.

The legal status of animals is a topic that has received little scholarly attention from a statistical perspective. This survey is the first in Australia to attempt to measure the extent to which the community knows of, and/or agrees with, the legal status of animals. As the empirical research undertaken as part of this thesis sought to explore and report on an under-researched area, an exploratory and descriptive approach was taken.

As the three research questions for this empirical study required numeric answers, quantitative research methodology was appropriate. Specifically, a survey was chosen as the means of collecting the necessary data. A self-administered questionnaire was used to conduct the survey at three locations in Victoria: Melbourne City, Ballarat and Warragul. The design of the questionnaire was guided by the research questions as well as learnings from a pilot study. Surveys, including questionnaires of the type used for this research, have limitations. However, the questions and collection method adopted for this study were designed to address these limitations.

The population for the survey was Victorians over the age of 18. A convenient sample of 287 respondents was achieved for the research, which is suitable for exploratory research. This sample method and size do limit the representativeness of the sample. However, the sample quality was improved by selecting the sample from metropolitan as well as regional parts of Victoria. Notwithstanding that the study was confined to the Victorian population, it provides valuable empirical data and a solid foundation for future research.

With the backdrop of these methodological aspects, Chapter 6 will report and analyse the results of the survey.

# **Chapter 6**

## **Results and Analysis of Data**

### **6.1 Introduction**

### **6.2 Survey Respondents**

### **6.3 Knowledge and Awareness of the Legal Status of Animals**

6.3.1 Respondents' Knowledge of the Property Classification of Animals

6.3.2 Respondents' Understanding of the Implications of the Property Status of Animals

### **6.4 Attitudes towards the Property Status of Animals**

6.4.1 Respondents' Attitudes towards the Legal Status of Animals

6.4.2 Relationship between Knowledge and Opinion of Animals' Legal Status

6.4.3 Respondents Who Thought Animals Should be Classified as Property

6.4.4 Respondents Who Thought All or Some Animals Should Not be Classified as Property

### **6.5 Perceptions of Different Kinds of Animals**

6.5.1 Attitudes towards Companion Animals

6.5.2 Attitudes towards Farm Animals

6.5.3 Attitudes towards Wild Animals

6.5.4 Variegated Attitudes towards Animals

6.5.5 The Relationship between Attitudes towards Different Kinds of Animals and Attitudes towards the Legal Status of Animals

### **6.6 What Influences Respondents' Perceptions of Animals**

### **6.7 Overall Age Trends**

### **6.8 Overall Gender Trends**

### **6.9 Conclusion**

## 6.1 Introduction

*'All animals are equal but some animals are more equal than others'*.<sup>922</sup>

This chapter presents the key results and findings from the survey.<sup>923</sup> The survey was designed to collect data that would increase understanding of how a sample of people in Victoria perceive animals in terms of broad classifications, and their knowledge of the formal legal status of animals. The findings help to answer one of the thesis questions, namely, whether the current legal status of animals as property is consistent with contemporary community attitudes in Australia.<sup>924</sup> The answer to this question is important as it leads to the second question of this thesis, which seeks to identify an alternative legal status for animals that is more in conformity with modern community attitudes.<sup>925</sup>

As explained in Chapter 5, data collection was completed between December 2013 and July 2014. Data was collected at three locations, namely, Melbourne, Ballarat and Warragul. The main goal of this empirical study was to find answers to three specific research questions. First, the survey aimed to determine whether the community is aware that animals are legally classified as property. Second, the survey sought to determine whether the community agrees with the legal classification of animals as property. Third, the survey intended to find out whether specific kinds of animals (pet animals, farm animals and wild animals) are perceived by the community as property, or whether some other category better reflects their perception of these animals.

The results reveal that more than half of the respondents were unaware that animals are classified as property, and that a third of the respondents believe that only some animals should be classified as property. The results further reveal that in none of the three categories of animals were they perceived or classified by respondents predominantly as property.

This chapter begins by identifying the demographics of the survey respondents in Section 6.2. Section 6.3 then highlights the survey results that indicate that most respondents were unaware of the property status of animals and of the implications of classifying animals as property. Section 6.4 reports that most respondents did not agree with the property status of at least some animals or did not know if animals should be property. Section 6.5 reports that most respondents did not perceive companion animals, farm animals and wild animals as property,

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<sup>922</sup> George Orwell, *Animal Farm* (Harcourt, Brace and Company, 1946).

<sup>923</sup> The complete set of results are provided in Appendix B.

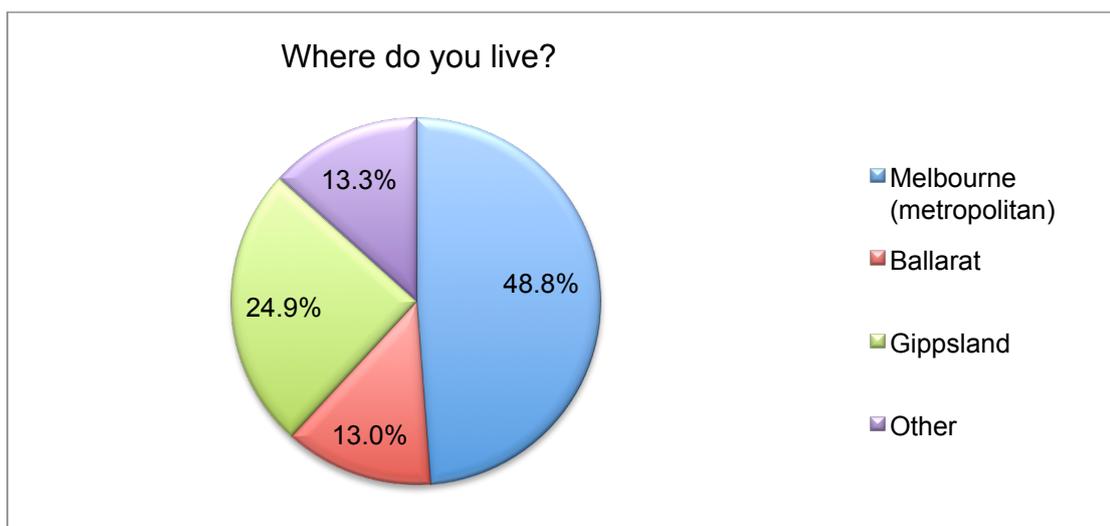
<sup>924</sup> The research questions for this thesis are set out in Chapter 1 section 1.2.

<sup>925</sup> The second research question is addressed in Chapter 7.

and that attitudes towards these three categories of animals were variegated. Section 6.6 provides results that indicate that personal experience and education were more influential in shaping respondents' attitudes towards animals, while religion did not play a significantly influential role. Sections 6.7 and 6.8 dissect the survey results to reveal age and gender trends, respectively. Based on these empirical results, section 6.9 concludes that the legal status of some animals at least may be inconsistent with community attitudes, thus making the second research question of this thesis relevant.

## 6.2 The Survey Respondents

A total of 287 surveys were completed. Almost half (49%) of the survey respondents lived in metropolitan Melbourne (see Figure 6.1 below). The remaining respondents were mostly from the two Victorian regions targeted for the survey, namely, Gippsland (25%) and Ballarat (13%). A further 13% of respondents resided in other parts of Victoria.



**Figure 6.1 – Location of respondents**

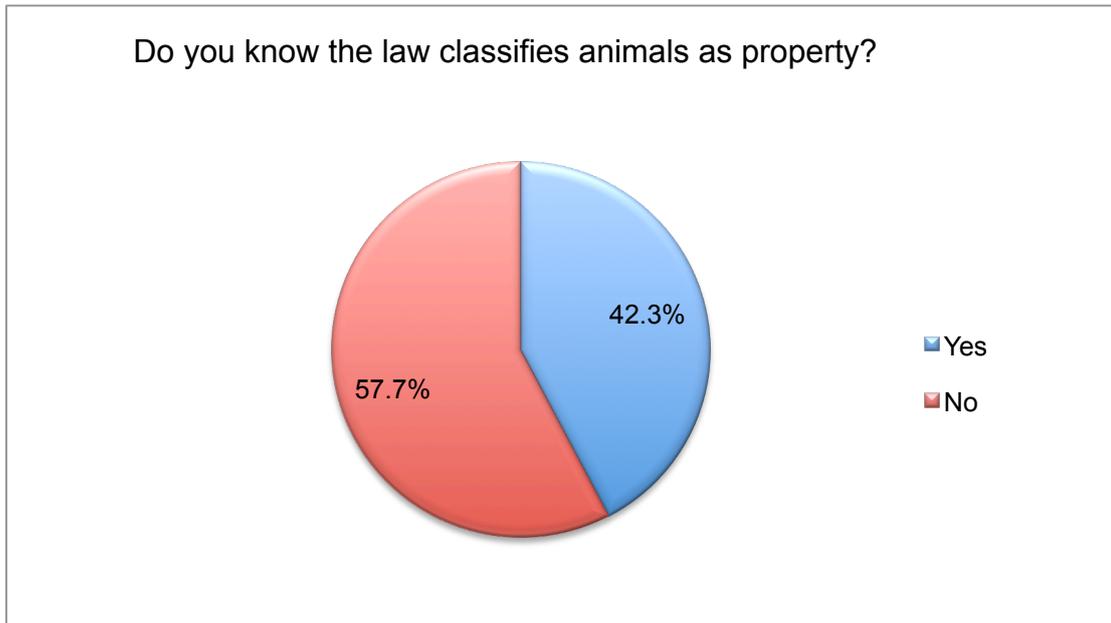
There was an almost equal number of male (49%) and female (51%) respondents. Forty-four percent of the respondents were aged between 18 and 35. Thirty-two percent were aged between 36 and 60, while 23% were over the age of 60. The significance of these demographics is discussed below.<sup>926</sup>

<sup>926</sup> See sections 6.7 (age) and 6.8 (gender).

## Section 6.3 Knowledge and Understanding of the Legal Status of Animals

### 6.3.1 Respondents' Knowledge of the Property Classification of Animals

Question 7 asked respondents: 'Do you know the law classifies animals as property?'. Out of the 286 participants who responded to question 7, a majority indicated they did not know that animals are legally classed as property. Figure 6.2 illustrates these findings.



**Figure 6.2 – Respondents' knowledge of the current legal status of animals**

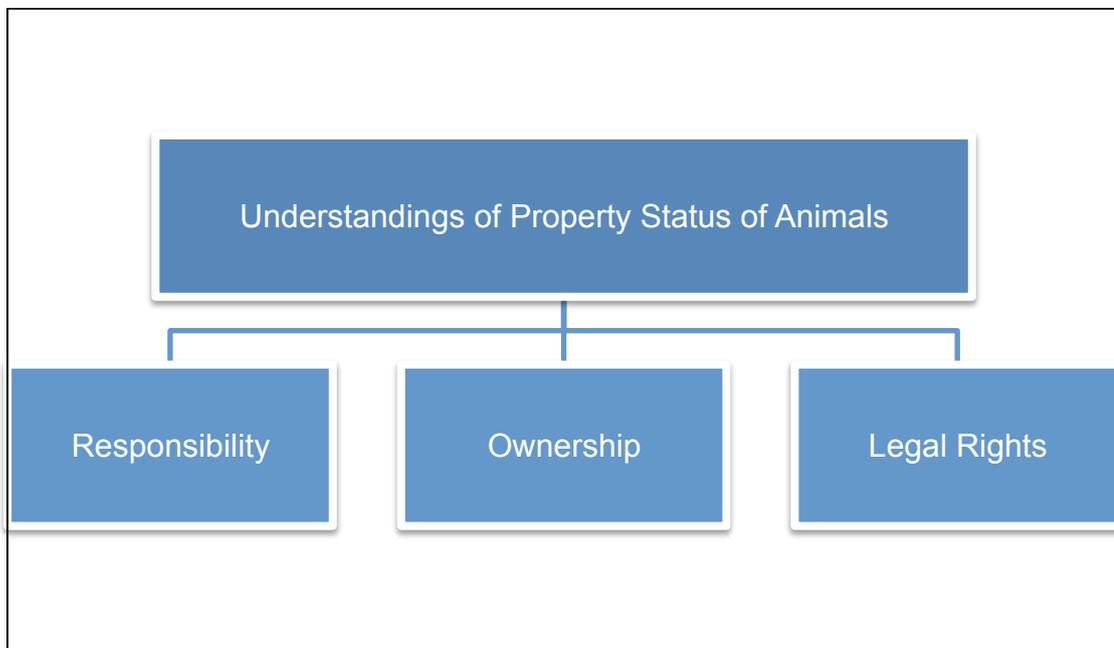
A lack of awareness in the community on this scale could provide an explanation for why the legal status of animals has remained unchanged for so long (see Chapter 2). A community that is unaware of the legal status of animals is unlikely to evaluate the moral correctness or necessity of the status. Such a community is also unlikely to consider alternative ways of legally categorising animals.

This finding suggests that efforts should be made to create better awareness of the current property status of animals, its implications and its alternatives. Doing so would not only educate members of the community about the current legal status of animals, it would also encourage them to think about the implications of labeling and treating animals as property. It would also prompt members of the community to consider alternative ways of legally treating animals. This in turn would allow law and policy makers to more easily gauge whether or not the community agrees with the legal frameworks that regulate human interactions with animals.

### 6.3.2 Respondents' Understanding of the Implications of the Property Status of Animals

Responses to Question 9 also provide some insight in measuring the extent of knowledge regarding the legal status of animals. Question 9 was an open question that asked respondents: What do you think it means to classify animals as property?

One in three respondents indicated they 'didn't know' what it means to classify animals as property. Sixty-seven percent (191) of the respondents wrote down their opinion in the comments section. Figure 6.3 below sets out the key themes to emerge from the responses provided by survey participants regarding their understanding of the current legal status of animals. All the responses are set out in Appendix B.



**Figure 6.3 – Respondents' understanding of the implications of the property status of animals**

#### 6.3.2.1 Responsibility

Out of the 191 respondents who commented, 35% (66) made reference to the words 'responsibility', 'responsible', 'liability', 'liable' or 'care'. The sentiments behind the comments on care, responsibility and liability seem to be similar, in that they allude to the legal obligation an animal owner has to care for the animal and to take legal responsibility for any harm that may be caused by the animal.

For example, forty-six respondents made reference to the words 'responsibility' or 'responsible', with specific representative statements including:

"Domestic animals need to be property so you can be responsible. Different story for wild animals, everyone's responsibility but nobody's property."

"It means there is a legal relationship between an animal and a human being which gives the human being control and responsibility over the animal."

"Some human being is taking responsibility for them."

"I think it means that you have a responsibility to treat your animals humanely & if necessary legal action can be taken against you if you don't."

"That there is someone somewhere who is responsible for the health and wellbeing of said animal, also if the animal causes harm to someone/thing then they are held legally responsible for any damages caused by the animal."

A smaller number of respondents (18) referred to notions of care rather than responsibility when asked what they understood to be the implications of the property classification. Examples of such responses include:

"To care and look after animals humanely."

"Take care/nurture them."

"They are your's [*sic*] to take care of and ensure their health and safety."

"It means that humans own and should take great care of the animal in their care."

Two respondents used the words 'liable' or 'liability' in their comments:

"Liability and responsibility"

"[L]iable for any damage they cause - ensure safety of animal - ensure animals not neglected etc."

These responses indicate that the respondents associated the property status of animals with legal duties imposed with respect to the ownership or control of animals. This illustrates that respondents did not have an entirely accurate understanding of what it means to be classified as property in law. Whilst it is true that owners have responsibilities towards animals they own, such responsibilities do not stem from the property status of animals. Rather, such obligations may arise from animal welfare laws, tort law as well as other regulatory schemes, such as dangerous dogs legislation. As explained in Chapter 2, animal welfare laws in fact operate as

restrictions on property rights.<sup>927</sup>

Animal welfare laws are certainly valuable tools for protecting the interests of animals, but the property status of animals is not a pre-requisite for the operation of animal welfare laws. Animal welfare obligations can arguably be imposed on humans even if animals were not legally classified as property. For example, if humans were to become guardians rather than owners of animals, they could still be subjected to animal welfare laws. Even if animals were to be treated as legal persons, animal welfare laws could still operate to regulate human interactions with animals. Accordingly, it is a misconception to think that the *property status* of animals imposes animal welfare obligations on owners.

This misconception on the part of the respondents is understandable, however, as laypersons cannot be expected to appreciate the nuances of legal concepts such as ‘property’.

These results reiterate the potential value of education about the legal status of animals. They reveal a space for educating the community not only about the property status of animals, but also the implications of that status. It would be valuable to run campaigns educating the community that welfare requirements do not flow from the property status. Instead, the community can be educated that the responsibilities and obligations placed on animal owners actually restrict the property rights of owners. Such knowledge would empower members of the community to decide whether they agree with the property classification of animals, and further facilitate informed debate about the legal status of animals.

### **6.3.2.2 Ownership**

Thirty-five percent (66) of the 191 responses used the words ‘own’, ‘ownership’ or ‘owned’ when explaining what they thought it means to classify animals as property. Such responses are consistent with an accurate understanding of property as being subject to ownership and trade. Among this group, some respondents related the concept of property to an owner’s right to dispose or destroy their property. For example, a vet quoted below shared their experience of having to euthanise animals because of their owners no longer wanting to keep the animals, while another respondent wrote of the ability to dispose of property.

The following are examples of such responses:

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<sup>927</sup> See section 2.7.3.

“Something that can be owned, belongs to someone, looked after and cannot be abused.”

“They can be owned, traded, sold, and belong to owner.”

“To have ownership”.

“Ownership. But not acknowledging that they are living things.”

“It means as a vet I am sometimes forced to put down healthy pups as '0' client want anyone else to have it.”

“It means that you own the animal and that animals do not have their own rights.”

“I think it is a legal definition which assist in the case of laws around owning, harming, trading and containing animals. It makes it easier e.g. to legislate laws regarding dangerous dogs - to name only one example.”

“Can be owned. Can sell and dispose anytime.”

“If you own a pet it could be stolen and therefore considered property. Other people cannot take or abuse your property i.e. pet.”

Overall, these respondents demonstrate an understanding that is closer in accuracy to the implications of the legal classification of animals as property. The concept of ownership certainly does not exhaust the legal implications of animals as property. Such responses show, however, that even though there were a large number of respondents who were unaware of the property status of animals, some were able to correctly recognise the key implications of an animal being classified as property. Such an understanding arguably places these respondents in a better, more informed position to decide whether or not they agree with the property status of animals, and to engage in the debate concerning alternative ways of legally classifying animals.

### **6.3.2.3 Legal Rights**

Eight percent (15) of the respondents made reference to the concept of legal rights when expressing their understanding of the implications of classifying animals as property. Seven of these included statements about animals lacking rights as a result of being property. Contrarily, three responses understood that the property classification granted rights to animals. Five respondents referred to rights as attaching to the animal's owner. Examples of these comments include:

“Assigns rights to and responsibility for the animals affected to specific individuals that are responsible for their care.”

“There are so many variety of animals it is unrealistic to have a generic classification. I assume ‘property’ assumes no freedom or rights.”

“I don’t really know but it sounds to me that they have no “rights” and people can treat them the way they want (badly) not considering what animal is and what freedom belongs to it.”

“They have rights to be respected and treated humanely.”

“They have no rights. You can do what you want - not necessarily good things.”

“To be able to own and treat them in any manner that you deem is your right.”

“Gives them some rights. Responsible for them legally and ethically.”

The majority of responses that dealt with rights demonstrate close approximation to the legal implications of the concept of property. The exceptions were the three answers that describe the property status of animals as conferring to them legal rights. As noted in Chapter 2, property itself cannot have any rights; in its deep sense the quality of being property is antithetical to the concept of being a rights’ holder.<sup>928</sup>

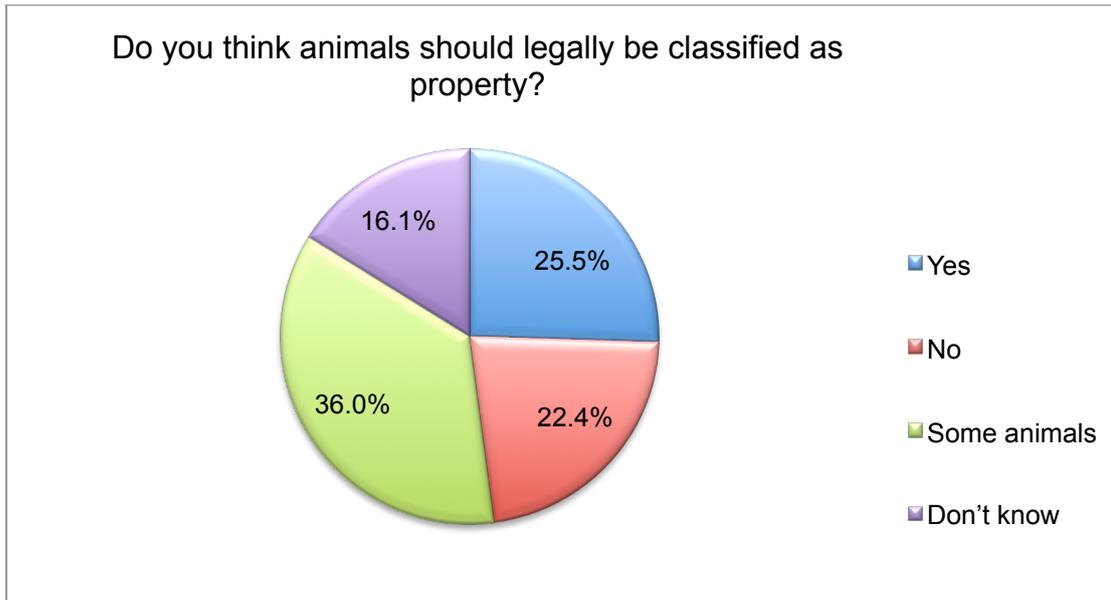
## **6.4 Attitudes towards the Property Status of Animals**

### **6.4.1 Respondents’ Attitudes towards the Property Status of Animals**

Question 8 of the survey asked respondents: ‘Do you think animals should legally be classified as property?’ This question was answered by 286 respondents. The results are illustrated in Figure 6.4.

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<sup>928</sup> As noted in Chapter 2, however, some scholars disagree with this position. They contend that property can have rights. See section 2.6.1.



**Figure 6.4 – Respondents’ views on the legal status of animals**

While a quarter of the respondents agreed with the property status of all animals, 58% of the respondents disagreed with the property status of either all or some animals. These results suggest that the majority of the respondents did not agree with the prevailing status quo. In other words, the property status of at least some animals is inconsistent with the intuitive position of most respondents.

A further 16% indicated that they did not know whether animals should be property, meaning they may or may not necessarily be supportive of the property status of animals. A majority (71%) of these respondents indicated that they were not aware of the property classification of animals. Fifty percent of these respondents also indicated that they did not know the implications of classifying animals as property. Thus, this data suggests that these respondents may not have felt sufficiently informed about the issues surrounding the legal status of animals to form even an intuitive opinion as to whether animals should be property.

Caution needs to be applied when examining the results of question 8. The particular finding has to be read in light of the results of Question 7, which as explained above, suggests that most respondents were not aware of the property status of animals. The fact that over half of the respondents were not aware of the property status of animals means that they would not have had much opportunity or time to think about whether they agreed or disagreed with that status. The immediate response required of respondents forced them to make up their minds on the spot. It is thus possible, that some respondents may not have chosen the same answer for question 8 if they had the time to think of their responses. Nevertheless, taking into account the

lack of awareness about the property status of animals, these results do provide a representation of intuitive responses to the property status of animals. Thus, the results do suggest that the property status of animals is inconsistent with the intuitive attitudes of the respondents.

It should be clarified that respondents were not specifically asked whether they thought the property status of animals should be abolished. Respondents were also not asked whether they supported an alternative legal status for animals. Such questions are best reserved for later research, undertaken after ensuring the respondents are informed of the current legal status of animals and its implications. In the absence of this background knowledge, there would be a risk of collecting data that reflects intuitive responses rather than considered public opinion.

#### **6.4.2 Relationship between Knowledge and Opinion of Animals' Legal Status**

Thirty-nine percent (47) of the 121 respondents who knew animals are legally classified as property agreed with that classification. Eleven percent (13) thought animals should not be classified as property, 40% (48) said that some animals should be classified as property. Eleven percent (13) of the respondents who knew of the property status of animals indicated that they did not know if animals should be property. Twenty-six percent (31) also said that they did not know the implications of classifying animals as property.

Out of the 165 respondents who said they did not know that animals are classified as property, only 16% (26) agreed with the status. Thirty-one percent (51) entirely disagreed with the property status of animals, while a third of the respondents (55) disagreed with the property status of some animals. Twenty percent (33) of the respondents who did not know of the property classification of animals also did not know if animals should be property. Thirty-eight percent (63) of these respondents also indicated that they did not understand the implications of classifying animals as property.

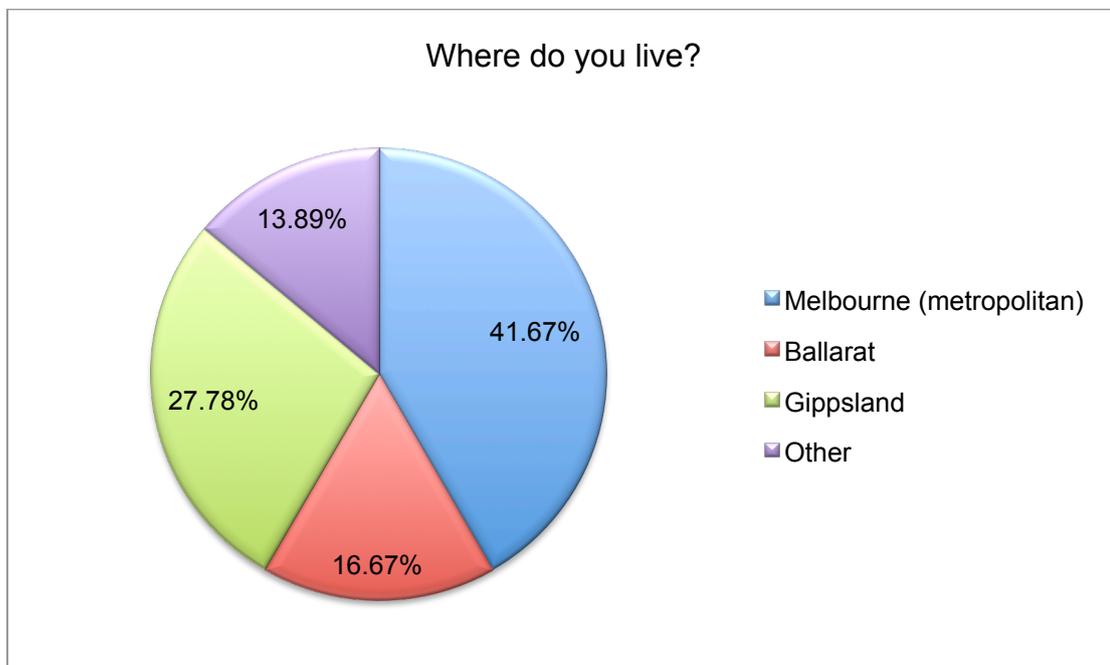
These results suggest that those respondents who were aware of the property classification of animals were more likely to agree with the property status of all animals. Conversely, those who were unaware of this status were more likely to disagree entirely with the status. There appears to be a correlation, therefore, between a person's pre-existing knowledge about the property status of animals and agreement with that status.

Sections 6.4.3 and 6.4.4 delve deeper into the statistics to examine the demographics of the respondents who thought that animals should be classified as property, and the respondents

who thought otherwise.

### 6.4.3 Respondents Who Thought Animals Should be Classified as Property

Twenty-six percent (73) of the 286 respondents who answered Question 8 thought animals should be classified as property. The majority (42) of these respondents who agreed with the property status of all animals were from regional parts of Victoria, while one respondent who agreed with property status of animals did not indicate where they lived. This means respondents living in regional parts of Victoria were more likely to agree with the property status of animals. Or, expressed in another way, respondents living in Melbourne were less likely to agree with the property status of all animals when compared to respondents living in regional Victoria. Figure 6.5 illustrates this result.



**Figure 6.5 – Location of respondents who agreed with the property status of animals**

These results should be put into perspective, however. While regional respondents were more likely than Melbourne-based respondents to agree with the property status of animals, the majority in both groups (59% and 63%, respectively) thought that only some animals should be property. Overall, therefore, the property status of animals appears to be inconsistent with community attitudes in regional Victoria and in Melbourne both.

Out of the 73 respondents who agreed with the property status of animals, 64% (47) indicated

that they were aware of the property status of animals. Thirty-six percent (26) of the 73 respondents said they did not know that animals were classified as property. Twenty-nine percent (21) of these respondents indicated that they did not know the implications of classifying animals as property. These results further suggest a correlation between knowledge about the property status of animals and agreement with that status.

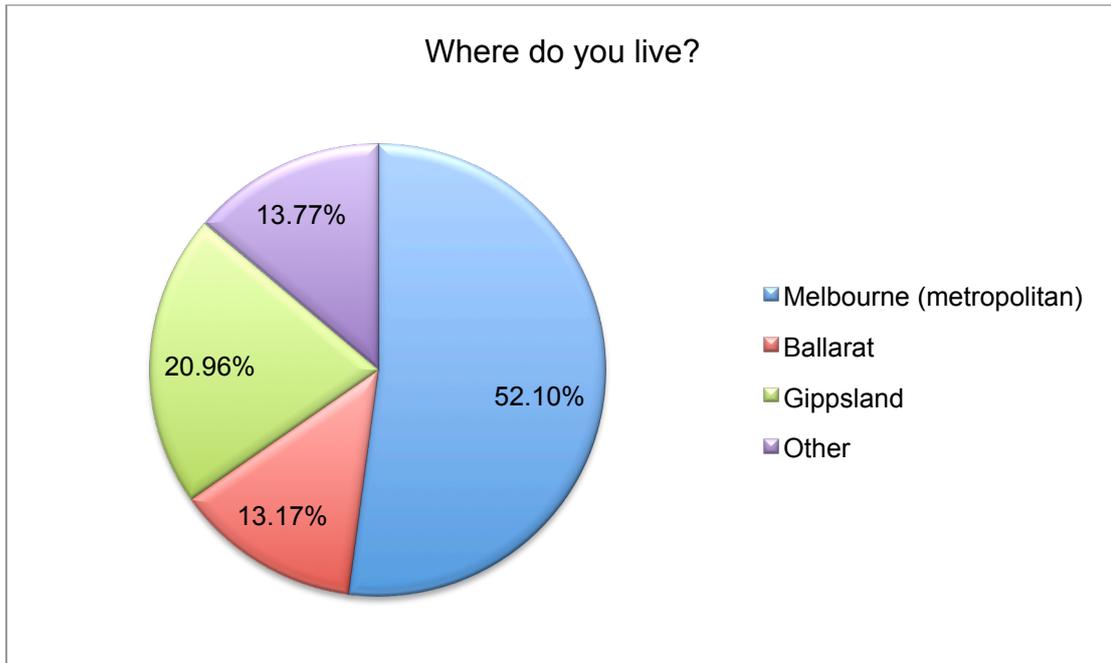
Respondents who agreed with the property status of animals were mostly influenced by their personal experience. Eighty-one percent (58) of these respondents said that their opinion was influenced by personal experience, while 44% (32) indicated that their education had influenced their perceptions. Those influenced by religious and cultural teachings only accounted for 13% (9) of these responses. Television accounted for 8% (6) of these responses.

Pet ownership did not make it significantly more or less likely for respondents to agree or disagree with the property status of animals. Out of the 166 pet owner respondents, 26% (43) thought that all animals should be classified as property. Fifty-eight percent (95) thought that some or all animals should not be classified as property. Sixteen percent (27) did not know if animals should be property. Similarly, 25% (30) of the 121 respondents who did not own pets thought that animals should be property. Sixty percent (72) of the non-pet owner respondents disagreed with the property status of some or all animals. Sixteen percent did not know whether animals should be classified as property. Thus, it seems, attitudes towards the legal status of animals were not significantly affected by pet ownership.

#### **6.4.4 Respondents Who Thought All or Some Animals Should Not be Classified as Property**

As noted above, a majority of the respondents disagreed with the property status of either all or some animals. Twenty-two percent (64) of 286 respondents thought animals should not be classified as property. Thirty-six percent (103) of the 286 respondents thought only some animals should be classified as property. Thus, together, 58% of the respondents thought that at least some animals should not be classified as property.

Respondents from Melbourne and regional Victoria were almost equally likely to take this position. Again, however, it should be remembered that a majority of respondents in both groups thought only some animals should be classified as property. This is illustrated by Figure 6.6.



**Figure 6.6 – Location of respondents who disagreed with the property status of all or some animals**

Most of these 167 respondents did not know that animals were classified as property. In particular, 63% of the respondents expressed this lack of knowledge. Thirty percent (50) of these respondents further said that they did not know what it means to classify animals as property. Again, a correlation between the lack of awareness of the property status of animals and disagreement with that status is evident.

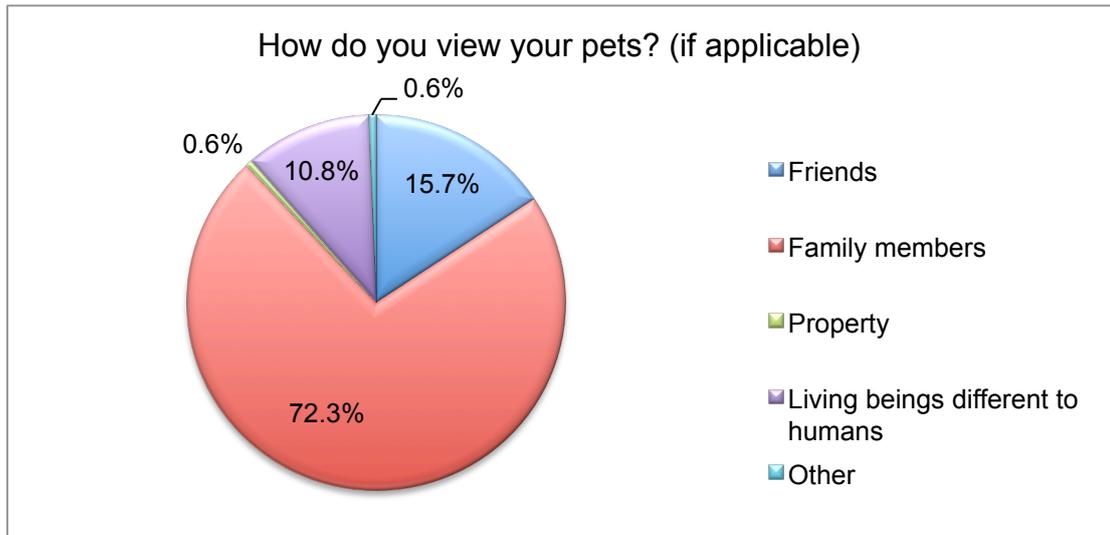
Personal experience again influenced the perceptions of most of these respondents towards animals. This was indicated by eighty-four percent (133) of the respondents. Education was again the second most influential factor, with 43% (68) of the respondents indicating it influenced their perceptions. Eighteen percent (29) of the respondents said that religious and cultural teachings influenced their perceptions towards animals, while television influenced 11% (18) of the respondents.

### **6.5 Perceptions of Different Kinds of Animals**

The survey ascertained the perspectives of respondents towards three different categories of animals: pet animals, farm animals and wild animals. These results are outlined below.

### 6.5.1 Attitudes towards Pet Animals

Of the 166 respondents who indicated that they had a companion animal(s), only a single respondent saw their companion animal as property. The majority of respondents saw companion animals as family members. Some respondents saw their companion animals as friends, while others saw them as living beings different to humans. These results are illustrated by Figure 6.7.



**Figure 6.7 – Respondents’ perspective of their pets**

This result is consistent with other research that has studied the relationship between companion animals and their owners. For example, the Australian Pet Ownership Survey, which surveyed 1,089 pet owners, found that nearly 90% of dog and cat owners considered their pets to be a member of their family.<sup>929</sup> Similarly, the National People and Pets Survey undertaken in 1995 found that 91% of the pet owners surveyed felt ‘very close’ to their pets.<sup>930</sup> The *Contribution of the Pet Care Industry to the Australian Economy* report, commissioned by the Australian Companion Animal Council (ACAC) in 2006, similarly noted the results of an Australian Newspoll which ‘explored the concept of being a “parent” as opposed to a pet “owner”’.<sup>931</sup> The Newspoll survey had found that 85% of pet owners considered their companion

<sup>929</sup> Animal Health Alliance, *Pet Ownership in Australia* (2013), 27 <[https://petsinaustralia.com.au/wp-content/themes/\\_TBST-BusinessAccelerator-v3/library/Downloads/Pet-Ownership-in-Australia-2013.pdf](https://petsinaustralia.com.au/wp-content/themes/_TBST-BusinessAccelerator-v3/library/Downloads/Pet-Ownership-in-Australia-2013.pdf)>.

<sup>930</sup> Urban Animal Management Coalition, *National People and Pets Survey* (January 1995), 19 Petnet <[http://www.i-pet.net.au/sites/default/files/PIAS\\_-\\_National\\_People\\_and\\_Pets\\_1994.pdf](http://www.i-pet.net.au/sites/default/files/PIAS_-_National_People_and_Pets_1994.pdf)>.

<sup>931</sup> Australian Companion Animal Council, *Contribution of the Pet Care Industry to the Australian Economy* (2006) Animal Health Alliance <<http://www.animalhealthalliance.org.au/files/Contribution%20of%20the%20Pet%20Care%20Industry%20to%20the%20Australian%20Economy.pdf>>.

animal to be 'a part of the family, like a child'.<sup>932</sup> A subsequent report prepared for the ACAC in 2010 recognised that the increasing perception of companion animals as family members was being reflected in the growth of pet food and pet care industries:

The continued trend of pets becoming a part of the family is having an ongoing and increasing impact on the pet food and pet care market place, with consumers placing greater value on the health and well-being of their pets. This trend has led to growth in premium pet foods as well as more specialised foods and health care products for pets.<sup>933</sup>

Franklin has explored perceptions of the public with respect to companion animals more thoroughly through surveys, focus groups and interviews. He found that 88% of respondents answered yes to the question 'Do you think of any animals you keep as members of your family?'.<sup>934</sup> He then explored this perception further by asking respondents about where their companion animals were allowed in the house. Franklin explains:

To see whether ascribing family status to animals meant anything more than just sentimental labels, we asked whether companion animals had access to those parts of the house historically reserved for humans. Anecdotal evidence suggests that in the 1950s and before, animals were largely kept out of the house, sleeping in kennels or on verandahs. Today this is very much not the case. We scaled questions according to where animals were allowed in the house, from the backyard at one extreme to the bedroom and on furniture, including beds, at the other. Over half of respondents claimed their companion animals were allowed in their bedroom and 35 percent allowed animals in their children's bedroom. Forty-eight per cent of households allowed animals on their furniture. Seventy-six percent allowed their animals into the family room or lounge, 62 per cent allowed their animals in the room where they eat and 66 per cent allowed them in the kitchen. In other words companion animals mostly have the run of the house...

The symbolism of household space needs to be emphasised here. Bedrooms are largely highly private spaces, the inner sanctum of privatised societies. Partners, close friends and siblings and other close family members form the restricted group of intimates using bedrooms together. So in this sense when people in our survey stated that an animal was *both* a member of the family *and* allowed into their bedroom, it was a refined answer indicating that they were not just a member of the family but a very close intimate member...in the past when dogs were kept outside, or when they were allowed inside but not on furniture, their separate, inferior status was being marked. To discover that half of those interviewed allowed their

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<sup>932</sup> Ibid.

<sup>933</sup> Australian Companion Animal Council, *Contribution of the Pet Care Industry to the Australian Economy* (2010) <[http://www.acac.org.au/pdf/ACAC%20Report%200810\\_sm.pdf](http://www.acac.org.au/pdf/ACAC%20Report%200810_sm.pdf)>.

<sup>934</sup> Franklin, *Animal Nation*, above n 65, 208.

animals on furniture is to uncover a major shift in their status and position relative to humans and human society.<sup>935</sup>

In later interviews with veterinarians, Franklin was told about people who were proud to admit that their pet was their 'substitute child'.<sup>936</sup> Such qualitative data complemented Franklin's survey results and supported his conclusion that companion animals were regarded as family members.

Conclusions about the family status of animals must, however, be understood in light of statistics on animals received by animal shelters. The Royal Societies for the Prevention of Cruelty to Animals (RSPCA) is perhaps the largest and most recognised animal shelter operator in Australia, with 40 animal shelters around the country.<sup>937</sup> According to its Annual Statistics for 2012-13, the RSPCA received 126,673 animals in its shelters, including 49,189 dogs, 49,236 cats and 7,228 small pets such as mice, rabbits, guinea pigs, birds, fish and ferrets.<sup>938</sup> Out of the 49,189 dogs received by the RSPCA shelters in 2012-13, 36.5% were reclaimed or reunited with their owners (especially through the help of microchip identification).<sup>939</sup> While there was a decrease in the number of dogs euthanised by the shelters, 21.1% of the dogs and puppies received by the shelters were euthanised.<sup>940</sup> Out of the 49,236 cats that were received by the shelters, only 4.6% were reclaimed or reunited with the owners.<sup>941</sup> Though the euthanasia rate for cats in 2012-13 was the lowest ever, this still amounted to 39.5%.<sup>942</sup> Steven White examines the limited data and literature on the reasons owners give for relinquishing companion animals in Australia,<sup>943</sup> and finds that those are largely 'owner-centric' reasons.<sup>944</sup> Owner-centric reasons include unwanted litter, accommodation problems, owners' health issues such as allergies, incompatibility of the animal with the family, a new child entering the family, incompatibility with other pets and lack of time.<sup>945</sup> White concludes that the data is in contrast to the recognition of animals as family members:

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<sup>935</sup> Ibid 210-212.

<sup>936</sup> Ibid 15.

<sup>937</sup> RSPCA, *About Us* <<http://rspca.org.au/what-we-do/about-us>>.

<sup>938</sup> RSPCA, *RSPCA report on animal outcomes from our shelters, care and adoption centres: 2012-13*, 2 <[http://www.rspca.org.au/sites/default/files/website/The-facts/Statistics/RSPCA-report\\_on\\_animal\\_outcomes-2012-2013.pdf](http://www.rspca.org.au/sites/default/files/website/The-facts/Statistics/RSPCA-report_on_animal_outcomes-2012-2013.pdf)>. The remaining animals received by the RSPCA shelters were made up of 267 horses, 3,406 livestock and 17,347 wildlife (eg. wombats, kangaroos, possums and reptiles).

<sup>939</sup> Ibid.

<sup>940</sup> Ibid 5.

<sup>941</sup> Ibid 9.

<sup>942</sup> Ibid.

<sup>943</sup> White, 'Companion Animals', above n 26, 863.

<sup>944</sup> Ibid 864.

<sup>945</sup> Ibid.

The fate of many of these animals – including young, healthy animals – is death. These companion animals are legally discarded, with no regulatory sanction falling upon those who relinquish their animals. There is, therefore, a striking tension in the way society regards companion animals. On the one hand, they are affectionately regarded as members of the family. On the other hand, the role of animal shelters shows that they are also regarded as dispensable, being freely discarded in significant numbers each year.<sup>946</sup>

Thus, even though companion animals are commonly regarded as members of the family, and despite companion animals having access to some of the most intimate spaces in a family home, there are still significant numbers of owners that relinquish ownership of their animals when their personal interests override their sentiments towards the animals. This suggests that the behaviour of animal owners may not always accord with their perception of animals as family members. Moreover, attitudes towards companion animals can be said to be quite ambivalent.

It ought to be clarified that the perception of companion animals as family members does not imply support for animal personhood. Indeed, respondents were not asked if they saw their companion animals as persons. Rather, the result suggests that respondents' concept of 'family' extends to animals. Different communities can attach different meanings to the concept of a family. For example, some cultures consider a family unit to comprise of parents and their children, while in other cultures a family unit also includes extended family members (such as grandparents).<sup>947</sup> It seems for many pet owner respondents, the concept of family also includes companion animals.<sup>948</sup>

### **6.5.2 Attitudes towards Farm animals**

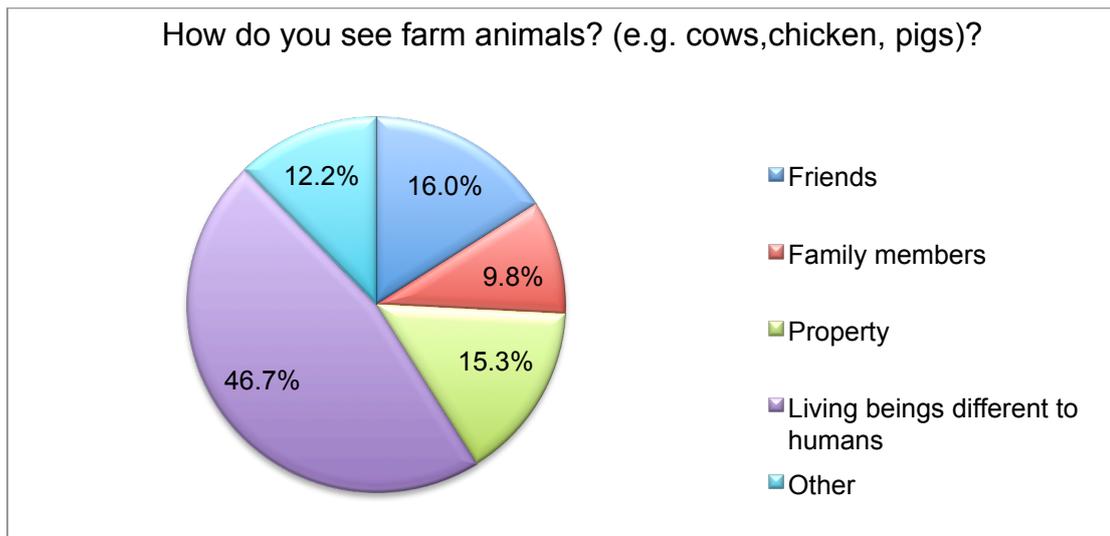
When it came to farm animals, the majority of respondents did not perceive them as property. Close to half of the respondents elected to describe their perception of farm animals as 'living beings different to humans', while a quarter of the respondents viewed them as either friends or family members. These results are detailed in Figure 6.8.

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<sup>946</sup> Ibid 864-5.

<sup>947</sup> Mary Patricia Treuthart, 'Adopting a More Realistic Definition of "Family" (1990) 26(1) *Gonzaga Law Review* 91, 96-7.

<sup>948</sup> See also, Susan Phillips Cohen, 'Can Pets Function as Family Members?' (2002) 24(6) *Western Journal of Nursing Research* 621, 621.



**Figure 6.8 – Respondents’ perspective of farm animals**

Although respondents who selected ‘property’ as the preferred way of describing their view of animals were not in the majority, it is notable that farm animals were more likely to be perceived as property than other animals. As noted in sections 6.5.1 and 6.5.3, only one pet owner elected to describe their perception of their pets as property, while no one chose to express their perception of wild animals as property. In contrast, 15% of the survey respondents indicated that they perceived farm animals as property. The greater tendency to perceive farm animals as property may suggest that farm animals are more likely than other animals to be seen in light of their instrumental, rather than inherent, value.

Nonetheless, the majority of the respondents chose to record their perception of farm animals as ‘living beings different to humans’ rather than as property or friends or family members. This could suggest that these respondents distinguished animals from inanimate things as well as persons, although the question did not specifically ask respondents whether they saw farm animals as persons. Such an interpretation of these results would need to be verified in future research. If verified, however, it could add weight to the proposal for the introduction of a new and separate legal category for animals. This proposal is examined in greater detail in Chapter 7.<sup>949</sup>

It was anticipated that respondents from regional Victoria would be more inclined to see farm animals as property given that animal farming is generally carried out in the regional parts of Victoria. That is, in these areas, farm animals may be more likely to be seen as having an economic value and hence be considered more closely equivalent to other economic units,

<sup>949</sup> See section 7.4.4.

given the closer geographic proximity of such respondents to communities whose economic health is connected to animal industries. There was no significant difference, however, between the responses of respondents from regional Victoria and Melbourne. Seventeen percent of the respondents from regional Victoria saw farm animals as property, while 14% of the Melbournian respondents saw farm animals as property.

The interpretation of the results of the survey that many people perceive farm animals as more than mere property is consistent with the extent of concern that has been demonstrated for farm animals in recent years. For example, Australians' concern for farm animals was highlighted by the results of the Animal Tracker survey commissioned by Voiceless and undertaken by the Humane Research Council.<sup>950</sup> The survey had a sample of 1,041 adults from all Australian states and territories. The study made various findings with respect to community perceptions of the adequacy of welfare laws concerning farm animals and the live export trade. In particular, there was a high degree of community support for improving conditions for farm animals. For example, a majority of the respondents surveyed by the Humane Research Council supported the proposition that farm animals should be given the space to 'exhibit their natural behaviours' and to have access to the outdoors.<sup>951</sup> The survey also found that most Australians believe farm animals should receive the same protection as companion animals.<sup>952</sup> Additionally, the study found that most Australians believe the wellbeing of animals subject to the live export trade is important.<sup>953</sup> While the Animal Tracker study did not ask respondents about the legal status of animals, the concerns highlighted in the survey do add weight to the suggestion that animals are not perceived as mere property.

The interpretation of the survey results that respondents see farm animals as more than mere property is also consistent with the public response to a live export cruelty investigation that aired on the 'Four Corners' program on ABC TV on 30 May 2011.<sup>954</sup> Video footage of cruelty inflicted on cattle exported to Indonesia caused an intense public response that prompted the Australian Government to suspend live export.<sup>955</sup> Within three days of the episode airing, a petition to ban live export containing 160,000 signatures was delivered to the federal parliament.<sup>956</sup> The public response ultimately led to the introduction of the Exporter Supply

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<sup>950</sup> Humane Research Council, above n 46.

<sup>951</sup> Ibid 10.

<sup>952</sup> Ibid 3.

<sup>953</sup> Ibid 2.

<sup>954</sup> Australian Broadcasting Corporation, 'A Bloody Business', *Four Corners*, 30 May 2011 (Sarah Ferguson) <[http://www.abc.net.au/4corners/special\\_edts/20110530/cattle/](http://www.abc.net.au/4corners/special_edts/20110530/cattle/)>.

<sup>955</sup> Joe Ludwig, 'Minister suspends live cattle trade to Indonesia' (Media Release, DAFF11/174L, 8 June 2011).

<sup>956</sup> Catherine Tiplady, Deborah-anne Walsh and Clive Phillips (2013) 26(4) 'Public response to media coverage of animal cruelty', *Journal of Agricultural and Environmental Ethics* 869, 872.

Chain Assurance System in October 2011, which requires exporters of live cattle to ensure minimum welfare standards are met in the importing country.<sup>957</sup> Such a strong response may not have been possible if the cattle were perceived as mere property.

Concern within the Australian public for the welfare of farm animals is also highlighted by consumer trends in relation to ethically produced animal products, which has in turn affected the behavior of Australian farmers, producers, suppliers and retailers. According to Woolworth's Corporate Responsibility Report for 2013, demand for free range, barn laid and organic eggs is continuing to grow.<sup>958</sup> These now make up almost 50% of all sales in the egg category. Conversely, demand for caged eggs is declining each year.<sup>959</sup> These trends have led Woolworths' to phase out the sale of caged eggs in its stores by December 2018.<sup>960</sup>

Further, in response to 'overwhelming feedback' from customers regarding their confusion on free range stocking density requirements, Woolworths will now label the relevant stocking density on egg packaging.<sup>961</sup> In addition, it is planning to use only RSPCA approved, or equivalent, standard chicken in its Own Brand products by the end of 2018.<sup>962</sup> Woolworths also claims to source 99% of its fresh pork range from farms that only use gestation stalls for less than 10% of the sow's gestation period.<sup>963</sup>

Coles supermarket has also committed to animal welfare, stating in its corporate social responsibility policy that all Coles Brand fresh chicken is RSPCA approved.<sup>964</sup> It too has phased out Coles Brand caged eggs as well as sow stalls in the production of Coles Brand fresh pork, ham and bacon.<sup>965</sup> Coles claims its free range pork and turkey products are sourced from RSPCA approved farms.<sup>966</sup> When announcing these achievements, Coles attributed the development to consumer demand:

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<sup>957</sup> Department of Agriculture, *Exporter Supply Chain Assurance System (ESCAS)* (21 January 2015) <<http://www.agriculture.gov.au/biosecurity/export/live-animals/livestock/information-exporters-industry/escas/>>.

<sup>958</sup> Woolworths Limited, *Corporate Responsibility Report* (2013), 22 <[http://www.woolworthslimited.com.au/CRRReport/2013/downloads/Woolworths\\_Limited\\_Corporate\\_Responsibility\\_Report\\_2013.pdf](http://www.woolworthslimited.com.au/CRRReport/2013/downloads/Woolworths_Limited_Corporate_Responsibility_Report_2013.pdf)>.

<sup>959</sup> *Ibid.*

<sup>960</sup> *Ibid.*

<sup>961</sup> *Ibid.*

<sup>962</sup> *Ibid.* 23.

<sup>963</sup> *Ibid.* 22.

<sup>964</sup> Coles Limited, *RSPCA Approved* <<http://www.coles.com.au/corporate-responsibility/responsible-sourcing-and-sustainability/rspca-approved>>.

<sup>965</sup> Coles Limited, 'Better Animal Welfare at Coles' on Coles Limited, *Coles Blog* (9 January 2013) <<http://blog.coles.com.au/2013/01/09/better-animal-welfare-at-coles/>>.

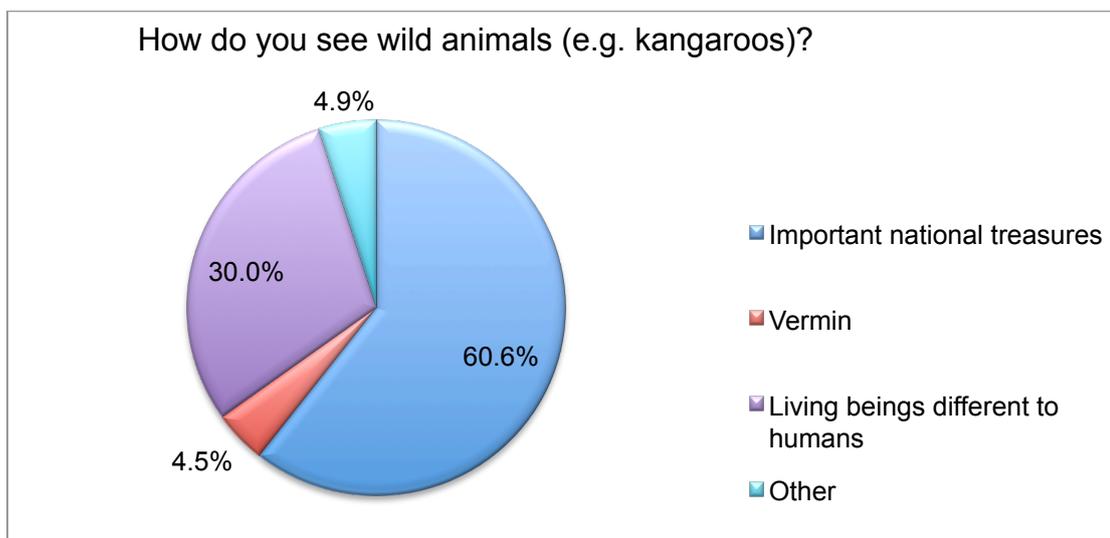
<sup>966</sup> Coles Limited, *RSPCA Approved*, above n 964.

These major animal welfare initiatives are a response to demand from our customers for more responsibly sourced products and will see 34,000 mother pigs no longer kept in stalls for long periods of their lives and 350,000 hens freed from cages. We announced both these targets in 2010 with a deadline of 2014 set for ending the use of sow stalls and 2013 for the move out of caged eggs. Now our customers across Australia can enjoy welfare friendly pork and eggs at Coles from January 2013.<sup>967</sup>

It can clearly be discerned from these voluntary animal welfare improvements led by consumer demand, as well as the Animal Tracker study and live export petition discussed above, that concern about the welfare of farm animals is increasing. Such attitudes add strength to the argument that animals are perceived as more than mere property. Advocacy groups and policymakers may thus be well served in considering whether an alternative legal status for animals could assist in responding to concerns about the welfare of farm animals.

### 6.5.3 Attitudes towards Wild Animals

None of the respondents to the survey saw wild animals as property. Most respondents chose to describe their perception of wild animals as important national treasures, while many respondents also elected to describe their perception of wild animals as living beings different to humans. Some respondents considered wild animals to be pests. These responses are illustrated in Figure 6.9.



**Figure 6.9 – Respondents’ perspective of wild animals**

<sup>967</sup> Coles Limited, ‘Helping Australians with better animal welfare’ on Coles Limited, *Coles Blog* (24 October 2014) <<http://blog.coles.com.au/2012/10/24/helping-australians-with-better-animal-welfare/>>.

The results of this question must be treated with caution as many respondents verbally expressed difficulty in selecting only one answer for this question. Some stressed that they had different opinions about different species of wild animals. For example, while they might designate kangaroos as important national treasures, they regard foxes as vermin. Some respondents also indicated that a particular species of animal could be perceived in more than one way. Kangaroos, for instance, could be important national treasures but also pests to farmers. Further, the fact that only kangaroos were noted as an example of wild animals may have influenced the responses to this question. Listing foxes and cane toads as further examples of wild animals could arguably have elicited different responses. In hindsight, therefore, this question should have been phrased in more precise and balanced terms. The difficulty expressed in answering this question does highlight that if the law were to reflect community attitudes, a variegated system that categorises different species of animals differently may be more in keeping with public opinion.<sup>968</sup> Further, in future research, survey questions may need to focus on different species of animals or, at least, narrower categories for describing animals.

Despite the imprecise nature of this question, however, it is notable that none of the respondents saw wild animals as property. It again supports the proposition that animals are not seen as property. Further, so far as animals that are not in the possession or control of humans are concerned, this result suggests the law is consistent with community attitudes. As explained in Chapter 2 (see section 2.2), animals living in a wild state are not considered to be property. This legal status is thus consistent with the perceptions of wild animals reported by the respondents in this survey. Such a conclusion cannot be reached in respect of wild animals that are subject to qualified property (ie animals within the possession or control of humans). The legal status of such animals as a form of property is not consistent with the attitudes of the respondents.

#### **6.5.4 Variegated Attitudes towards Animals**

While most respondents did not see the different categories of animals as property, it appears that some animals are more likely than others to be seen as property. Farm animals in particular were more likely to be seen as property in comparison to pets and wild animals. Wild animals, on the other hand, were the least likely to be perceived as property.

It was also noticeably evident in this study that respondents have different sentiments and

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<sup>968</sup> The regulatory framework for wild animals, which provides different degrees of protection for different kinds of wild animals (such as native animals, endangered animals and introduced species) may in fact be consistent with these verbally expressed opinions. See generally, White, 'British Colonialism, Australian Nationalism and the Law', above n 343.

attitudes towards different categories of animals. While pet animals were mostly considered as family members, farm animals were most commonly seen as living beings different to humans. Wild animals, on the other hand, were most commonly designated as important national treasures (although, as noted above, some respondents found it difficult to choose between this option and 'vermin'). This finding confirms what other scholars have observed about human attitudes towards different kinds of animals.

Humans' tendency to treat different kinds of animals inconsistently has been observed by several scholars.<sup>969</sup> Some animals, such as pet animals, are much loved and cared for by their human owners. Others, such as farm animals, are subjected to various degrees of harm that would be considered unacceptable if directed at pet animals. This inconsistent treatment is reflected within the legal system, as different regulatory frameworks operate to regulate human interactions with different kinds of animals. Thus, while pet animals enjoy the greatest level of protection under animal welfare laws, farm animals are generally excluded from the protections of animal welfare statutes.<sup>970</sup> Accordingly, the law may already reflect community attitudes so far as it provides different levels of protection for different kinds of animals.

#### **6.5.5 The Relationship between Attitudes towards Different Kinds of Animals and Attitudes towards the Legal Status of Animals**

The respondents' general attitudes towards pets, farm animals and wild animals appear to correspond to attitudes towards the legal status of animals. The finding that few respondents perceived the three categories of animals as property may explain why a majority of the respondents did not agree with the property status of all animals. Respondents' variegated attitudes towards different categories of animals may also explain why many respondents thought only some animals should be classified as property.

While the survey did not ask respondents to specify which animals they believed should be classified as property, the results of Questions 3-5 indicate that respondents would have been less likely to agree with the property classification of companion animals and wild animals. Only one respondent saw their pet as property, and none of the respondents saw wild animals as property. Thus, respondents may be more likely to disagree with the property status of

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<sup>969</sup> See Siobhan O'Sullivan, *Animals, Equality and Democracy* (Palgrave Macmillan, 2011), 9-24; Hal Herzog, *Some We Love, Some We Hate, Some We Eat: Why It's So Hard to Think Straight About Animals* (Harper, 2010); Jodey Castricano, *Animal Subjects: An Ethical Reader in a Posthuman World* (Wilfrid Laurier University Press, 2008), 259; James Serpell, *In the Company of Animals: A Study of Human-Animal Relationships* (Cambridge University Press, 1996), 13.

<sup>970</sup> See Chapter 2 section 2.7.2 for an overview of the differential regulatory treatment of different kinds of animals.

companion and wild animals. As a greater number of respondents (44) saw farm animals as property, respondents would have arguably been more likely to agree with the property status of farm animals.

Nevertheless, there does appear to be some inconsistency between attitudes towards animals and attitudes towards the property status of animals. Overall, only a small number of respondents perceived animals as property, yet 62% of the respondents believed that all or some animals should be classified as property. This highlights an inconsistency between the sentiments respondents attach to animals and their opinions on the legal status of those animals. For these results to be consistent, most respondents would have opined that animals should not be classified as property at all. This was not the case. The only way these results could be regarded as consistent is if respondents had in mind other broad categories of animals not covered by the survey, for example, fish, animals used for entertainment or sport, animals used in research or wild animals held in captivity. Otherwise, it is difficult to see a reflection of respondents' perspectives of the different categories of animals in their opinion about the property status of animals.

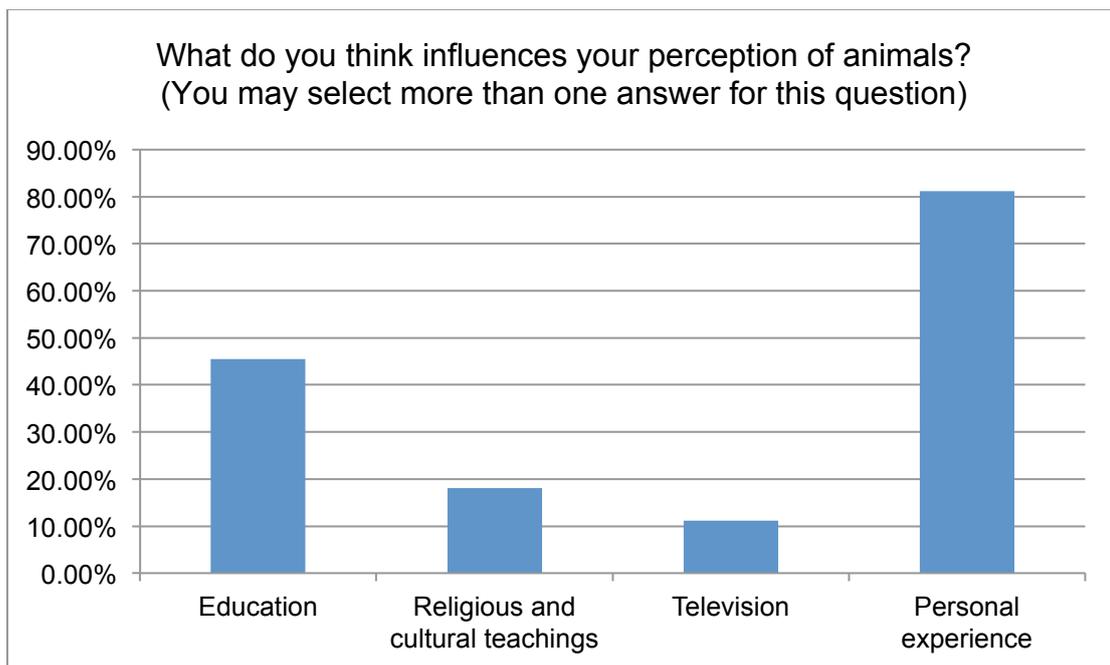
The inconsistency between respondents' perceptions of the different categories of animals and their opinions on the legal status of animals could perhaps be explained by the 'on the spot' nature of the survey. In the short amount of time respondents had to complete the survey, they did not have an opportunity to think about their responses. It is possible that respondents recognised the impact of the property status of animals in their lives only after they were directly asked whether they agreed with the property status of animals (which was after their perspectives had already been sought in respect of the three different categories of animals).

The inconsistencies identified through this survey need further exploration. If the legal status of animals is to reflect current community attitudes, further research is required to ascertain and confirm the community's perspectives towards different categories of animals and the legal status of those different kinds of animals. Such studies may be longer with more precise questions than the survey undertaken for this thesis, and may include a greater number of qualitative or open questions. Replication of this study across all Australian states and territories could also assist in identifying the categories or species of animals that Australians think should not be property.

## **6.6 What Influences Respondents' Perceptions of Animals**

Question 6 of the survey asked respondents: What do you think influences your perception of

animals? Respondents were allowed to select more than one answer for this question. A majority of the respondents indicated that their own personal experience with animals influenced their perception. Education influenced the perceptions of almost half of the respondents. Religious and cultural beliefs and television influenced a smaller percentage of respondents. A minority of the respondents also indicated that 'other' factors influenced their perception of animals. These respondents were given the opportunity to specify what these other influences were. Where respondents chose to do so, responses included parental influences, upbringing and personal beliefs. These results are illustrated in Figure 6.10.



**Figure 6.10 – Influences over respondents’ perception of animals**

These results show that respondents’ personal experience with animals was by far the most influential factor in shaping their perception of animals. This would suggest that animal ownership (eg pet ownership or ownership of farm animals) may influence perceptions towards animals and their legal status. As noted above, however, the results of this survey did not find any significant difference in the attitudes of pet owners and non-pet owners towards the property status of animals.

The finding that most respondents are influenced by their personal experiences may also help explain why respondents perceive different categories of animals differently. Companion animals provide companionship to humans and often share intimate space with humans in their homes. Accordingly, humans are likely to have close relations and regular interactions with these animals. It is unsurprising, therefore, that companion animals were more likely to be seen

as family members or friends than other categories of animals mentioned in this survey.

This close relationship with companion animals also appears to impact attitudes towards other categories of animals. This survey found, for example, that pet owner respondents (14%) were less likely than non-pet owner respondents (19%) to perceive farm animals as property. Such a finding is consistent with other international studies that report a correlation between pet ownership and attitudes towards animals. A British survey of 220 participants, for example, found pet owners to be more supportive of wildlife management strategies aimed at preventing extinction and less supportive of strategies that put human needs above the needs of wildlife.<sup>971</sup> A Swedish study of over 500 teaching students also found that pet owners were less likely to find the use of pet species in biomedical research acceptable.<sup>972</sup>

Interestingly, only 18% of respondents indicated that their perception of animals was influenced by religious and cultural teachings. The result is notable given, as discussed in the introduction to this thesis, the general legal status of animals in Australia has often been justified according to Christian biblical interpretations that give a higher status to humans in comparison to animals. This survey did not ask respondents to indicate whether they held any particular religious beliefs. Thus, conclusions cannot be drawn about the extent to which Christian beliefs influenced respondents' perceptions towards animals. Nevertheless, the relatively small influence of religious and cultural teachings does suggest that a legal status of animals premised on religious thought may have less persuasive impact today than historically.

The lack of influence of religious and cultural teachings on attitudes towards animals identified in this survey highlights the potential for educational campaigns to drive a shift in law regarding the foundational legal status of animals. Notably, education was cited by respondents as the second most influential factor in shaping perceptions of animals. This also supports the hypothesis that education might play an important role in informing public understanding, sentiment and debate around the legal status of animals in Australia in the future. If the Australian community is indeed unaware of the property status of animals, educational campaigns can help build awareness of this status and its implications. This could ultimately enable researchers to more accurately measure whether Australians agree with the property status of animals, and help develop a deeper public debate about its alternatives.

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<sup>971</sup> Cameron Z Shuttlewood, Phillip J Greenwell and Tamara Montrose, 'Pet Ownership, Attitude Towards Pets, and Support for Wildlife Management Strategies' (2016) 21(2) *Human Dimensions of Wildlife* 180.

<sup>972</sup> Joakim Hagelin et al, 'Influence of Pet Ownership on Opinions Towards the Use of Animals in Biomedical Research' (2002) 15(3) *Anthrozoös* 251.

## 6.7 Overall Age Trends

There were 126 respondents to the survey who were in the 18-35 age group. Ninety-two respondents fell in the 36-60 age group, while 67 respondents were over 60 years of age.

As evident in Table 6.1 below, the majority of respondents in each of the three age groups believed that only some animals should be classified as property. Respondents aged over 60 (37%) were more likely than the other age groups to say that all animals should be classified as property. Respondents aged between 18 and 35 were more likely to say that animals should not be classified as property (25%) or to say that they did not know whether animals should be classified as property (21%).

<b>Age group</b>	<b>Yes</b>	<b>No</b>	<b>Some animals</b>	<b>Don't know</b>	<b>Total respondents</b>
18-35	28	32	40	26	126
36-60	20	20	36	16	92
60+	25	11	27	4	67
<b>Total</b>	<b>73</b>	<b>63</b>	<b>103</b>	<b>46</b>	<b>285</b>

**Table 6.1 – Should animals be classified as property? - by age**

It is apparent from this data that younger generations are less supportive of the property status of animals. As older respondents were most supportive of the property status, and younger respondents least supportive, overtime the proportion of people who disagree with the property status of animals may grow. Challenges to the current legal status of animals may thus become increasingly acceptable to members of the Australian community. Assuming this becomes a trend over the next few generations, the possibility of an alternative legal status for animals may be more likely to eventuate.

That would only be the case, however, if the position of the younger generation remains static as they age. This study was not longitudinal and did not ascertain whether the older respondents had thought differently in the past. A longitudinal study may be useful in determining whether opinions of the legal status of animals tend to evolve as people age. Such longitudinal data would also help identify trends in attitudes towards the legal status of animals.

## 6.8 Overall Gender Trends

There were 178 male and 147 female respondents to the survey. A majority in both groups believed that only some animals should be classified as property. A greater percentage of women (28%) supported the property classification compared to men (23%). Female respondents (24%) were also more likely to support the proposition that animals should not be classified as property compared to male respondents (20%). Thus, women were more likely to take absolute positions with respect to the property status of animals.

Men were more likely to take the middle ground. Forty-three percent of the male respondents thought some animals should be classified as property, compared to 30% of females. Table 6.2 provides a breakdown of these results.

<b>Sex</b>	<b>Yes</b>	<b>No</b>	<b>Some animals</b>	<b>Don't know</b>	<b>Total respondents</b>
Male	32	28	59	19	178
Female	41	35	44	27	147
<b>Total</b>	<b>73</b>	<b>63</b>	<b>103</b>	<b>46</b>	<b>285</b>

**Table 6.2 – Should animals be classified as property? - by gender**

## 6.9 Conclusion

This chapter reported on the results of the survey undertaken as part of this thesis and provided an interpretation of these results. The results provide an insight into the respondents' awareness of the legal status of animals, their opinion of the status and their perceptions of different kinds of animals. These results provide an answer to the first thesis question identified in Chapter 1. In particular, the results indicate that the property status of at least some animals is inconsistent with community attitudes. Even taking into account the lack of community awareness about the property status of animals, the results suggest that the property status does not entirely reflect the intuitive attitudes of the community. This conclusion is strengthened by the finding that companion animals, farm animals and wild animals are not predominantly perceived as property.

Aside from finding that the property status of some animals is inconsistent with contemporary attitudes, this chapter has highlighted educational opportunities in respect of the legal status of animals. In particular, it has revealed a gap in community knowledge about the legal status of

animals and the implications of classifying animals as property. Such community awareness is important because without such knowledge, members of the community are unlikely to contemplate on the implications and appropriateness of classifying animals as property. Through education, which was found to be an influential factor in shaping attitudes towards animals, members of the community can be empowered to develop informed opinions on the legal status of animals. As knowledge of the legal status of animals grows, future empirical studies will be able to obtain a more accurate picture of the extent to which the property status of animals reflects community attitudes. Further, as awareness of the legal status of animals appears to correlate with attitudes towards the property status of animals, there is value in replicating similar empirical studies in the future to verify the impact of education on attitudes towards the legal status of animals.

Additionally, analysis of the survey data provided in this chapter has revealed that community attitudes towards animals are variegated. It has revealed that there are nuances in community attitudes towards the legal status of animals, as there is no universal agreement about the legal status of all animals. It has further revealed that different kinds of animals are perceived differently by the community. These findings are especially relevant to the second research question of this thesis: Which alternative legal status for animals might better reflect contemporary attitudes towards the legal status of animals? Chapter 7 addresses this research question.

## Chapter 7

# Implications for the Legal Status of Animals

### 7.1 Introduction

### 7.2 Recommendations for the Legal Status of Animals

7.2.1 Some Animals Should not be Property

7.2.2 Laws Should Provide for Different Kinds of Animals to be Classified or Treated Differently

### 7.3 The Existing Model

### 7.4 Alternative Models

7.4.1 A New Subcategory of Property

7.4.2 Animal Personhood

7.4.3 The Guardianship Model

7.4.4 A New Legal Category for Sentient Animals (The Non-personal Subjects of Law Model)

### 7.5 Conclusion

## 7.1 Introduction

*'If everyone were cast in the same mold, there would be no such thing as beauty'.<sup>973</sup>*

The previous chapter provided an answer to the first research question of this thesis: whether the property status of animals is consistent with contemporary attitudes in Australia. The survey results reported in Chapter 6 suggest that most people do not agree with the property categorisation of at least some animals. Further, the results indicate that although attitudes towards animals are variegated, companion animals, farm animals and wild animals are not predominately perceived as property. It was concluded on the basis of these results that the property status of at least some animals might not be consistent with contemporary attitudes in Australia.

This chapter answers the second research question of this thesis, namely, which alternative legal status for animals better reflects contemporary community attitudes towards the legal status of animals. In order to answer this question, this chapter expounds how the law can reflect the attitudes reported in the survey. It does this by, first, determining that the legal status of some animals should change, so as to be consistent with community attitudes. Second, it concludes that to reflect variegated attitudes towards animals, the law should allow different kinds of animals to be legally classified and/or treated differently through the assignment of different statuses and entitlements.

This analysis is followed by an exploration of the existing legal framework and six different models that others have proposed for defining the legal status of animals, in order to determine which model is the most reflective of the attitudes identified in the survey results. This chapter also considers the ethical implications of the proposed models because, as noted throughout this thesis, public opinion alone does not, and should not, influence the content of law. Due to the number of models considered, and the in-depth critique of these models, this chapter is necessarily a lengthier chapter.

The recommendations for the legal status of animals are set out in section 7.2. Sections 7.3 and 7.4 explore different models for defining the legal status of animals, analysing the ethical and practical implications of the models and the extent to which the models reflect the attitudes highlighted in the survey results. Section 7.3, in particular, examines the existing model, which currently distinguishes between the legal status of wild and domesticated animals. Section 7.4

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<sup>973</sup> Charles Darwin, quoted in Paul H Carr, *Beauty in Science and Spirit* (Beech River Books, 2007), 6.

explores six alternative models for defining the legal status of animals. Two of these are proposals to establish a new subcategory of property, namely, the 'living property' and 'companion animal property' models. Another two models are Francione's and Wise's distinct legal models for animal personhood. The remaining two models are the 'guardianship' and the 'non-personal subjects of law' models. Section 7.5 provides a conclusion, suggesting that while all models reflect the survey results to some extent, the guardianship and non-personal subjects of law models provide the greatest potential to accommodate community attitudes.

## **7.2 Recommendations for the Legal Status of Animals**

This section sets out two broad recommendations for the legal status of animals from the survey results reported in the previous chapter. First, given that the legal status of at least some animals does not appear to entirely reflect community attitudes, at least some animals should not be classified as property. Second, the variegated attitudes towards animals highlighted in the survey suggest that the law should allow for different kinds of animals to be categorised or treated differently. These implications are explained in detail below.

### **7.2.1 Some Animals Should Not be Property**

The empirical data collected as part of this doctoral research exposes an inconsistency between the legal categorisation of some animals as property and contemporary community attitudes. This conclusion is based on the fact that a majority of the survey respondents disagreed with the property status of some or all animals. Further, companion animals, farm animals and wild animals were predominantly not perceived as property.

These results add some weight to the abolitionist position, in that they provide an empirical basis for challenging the property classification of some animals. In particular, they allow an argument to be advanced that the property status of at least some animals should be abolished because it is inconsistent with community attitudes. The survey results also refute, to some extent, a common welfarist argument that abolition of the property status of animals would not enjoy community support. As pointed out in Chapter 3, welfarists such as Garner, Lovvorn and Cupp oppose arguments for abolishing the property status of animals by asserting that society is not ready for such change.<sup>974</sup> The attitudes highlighted in the survey data contradict these welfarist claims, and therefore, the welfarist position is weakened to some extent.

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<sup>974</sup> See Chapter 3 section 3.3.

Of course, the survey results do not completely refute the welfarist argument, because the results also reveal that there is still community support for the property categorisation of some animals. Thus, although the property status of some animals may not be consistent with community attitudes, the property status of other animals still is. This means that abolishing the property status of all animals would not be consistent with community attitudes. In this sense, the results partially validate the welfarist argument that an alternative legal status for animals may lack community support. However, such partial validation of the welfarist argument does not necessarily undermine abolitionist arguments. As Chapter 3 and the remainder of this chapter demonstrate, arguments for abolishing the property status of animals are directed at certain animals only, such as sentient animals, animals with specific cognitive abilities or companion animals.

If law is to reflect community attitudes, then these results tell us that the community – or at least the sample surveyed – believe that some animals should no longer be legally classified as property. At the same time, some animals should continue to be property. This data indicates that an alternative legal status is needed for at least some animals.

### **7.2.2 The Law Should Provide for Different Kinds of Animals to be Classified or Treated Differently**

As noted above, the empirical data collected as part of this research demonstrates that attitudes towards animals are variegated; companion animals, farm animals and wild animals are all perceived differently.<sup>975</sup> Companion animals are more likely to be regarded as family members, while wild animals are more likely to be seen as important national treasures. Farm animals are more likely to be perceived as living beings that can be differentiated from humans. Further, over half of the respondents did not entirely agree or disagree with the property status of all animals.

Such varied attitudes towards animals make the search for an alternative legal status for animals that is reflective of, or responsive to, public attitudes, challenging. The broader area of animal welfare policy has already been described as a democratic nightmare for politicians and policymakers, because the Australian public's attitudes towards animals and animal protection are complex, varied and inconsistent.<sup>976</sup> What complicates matters more is that there is no single way of categorising animals that is reflective of community attitudes. As Chen observes, 'the boundaries are fuzzy and are not neatly aligned with the boundaries between species;

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<sup>975</sup> See Chapter 6 section 6.5.

<sup>976</sup> Chen, above n 52, 65.

animals' use-value and relational position to people are just as influential'.<sup>977</sup> Thus, not only is there a lack of understanding about Australians' attitudes towards the legal status of different kinds of animals, there is also diversity in how the public categorises animals. This ambiguity affects the search for an ideal legal status(es) for animals because without understanding how the community categorises animals, it is difficult to identify which animals should have what legal status.

In considering other models for defining the legal status of animals, it should also be noted that whether a proposed model reflects contemporary Australian attitudes will depend not only upon the general attitudes towards the legal status of animals, but also attitudes towards the specific legal implications of a proposed model. Thus, if a proposed legal status for animals involves assigning particular rights to animals, it is necessary to consider whether the allocation of those rights to animals also accords with contemporary attitudes. As the survey conducted as part of this research did not seek to elicit attitudes towards different models, the extent to which a particular model reflects community attitudes cannot be stated with certainty. Further research is required in order to fill this evidentiary gap.

Nevertheless, the variegated attitudes highlighted in the survey results do suggest that there is support for a nuanced regulatory framework that allows different kinds of animals to be categorised or treated differently. Thus, the legal status of animals should vary depending on the kind of animal in question. Alternatively, if all or a large group of animals have the same legal status, the law should allow different kinds of animals to have different legal entitlements. For example, although all sentient animals may be persons, some sentient animals may warrant more legal rights than others.

The idea of treating different animals differently is not new; the existing legal framework already distinguishes between domesticated and wild animals.<sup>978</sup> A more nuanced approach is proposed by Donaldson and Kymlicka, who distinguish between domesticated, wild and liminal animals<sup>979</sup> in developing an 'animal rights' framework premised on political theory.<sup>980</sup> They contend that domesticated animals should be considered full citizens of a polity because they have been bred over generations for interdependence with humans.<sup>981</sup> As co-citizens in a

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<sup>977</sup> Ibid 53.

<sup>978</sup> See section 7.3 below.

<sup>979</sup> Liminal animals are wild animals that live in human habitations (such as birds, possums and mice).

<sup>980</sup> Donaldson and Kymlicka focus on the political status of animals, not their legal status. They rely on contemporary theories of citizenship to argue that rights emanate not only from personhood, but also from citizenship: Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press, 2011), 13.

<sup>981</sup> Ibid 14, 108.

human society, they would be entitled to a range of rights, such as the right to socialisation, mobility, protection from harm, protection from illegitimate use, medical care, adequate nutrition and political representation.<sup>982</sup> In contrast, animals living in the wild would be recognised as separate sovereign communities; Donaldson and Kymlicka propose that fair terms of interaction should be defined for human interventions in these sovereign communities.<sup>983</sup> Liminal animals would be recognised as denizens and would have a reduced set of rights compared to animals recognised as citizens.<sup>984</sup>

Whether or not such a nuanced approach would be morally appropriate is a separate question that deserves further consideration.<sup>985</sup> O'Sullivan, for example, asserts that inconsistency in how different kinds of animals are treated is inequitable.<sup>986</sup> She argues that to uphold the principle of equity, which is a cornerstone of liberal democratic values, inconsistent legal protections for different kinds of animals should be opposed.<sup>987</sup> For animal welfare laws to be equitable, O'Sullivan maintains that 'a consistent, non-discriminatory approach' is required.<sup>988</sup>

There may therefore be a tension between the need to reflect community attitudes regarding the legal status of animals and the need to align the law with moral principles. Indeed, as was pointed out in Chapter 4, community attitudes do not always align with conceptions of morality, and in such situations, it may not be appropriate for law to align with community attitudes. Accordingly, although this chapter sets out to identify a framework for defining the legal status of animals that is reflective of community attitudes, it is acknowledged that reflecting variegated attitudes towards animals may not be consistent with moral principles.

With these broad implications in mind, this chapter explores several different models for defining

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<sup>982</sup> Ibid 122-152.

<sup>983</sup> Ibid 14, 169.

<sup>984</sup> Ibid 14, 214, 241. Donaldson and Kymlicka believe that acceptance of the basic rights of animals does not require all forms of human-animal interactions to stop; accordingly, they propose that their citizenship approach 'has potential for expanding public support and public alliances for the animal advocacy movement': Ibid 16, 49.

<sup>985</sup> Lisa Marie Morrish, 'The Elephant in the Room: Detrimental Effects of Animals' Property Status on Standing in Animal Protection Cases' (2014) 53(4) *Santa Clara Law Review* 1127, 1151.

<sup>986</sup> See O'Sullivan, *Animals, Equality and Democracy*, above n 969. O'Sullivan's research found that animals that are more visible to the community (eg companion animals and animals used in public exhibitions) are more likely to receive stronger legal protection in comparison to the less visible animals (eg farm animals and animals used in research): Siobhan O'Sullivan, 'Animals and the Politics of Equity' in Robert Garner and Siobhan O'Sullivan (eds) *The Political Turn in Animal Ethics* (Rowman & Littlefield International, 2016) 51, 58.

<sup>987</sup> O'Sullivan, 'Animals and the Politics of Equity', above n 986, 65.

<sup>988</sup> Ibid 65. O'Sullivan accepts that this approach may have the unintended effect of reducing the legal protections afforded to the more visible animals (rather than increasing the protections provided to less visible animals), but she considers this an unlikely scenario as she believes there is no community support for animal suffering: Ibid 66-7.

the legal status of animals and contemplates the extent to which they may align with these recommendations for reform. This exercise includes the current model that distinguishes between domesticated and wild animals.

### 7.3 The Existing Model

As explained in Chapter 2, in Australia, a distinction is drawn between the legal status of domesticated animals and wild animals.<sup>989</sup> The legal status of wild animals living in a wild state is different from the legal status of other animals. The former are treated as neither person nor property. Humans can only have qualified property rights over wild animals that come into the possession or control of humans. Domesticated animals, in contrast, are unequivocally classified as property.

The current model also has different legal protections for companion animals, farm animals and wild animals.<sup>990</sup> Companion animals receive the greatest level of protection from human activities under animal protection legislation.<sup>991</sup> This is perhaps reflective of empirical data indicating that companion animals are generally seen as members of the family and friends.<sup>992</sup> At the same time, the law allows humans to subject farm animals to various forms of harmful activities that are not permitted in respect of companion animals. State legislation and national standards, for example, allow intensive housing practices and the slaughter of animals for food.<sup>993</sup> A different regulatory framework operates in respect of wild animals, whereby diverse levels of protection are provided to different types of wild animals, depending upon whether they are native species, introduced species and/or endangered species.<sup>994</sup>

Thus, the existing legal framework already distinguishes between the legal status of wild and domesticated animals, and provides different degrees of protection for different kinds of animals. The existing legal framework may therefore already reflect community attitudes by excluding wild animals that are not within the possession or control of humans from the category of property. Additionally, it may already reflect community attitudes by providing different

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<sup>989</sup> See Chapter 2 section 2.2.

<sup>990</sup> See Chapter 2 section 2.7.2.

<sup>991</sup> O'Sullivan, 'Animals and the Politics of Equity', above n 986, 51. See also: Chapter 2 section 2.7.2.

<sup>992</sup> See Chapter 6 section 6.5.1.

<sup>993</sup> Eg, the Victorian Standards and Guidelines for the Welfare of Pigs, which is a prescribed standard for the purposes of the *Livestock Management Act 2010* (Vic), allows sows to be kept in stalls where the floor space is 0.6m wide and 2.2m long: Agriculture Victoria, *Victorian Standards and Guidelines for the Welfare of Pigs* (2010), cl 4.1 <<http://agriculture.vic.gov.au/agriculture/animal-health-and-welfare/animal-welfare/animal-welfare-legislation/livestock-management-legislation-and-regulations/pig-welfare-standards-and-guidelines>>.

<sup>994</sup> See generally, White, 'British Colonialism, Australian Nationalism and the Law', above n 343.

protection regimes for different kinds of animals.

However, this suggestion cannot be made with any certainty, as the data obtained for this research does not provide direct or sufficient support for this hypothesis. Respondents to the survey were not asked to identify which animals they thought should or should not be classified as property. They may disagree with the legal classification of companion animals rather than that of wild animals. Moreover, respondents were not asked to express their opinions about the existing legal framework, other than to indicate whether they agreed or disagreed with the property status of animals. Accordingly, further empirical research is needed to be able to verify whether the existing manner of legally differentiating between different kinds of animals is reflective of community attitudes.

Even though the existing model may, to some extent, reflect community attitudes, it may not be practically and ethically ideal. As noted in Chapter 2, the inconsistencies in the legal treatment of animals under the existing model creates a complex framework.<sup>995</sup> Additionally, as noted in section 7.2.2 above, the inconsistent treatment of animals may offend principles of equity.

#### **7.4 Alternative Models**

A number of different models have been proposed for defining the legal status of animals. These include proposals to modify, rather than abolish, the property status of animals; in other words, creating a new subcategory of property. Favre, for example, has suggested the establishment of a subcategory of property called 'living property' for sentient vertebrate animals.<sup>996</sup> Hankin also calls for a new subcategory of property called 'companion animal property'.<sup>997</sup> As the name suggests, this model would be dedicated to companion animals.

There are also proposals for some animals to be categorised as persons rather than as property. Two distinct proposals come from prominent abolitionists, Francione and Wise. Francione argues that all sentient animals should be legal persons with a single right to not be treated as property.<sup>998</sup> Wise, in contrast, takes an incremental approach to personhood. He suggests that animals that possess practical autonomy should be legal persons for the

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<sup>995</sup> See Chapter 2 section 2.7.2.

<sup>996</sup> Favre, 'Living Property', above n 281.

<sup>997</sup> Susan J Hankin, 'Not a Living Room Sofa: Changing the Legal Status of Companion Animals', (2007) 4 *Rutgers Journal of Law & Public Policy* 314.

<sup>998</sup> Francione, *Animals, Property and the Law*, above n 20; Francione, *Rain Without Thunder*, above n 20; Francione, *Introduction to Animal Rights*, above n 20; Francione and Garner, *The Animal Rights Debate*, above n 20; Francione, *Animals as Persons*, above n 20; Francione, 'Animals – Property or Persons?', above n 365.

purposes of some liberty rights.<sup>999</sup>

Other models proposed for the purposes of defining the legal status of animals include the guardianship and ‘non-personal subjects of law’ models. The guardianship model was formulated by Favre before he suggested the living property model. Under the guardianship model, animals not within the possession or control of humans would continue to be treated as property, but they would also be capable of equitable self-ownership.<sup>1000</sup> As self-owned animals, they would be able to enforce their legally recognised interests against their guardians or others. The ‘non-personal subjects of law’ model is a proposal of Pietrzykowski.<sup>1001</sup> It involves the establishment of an entirely new legal category that would be distinct from the existing categories of persons and property. All sentient animals would fall within this category, and would be entitled to a single right to have their interests taken into account. Each of these six models is described and analysed in this section.

#### **7.4.1 A New Subcategory of Property**

##### **7.4.1.1 Living Property**

###### *i. Description of the Living Property Model*

One of the two models proposed by Favre for altering the legal status of at least some animals involves the establishment of a new subcategory of property called ‘living property’.<sup>1002</sup> Favre proposes that some animals should be classed as ‘living property’.<sup>1003</sup> The underlying premise of this model is that it is ethically acceptable to categorise animals as property because, Favre believes, property can (and already does) have legal rights.<sup>1004</sup> The central issue for Favre is the creation of legal rights to better protect the interests of animals, which does not require the property status of animals to be abolished.<sup>1005</sup>

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<sup>999</sup> Wise, *Rattling the Cage*, above n 21; Wise, *Drawing the Line*, above n 21; Wise, ‘Animals Rights, One Step at a Time’, above n 366.

<sup>1000</sup> David Favre, ‘Equitable Self-Ownership for Animals’ (2000) 50 *Duke Law Journal* 473; David Favre, ‘A New Property Status for Animals: Equitable Self-Ownership’ in Sunstein and Nussbaum (eds) *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 234.

<sup>1001</sup> Pietrzykowski, ‘The Idea of Non-personal Subjects of Law’, above n 22; Pietrzykowski, *Personhood Beyond Humanism*, above n 22.

<sup>1002</sup> The other is a guardianship model, which is examined below at section 7.4.3.

<sup>1003</sup> See Favre, ‘Living Property’, above n 281.

<sup>1004</sup> *Ibid* 1023.

<sup>1005</sup> *Ibid*.

Favre recognises 'a large disconnect between public expectations and the rules of property'.<sup>1006</sup> For example, in light of the sentiment and value humans attach to their companion animals, Favre does not consider that the current rules for calculating damages to property should be applied to such animals.<sup>1007</sup> He further regards the increasing number of protections provided under animal welfare laws as evidence of changing social attitudes.<sup>1008</sup> To better recognise the changing relationships between humans and animals, Favre suggests that it is time to acknowledge a new category of property – living property.<sup>1009</sup> He contends that the establishment of such a subcategory of property is a feasible goal because although property law is slow to develop, it does change when society's moral and ethical perspectives change.<sup>1010</sup>

For Favre, animals have inherent interests simply because they are alive. He argues that beings which are 'driven to live a life by the encoding of their DNA' have moral value.<sup>1011</sup> He elaborates that having DNA is sufficient for a being to have interests because 'DNA beings have the molecular desire to replicate and this requires them to live, to fight to live, and perhaps to kill other DNA beings in order to live'.<sup>1012</sup> Thus, law should protect the interests of such beings.<sup>1013</sup> On this basis, Favre suggests that inclusion into the new category of living property would simply require a being to be alive and have DNA.<sup>1014</sup>

Favre does make two qualifications for eligibility in the category of living property. First, the being must be knowingly possessed by humans.<sup>1015</sup> Thus, wild animals living in their natural habitats would not be included in this category.<sup>1016</sup> Most insects and worms would also be excluded, as they are normally not possessed by humans.<sup>1017</sup> Second, the living property status would only be extended to vertebrate animals<sup>1018</sup> in order to 'keep the discussion focused on those who have the most complex needs and for whom we can do the most'.<sup>1019</sup> Favre does suggest that this line could be redrawn in the future when more scientific information about the

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<sup>1006</sup> Ibid

<sup>1007</sup> Ibid.

<sup>1008</sup> Ibid 1027-1030.

<sup>1009</sup> Ibid 1023.

<sup>1010</sup> Ibid 1030.

<sup>1011</sup> Ibid 1043. Favre argues that the more advanced characteristics, such as self-awareness, would be relevant for the purposes of deciding which rights animals should get.

<sup>1012</sup> Ibid 1049.

<sup>1013</sup> Ibid 1047-8.

<sup>1014</sup> Ibid 1043.

<sup>1015</sup> Ibid.

<sup>1016</sup> Ibid.

<sup>1017</sup> Ibid 1044.

<sup>1018</sup> As noted in Chapter 3, invertebrates account for over 90% of all animal kingdom. Thus, the living property status would be available to a very small percentage of animals.

<sup>1019</sup> Ibid 1045-6.

interests of non-vertebrate animals becomes available.<sup>1020</sup>

As to which interests of living property should be legally protected, Favre argues that ‘those interests that can garner sufficient political support for the passage of new laws’ ought to be protected.<sup>1021</sup> He accepts that different species will end up with different rights as a result, but calls this a ‘political reality of incremental change’.<sup>1022</sup> He also accepts that determining which interests the law should protect is ultimately a ‘judgment call’.<sup>1023</sup> He states that ‘[d]eciding how much weight to give to an interest is a social and, therefore, political judgment’.<sup>1024</sup> Favre clarifies that animals’ interest in liberty of movement would not be recognised,<sup>1025</sup> because living property would remain under the broad category of property, and possession would be a key element for eligibility to be living property.<sup>1026</sup>

Favre suggests a number of specific rights (not a definitive list) for living property. One of those rights is to ‘[n]ot be held for or put to prohibited uses’.<sup>1027</sup> Favre does not push for complete non-possession or non-use of animals, as he believes that ‘positive human communities can include animals that are owned and used by humans’.<sup>1028</sup> He asserts that what is an acceptable use of animals is a political decision.<sup>1029</sup> As such, he predicts that prohibitions against specific animal uses will be sporadic.<sup>1030</sup> Other rights of living property suggested by Favre include the right to not be harmed, to be cared for, to have living space, to be properly owned, to own property, to enter into contracts and to file tort claims.<sup>1031</sup>

Since legal personality is required for legal standing, Favre argues that ‘limited legal personality’ ought to be recognised in living property.<sup>1032</sup> He further suggests that animals must be identifiable as individuals or groups to be able to access the legal system.<sup>1033</sup> Thus, an animal must have an individual name, or the facts regarding a group of animals that are similar should

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<sup>1020</sup> Ibid 1046.

<sup>1021</sup> Ibid 1050.

<sup>1022</sup> Ibid.

<sup>1023</sup> Ibid 1052.

<sup>1024</sup> Ibid 1053.

<sup>1025</sup> Ibid 1050.

<sup>1026</sup> Accordingly, it would be acceptable for living property to be kept in captive states, although Favre suggests that: ‘This does not mean that it would be appropriate to keep [sheep] in a five-by-five-foot pen in the barn, as this would frustrate most of their other interests and their quality of life’: See Favre, ‘Living Property’, above n 281, 1050.

<sup>1027</sup> Ibid 1062.

<sup>1028</sup> Ibid 1023.

<sup>1029</sup> Ibid 1057.

<sup>1030</sup> Ibid.

<sup>1031</sup> Ibid 1062-1070.

<sup>1032</sup> Ibid 1061-2.

<sup>1033</sup> Ibid 1045-6.

be discoverable (for example, the pigs on Jones' Farm).<sup>1034</sup>

## *ii Analysis of the Living Property Model*

Whether the living property model is conceptually sound depends upon the correctness of the underlying premise of the model: that property can possess rights. If that is the case, then the need to abolish the property status of animals is certainly diminished. The implications of categorising animals as property would also become less significant. As noted in Chapter 2, however, there is no consensus about whether property can possess legal rights.<sup>1035</sup> Francione and Wise, for example, maintain that animals cannot have legal rights as long as they are property.<sup>1036</sup> Until this theoretical debate is resolved, it is unclear whether the living property model can be implemented.

It should also be pointed out that although Favre does not consider it necessary to abolish the property status of animals, the living property model does require some degree of legal personality for eligible animals. Favre states that animals categorised as living property would have legal standing to enforce their rights. However, as stated in Chapter 2, legal personhood is required for legal standing.<sup>1037</sup> For animals to have legal standing under the living property model, therefore, the law would need to either recognise 'living property' as persons for the purposes of legal standing, or modify the requirements for legal standing. Accordingly, under the living property model, animals would be both, property and persons. Whilst this approach appears to be an oxymoron, it is consistent with the view that the categories of persons and property are not exclusive.<sup>1038</sup>

The living property model has potential to overcome several of the limitations of the current legal status of animals by making specific provisions for enforceable pet trusts, for how companion animals should be treated in the case of relationship breakdowns, and for the assessment of compensation for pain and suffering when companion animals are wrongfully injured or killed. However, because animals would continue to be categorised as property, the living property model would still objectify animals. As explained in Chapter 2, the property status promotes the conception of animals as mere things. This is problematic because such a perception

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<sup>1034</sup> Ibid 1046.

<sup>1035</sup> See Chapter 2 section 2.6.1.

<sup>1036</sup> Francione, *Rain without Thunder*, above n 20, 177; Francione, *Animals, Property and the Law*, above n 20, 4; Wise, *Drawing the Line*, above n 21, 21; Wise, *Rattling the Cage*, above n 21, 4; Wise, 'Animals Rights, One Step at a Time', above n 366, 25.

<sup>1037</sup> See Chapter 2 section 2.6.2.

<sup>1038</sup> As explained in section 2.3.3, this position is demonstrated by the legal status of corporations; such entities have legal personality for certain purposes under Corporations Law (eg, they can sue or be sued), but they also have characteristics of property (eg, it is possible to own shares in corporations).

undermines or overlooks the inherent interests or intrinsic value of animals.

So far as this model's consistency with community attitudes is concerned, it does reflect community attitudes to the extent that it provides a framework for differentiating between animals that are classified as property and those that are not. As the living property subcategory would not apply to wild animals, it would distinguish between wild and domesticated animals. The former would not be property (unless possessed by humans), while the latter would be property. In this sense, this model is similar to the existing legal framework.

Unlike the current legal framework, however, some animals would have an elevated status within the broad category of property. In particular, to be classified as living property, an animal has to be of a vertebrate species and be knowingly possessed by humans. Thus, the living property model would draw a further distinction between the legal status of vertebrate animals that meet these criteria and animals that do not (for example, invertebrate animals and vertebrate animals that are not knowingly possessed by humans).

Accordingly, the living property model offers a nuanced framework that allows different animals to be categorised differently. As pointed out in respect of the current model, however, more empirical data is needed to determine whether the distinctions drawn between animals do in fact correspond with the community's perceptions. Until such data becomes available, it cannot be said with confidence whether the proposed distinctions drawn under this model are reflective of the variegated attitudes highlighted in the survey results.

Moreover, as social attitudes would determine which interests of living property should be legally protected, it is likely that different degrees of legal protection will be provided to different groups of animals. In other words, the legal treatment of different kinds of animals classified as living property would vary. In this manner, this aspect of the living property model could also be a reflection of variegated attitudes towards animals.

It is notable that companion animals would continue to be classified as property. As these animals are commonly perceived as members of the family or as friends, the categorisation of them as living property would potentially be inconsistent with those attitudes. However, given that pet ownership did not significantly affect attitudes towards the legal status of animals, the property categorisation of animals may still be consistent with community attitudes.<sup>1039</sup>

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<sup>1039</sup> See Chapter 6 section 6.4.2.

Additionally, if animals classified as living property have the capacity to hold rights and to be granted legal standing to enforce those rights, then attitudes towards the property categorisation of animals may also change. There may potentially be less disagreement with the property categorisation of animals if animals have enforceable legal rights. Further empirical research that seeks to ascertain attitudes towards the implications of categorising animals as property is needed in order to confirm whether this is the case. For example, surveys can ask respondents whether they think animals should be able to enforce the legal protections provided to them under animal welfare legislation.

Favre intends for the categorisation of animals as living property, and the legal capacities associated with this classification, to be guided by social attitudes. Such dependence on social attitudes recognises that the law should reflect community attitudes. This highlights the value of empirical research, including of the kind undertaken for this thesis. Empirical data could assist in determining the practical feasibility of implementing the living property model in Australia.

In summary, the living property model shows potential to reflect community attitudes. However, further empirical data is needed to determine whether there is public support for the specific elements of this model, such as the eligibility criteria for the living property subcategory and the legal capacities that animals would have under this model. Further scholarship is also needed to determine whether it is possible for property to have legal rights, especially in an Australian context. This is necessary to determine whether the creation of a new subcategory of property is preferable to the idea of abolishing the property status of animals. It should also be remembered that because animals would continue to be classified as property, this model might continue to facilitate the objectification of animals.

#### **7.4.1.2 Companion Animal Property**

In recognition of the sentiments humans attach to companion animal property, Hankin suggests the establishment of a dedicated new subcategory of property for companion animals. This model is described and analysed below.

##### *i Description of the Companion Animal Property Model*

In light of the sentience of animals and the capacity of humans to develop bonds with their companion animals, Hankin proposes a new type of property – companion animal property.<sup>1040</sup>

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<sup>1040</sup> Hankin, above n 997, 377.

Under this model, the law would recognise that while companion animals are property, they should be treated differently from other inanimate types of property.<sup>1041</sup> The category would mostly be restricted to the most common types of companion animals, particularly cats and dogs, although evidence could be allowed in relation to other companion animals such as rabbits, parrots, backyard horses, etc.<sup>1042</sup> Farm animals would not fall within the category of companion animal property.<sup>1043</sup> As to its legal effects, Hankin proposes that the new category of companion animal property should make specific provision for pet trusts, the resolution of ‘pet custody’ disputes and awards of damages in torts cases involving companion animals.<sup>1044</sup> Hankin does not propose that companion animal property should be entitled to any legal rights.

According to Hankin, this new legal status for companion animals would reflect how they are viewed in society, as evidenced by the large amounts of money spent on veterinary care, dog training, birthday presents, vacations with companion animals and ‘pet sitters’.<sup>1045</sup> Hankin argues that the new category ‘has both intuitive appeal and would better reflect the way in which we value companion animals in our society’.<sup>1046</sup> Hankin further asserts that establishing the category of companion animal property is preferable to other models, such as the guardianship model or legal personhood models, as it ‘would likely gain greater acceptance and avoid much of the controversy generated by other proposals that can be grouped into the “animal rights” camp’.<sup>1047</sup>

Hankin advocates that the category would recognise the sentience of companion animals as well as their dependence on humans.<sup>1048</sup> It would align with new judicial and legislative trends in the United States, particularly in light of the establishment of binding pet trusts, the increasing penalties attached to animal cruelty offences, and damages awarded for the pain and suffering caused by the wrongful death or injury of companion animals.<sup>1049</sup>

Hankin accepts that categorising some animals as companion animal property could ‘create additional distinctions both between and within animal species’.<sup>1050</sup> In defending such distinctions, Hankin argues:

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<sup>1041</sup> *Ibid.*  
<sup>1042</sup> *Ibid* 386-7.  
<sup>1043</sup> *Ibid.*  
<sup>1044</sup> *Ibid* 387.  
<sup>1045</sup> *Ibid* 377.  
<sup>1046</sup> *Ibid.*  
<sup>1047</sup> *Ibid* 381.  
<sup>1048</sup> *Ibid* 379.  
<sup>1049</sup> *Ibid* 380.  
<sup>1050</sup> *Ibid* 391.

There are good reasons for many of the legal differences that exist between animal species. The differences that exist based on how we use the animals may be harder to justify, but they are a reality of our current legal system that are unlikely to change anytime soon.<sup>1051</sup>

Hankin does not elaborate further on the justifications for distinguishing between and within animal species. However, she points out that the law already provides for the differential treatment of different kinds of animals, such as under animal cruelty statutes.<sup>1052</sup> In fact, she predicts that such distinctions will always be a feature of the legal system, and insists that the distinction drawn by the proposed model should not deter the creation of a separate legal category for companion animals.<sup>1053</sup>

### *ii Analysis of the Companion Animal Property Model*

Like Favre's proposed living property category, the companion animal property model does not seek to abolish the property status of animals. Instead, Hankin proposes to create a subcategory of property that recognises that animals are different from inanimate property. Hankin is clearly conscious of community attitudes when she insists that this model is more likely to be socially accepted. She also relies on judicial and legislative trends, such as with respect to pet trusts, wrongful injury cases and pet custody disputes, to highlight the appeal of her proposed model.

Because the companion animal property model would not alter the legal status of wild animals, it would continue to distinguish between the legal status of domesticated and wild animals (like the current framework and the living property model). Additionally, although this model does not propose to abolish the property status of companion animals, it does seek to elevate the legal status of such animals. Thus, the model provides a framework that allows different kinds of animals to be categorised differently.

The intention behind this model is to reflect the bond that humans share with companion animals in the legal status of the latter. Hankin's assertions about the close relationship between humans and companion animals is supported by the survey results reported in the previous chapter.<sup>1054</sup> Those results reveal that companion animals are commonly perceived as family members or friends. Moreover, the results indicate that companion animals are less likely than farm animals to be perceived as property. As such, by distinguishing between companion animals and other kinds of animals, this model may reflect variegated attitudes towards animals.

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<sup>1051</sup> *Ibid.*

<sup>1052</sup> *Ibid.*

<sup>1053</sup> *Ibid* 393.

<sup>1054</sup> See Chapter 5 section 5.5.1.

As noted earlier, however, further empirical data is needed to identify animals whose property status is inconsistent with contemporary Australian attitudes. It cannot be said with certainty whether an elevated legal status for companion animals, compared to other kinds of animals (for example, farm animals), is consistent with the attitudes highlighted in the survey. Moreover, the results did not seek to ascertain attitudes towards a modified property status. Accordingly, even if the respondents had disagreed with the property status of companion animals, it is unclear whether their attitudes would be consistent with the categorisation of companion animals as a unique type of property.

While her proposed model aims to resolve certain anomalies in the law, especially in the areas of trust law, criminal law and torts law, Hankin does not consider whether companion animal property ought to have legal rights. This seems deliberate as she considers efforts to grant legal rights to animals futile in the current social climate. Whether animals categorised as companion animal property should be entitled to legal rights is an issue associated with the implications of being classified as property.<sup>1055</sup> Therefore, this issue may have a bearing on attitudes towards the categorisation of some animals as companion animal property. If the Australian community disagrees with the property status of animals on the basis that animals cannot possess legal rights, then the companion animal property model does not reflect those attitudes. Of course, further empirical data is needed to confirm the reasons why people disagree (or agree) with the property categorisation of animals.

Additionally, as argued in respect of the living property model, the fact that companion animals would continue to be treated as property under this model may mean that the animals would continue to be objectified. The fact that animals would not have legally enforceable rights potentially adds to this effect. Thus, the companion animal property model may not be entirely effective in recognising the inherent interests of animals.

In summary, the companion animal property model may provide a framework that is capable of reflecting variegated attitudes towards animals and facilitating different legal statuses for different kinds of animals. This model does overcome several limitations associated with the current legal status of companion animals, particularly in relation to pet estates, family disputes and the calculation of damages in tort cases; however, it does not seek to assign any enforceable legal rights to animals. Additionally, by retaining animals within the category of property, this model may continue to enable the objectification of animals.

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<sup>1055</sup> See Chapter 2 section 2.6 for an examination of the implications of being classified as property, including in relation to the capacity to possess legal rights.

## 7.4.2 Animal Personhood

In contrast to the two alternative models explored above, which propose to retain animals within the category of property, there are other legal paradigms which suggest that it is preferable to categorise some animals as legal persons. The two models discussed below are the suggestions of Francione and Wise. Francione and Wise are prominent figures in the abolition debate, and their reasons for abolishing the property status of (some) animals were analysed in Chapter 3.<sup>1056</sup> The sections below examine their proposed models for animal personhood, in order to evaluate the extent to which the models reflect the attitudes revealed by the survey results.

### 7.4.2.1 Sentient Animals as Persons (Francione's Personhood Model)

#### *i Description of Francione's Personhood Model*

Francione's model is relatively easy to understand. As noted in Chapter 3, Francione argues that all sentient animals should be categorised as legal persons. Further, Francione proposes that as legal persons, all sentient animals should have the right to not be treated as property.<sup>1057</sup> Although Francione seeks the recognition of a single right of animals, he does not propose precluding animals from being entitled to other legal rights.<sup>1058</sup>

As explained in Chapter 3, the underlying premise for this proposed model is that it is morally wrong to use sentient animals.<sup>1059</sup> Francione argues that sentience alone is sufficient for animals to have moral worth, and that all sentient animals have an interest in living.<sup>1060</sup> This interest, Francione contends, is incompatible with the categorisation of animals as property because property cannot have intrinsic value or legal rights.<sup>1061</sup> Additionally, according to Francione, only legal persons can have legal rights.<sup>1062</sup> Thus, personhood is necessary for the adequate protection of the interests of sentient animals.

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<sup>1056</sup> See section 3.3.2 for a review of Francione's and Wise's abolitionist arguments.

<sup>1057</sup> Francione, 'Animals – Property or Persons?', above n 365, 125.

<sup>1058</sup> Francione, *Introduction to Animal Rights*, above n 20, 93;

<sup>1059</sup> Francione, *Animals as Persons*, above n 20, xiii, 10. See section 3.2.1.

<sup>1060</sup> *Ibid* xiii, 11.

<sup>1061</sup> *Ibid* 2, 135; Gary L Francione, *Introduction to Animal Rights*, above n 20, 54; Francione, *Animals, Property and the Law*, above n 20, 4, 113.

<sup>1062</sup> Francione, *Animals, Property and the Law*, above n 20, 110.

## *ii Analysis of Francione's Personhood Model*

The limitations of Francione's arguments for abolishing the property status of animals were explained in Chapter 3. These limitations are also relevant considerations when reviewing the broad animal personhood framework he proposes. These limitations are briefly revisited below before evaluating the extent to which Francione's model reflects the community attitudes highlighted in the survey results.

First, Francione's assumption that property cannot possess legal rights needs to be verified. If, as Francione suggests, property cannot possess legal rights then the need for animal personhood is apparent. However, if the assumption is inaccurate, the need to change the legal status of animals is not as clear. As noted above, this issue needs further scrutiny, especially in an Australian context.

The strength of Francione's model is arguably also complicated by the lack of clarity on who is a legal person. As highlighted in Chapter 2, there is no consensus in relation to the definition of a person or what the requirements for personhood are.<sup>1063</sup> On one interpretation, personhood is merely a fictional legal construct and therefore anyone or anything can be declared by law to be a person. A narrower interpretation equates personhood with a human being or some degree of rationality. The narrower meanings of a person mean that animals can never be included in this category. Until the meaning of a person is clarified, therefore, the possibility of implementing Francione's suggested model cannot be determined.

Francione also employs the similarity argument in justifying legal personhood for sentient animals. As explained in Chapter 3, this argument identifies specific human abilities, such as sentience or autonomy, as the benchmark for qualifying as persons.<sup>1064</sup> Based on the principle that like entities ought to be treated alike, the argument is that animals that possess the relevant cognitive ability should be treated like humans in respect of those capabilities. This line of reasoning has been opposed on the basis that it is an anthropocentric approach that reinforces the belief of human superiority and ignores the value of diversity of life.<sup>1065</sup>

Practically, setting sentience as the criterion for animal personhood requires a method for identifying which animals are sentient. This is an empirical question that requires scientific investigation. Accordingly, grounding animal personhood on sentience may have the

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<sup>1063</sup> See section 2.4.2.

<sup>1064</sup> See section 3.2.4.

<sup>1065</sup> See section 3.2.4.

consequence of subjecting animals to scientific research. This would give rise to ethical questions about whether animals should be subject to scientific research, and if so, to what extent. Such an outcome is contradictory to Francione's goal of ending all forms of animal use. Moreover, while the capacity to feel pain or suffer may already be apparent in some animals, there may be uncertainty about the sentience of other animals. The legal framework relating to the legal status of animals would thus have to provide a mechanism for dealing with such uncertainty.

It is clear that Francione's personhood model is premised on morality, and not intended to align with community attitudes. It is for this reason that he insists on a model that carries significant implications for people and animals. Francione himself describes the implications as 'radical', as it would no longer be possible to exploit animals for food, clothing, entertainment, research etc.<sup>1066</sup> It may even mean that animals such as cats and dogs can no longer be bred for companionship. It is reasonable to expect, based on the prevalence of such animal use, that there might be significant public objection to such implications. Indeed, in 2006, only a small percentage (11%) of the Australian population was found to have an all, or almost all, vegetarian diet.<sup>1067</sup> Meat consumption in Australia is actually increasing.<sup>1068</sup> In fact, meat consumption is expected to continue rising, although the consumption of some types of meat is declining.<sup>1069</sup> Certainly, the number of Australians adopting a vegetarian diet is increasing.<sup>1070</sup> That increase, however, does not necessarily stem from opposition to animal use. Rather, research suggests that reduced intake of meat is also influenced by a range of other factors including, the price of meat, health and weight concerns and environmental concerns.<sup>1071</sup> Even

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<sup>1066</sup> Francione, *Introduction to Animal Rights*, above n 20, xxix, 102.

<sup>1067</sup> Having stated that, vegetarianism does appear to be on the rise in Australia. Between 2012 and 2016, the number of *Australians* eating a vegetarian (or almost all vegetarian) diet increased from 1.7m to 2.1m – an increase of 1.5%: Roy Morgan, *The Slow but Steady Rise of Vegetarianism in Australia* (15 August 2016) <<http://www.roymorgan.com/findings/vegetarianisms-slow-but-steady-rise-in-australia-201608151105>>. Cf Humane Research Council, above n 46, 8. The Animal Tracker survey estimated the percentage of *Australian households* that are vegetarian and vegan to be at 1.5% and 0.5%, respectively. It ought to be noted that the Roy Morgan statistics concern individual Australians while the Animal Tracker data relates to Australian households.

<sup>1068</sup> Chen, above n 52, 42; Lucille Wong, Eliyathamby A Selvanathan and Saroja Selvanathan, 'Modelling the meat consumption patterns in Australia' (2015) 49 *Economic Modelling* 1, 2.

<sup>1069</sup> Conrad Rees and Jack Mullumby, 'Trends in Meat Consumption' (2017) 7(3) *Agricultural Commodities* 82, 82; Australian Bureau of Agricultural and Resource Economics and Sciences, *Agricultural Commodities* (March Quarter 2017) Department of Agriculture and Water Resources, 116 <[http://data.daff.gov.au/data/warehouse/agcomd9abcc004/agcomd9abcc20170307\\_0S6mp/AgCommodities201703\\_v1.0.0.pdf](http://data.daff.gov.au/data/warehouse/agcomd9abcc004/agcomd9abcc20170307_0S6mp/AgCommodities201703_v1.0.0.pdf)>; Zhixian Sui et al, *Changes in Meat/Poultry/Fish Consumption in Australia: From 1995 to 2011-2012* (2016) 8(12) *Nutrients* 753.

<sup>1070</sup> Roy Morgan, *The Slow but Steady Rise of Vegetarianism in Australia*, above n 1067. While it may seem contradictory that the rate of meat consumption and vegetarianism are rising at the same time, this trend may be because those who eat meat are consuming more meat at a faster rate than the rate at which others are giving up meat.

<sup>1071</sup> See The Centre for Global Food and Resources, *Understanding Current Meat Consumption Trends in Australia: An analysis of the Factors Leading to Increasing Vegetarianism in Australia* (6 September

consumers of cosmetic products in Australia have indicated that ‘value for money’ and the ‘natural look’ effect of the products are more important purchase considerations than labels advising whether the product has been tested on animals.<sup>1072</sup> These trends suggest that Australians still find animal use acceptable.

Some forms of animal use do face greater opposition from the public. Recent statistics suggest, for example, that almost half of the Australian population opposes the use of animals in scientific research.<sup>1073</sup> Even then, however, opposition to animal use is not unanimous. Francione’s proposed model therefore does not appear to be consistent with community attitudes so far as it calls for an end to all forms of animal use.

That is not to suggest that the idea of categorising sentient animals as persons is inconsistent with contemporary attitudes. Animal personhood can be consistent with community attitudes if the rights associated with this status are moderated. For example, Francione’s model may be more likely to be consistent with community attitudes if sentient animals as persons are simply assigned the right to enforce the protections guaranteed under animal welfare legislation (rather than the right to not be treated as property).

So far as the survey undertaken for this thesis is concerned, Francione’s proposed model is consistent with the results to the extent that it allows for the differential treatment of sentient and non-sentient animals. Under this model, sentient animals are classified as persons; animals that lack sentience do not qualify for personhood and therefore remain property. Further empirical research is needed, however, to determine whether a simple division between sentient and non-sentient animals in defining the legal status of animals is sufficient for the purposes of reflecting the variegated attitudes towards animals. Although there may be valid moral reasons for differentiating between the legal status of sentient and non-sentient animals, this may not necessarily accord with how the public differentiates between different kinds of animals.

As Nussbaum contends, animals are not valued for their sentience alone. She argues that people who live close to or study animals in some way do not just see pleasure and pain.

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2017) The University of Adelaide <<https://www.adelaide.edu.au/global-food/research/healthy-societies/meat-consumption-trends/>>.

<sup>1072</sup> Roy Morgan, *Is Animal Testing for Cosmetics on the Way Out?* (24 July 2014) <<http://www.roymorgan.com/findings/5698-is-animal-testing-for-cosmetics-on-way-out-201407240022>>; Roy Morgan, *New Legislation Banning Sale of Animal-tested Cosmetics and Skincare in Line with Public Sentiment* (8 March 2017) <<http://www.roymorgan.com/findings/7167-new-legislation-banning-animal-testing-on-cosmetics-in-line-with-public-201703080937>>.

<sup>1073</sup> Australian National University, *The Australian Beliefs and Attitudes Towards Science Survey* (August 2017) Science.gov.au, 4 <<https://www.science.gov.au/community/Documents/REPORT-SCAPA172001-CPAS-poll.pdf>>.

Instead, 'they see a form of life with numerous aspects, complexly interacting'.<sup>1074</sup> She further asserts that humans are fascinated with animal life 'because we care about what animals are able to do and be'.<sup>1075</sup> As such, sentience may not be the appropriate criteria for defining the legal status of animals. Of course, Nussbaum is merely hypothesising about how animals are perceived by humans. This hypothesis could, however, be tested in future empirical studies, so as to shed more light on how animals are perceived. For example, Australians could be surveyed about whether they think *sentient* animals should legally be classified as property.

In summary, Francione's personhood model is grounded on moral principles rather than community attitudes. Although the framework differentiates between sentient and non-sentient animals, it would require drastic lifestyle changes for Australians. On this basis, Francione's personhood model is unlikely to be consistent with community attitudes in Australia at the present time. Moreover, there are some theoretical questions that warrant further examination before this model should be implemented in Australia. In particular, the necessity of animal personhood needs to be confirmed by determining whether animals could possess legal rights as property. Further, clarity is needed about whether sentient animals can qualify for personhood. A mechanism for dealing with scientific uncertainty is also needed, particularly where it is unclear whether a particular species of animal is sentient.

#### **7.4.2.2 Cognitively Advanced Animals as Persons (Wise's Personhood Model)**

Wise is another prominent abolitionist who suggests personhood for some animals. Wise takes a more cautious approach than Francione, arguing that as a first step, the legal status of a narrower class of animals ought to be changed. In particular, his focus is on animals that are cognitively similar to humans.

##### *i Description of Wise's Personhood Model*

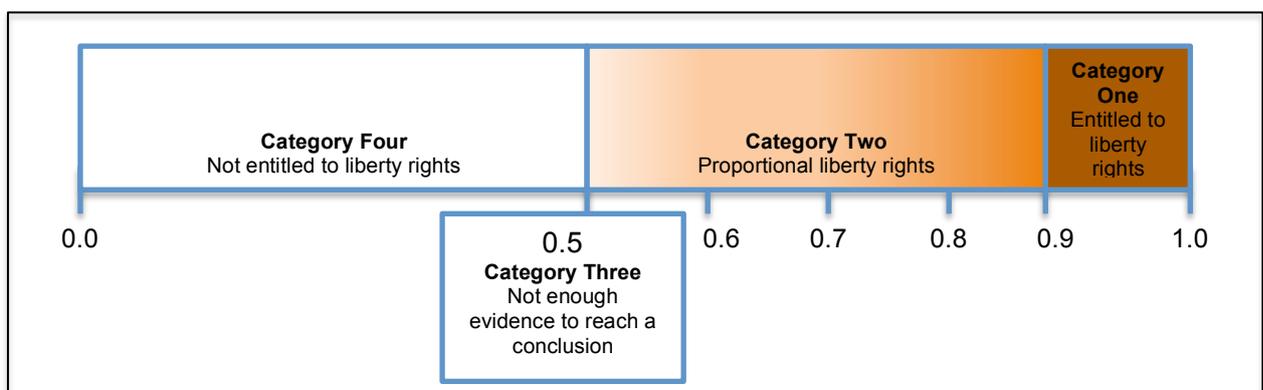
Wise proposes a more nuanced model for defining the legal status of animals, whereby legal personhood and rights depend on the extent of an animal's cognitive capacities. Thus, he calls for a model that categorises animals based on the extent to which they possess practical autonomies. Because the degree of practical autonomy varies between different species of animals, Wise draws inspiration from Griffin's work in measuring the practical autonomies of

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<sup>1074</sup> Martha C Nussbaum, 'Working with and for Animals: Getting the Theoretical Framework Right' (2018) 19(1) *Journal of Human Development and Capabilities* 2, 15.

<sup>1075</sup> *Ibid.*

animals.<sup>1076</sup> He suggests that animals should be assigned an ‘autonomy value’ between 0.0 and 1.0 based on the probability that the animal possesses practical autonomy. Wise is of the opinion that the more an animal’s behavior resembles that of humans, and the taxonomically closer the animal is to humans, the greater the probability that the animal possess desires, intentions and a sense of self.<sup>1077</sup> Thus, the more certain we are, based on scientific evidence, that an animal possesses practical autonomies resembling humans, the greater the ‘autonomy value’ (closer to 1.0) assigned to the animal. The less certain we are that the animal possesses practical autonomy, the lesser the autonomy value (closer to 0.0) ought to be. Where not enough is known about an animal to be able to assign the animal an autonomy value, the animal is assigned an autonomy value of exactly 0.5.



**Figure 7.1 – The scale of autonomy value and corresponding rights under Wise’s personhood model**

Wise proposes four different categories to classify animals. Whether or not an animal is entitled to liberty rights, and the extent to which an animal is entitled to those rights, depends on the category that the animal falls within. Category One encompasses animals that have an autonomy value of 0.90 or greater.<sup>1078</sup> Wise proposes that these animals should be deemed to qualify for the basic liberty rights of bodily integrity and bodily liberty.<sup>1079</sup> He suggests that animals that are the evolutionary cousins of humans should be assigned an autonomy value of 0.9 or more, as should animals that pass a mirror self-recognition (MSR) test.<sup>1080</sup> Animals that ‘understand symbols, use a sophisticated language or language-like communication system, and may deceive, pretend, imitate, and solve complex problems’ are likely to have a ‘theory of

<sup>1076</sup> Griffin formulated a probability-based method of measuring the mental abilities of animals, such as their ability to feel, desire, act with intent, think, know or have self-awareness. See Griffin, above n 455.

<sup>1077</sup> Wise, *Drawing the Line*, above n 21, 36.

<sup>1078</sup> Ibid; Wise, ‘Animal Rights, One Step at a Time’, above n 366, 33.

<sup>1079</sup> Wise, *Drawing the Line*, above n 21, 36; Wise, ‘Animals Rights, One Step at a Time’, above n 366, 35.

<sup>1080</sup> Wise, *Drawing the Line*, above n 21, 36; Wise, ‘Animals Rights, One Step at a Time’, above n 366, 34.

mind' and should therefore also be placed in Category One.<sup>1081</sup> Based on scientific evidence, Wise assesses chimpanzees, bonobos, gorillas, orangutans and Atlantic bottle-nosed dolphins to qualify for this category.<sup>1082</sup>

Category Two comprises of animals that have an autonomy value between 0.51 and 0.89. Animals that do not pass the MSR test and possess 'a simpler consciousness' fall within this group.<sup>1083</sup> Animals with a simpler consciousness are likely to 'mentally represent and act insightfully, think, use a simple communication system, have a primitive sense of self, and are modestly close to humans in an evolutionary sense'.<sup>1084</sup> Given that Category 2 is so wide, Wise appreciates that there may be vast differences amongst the animals in this category.<sup>1085</sup> Such differences are relevant in determining whether these animals are entitled to liberty rights and the extent to which they are entitled to such rights.<sup>1086</sup> After all, Wise's suggestion is that animals should be entitled to liberty rights in proportion to the autonomies they possess.<sup>1087</sup> Thus, animals in the higher subcategories would be entitled to greater rights in comparison to animals in the lower categories. Wise explains:

Category Two covers the immense cognitive ground of every animal with an autonomy value between 0.51 and 0.89. Whether an animal should be placed in the higher, middle or lower reaches of Category Two depends upon whether she uses symbols, conceptualizes (mentally represents), or demonstrates other sophisticated mental abilities. Her taxonomic class (mammal, bird, reptile, amphibian, fish, insect) and the nearness of her evolutionary relationship to humans (which are related) may also be important factors.<sup>1088</sup>

Wise proposes that an animal with an autonomy value of 0.70 or higher should be presumed to possess practical autonomy sufficient for basic liberty rights.<sup>1089</sup> Those with an autonomy value between 0.60 (or 0.65) and 0.69 should be granted liberty rights in proportion to the autonomies they possess.<sup>1090</sup> Animals with an autonomy value below 0.60 (or 0.65) would be less likely to be entitled to liberty rights.<sup>1091</sup> Wise explains:

Personhood and basic liberty rights should be given in proportion to the degree one has

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<sup>1081</sup> Wise, *Drawing the Line*, above n 21, 36.

<sup>1082</sup> Ibid 47, 157, 205, 230, 241.

<sup>1083</sup> Ibid 36; Wise, 'Animal Rights, One Step at a Time', above n 366, 34.

<sup>1084</sup> Wise, *Drawing the Line*, above n 21, 36-7.

<sup>1085</sup> Ibid 43; Wise, 'Animal Rights, One Step at a Time', above n 366, 34.

<sup>1086</sup> Wise, *Drawing the Line*, above n 21, 36.

<sup>1087</sup> Ibid 37; Wise, 'Animal Rights, One Step at a Time', above n 366, 34.

<sup>1088</sup> Wise, *Drawing the Line*, above n 21, 37.

<sup>1089</sup> Ibid 43, 231.

<sup>1090</sup> Ibid 44-5, 230-1.

<sup>1091</sup> Ibid 45.

practical autonomy. If you have it, you acquire rights in full; if you don't, the degree to which you *approach* autonomy might make you eligible to receive some proportion of liberty rights.<sup>1092</sup>

Wise's categorisation of honeybees, dogs and African grey parrots demonstrates the wide scope of Category Two. He finds evidence of honeybees' 'excellent learning capacity and memory', their possession of a symbolic cognitive map and a sophisticated communication system, as well as their ability to engage in rudimentary thinking.<sup>1093</sup> These factors, Wise argues, place honeybees above categories Three and Four, although they do not qualify for Category One.<sup>1094</sup> Wise suggests that if honeybees had been vertebrates, he would have placed them at 0.70 or even 0.80. He argues, however, that 'the vastness of the evolutionary distance between honeybees and humans makes it difficult, nearly impossible', to understand the experiences and consciousness of honeybees.<sup>1095</sup> In light of conflicting evidence on the consciousness of honeybees, Wise assigns them an autonomy value of 0.59.<sup>1096</sup> He admits, however, that as scientific investigations continue, the argument for practical autonomy in honeybees may be strengthened or weakened, prompting a need to revisit honeybees' entitlement to liberty rights.<sup>1097</sup>

In contrast, Wise assigns an autonomy value of 0.68 for his dog.<sup>1098</sup> He places the dog higher in Category Two in comparison to honeybees on the basis that the evolutionary distance between humans and honeybees is much greater.<sup>1099</sup> Further, unlike honeybees, dogs are mammals, so Wise feels he is better able to understand the dog's mental capabilities.<sup>1100</sup> Wise finds some evidence that dogs have a sense of the self, although he concludes that the evidence is not adequate to prove this capability in dogs.<sup>1101</sup> The dog is given a lesser autonomy value in comparison to an African grey parrot (assigned 0.78) because unlike the latter, dogs do not understand symbols or use a sophisticated language-like system.<sup>1102</sup> Again, Wise suggests that scientific understanding of the mental capabilities of dogs is in need of much further development.<sup>1103</sup>

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<sup>1092</sup> Ibid 44 (emphasis in original).

<sup>1093</sup> Ibid.

<sup>1094</sup> Ibid.

<sup>1095</sup> Ibid.

<sup>1096</sup> Ibid 86.

<sup>1097</sup> Ibid.

<sup>1098</sup> Ibid 129. Wise does not know the breed of his dog. However, he contends that the breed does not matter; they just have to be of the dog species: Wise, *Drawing the Line*, above n 21, 114.

<sup>1099</sup> Ibid 128.

<sup>1100</sup> Ibid.

<sup>1101</sup> Ibid.

<sup>1102</sup> Ibid 112, 129.

<sup>1103</sup> Ibid 129.

Wise is also conscious of the impact of community attitudes on the prospects of granting rights to animals, although he is uncertain how the attitudes might affect the legal status of animals. On the one hand, for example, Wise hypothesises that arguments for the liberty rights of dogs would face greater resistance in comparison to African grey parrots because there are significantly more dogs owned and used in the United States than African grey parrots.<sup>1104</sup> On the other hand, Wise also recognises that most dog owners consider their dogs to be a member of their family; such attitudes may actually make it easier for judges to recognise the personhood of dogs.<sup>1105</sup>

Animals with an autonomy value of 0.5 fall into Category Three.<sup>1106</sup> The category represents animals in respect of whom a rational judgment cannot be made because information about the mental abilities of these animals is lacking.<sup>1107</sup> Wise predicts that most animals may fall into Category Three.<sup>1108</sup>

Category Four encompasses animals with an autonomy value of less than 0.5; these animals are not entitled to liberty rights.<sup>1109</sup> These animals are taxonomically and evolutionarily remote to humans, and their behavior scarcely resemble the behavior of humans.<sup>1110</sup> Further, such animals may 'lack all consciousness and be nothing but living stimulus-response machines'.<sup>1111</sup> Although such animals are not to be entitled to liberty rights, Wise argues that these animals may have rights to equality.<sup>1112</sup> Wise's argument is that if there are humans who do not have practical autonomy, and yet are bearers of liberty rights, then other beings that lack practical autonomy should not be barred from liberty rights either.<sup>1113</sup> Nonetheless, Wise accepts that the less an animal's autonomy resembles humans, the weaker the argument for equality rights.<sup>1114</sup> Thus, as the autonomy value of animals decreases below 0.50, it becomes easier to distinguish rationally between those animals and humans.<sup>1115</sup>

Wise also offers a solution for dealing with scientific uncertainty with respect to the cognitive abilities of animals. He recognises that absolute scientific truth does not exist, and that there

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<sup>1104</sup> Ibid.

<sup>1105</sup> Ibid 130.

<sup>1106</sup> Ibid 37; Wise, 'Animal Rights, One Step at a Time', above n 366, 34.

<sup>1107</sup> Wise, *Drawing the Line*, above n 21, 35-8.

<sup>1108</sup> Ibid 37.

<sup>1109</sup> Ibid 35-38; Wise, 'Animal Rights, One Step at a Time', above n 366, 34.

<sup>1110</sup> Wise, *Drawing the Line*, above n 21, 37.

<sup>1111</sup> Ibid.

<sup>1112</sup> Ibid 45.

<sup>1113</sup> Ibid 45, 236.

<sup>1114</sup> Ibid 236.

<sup>1115</sup> Ibid 238.

can be uncertainty about the mental capacities of some animals.<sup>1116</sup> Wise advocates for the application of the precautionary principle to deal with such uncertainty.<sup>1117</sup> This principle requires that if 'serious damage is threatened, we should err on the cautious side when some evidence of practical autonomy exists'.<sup>1118</sup> Wise cautions, however, that at least some evidence of practical autonomy is required for the precautionary principle to apply; mere speculation is not an adequate basis for animals to be granted liberty rights.<sup>1119</sup>

In relation to who should bear the onus of proving the cognitive abilities of animals (or lack thereof), Wise suggests different answers for different kinds of animals. Because Wise expects mammals and birds to be more likely to have emotions, consciousness and a sense of self, the burden ought to be on the person whose actions may harm the mammal or bird.<sup>1120</sup> This person would have to prove that the mammal or bird lacks practical autonomy. For all other animals, the person who objects to the potential harm of an animal should bear the burden of proving practical autonomy.<sup>1121</sup> Based on the evidence presented, a judge would assign an autonomy value for the animal and determine the category that the animal falls into.<sup>1122</sup>

## *ii Analysis of Wise's Personhood Model*

Like Francione, Wise also proposes that some animals should be legal persons because their interests are not recognised by the law so long as they remain property. Accordingly, some of the limitations highlighted in respect of Francione's proposed model also apply to Wise's approach for defining the legal status of animals. In particular, the ambiguity relating to the meaning and implications of legal personhood makes it difficult to determine whether animals can qualify for legal personhood. Additionally, the justification for animal personhood is weakened if it is true that animals can possess rights whilst classified as property. Furthermore, like Francione, Wise employs the similarity argument. As already noted, the similarity argument has been criticised for undermining diversity and the ecological importance of animals, as well as for overlooking the vulnerability of animals.<sup>1123</sup>

Additionally, as explained in Chapter 3, there is a risk that Wise's approach creates ethical problems. Although Wise intends the opposite, his strategy of focusing on a narrow class of

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<sup>1116</sup> Ibid 38-39.

<sup>1117</sup> Ibid 38-43; Wise, 'Animal Rights, One Step at a Time', above n 366, 36. See Chapter 3 section 3.2.2.

<sup>1118</sup> Wise, *Drawing the Line*, above n 21, 40.

<sup>1119</sup> Ibid.

<sup>1120</sup> Ibid 43.

<sup>1121</sup> Ibid.

<sup>1122</sup> Ibid.

<sup>1123</sup> See section 3.2.4 for a more detailed analysis of these limitations.

animals to expand the boundaries of legal personhood may reinforce a hierarchy that considers humans as superior to other species of animals. Moreover, Wise's model is dependent upon scientific evidence to determine whether a particular animal has the requisite autonomy. As with Francione's model, therefore, Wise's personhood model may encourage and facilitate scientific research on animals. Such research may be counter to the goals of Wise, particularly as he pursues bodily liberty rights for the eligible animals, unless there are non-intrusive field study methods that can allow such research to be carried out without infringing on the potential rights of the animals.

It is also questionable whether courts are the best institutions to be assessing the autonomy value of animals. Such a task would purely be premised on scientific evidence. Although courts do already deal with scientific evidence in areas of law such as patents, torts and forensics, there are concerns about their ability to deal with conflicting scientific information and to discriminate between reliable and unreliable scientific evidence.<sup>1124</sup> This may leave the assignment of autonomy values susceptible to legal challenges. Disagreements about scientific evidence also tend to prolong court hearings and contribute to 'justice being an expensive, drawn-out and stressful experience for all involved'.<sup>1125</sup> The framework for Wise's proposed model may therefore require some modification for it to operate more efficiently, such as through the establishment of independent scientific panels to assess the autonomy of animals.

Nevertheless, Wise's focus on animals that are cognitively similar to humans does intuitively appear more likely to garner social acceptance than Francione's model. In an Australian context, many of the animals that Wise focuses on, such as the great apes, dolphins and elephants, have little impact on the day-to-day lives of the public, especially in comparison to many farm animals.<sup>1126</sup> Accordingly, there is likely to be less public resistance to the idea of making those animals legal persons. As such, Wise may have a successful strategy for stretching the boundaries of legal personhood. That does not necessarily mean, however, that the proposition of categorising cognitively advanced animals as persons is popular. While there is no empirical data on attitudes towards Wise's personhood model, some indication can be

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<sup>1124</sup> See David Neuberger, 'Stop Needless Dispute of Science in the Courts' (2016) 531 *Nature* 9; Susan Haack, 'Trial and Error: The Supreme Court's Philosophy of Science' (2005) 95(S1) *American Journal of Public Health* S66; John A Thomas, 'Junk Science and the Courts: Not All Bad News' (1992) 17(1) *The Skeptical Inquirer* 6; Sheila Jasonoff, 'Judicial Fictions: The Supreme Court's Quest for Good Science' (2002) 23(3) *Science Communication* 264; Francisco J Ayala and Bert Black, 'Science and the Courts' (1993) 81(3) *American Scientist* 230.

<sup>1125</sup> Neuberger, above n 1124, 9.

<sup>1126</sup> It should be noted that some farm animals, such as pigs, may also be cognitively advanced. See, eg, Marianne Wondrak et al, 'Pigs (*Sus Scrofa Domestica*) Categorise Pictures of Human Heads' (2018) 205 *Applied Animal Behaviour Science* 19; Elise Gieling, Rebecca Nordquist and Franz van Der Staay, 'Assessing Learning and Memory in Pigs' (2011) 14(2) *Animal Cognition* 151.

obtained from public comments made in response to online media articles reporting on the NhRP cases. The comments are sharply divided on the issue, with many people expressing their opposition to the NhRP's aims.<sup>1127</sup> Thus, although Wise's approach might enjoy more popular support in comparison to Francione's, Wise's personhood goal for cognitively advanced animals is still controversial.

Wise's approach appears to be consistent with the attitudes highlighted in the survey data so far as he seeks to change the legal status of some, but not all, animals. Under Wise's personhood model, animals with an autonomy value of 0.5 or below do not qualify as legal persons. Thus, while animals with practical autonomy qualify as persons, other animals remain as property.<sup>1128</sup> It is unclear, however, whether this model reflects the variegated attitudes towards animals. The model allows for the differential treatment of animals by recognising the liberty rights of the animals in proportion to their cognitive abilities; but such differential treatment is dictated by a scientific scale of practical autonomy rather than community attitudes.

Wise proposes a restricted approach partly to overcome social barriers, but hopes that once cognitively advanced animals are recognised as legal persons, it may become more socially acceptable to redraw the lines of legal personhood in the future to include other kinds of animals. However, he does not propose that the community should have any say in actually deciding which animals should become legal persons. Currently, it is unclear whether Australians believe cognitively advanced animals should, or should not be, property. Therefore, in the absence of empirical data, it is difficult to assess whether legal personhood and liberty rights for such animals align with community attitudes. To be able to make such an assessment, further empirical research is needed in order to discover whether Australians think that the legal status of animals should be determined according to specific cognitive abilities, such as practical autonomy. Alternatively, respondents in future empirical studies could be asked whether they think specific kinds of animals, such as the great apes, should be property.

In summary, Wise's personhood model is more conservative than Francione's model. Because the legal implications of Wise's model are not as significant as under Francione's model, Wise's personhood model is likely to be more consistent with community attitudes. It is also a more

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<sup>1127</sup> See, eg, the public comments published in response to Alan Yuhas, 'Chimpanzees Are Not People, New York Court Decides', *The Guardian* (online), 5 December 2014 <<https://www.theguardian.com/world/2014/dec/04/court-denies-legal-personhood-of-chimpanzees>>; Karin Brulliard, 'Chimpanzees Are Animals. But Are They "Persons"?', *The Washington Post* (online), 16 March 2017 <[https://www.washingtonpost.com/news/animalia/wp/2017/03/16/chimpanzees-are-animals-but-are-they-persons/?utm\\_term=.f0329a3abe8a](https://www.washingtonpost.com/news/animalia/wp/2017/03/16/chimpanzees-are-animals-but-are-they-persons/?utm_term=.f0329a3abe8a)>.

<sup>1128</sup> The legal status of wild animals that lack practical autonomy is not clear under Wise's proposed framework.

nuanced model. However, the model may still face opposition for trying to categorise animals as persons. Further, under Wise's personhood model, community attitudes do not directly influence the legal status or entitlements of animals. In any case, further empirical data is needed to determine the extent to which Wise's model and its legal implications are consistent with contemporary attitudes. Additionally, the need to resolve questions about who can be a legal person is important for the purposes of determining whether Wise's personhood model can be implemented. Furthermore, there are ethical questions about whether a scientific approach to personhood is appropriate, especially if scientific experiments are required to assess the cognitive abilities of animals.

### **7.4.3 The Guardianship Model**

Before Favre suggested the living property model, he proposed a different model that can be described as a guardianship model. This paradigm allows animals to be self-owned under equitable principles, making them part-property and part-persons. What follows is a description and analysis of the guardianship model.

#### **7.4.3.1 Description of the Guardianship Model**

Favre initially suggested a model for defining the legal status of animals that borrows ideas from the law of trusts and laws governing parent-child relationships.<sup>1129</sup> Favre reasons that a new legal status for animals under the control of humans is warranted because their current categorisation as property 'is inadequate for the recognition and protection of the interests of animals'.<sup>1130</sup>

Favre explains that the legal status of animals depends in a large part on what the public thinks. Thus, he argues, 'it is important to distinguish first steps of change within the legal system, where maximum consensus ought to exist, versus the ultimate destination of legal change'.<sup>1131</sup> He asserts that there may be wide support for the proposition that in divorce cases, the primary consideration ought to be the interests of the companion animal rather than financial contributions towards the acquisition and maintenance of the animal.<sup>1132</sup> In contrast, he suspects broad public support is lacking for the proposition that animals should not be farmed

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<sup>1129</sup> As explained above, Favre has more recently formulated a 'living property' model. It is unclear if Favre still advocates for the guardianship model. Nevertheless, the guardianship model is explored as part of this chapter as it is still a unique proposal for defining the legal status of animals.

<sup>1130</sup> Favre, 'Equitable Self-Ownership for Animals', above n 1000, 475.

<sup>1131</sup> Favre, 'A New Property Status for Animals', above n 1000, 236.

<sup>1132</sup> Ibid.

and consumed.<sup>1133</sup> Favre argues, however, that '[a]greement on the latter is not necessary for changing the legal system to realise the former'.<sup>1134</sup> In light of political and social realities, he contends that change has to be incremental. That is, the journey of change should begin by modifying, rather than eliminating, the property status of animals.<sup>1135</sup> It is from this understanding that Favre envisages the guardianship model, although he recognises that this model too can only be implemented if it finds social acceptance.<sup>1136</sup>

Favre argues that property laws are a human construct; therefore, there is 'conceptual space for innovation'.<sup>1137</sup> He proposes that the property paradigm be modified, so that living beings can have self-ownership. Similar to the structure of trusts, Favre suggests that the title to an animal should be divided into legal and equitable elements,<sup>1138</sup> with humans holding the legal title and the animal retaining equitable self-ownership (these animals being called 'self-owned animals').<sup>1139</sup>

The legal title owner, called a guardian, would owe duties to the self-owned animal.<sup>1140</sup> While the duties would arise pursuant to animal-cruelty statutes, they would be owed directly to the self-owned animals.<sup>1141</sup> The nature of the duties would flow from the legal principles that define parent-child relationships.<sup>1142</sup> For example, guardians would need to make decisions that are in the best interests of the self-owned animal.<sup>1143</sup>

Two methods are suggested by Favre for implementing a change in the legal status of animals. One is to allow private parties to voluntarily and explicitly choose to confer equitable title in the animals they own to the animals themselves, such as through a deed.<sup>1144</sup> Alternatively, Favre

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<sup>1133</sup> *Ibid.*

<sup>1134</sup> *Ibid.*

<sup>1135</sup> *Ibid.*

<sup>1136</sup> Favre, 'Equitable Self-Ownership for Animals', above n 1000, 484.

<sup>1137</sup> *Ibid.* 479-480.

<sup>1138</sup> Favre, 'A New Property Status for Animals', above n 1000, 240.

<sup>1139</sup> *Ibid.* 241.

<sup>1140</sup> *Ibid.*

<sup>1141</sup> Favre, 'Equitable Self-Ownership for Animals', above n 1000, 494, 498. Favre suggests that duties would still be owed to the State under animal cruelty laws.

<sup>1142</sup> Favre, 'A New Property Status for Animals', above n 1000, 242-3; Favre, 'Equitable Self-Ownership for Animals', above n 1000, 497.

<sup>1143</sup> Favre, 'A New Property Status for Animals', above n 1000, 244. This concept of 'best interests' is borrowed from family law principles. For example, s 60CA of the *Family Law Act 1975* (Cth) requires a court to have regard to the 'best interests of the child as the paramount consideration' when deciding whether to make a parenting order. Section 60CC lists numerous matters that a court must take into account when determining what is in a child's best interest. One of the primary considerations is 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence'.

<sup>1144</sup> Favre, 'A New Property Status for Animals', above n 1000, 241. The specific mechanisms for this approach are discussed in Favre, 'Equitable Self-Ownership for Animals', above n 1000, 492-4.

suggests a change in the legal status of animals can be implemented through the adoption of legislation that transfers equitable ownership of animals.<sup>1145</sup> For example, the legislature may decide that, in order to recognise the cognitively-advanced nature of primates, it should pass legislation declaring those animals' equitable self-ownership.<sup>1146</sup> Regardless of which of these methods is employed, the legal status of the relevant animals would change to 'self-owned animals'.<sup>1147</sup>

Self-owned animals would be treated as juristic persons.<sup>1148</sup> As equitable self-owners, they would be able to enforce their legally recognised interests against their guardian.<sup>1149</sup> Additionally, self-owned animals would be able to sue others (that is, humans other than their guardians) in accordance with modified torts principles, so as to seek compensation for their losses as well as pain and suffering.<sup>1150</sup> Because animals cannot personally seek the enforcement of their rights in courts, Favre suggests that courts may appoint guardians to assert the rights of the self-owned animals. In light of limited government resources, Favre suggests that private parties, such as animal protection organisations, could be called upon to assert the interests of these self-owned animals.<sup>1151</sup> Favre further proposes that self-owned animals should be capable of having an equitable interest in property.<sup>1152</sup> He also leaves open the possibility of animals being privy to contractual income and contest winnings.<sup>1153</sup>

At the same time, Favre maintains that animals should continue to be subject to ownership because property laws enable humans to take responsibility for them.<sup>1154</sup> He contends that domesticated animals are not capable of self-care, and would find themselves in a hostile environment if no one owned them.<sup>1155</sup> Thus, he argues, 'it is important that legal ownership continues to exist so that responsibility for the care of the self-owned animal can be squarely placed on a specific human'.<sup>1156</sup> Further, Favre believes that self-ownership should not prevent the economic value of animals from being realised,<sup>1157</sup> and he suggests that such value be

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<sup>1145</sup> Favre, 'A New Property Status for Animals', above n 1000, 241.

<sup>1146</sup> Favre, 'Equitable Self-Ownership for Animals', above n 1000, 494.

<sup>1147</sup> Ibid 493.

<sup>1148</sup> Ibid 501.

<sup>1149</sup> Ibid 493.

<sup>1150</sup> Ibid 502.

<sup>1151</sup> Favre, 'A New Property Status for Animals', above n 1000, 243.

<sup>1152</sup> In this case, the human guardian would be a trustee of those assets, and would be required to use the assets to serve the interests of the self-owned animal: Favre, 'Equitable Self-Ownership for Animals', above n 1000, 501.

<sup>1153</sup> Ibid 502.

<sup>1154</sup> Ibid 495.

<sup>1155</sup> Ibid.

<sup>1156</sup> Ibid.

<sup>1157</sup> Ibid.

maintained under this model.<sup>1158</sup>

In essence, therefore, Favre presents a paradigm that is ‘an intermediate ground between being only property and being freed of property status, where the interests of animals are recognised by the legal system but the framework of property law is still used for limited purposes’.<sup>1159</sup>

#### 7.4.3.2 Analysis of the Guardianship Model

Favre does not support the complete abolition of the property status of animals, at least at this time. He is conscious of the connection between law and community attitudes, and therefore proposes a model that he believes is consistent with current social attitudes. Thus, unlike the personhood models, the premise of the guardianship model does not lie purely in ethics, but also in community attitudes.

Favre’s goal is to provide at least some animals with certain legal capacities, such as to legally compel their guardians and other humans to take their interests into account, to sue and to own property.<sup>1160</sup> Accordingly, animals effectively become separate legal entities with legally recognised interests. At the same time, the property status of animals is not abolished and they are still to be subject to ownership. Conceptually, therefore, the guardianship model sees an animal being categorised as property and conferred with legal personhood at the same time. Underlying this paradigm is an understanding that the categories of property and persons are not exclusive categories. As noted above, this is consistent with the view taken in Chapter 2.<sup>1161</sup>

However, Favre’s justification for continuing to classify animals as property can be disputed. He assumes that the *property status* of animals allows animals to be cared for by humans. This is similar to Epstein’s argument that the property categorisation benefits animals.<sup>1162</sup> However, as argued in Chapter 3, humans do not necessarily take care of animals simply because animals are their property. Laws restricting the property rights of owners compel humans to take care of the animals they own. Additionally, humans may take care of animals because of the emotional bond they share with the animals, or because of their own sense of morality. Accordingly, just as children are cared for without being treated as property, animals too can be cared for without being classified as property.

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<sup>1158</sup> Ibid. To clarify, Favre does not deny that animals have intrinsic, as opposed to extrinsic, value.

<sup>1159</sup> Favre, ‘Equitable Self-Ownership for Animals’, above n 1000, 476.

<sup>1160</sup> As noted in Chapter 2, legal personhood is a requirement for legal standing in Australia. See section 2.3.3.

<sup>1161</sup> See section 2.3.3.

<sup>1162</sup> Epstein, above n 370, 148. See section 3.3 for a critique of Epstein’s argument.

In theory, all animals could become self-owned animals and therefore have the capacity to legally hold and enforce their interests. Favre asserts that wild animals that are not under the control or possession of humans already retain self-ownership because they belong to no one.<sup>1163</sup> The guardianship model allows other animals to also become self-owned animals. Which animals benefit from this status in practice, however, may not be as straightforward. As non-wild animals would only get equitable self-ownership through the voluntary acts of their owners or through legislation, the legal status of animals ultimately depends on community attitudes. In particular, it depends upon whether current owners are willing to assume duties that would be owed directly to the animals, or whether the legislature is prepared to dilute the legal rights of individual and/or corporate owners of animals, many of whom/which may hold powerful political positions.

In light of the diminished rights and increased exposure to liability, companion animals, who are commonly perceived by their owners as members of the family or friends, may be more likely to become self-owned animals. In light of the economic interests that may be at stake, the likelihood of farm animals and animals used in entertainment or sport becoming self-owned animals seems low. A similar prediction can be made in light of the research interests that may be at stake in the context of animals used for experimental purposes. As such, practically, the benefits of this paradigm may not be available as widely as may first appear.<sup>1164</sup>

Nonetheless, the two mechanisms for effecting a change in the legal status of animals may actually operate as a way of reflecting community attitudes in the legal status of animals, by essentially allowing the community to determine which animals should be self-owned. That is, by enabling individual owners to change the legal status of animals themselves, or allowing the community to pressurise legislators to do so. While this would mean that not all animals would become self-owned animals, it provides a nuanced framework whereby different kinds of animals are treated differently. Changes in the legal status of animals under this model would be ad hoc, but over time, the idea of self-equitable animals may become more socially acceptable.

Despite providing a means for the community to be directly involved in defining the legal status of animals, the guardianship model carries the risk of creating an incoherent system whereby there is no consistency in how animals are categorised. While the current framework already harbours many inconsistencies in how animals are treated, allowing ad hoc changes in the legal status of animals arguably creates an even more complicated framework. It potentially

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<sup>1163</sup> Favre, 'Equitable Self-Ownership for Animals', above n 1000, 480.

<sup>1164</sup> It should be remembered, however, that Favre's strategy involves incremental change.

constructs a situation, for example, where some companion animals are self-owned whilst others are not. Such inconsistent treatment of companion animals would be difficult to justify ethically. Such inconsistency would also create practical difficulties. For instance, the liability of veterinarians would be different in respect of self-owned animals and non-self-owned animals. Special provisions may also be required to identify which animals are self-owned and which are not. Additionally, different standards of care may have to be maintained for self-owned and non-self owned animals. These difficulties may outweigh the advantages of a legal model that reflects community attitudes.

In summary, the guardianship model does provide for a nuanced framework whereby different animals can be categorised and treated differently. Furthermore, it is more capable of reflecting community attitudes, particularly when compared to the other models analysed above, especially because it enables individuals to effect a change in the legal status of animals they own. However, because of the ad hoc nature of the changes, the ethical and practical implications of the guardianship model may outweigh the benefits of reflecting community attitudes. It is necessary to resolve these ethical and practical issues before this model can be implemented. Thus, further theoretical development of this model is suggested.

#### **7.4.4 A New Legal Category for Sentient Animals (The Non-personal Subjects of Law Model)**

The alternative models explored above attempt to work within the existing categories of persons and things, by either moving animals from one category to the other, or creating a hybrid of the two categories. Pietrzykowski takes a unique approach. Mindful of social attitudes, he proposes that a new and separate legal category should be established for entities that are a misfit for the existing categories of persons and things.<sup>1165</sup>

##### **7.4.4.1 Description of the Non-Personal Subjects of Law Model**

Pietrzykowski proposes that a new legal category called 'non-personal subjects of law' should be established to make sentient animals subjects, rather than objects, of the law.<sup>1166</sup> As explained in Chapter 3, Pietrzykowski contends that sentient animals have subjective mental states and inherent interests in ensuring the quality of their lives.<sup>1167</sup> As a result, sentient

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<sup>1165</sup> Pietrzykowski proposes that this model may also be suited to other entities, such as advanced human-animal chimeras and hybrids and artificial agents: Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 104.

<sup>1166</sup> *Ibid* 97; Pietrzykowski, 'Animal Rights', above n 501, 12.

<sup>1167</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 58. See section 3.2.3.

animals do not fit into the category of mere things,<sup>1168</sup> and should therefore be categorised as non-personal subjects of law.

As eligibility would depend on sentience, scientific data would be required to provide evidence of whether a particular species of animal is capable of having subjective experience.<sup>1169</sup> Based on current scientific knowledge, Pietrzykowski asserts that all species of mammals and birds are sentient.<sup>1170</sup> He further suggests that there is strong evidence to establish that a few species of invertebrate animals are also sentient, referring in particular to cephalopods.<sup>1171</sup>

Pietrzykowski proposes that non-personal subjects of law have a single right – the right ‘to have one’s own individual interests considered as relevant in all decisions that may affect their realisation’.<sup>1172</sup> The range of interests that count depends on the specific kind of animal in question and the particular circumstances.<sup>1173</sup> This right would recognise that animals as non-personal subjects of law can be victims of some offences, and provide them with the legal capacity to act as the wronged party in related legal proceedings.<sup>1174</sup> In this way, the subjective good of animals could not be ignored.<sup>1175</sup>

Pietrzykowski acknowledges that assigning a single right to animals to have their interests counted is a controversial idea because questions may be raised as to why animals cannot hold other more specific rights, such as the right to liberty.<sup>1176</sup> Pietrzykowski offers two reasons for his position. First, there is a distinction between animals and humans, with the latter having awareness of their own legal situation and the ability to plan their behaviour according to the predictable consequences of their actions.<sup>1177</sup> To be able to rationally plan their actions, Pietrzykowski argues that humans require precise and operative rights to define one’s situation.<sup>1178</sup> In contrast, the nature of protection provided to animals through the legal system is paternalistic.<sup>1179</sup> The protection does not revolve around the individual choices and preferences of animals.<sup>1180</sup> In fact, the interests of animals have to be constructed by humans before the law

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<sup>1168</sup> Ibid.

<sup>1169</sup> Ibid 62.

<sup>1170</sup> Ibid 63.

<sup>1171</sup> Ibid.

<sup>1172</sup> Ibid 59. See also: Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 98.

<sup>1173</sup> Pietrzykowski, ‘The Idea of Non-Personal Subjects of Law’, above n 22, 59.

<sup>1174</sup> Ibid 98. Pietrzykowski leaves open the question of whether animals as non-personal subjects of law can be regarded as the wronged party in torts cases.

<sup>1175</sup> Ibid 59.

<sup>1176</sup> Ibid 60.

<sup>1177</sup> Ibid.

<sup>1178</sup> Ibid.

<sup>1179</sup> Ibid.

<sup>1180</sup> Ibid.

protects those interests.<sup>1181</sup> Accordingly, Pietrzykowski asserts, 'there is no point in granting an animal specifically defined rights that would let it rationally plan and self-govern its own situation'.<sup>1182</sup>

The second justification offered by Pietrzykowski rests on the relationship between law and community attitudes. He argues that the extent of protection given to animals needs to be adjustable and not entrenched so as to avoid producing results that are inconsistent with predominant social attitudes to animals.<sup>1183</sup> His intention is thus to develop a framework that is 'reconcilable with ... existing practices', and at the same time provide 'potential to gradually improve the boundary conditions' in which those practices occur.<sup>1184</sup> He proposes that his conservative model allows for much more flexibility in the scope and manner of protecting animals' interests.<sup>1185</sup> Pietrzykowski explains:

The only way to foster gradual improvements in the real conditions of animal lives is to create conditions in which developing progressive attitudes may relatively easily influence the imposition of binding limitations on the way in which animals may be legally used. The law may contribute to that by prompting human decision-makers to take animal interests into account, even without compelling them to find such interests significant enough to override all competing considerations. The actual results of such considerations must ultimately refer to the prevailing social attitudes and shared moral standards. The law is not able to effectively impose a radical change of such attitudes and standards, but to some extent may stimulate their evolution. So the law cannot replace the further evolution of human attitudes towards animals and the weight given to their good when it comes into conflict with the interests and needs of people. However, it may mandate the consideration of their interests, mandating the perception of each individual and animal as an entity whose subjective good counts under the law, even if in particular situations the requirements of its good may be prevailed by more arresting considerations of human interests. The sole applicability to such conflicts of the general principle of proportionality seems to open a promising way to make it increasingly difficult to compromise at least the vital animal interests for the sake of the most trivial human whimsies.<sup>1186</sup>

As to who would be required to take the interests of non-personal subjects of law into account, Pietrzykowski envisions that lawmakers as well as individuals (as guardians perhaps) would be

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<sup>1181</sup> *Ibid.*

<sup>1182</sup> *Ibid.*

<sup>1183</sup> *Ibid* 60-61.

<sup>1184</sup> *Ibid* 61.

<sup>1185</sup> *Ibid* 60.

<sup>1186</sup> *Ibid.*

required to do so.<sup>1187</sup> Lawmakers, in particular, would be bound to take into account the interests of non-personal subjects of law in drafting regulations.<sup>1188</sup>

Pietrzykowski foresees that the right of non-personal subjects of law could come into conflict with the rights of persons, and that the rights of persons could outweigh the right of non-personal subjects of law.<sup>1189</sup> A proper implementation of this model would require all relevant interests to be fairly compared and tested against the proportionality principle.<sup>1190</sup> This principle dictates that 'any action potentially infringing on the right of a non-personal subject of law must serve a useful purpose and be necessary and appropriate'.<sup>1191</sup> Thus, he explains, the negative effects of an action must be limited to the 'absolute minimum necessary for the realisation of legitimate actions and goals of personal subjects'.<sup>1192</sup>

Where there are disputes concerning the interests of animals, courts or an independent authority would have to consider whether the interests of non-personal subjects were given sufficient weight.<sup>1193</sup> The court or authority would be empowered 'to examine whether a given decision struck the proper balance of all relevant considerations'.<sup>1194</sup> Further, a public institution would be appointed with the authority to initiate legal proceedings where the right of non-personal subjects of law is infringed.<sup>1195</sup> The judicial review would not only subject the practices of animal handlers or carers to scrutiny, but would also transform the interests of animals into legitimate legal considerations that are taken into account during law-making or the application of laws.<sup>1196</sup>

Pietrzykowski suggests that to implement such a model, a constitutional declaration would first have to be made that animals are not things but subjects of law with the right to have their interests properly considered.<sup>1197</sup> Legislation would then set out the normative details of the model as well as the procedural arrangements. These would include detailed provisions and guidelines explaining how the interests of specific animals ought to be considered in the context

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<sup>1187</sup> Pietrzykowski, 'Animal Rights', above n 501, 12; Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 99.

<sup>1188</sup> Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 99.

<sup>1189</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 59; Pietrzykowski, 'Animal Rights', above n 501, 12-13.

<sup>1190</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 59; Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 99; Pietrzykowski, 'Animal Rights', above n 501, 13.

<sup>1191</sup> Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 99.

<sup>1192</sup> Ibid.

<sup>1193</sup> Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 99; Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 59.

<sup>1194</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 61.

<sup>1195</sup> Pietrzykowski, *Personhood Beyond Humanism*, above n 22, 99.

<sup>1196</sup> Pietrzykowski, 'The Idea of Non-Personal Subjects of Law', above n 22, 60.

<sup>1197</sup> Ibid.

of specific types of decisions, including when legislating in respect of animal practices.<sup>1198</sup>

It can be argued that the status proposed by Pietrzykowski may not offer any more practical benefits than the current property status of animals, and he accepts this. However, he notes that the new status is not intended to facilitate an immediate eradication of most of the animal suffering that is caused by human practices.<sup>1199</sup> Rather, he sees it as an important step forward from the current situation. Pietrzykowski asserts that his model compels a consideration of animal interests and offers procedural tools for the review of decisions that may adversely impact on the interests of animals.<sup>1200</sup> The extent to which animals' new legal status as non-personal subjects of law is better able to protect animals will depend on the evolution of social attitudes.<sup>1201</sup> Indeed, Pietrzykowski recognises that the new status 'is by no means a magic wand that can miraculously change society into one with more balanced human-animal relations'.<sup>1202</sup>

#### **7.4.4.2 Analysis of the Non-personal Subjects of Law Model**

Pietrzykowski's approach is clearly distinguishable from the other models discussed above. Unlike Francione and Wise, he does not argue for animal personhood. He is also not proposing a new subcategory of property, such as living property or companion animal property. Pietrzykowski's proposal is to create an entirely new legal category. Further, he does not rely on the 'similarity argument' to justify an alternative legal status for animals; he readily embraces the differences between the abilities of humans and animals.

In some ways, however, Pietrzykowski's model is similar to Francione's, in that both suggest paradigms aimed at making sentient animals the subject of legal rights. That is, under both models, the criterion for animals to be entitled to legal rights is sentience. Accordingly, the limitations identified in the analysis of Francione's model, particularly in relation to sentience, also apply to Pietrzykowski's. In particular, Pietrzykowski's reliance on sentience as the basis for entitlement to legal rights is vulnerable to the argument that it undermines diversity, the dependence of animals on humans and the ecological importance of all animals.<sup>1203</sup> Further, some scientific inquiry may be required to determine whether an animal is sentient. Indeed, Pietrzykowski suggests that scientific data should be used to determine whether a particular

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<sup>1198</sup> *Ibid.*

<sup>1199</sup> *Ibid.* 61.

<sup>1200</sup> *Ibid.*

<sup>1201</sup> *Ibid.* 62.

<sup>1202</sup> *Ibid.*

<sup>1203</sup> Again, the ecological importance of animals may be an extrinsic, rather than intrinsic, value.

species of animal is sentient. Unless such data can be obtained through non-invasive field studies, it is ethically questionable whether scientific studies of animals should be encouraged for the purposes of determining whether an animal is capable of feeling pain or suffering.

Because the non-personal subjects of law category only accommodates sentient animals, the framework proposed by Pietrzykowski draws a distinction between sentient and non-sentient animals. The latter would presumably retain their existing legal status. Thus, domesticated non-sentient animals would remain property, while wild non-sentient animals would continue to not be categorised as property (unless under the possession or control of humans). Accordingly, it is a legal paradigm that effectively categorises different kinds of animals differently. In providing such variation, the non-personal subjects of law model would potentially reflect community attitudes. However, again, further research is needed to determine whether a division between sentient and non-sentient animals would in fact align with how the community perceives and categorises animals.

By requiring the interests of non-personal subjects of law to be taken into account, Pietrzykowski's model allows different kinds of animals to be treated differently as well. Diverse animal species would likely have varied interests depending on, for example, characteristics such as their cognitive abilities, social tendencies and their living arrangements. The interests of cognitively advanced animals may be greater than the interests of those animals who have very basic cognitive abilities. Companion animals would have different interests to animals living in the wild. It can be anticipated, therefore, that the nature and scope of protection provided to animals under Pietrzykowski's model will vary. Although all non-personal subjects of law would have the same legal right, exercise of that right, that is, the outcome of taking their interests into consideration, will be different according to the animal.

The degree to which the interests of different kinds of animals are recognised may also vary depending on prevailing community attitudes. Non-personal subjects of law will only have the right to have their interests *considered*, not necessarily protected. Given that attitudes towards animals are variegated, it is likely that the interests of different kinds of animals will be recognised by legal institutions to different extents. Thus, if a community places greater value on companion animals or wild animals, their interests are likely to be better protected. Further, although the model seeks to change the legal status of animals, it also aims to reflect current animal use practices. In this way, community attitudes will determine the manner in which animals are legally treated. Consequently, the non-personal subjects of law model also carries an ongoing potential to reflect variegated attitudes towards animals.

Allowing community attitudes to influence the legal treatment of animals in this way, and its potential to result in the inconsistent treatment of animals, may not accord with ethical principles of equity. Additionally, because Pietrzykowski's approach will not operate significantly differently to the existing animal welfare model, it is predisposed to the argument that it ignores the inherent or moral value of animals. However, the model is an attempt to balance ethical considerations with social considerations. On the one hand, it elevates the legal status of sentient animals to recognise their inherent interests. On the other hand, Pietrzykowski's modest aim is to create the right legal conditions that will incrementally allow the interests of animals to be better protected in the future, on the basis that the law can only stimulate community attitudes, not radically change them. By mandating the consideration of the interests of animals, the model would potentially educate and shape community attitudes.

It is also worth identifying the differences between the existing framework and Pietrzykowski's model here. A key difference between Pietrzykowski's model and the existing legal framework is that under the former, sentient animals would no longer be regarded as property. Semantically, this can discourage the objectification of animals. The proposed model would also resolve some of the issues related to the implications of classifying animals as property,<sup>1204</sup> simply because the consideration of an animal's interests would become mandatory. For example, when courts are required to decide which partner a companion animal should live with following the dissolution of a relationship, the decision would no longer be made on the basis of the principles of property distribution. Instead, courts would foreseeably be forced to take into consideration the interests of the animals. Additionally, when deciding whether pet trusts should be enforceable, lawmakers would be prompted to take into account the interests of animals.

Creating a separate legal category for animals may also resonate better with the community than categorising them as property or persons. The legal division between persons and things may not reflect community attitudes. Instead, animals may be perceived as distinct from both persons and things. This model is supported by the attitudes towards farm animals highlighted in the survey; more respondents perceived farm animals as 'living beings different to humans' than as 'property', 'family' and 'friends'.<sup>1205</sup> If the community does view animals as apart from persons and things, the creation of a new legal category is an appropriate way of giving effect to contemporary community attitudes.

The sentiment that animals do not fit into the category of either persons or property may not be unique to the perception of the general community. For example, such a sentiment was

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<sup>1204</sup> See Chapter 2 section 2.6.

<sup>1205</sup> See Chapter 6 section 6.5.2.

expressed by Associate Judge Fahey in the New York Court of Appeals when he stated that the current legal paradigm fails to ‘address some of our most difficult ethical dilemmas’.<sup>1206</sup> Whilst denying the NhRP’s motion to appeal the habeas corpus cases in respect of chimpanzees Tommy and Kiko, Fahey J stated:

The reliance on a paradigm that determines entitlement to a court decision based on whether the party is considered a ‘person’ or relegated to the category of a ‘thing’ amounts to a refusal to confront a manifest injustice. ...

While it may be arguable that a chimpanzee is not a ‘person’, there is no doubt that it is not merely a thing.<sup>1207</sup>

An advantage of Pietrzykowski’s model is that it bypasses the debate about who is a legal person. It would not be necessary, for the purposes of defining the legal status of animals, to resolve the debate about the requirements of legal personhood.<sup>1208</sup> The risk of reinforcing hierarchies between different species of animals, and of undermining the potential for less cognitively advanced animals to possess legal rights, would also be lessened in comparison to Wise’s incremental approach for animal personhood. This is because categorisation as a non-personal subject of law and entitlement to legal rights does not depend on any cognitive ability other than sentience.

The non-personal subjects of law model is similar to Favre’s guardianship model in the sense that both would be driven by community attitudes and both would allow different animals to be categorised and treated differently. However, the non-personal subjects of law model is preferable because it provides greater coherence than the guardianship model. In particular, as noted above, the guardianship model would involve ad hoc changes to the legal status of animals and potentially result in an extreme situation where animals of the same kind would be categorised and treated significantly differently. Under the guardianship model, it may be difficult to identify which animals are self-owned and which are not. The non-personal subjects of law model also allows for the different legal categorisation of animals, but it does so in more organised manner. Under Pietrzykowski’s model, it would be clear at all times that all sentient animals are non-personal subjects of law. It thus strikes a better balance in recognising the inherent worth of sentient animals and in accommodating community attitudes.

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<sup>1206</sup> *Nonhuman Rights Project, on Behalf of Tommy v Patrick C Lavery et al; Nonhuman Rights Project, on Behalf of Kiko v Carmen Presti et al*, 152 AD3d 74 ( NY App Div, 2017).

<sup>1207</sup> *Ibid* 6-7.

<sup>1208</sup> See Chapter 2 section 2.4.2.

Given that Pietrzykowski's model requires the innovation of an entirely new legal category, it does require further scholarly deliberation, especially in an Australian context. For example, the implications of this model for legal standing need to be ascertained. As noted in Chapter 2, legal personhood is required for legal standing in Australia.<sup>1209</sup> The existing rules of standing may require modification if animals, as subjects of the law, are to be given the legal capacity to enforce the right to have their interests taken into account. It would also be necessary to determine whether it is theoretically possible for a new legal category to be established in Australia, and if so, then how such a model could be adapted for the Australian legal system. While Pietrzykowski provides some guidance on this, a declaration of the legal status of animals in the Australian Constitution would not be an appropriate way of implementing this model. This is because the role of the Australian Constitution is simply to set out the functions and powers of the different arms of government; it is not directly concerned with the protection of rights.<sup>1210</sup>

Overall, however, Pietrzykowski's model does have appeal in light of its potential to reflect contemporary attitudes and to overcome some of the limitations of the property categorisation of animals. By elevating the legal status of sentient animals and allowing the differential legal treatment of animals, the model strives to balance ethical and social considerations. By mandating the consideration of animal interests, it also carries the potential to shape community attitudes. The modest changes proposed by this model can therefore become a catalyst for better legal protection of animal interests in the future.

## 7.5 Conclusion

In order to answer the second research question of this thesis, this chapter set out to determine whether a different legal status for animals might better reflect contemporary community attitudes. Two key implications drawn from the survey results for the legal status of animals helped answer this question. First, it was suggested that the legal status of at least some animals should change to better reflect community attitudes. At the same time, some animals should continue to be regarded as property, since disagreement with the property status of animals does not appear to be unanimous. It was thus argued that a legal framework that reflects community attitudes would allow some animals to be classified as property and some animals to be classified as something other than property.

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<sup>1209</sup> See section 2.6.2.

<sup>1210</sup> George Williams, *A Charter of Rights for Australia* (UNSW Press, 2007), 41-43; George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (UNSW Press, 2004), 44-46; Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Vintage Books, 2009), 60; Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009), 23-27.

Second, in light of the variegated attitudes towards animals revealed in the survey results, it was proposed that the law should allow for different animals to be categorised or treated differently. To reflect community attitudes, therefore, the legal framework should allow for some animals to be treated as property and for others to be assigned a different legal status. Alternatively, a reflection of variegated attitudes towards animals may require the law to provide different kinds of entitlements to different kinds of animals. It was recognised, however, that such an approach might not be consistent with ethical principles.

Although these implications provide some guidance in identifying a legal status for animals that is reflective of community attitudes, further empirical research is needed to understand the nuances of those attitudes. While it is evident that attitudes towards animals are variegated, future empirical research should attempt to identify which animals Australians think should not be classified as property. Future studies should also aim to understand attitudes towards the alternative ways of legally classifying animals. Such data would help policy makers understand and incorporate community expectations in the process of defining the legal status of animals.

Recognising the need for further empirical data, this chapter reviewed various legal models for categorising animals. These included the existing legal framework, as well as proposals for animal personhood, a guardianship model and new legal categories and subcategories. All the models explored reflect the attitudes highlighted by the survey to the extent that they provide or suggest different legal statuses for different kinds of animals. Their potential to reflect variegated attitudes towards animals, however, differs.

Overall, it seems the non-personal subjects of law model provides the most flexibility in accommodating and reflecting the variegated attitudes. The non-personal subjects of law model recognises the inherent interests of sentient animals and removes them from the category of property. A separate legal category would be established for sentient animals, thus alleviating the need to meet the ambiguous requirements of legal personhood. Ultimately, the non-personal subjects of law model would allow sentient and non-sentient animals to be categorised differently. As the protections afforded to animals would be shaped by community attitudes, it can also be expected that the model would allow different kinds of animals to be treated differently. The paradigm would also resonate with community members so far as the bifurcation between persons and property does not align with community attitudes. In light of the potentialities of this non-personal subjects of law model, it is suggested that the theoretical framework for the model should continue to be developed to provide a greater understanding of how the model could be implemented in the Australian context.

Having identified which model would best reflect community attitudes towards the legal status of animals, the next chapter provides a conclusion to this thesis.

# **Chapter 8**

## **Conclusion**

### **8.1 Introduction**

### **8.2 How the Aims of this Thesis were Developed and Met**

### **8.3 Key Findings of Empirical Research**

### **8.4 An Alternative Legal Status for Animals**

### **8.5 Implications of this Research**

8.5.1 Contribution to Existing Body of Knowledge

8.5.2 Contribution towards Policy

8.5.3 Contribution towards Education and Advocacy

8.5.4 Contribution to Animal Law Scholarship in Australia

8.5.5 Contribution to the Wider Debate about the Legal Status of Nature

### **8.6 Limitations of Research**

### **8.7 Recommendations for Future Research**

8.7.1 Recommendations for Empirical Research

8.7.2 Empirical for Theoretical Research

### **8.8 Conclusion**

## 8.1 Introduction

*Experience seems to most of us to lead to conclusions, but empiricism has sworn never to draw them.*<sup>1211</sup>

This thesis set out to answer two research questions, namely:

1. Whether the property status of animals is consistent with community attitudes in Australia; and
2. Whether an alternative legal status for animals might better reflect community attitudes.

The empirical study undertaken as part of this thesis suggests that the property status of at least some animals is inconsistent with community attitudes. The survey results also indicate that if the law is to reflect community attitudes, it should allow for different animals to be legally categorised and/or treated differently. A thorough analysis of six alternative models for categorising animals led to the conclusion that the non-personal subjects of law model carries the greatest potential to reflect variegated community attitudes towards animals.

This chapter draws together the various findings in order to provide an overall conclusion to this thesis. Section 8.2 revisits the research questions and maps out the process followed to answer each of the questions. The empirical findings of this research are highlighted in section 8.3, including the determination that the current classification of animals (or at least, some animals) as property is not consistent with contemporary attitudes. Section 8.4 proposes that the non-personal subjects of law model is the best way of reflecting community attitudes towards animals. Section 8.5 sets out the implications of this research. In particular, it explains the theoretical and evidentiary contribution it makes to the existing body of literature on the abolition debate, policy development, education, and animal advocacy. This section also highlights the overall contribution of this thesis to the growth of animal law in Australia, and to the wider debate about the legal status of nature. Section 8.6 acknowledges the limitations of this research, particularly in light of the research methodologies adopted for the empirical study. Section 8.7 makes recommendations for future empirical and theoretical research, before section 8.8 concludes the chapter.

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<sup>1211</sup> George Santayana, quoted in 'William James' in George Santayana (ed) *The Genteel Tradition in American Philosophy: And Character and Opinion in the United States* (Yale University Press, 2009) 51, 58.

## **8.2 How the Aims of this Thesis were Developed and Met**

The catalyst for this research was the apparent lack of awareness in the community about the property status of animals. A review of scholarly literature revealed a dearth of empirical data in respect of community attitudes towards animals. Data relating specifically to attitudes towards the legal status of animals was even scarcer. This scarcity of evidence made it difficult to judge whether the property status of animals is consistent with contemporary attitudes in Australia.

The overall aim of this thesis was formulated to address this evidentiary gap. The intention was to find out if the legal classification of animals as property is consistent with community attitudes in Australia. This question is particularly important because the legal status of animals has not changed since Roman times.

The specific research questions that were formulated to address this aim were:

1. Does the current legal status of animals in Australia reflect contemporary community attitudes? and
2. If not, which alternative legal status for animals might better reflect contemporary community attitudes towards the legal status of animals?

To determine whether the current legal status of animals is consistent with contemporary community attitudes, an empirical study was undertaken. In particular, a quantitative survey of 287 respondents was conducted in Victoria between December 2013 and July 2014 to ascertain:

1. Whether the respondents were aware of the property status of animals
2. Whether the respondents agreed with the property status of animals, and
3. Whether companion, farm and wild animals were perceived by the respondents as property.

The findings of the empirical research were then used to determine which alternative legal status would better reflect community attitudes. Six models for legally classifying animals were analysed, including animal personhood, entirely new legal categories, and new subcategories within the existing property category.

### **8.3 Key Findings of Empirical Research**

An in-depth analysis of the empirical data led to three key findings. First, most respondents were not actually aware that animals are legally classified as property. Additionally, many respondents did not know the implications of this classification. Thus there is limited awareness about the legal status of animals and the implications of that status. This lack of knowledge makes it difficult to gauge whether the property status of animals conforms to community attitudes, because if respondents do not know that animals are legally classified as property, they are unlikely to have an opinion on the question. These results highlight educational opportunities (discussed further in section 8.5.3 below).

Second, most respondents did not agree with the property status of at least some animals. This finding suggested that the property status of some animals is not consistent with contemporary attitudes. At the same time, because most people did not disagree with the property status of all animals, it was concluded that the property classification of some animals might also be consistent with community attitudes. However, further empirical research is needed to identify animals that the community believe should not be classified as property.

Third, most respondents did not view animals as property. Attitudes towards animals were found to be variegated, particularly as respondents attached different sentiments to companion, farm and wild animals. Companion animals were overwhelmingly described as members of the family or as friends. Farm animals were more likely to be seen as living beings different to humans, while wild animals were predominantly perceived as important national treasures.

These results were relied upon to answer the first research question. Because most respondents did not agree with the property status of at least some animals, and as companion animals, farm animals and wild animals were not predominantly perceived as property, it was concluded that the property status of at least some animals is not consistent with community attitudes.

These findings mean that it is time to consider whether a different legal classification is warranted; one that better reflects community attitudes – that some animals should no longer be categorised as property. Further, to accommodate variegated attitudes towards animals, the law should allow different animals to be legally categorised and/or treated differently. These two key implications guided the search for an alternative legal status for animals that better aligns with community attitudes.

## 8.4 An Alternative Legal Status for Animals

Six alternative models for classifying animals were explored in this thesis. These included proposals to establish new subcategories of property. Favre proposed a living property subcategory, which assigns certain legal rights to sentient animals. Hankin suggested a companion animal property subcategory, which makes specific provisions to allow the interests of companion animals to be taken into account in the breakdown of human relationships and in administering the estates of deceased persons.

Two personhood models were also examined. Francione's personhood model proposed that all sentient animals should be classified as persons with a right not to be treated as property. Wise's personhood model is more modest than Francione's, and proposed that animals that have practical autonomy ought to be recognised as legal persons for the purpose of being entitled to certain liberty and equality rights. A guardianship model was also reviewed, which allows animals to obtain equitable self-ownership in themselves. This model proposed that the legal status of animals be changed either through the voluntary acts of an animal's owner, or through the legislature passing such laws. Analysing each of these six models in light of the findings of the empirical research, it was clear that each of the alternative models is consistent with contemporary attitudes to the extent that they proposed to change the legal status of some animals only. The extent to which they reflect variegated attitudes towards animals, however, varies.

The model with the greatest potential to reflect community attitudes was the non-personal subjects of law model proposed by Pietrzykowski. This model involves establishing a new and separate legal category for sentient animals. It assigns a single legal right to animals – to have their legal interests taken into account by lawmakers and persons involved in animal use. This model is the most reflective of community attitudes to the extent that it changes the legal status of some animals. Further, because it only mandates that an animal's interests are *considered*, and the community tends to recognise the interests of different kinds of animals to different extents, the model practically allows different animals to be treated differently. Thus, it potentially accommodates variegated attitudes towards animals. The model additionally facilitates the continuation of existing animal use practices that are socially acceptable, and thus does not require radical changes in the community. The creation of a separate legal category for animals may better resonate with the public, if their attitude is that there should not be the strict legal bifurcation between persons and property that currently exists, and has for centuries.

In addition to the non-personal subjects of law model better reflecting community attitudes, it

bypasses the need for animals to meet the ambiguous, and potentially onerous, requirements of legal personhood. Moreover, it addresses the limitations arising from the implications of categorising animals as property. For example, by not categorising sentient animals as property, it discourages the objectification of such animals. Also, it allows animal interests to be taken into account in the dissolution of relationships and in deceased estates.

## **8.5 Implications of this Research**

### **8.5.1 Contribution to Existing Body of Knowledge**

This thesis has made a modest contribution to the abolition debate by providing a different angle from which to approach this debate. The abolition debate has so far been largely theoretical, with abolitionists and welfarists generally centering their arguments on ethical principles such as the principles of equality. Sometimes assertions are made about whether abolitionist perspectives conform to community attitudes. Such speculations, however, are not premised on empirical data that captures and evaluates attitudes towards the legal status of animals. This thesis described and analysed the relationship between law reform and community attitudes, and investigated whether community attitudes align with the current legal status of animals. Finding evidence of an inconsistency between the property categorisation of some animals and community attitudes, this thesis has provided a new basis to justify using an alternative legal status for at least some animals. Ultimately, it has added weight to the abolitionist position.

This research and analysis also validates efforts to develop new and/or modify existing models for defining the legal status of animals. The inconsistency between community attitudes and the legal status of animals illuminated in this thesis suggests that there may be an appetite for an alternative legal classification of some animals. Therefore, there is benefit in developing and exploring different models for defining the legal status of animals.

### **8.5.2 Contribution towards Policy**

As mentioned in Chapter 1, community expectations with respect to the legal treatment of animals are currently not well understood, making policy progress in the field of animal law difficult. This empirical research, which adds to the limited data available in relation to attitudes towards animals, will be helpful for policymakers, such as legislators, governments and law reform commissions. The analysis and findings presented in this thesis can help policymakers ensure that laws pertaining to animals align with community expectations. In particular, the

findings of this thesis can inform policy relating to the legal status of animals. This scholarly work can also inform policy on animal welfare more generally, as the empirical data provides broad insight into perceptions towards animals. For example, in reviewing and reforming the animal welfare framework, policymakers can better understand attitudes towards companion animals, farm animals and wild animals through the findings of this research.

This doctoral research can also guide future empirical investigation into the legal status of animals to improve understanding of community attitudes. Indeed, this thesis has acknowledged the need for further empirical research to measure and monitor attitudes towards the legal status of animals. Future research can build on this empirical study to obtain a more comprehensive picture of Australian attitudes towards the legal status of animals by replicating the study on a national scale and surveying attitudes towards the legal status of specific kinds of animals. Additionally, when measuring shifts in community attitudes in the future, the data provided in this thesis can be used as a benchmark of attitudes in this moment in time. Such further research and analysis will ultimately equip policymakers with data to make evidence-based policies, and enable policymakers to better comprehend and respond to community expectations. Further recommendations for future research are provided in section 8.7.1 below.

### **8.5.3 Contribution towards Education and Advocacy**

This research has highlighted educational opportunities for animal advocacy groups and schools. It has indicated that there is a lack of knowledge about the property status of animals and its implications in Australia. This lack of awareness is problematic because unless people are aware of the property classification of animals, it is unlikely that questions will be asked about the appropriateness of the classification. Further, until individuals become aware of the property status of animals, it is difficult to accurately measure the extent to which the legal status of animals reflects community attitudes.

Given that the survey results revealed that education is one of the most influential factors in shaping attitudes towards animals,<sup>1212</sup> advocacy groups could develop awareness raising campaigns to shape opinions about whether animals should be classified as property.<sup>1213</sup> This can be done through social media and, depending on resourcing constraints, television campaigns.

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<sup>1212</sup> See Chapter 6 section 6.6.

<sup>1213</sup> Education could convince Australians that animals should remain property, especially as this research indicates a correlation between knowledge of the property status of animals and agreement with that status. Informed opinions would, however, provide greater clarity to policymakers in ensuring that the legal status of animals accord with community attitudes.

Incorporation of the broad topic of the legal status of animals within the curriculum for Australian schools should also be explored. This is important in order to ensure that future generations do not suffer from the same knowledge deficit. Younger generations of Australians should be given the knowledge that enables them to develop informed opinions about the legal status of animals. In fact, this is starting to happen in Australia. In November 2018, Voiceless launched an educational campaign targeting high school students and teachers on the topic of legal personhood for animals. As part of the campaign, a range of materials were made available to encourage critical thinking on the subject of the legal status of animals; these include lesson plans and classroom activities, a video, a factsheet, a podcast and a quiz.<sup>1214</sup> It is too early to evaluate the extent to which the resources are being utilised, or to measure the impact the resources have had on the attitudes of the recipients of this education. Nevertheless, this doctoral research has affirmed the value of such education. This research may even be used to develop these educational materials further by shining a light on the various alternative ways of legally categorising animals.

Ultimately, however, education and the development of the school curriculum are the responsibility of the government, rather than animal advocacy groups, and this research can therefore provide useful guidance to government departments responsible for education and the Australian curriculum.

#### **8.5.4 Contribution to Animal Law Scholarship in Australia**

The analysis provided in this thesis has made a modest contribution to the growth of animal law in Australia. As discussed in Chapter 1, animal law is still an emerging area of law in Australia. This thesis adds to the currently limited body of literature in this field and thus plays a part in enhancing knowledge in the discipline. Further empirical and theoretical research will hopefully flow from the findings and conclusions of this thesis, as suggested in section 8.7, and thus the body of knowledge around animal law will continue to grow.

If similar research continues to be conducted on a larger scale, animal law scholars will have a greater pool of data and findings to rely on. The growing collection of data and literature will ultimately enable animal law scholars to formulate more evidence-based suggestions for reform

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<sup>1214</sup> Voiceless, *Animal Protection Education: Legal Personhood* <<https://www.voiceless.org.au/content/legal-personhood-0>>. Amongst the activities suggested for students, the campaign proposes empirical research projects 'to test peoples' attitudes towards the idea of granting legal personhood to animals': Voiceless, *Animal Protection Education: Legal Personhood – Activity 3 (Geography, Year 10)* <<https://www.voiceless.org.au/content/legal-personhood-activity-3-geography-year-10>>.

and stimulate more informed debate.

### **8.5.5 Contribution to the Wider Debate about the Legal Status of Nature**

Aside from enriching the abolition debate with empirical evidence, this research is also relevant to the parallel debate about the legal status of nature.<sup>1215</sup> In particular, the legal status of some rivers and forests has been challenged in recent times, including the Whanganui River and Mount Taranaki in New Zealand, the Atrato River in Colombia, and the Ganga and Yamuna rivers in India.<sup>1216</sup> Similar to the debate about the legal status of animals, these developments have started a discussion about whether these specific parts of the natural environment should be recognised as legal persons.

Researchers concerned with this broader debate may also choose to conduct similar empirical studies to investigate the extent to which the legal status of nature reflects community attitudes. Researchers may accordingly adapt the methodology developed for this thesis to gain similar knowledge about attitudes towards the legal status of nature. They may also benefit from the overall learnings of this research and the recommendations for future research provided in section 8.7.1 below.

### **8.6 Limitations of Research**

All research has its limitations, and this doctoral thesis is no exception. First, it is acknowledged that this research alone cannot be relied upon as a complete account of attitudes towards animals, as a large number of respondents in this study were not aware of the property status of animals. It should also be recognised that public opinion surveys may not provide an accurate account of community attitudes, particularly where survey respondents are not fully informed on the relevant subject, or where respondents do not in fact have any opinions on the subject. Nevertheless, so far as policymakers strive to ensure that the law reflects community attitudes, this thesis provides useful insight. It is also valuable for the purposes of informing the development of awareness raising campaigns as well as larger studies in the future.

Second, the findings of the empirical study undertaken need to be interpreted in light of the

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<sup>1215</sup> See Rafi Youatt, 'Personhood and the Rights of Nature' (2016) 10(4) *International Political Sociology* 39; Abigail Hutchison, 'The Whanganui River as a Legal Person' (2014) 39(3) *Alternative Law Journal* 179; Erin L O'Donnell and Julia Talbot-Jones, 'Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India' (2018) 23(1) *Ecology and Society* 7.

<sup>1216</sup> Michelle Maloney, 'Environmental Law: Changing the Legal Status of Nature: Recent Developments and Future Possibilities' (2018) 49 *Law Society of NSW Journal* 78, 79.

limitations associated with the research methodology adopted for the study (as explained in Chapter 5). Given the small sample size and the use of non-probability sampling, and in light of the fact that the sample of the survey was comprised of persons from a small part of Victoria, the results of the survey cannot be generalised for all Australians, or even all Victorians. In addition, the primarily quantitative nature of the survey means that the insight obtained from the survey responses does not have as much depth as a qualitative study would have. It should be remembered, however, that the methodologies adopted for this research were designed to enable the carrying out of exploratory research, that is, an initial inquiry into attitudes towards the legal status of animals. This thesis was successful in providing a snapshot of these attitudes in a small sample of people living in a particular part of Australia.

Third, as became apparent in Chapters 6 and 7, the data obtained from the survey is not sufficient to provide a complete critique of the different models that have been suggested as alternatives to the property status of animals. In other words, the extent to which the different models reflect community attitudes cannot be determined by relying on this data alone. Additional data is required to identify the specific kinds of animals whose property status is inconsistent with community attitudes, and to ascertain whether the classification of animals under alternative models would better reflect community attitudes.

Notwithstanding these limitations, this research has provided a solid foundation upon which future empirical research can build. The questions that have been left unanswered in this thesis can be the catalyst for future research, as recommended in section 8.7.1 below.

## **8.7 Recommendations for Future Research**

In undertaking this research, several empirical and theoretical questions that need further exploration were identified. This section uses these shortcomings to make recommendations for future empirical and theoretical research.

### **8.7.1 Recommendations for Future Empirical Research**

Further empirical research is needed to confirm the extent to which the property status of animals reflects contemporary Australian attitudes. Additionally, as Australians get more informed about the legal status of animals, there will be value in monitoring if and how attitudes towards the property status of animals change. Monitoring changing attitudes not only helps to inform policy, but can also be a tool for evaluating whether educational initiatives have been successful.

Future research, especially if unconstrained by the limited resources available to a PhD student, should target the population across all Australian states and territories to ensure that the results of the study can be more readily generalised. A larger sample size and probability sampling is also recommended, so as to allow for greater statistical analysis and inferences to be drawn.

Like this research, future empirical studies should accommodate the possibility that many respondents may not be aware of the property status of animals. The survey design should accordingly allow respondents to indicate whether or not they are aware of the legal status of animals. This will enable the data to be collected and interpreted accurately. Additionally, respondents' understanding of the implications of the property classification should be sought, in order to ascertain the extent to which respondents' answers reflect informed opinions about the effect of the property status of animals. Such insight can be useful in highlighting and developing educational opportunities.

Future research should also accommodate for the possibility of variegated attitudes towards animals, and the related possibility that opinions about the legal status of animals may differ depending on the type of animal. In this respect, future research should attempt to identify the specific kinds of animals whose property status may not reflect community attitudes. Examples of questions that a survey could include in order to ascertain this information include:

1. Do you think the law should classify sentient animals as property?<sup>1217</sup>
2. Do you think the law should classify animals with advanced cognitive abilities (such as the great apes, elephants and dolphins) as property?
3. Do you think the law should classify farm animals as property?
4. Do you think the law should classify pets as property?

Answers to questions such as these will help to identify animals whose legal status may not be consistent with community attitudes. Such data would also assist in conceiving and developing alternative models for defining the legal status of animals.

### **8.7.2 Recommendations for Future Theoretical Research**

In addition to highlighting the need for further empirical research, this thesis identifies further theoretical questions that could usefully be explored in the future. As noted in Chapter 2, the bifurcation between the existing legal categories of persons and things warrants further

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<sup>1217</sup> The research should first ascertain whether the respondent understands what is meant by the descriptor 'sentient animals'.

research. At the moment, there is ambiguity about the meaning and eligibility requirements for legal personhood. The implications of being classified as property also need further clarification. In particular, it would be beneficial to clarify whether property can hold legal rights. If being classified as property does not preclude the holding of certain rights, the reasons for abolishing the property status of animals are, at least to some extent, diminished. Moreover, within the common law context, the nature of the separation between the two categories should be clarified; whether or not they are mutually exclusive categories has a bearing on whether a particular model for defining the legal status of animals (such as the living property model) can be implemented. Aside from these questions, the potential to create a new legal category warrants further study. This is especially recommended for the non-personal subjects of law model, which was conceived in the context of a civil law system, as it carries the greatest potential to address the implications of categorising animals as property while also reflecting community attitudes.

The alternative models for defining the legal status of animals examined in this thesis also deserve further in-depth scholarly research so that their proposed structures and implications can be better understood. New ways of defining the legal status of animals should also continue to be explored and developed. On the basis that the legal status of some animals may no longer be reflective of community attitudes, such research would not merely be an 'intellectual indulgence'.<sup>1218</sup> Rather, it could provide a means for ensuring that the law continues to address and reflect the expectations of the community.

## **8.8 Conclusion**

This thesis was concerned with attitudes towards the legal status of animals in Australia. The new empirical data presented in this thesis indicates that the property status of at least some animals is not consistent with Australian attitudes. It further suggests that attitudes towards different kinds of animals are variegated. On this basis, it is proposed that the law is in need of reform to allow different kinds of animals to be legally categorised and/or treated differently. The non-personal subjects of law model, in particular, was identified as the paradigm that has the greatest potential to reflect variegated community attitudes.

This research has made a modest but important theoretical and empirical contribution to the existing body of knowledge within the abolition debate. It has provided new empirical findings that strengthen arguments for abolishing the property status of at least some animals, and that

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<sup>1218</sup> As suggested by Lovvorn, above n 24, 139.

enhance our understanding of contemporary community attitudes towards animals. This research has also provided direction for legal reform by carefully examining six alternative models for defining the legal status of animals. Additionally, it has provided a reliable foundation for future research to build upon. These theoretical and empirical contributions should be used not only to inform policy, but to also provide, through the identification of educational opportunities, guidance on how attitudes towards the legal status of animals could be shaped. In doing so, this research has made a valuable scholarly contribution to the emerging area of animal law in Australia.

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# Appendix A – Survey Questionnaire

## QUESTIONNAIRE

Please tick ONE box unless indicated otherwise

1. Where do you live?

- Melbourne (metropolitan)
- Ballarat
- Gippsland
- Other

2. Do you have any pets?

- Yes
- No

*What?*

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3. How do you view your pets? (if applicable)

- Friends
- Family members
- Property
- Living beings different to humans
- Other

4. How do you see farm animals (e.g. cows, chicken, pigs)?

- Friends
- Family members
- Property
- Living beings different to humans
- Other

5. How do you see wild animals (e.g. kangaroos)?

- Important national treasures
- Vermin
- Property
- Living beings different to humans
- Other

6. What do you think influences your perception of animals?  
(You may select more than one answer for this question)

- Your education
- Religious and cultural teachings
- Television
- Your own personal experience with animals
- Other - Please specify: \_\_\_\_\_

7. Do you know the law classifies animals as property?

- Yes
- No

8. Do you think animals should legally be classified as property?

- Yes
- No
- Some animals
- Don't know

9. What do you think it means to classify animals as property?

- Don't know

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10. Please select your sex

- Male
- Female

11. Please select your age group

- 18 - 35
- 36 - 60
- 60+

## Appendix B – Survey Results

Q1. Where do you live?

Answer Choices	Responses	
<b>Melbourne (metropolitan)</b>	48.77%	139
<b>Ballarat</b>	12.98%	37
<b>Gippsland</b>	24.91%	71
<b>Other</b>	13.33%	38
	<b>Answered</b>	<b>285</b>

Q2. Do you have any pets?

Answer Choices	Responses	
<b>Yes</b>	57.84%	166
<b>No</b>	42.16%	121
<b>Kinds of Pets?</b>		129
	<b>Answered</b>	<b>287</b>
	<b>Skipped</b>	<b>0</b>

**Kinds of Pets:**

Respondents	Kinds of Pets
1	Dog - staffy - Zacki Boy
2	Cat
3	Dogs
4	Cat and dogs
5	Dogs, cat
6	Dog
7	2 cats
8	Alaskan Malamute - dog
9	Bird, 1 elog
10	Dogs
11	Cat
12	Cat
13	Dog
14	2 dogs
15	American staffy (Dog)
16	Dog
17	Dog, cat
18	4 dogs, 4 cats, 2 rabbits
19	Dog
20	Dogs
21	Dogs and horses

22	Cat and goats
23	Dog, cat, fish, birds
24	Cat
25	Cat
26	Dogs, cats
27	Dog, 2 cats
28	Dog
29	Dog (labrador)
30	Dog, 2 cats
31	2 dogs
32	2 x dogs, 1 x cat
33	3 x dogs, 4 x cats
34	Dog
35	Dog
36	dog
37	Work dogs, sheep, cows
38	Dog
39	Cat
40	Dog, cat, chickens
41	cat, chickens
42	A cat and a dog
43	Dog, 3 turtles, 2 birds
44	cat
45	cat, dog
46	Dog
47	Ducks, chickens
48	Dog x 2
49	Dog
50	Dogs, cats
51	4 chooks
52	Dog
53	cat, dog
54	4 cats, 1 dog, lots of goldfish
55	Dog, cat, chicken, cockateils
56	2 cats, 1 dog and 2 pet ferrets
57	Dogs and birds
58	dog
59	cats
60	2 dogs
61	dogs, cats, cows
62	2 cats, 1 dog, 2 horses
63	2 cats
64	Dog
65	Dog
66	Cat, chickens
67	Dog, Cat

68	Rabbit
69	1 dog + 2 Chinese silky hens
70	Rabbit and a dog
71	rabbits
72	Dog, cat, rabbit, bird and fish
73	1 dog and 2 cats
74	Cats
75	Cats
76	Dog (pom)
77	Cat
78	1 dog, 1 cat
79	dog
80	2 cats
81	Dog
82	Dog
83	2 dogs
84	2 cats
85	Rabbits
86	2 goldfish
87	2 x dogs
88	Two dogs, one cat
89	Birds
90	2 x budgies
91	2 dogs, 2 cats
92	Dog
93	Dog
94	Cat
95	Cat
96	dogs
97	Dog
98	(2) dogs and fish
99	Fish
100	dog
101	2 dogs
102	Dog
103	Dog
104	Cat
105	Cat
106	Dog
107	Cats
108	Dog
109	2 x goldfish
110	Rabbit
111	Jack Russel - Pug (Dog)
112	Dogs, cats
113	Horses (2) Birds (several)

114	Horses, dogs, cattle
115	Dog, cat, fish
116	1 dog
117	Two cats, two dogs
118	Rabbits, Guinea Pigs
119	Rough collie
120	2 poodles and 2 cats
121	Cats
122	One dog + chickens
123	Rat, Dog
124	2 Fish
125	Whippet/Fox terrier cross
126	Cats
127	dog
128	2 cats
129	dog, 3 cats, 2 birds

Q3. How do you view your pets? (if applicable)

Answer Choices	Responses	
<b>Friends</b>	15.66%	26
<b>Family members</b>	72.29%	120
<b>Property</b>	0.60%	1
<b>Living beings different to humans</b>	10.84%	18
<b>Other</b>	0.60%	1
	<b>Answered</b>	<b>166</b>
	<b>Skipped</b>	<b>121</b>

Q4. How do you see farm animals? (e.g. cows, chicken, pigs)?

Answer Choices	Responses	
<b>Friends</b>	16.03%	46
<b>Family members</b>	9.76%	28
<b>Property</b>	15.33%	44
<b>Living beings different to humans</b>	46.69%	134
<b>Other</b>	12.20%	35
	<b>Answered</b>	<b>287</b>
	<b>Skipped</b>	<b>0</b>

Q5. How do you see wild animals (e.g. kangaroos)?

Answer Choices	Responses	
Important national treasures	60.63%	174
Vermin	4.53%	13
Property	0.00%	0
Living beings different to humans	29.97%	86
Other	4.88%	14
	<b>Answered</b>	<b>287</b>
	<b>Skipped</b>	<b>0</b>

Q6. What do you think influences your perception of animals? (You may select more than one answer for this question)

Answer Choices	Responses	
Your education	45.49%	126
Religious and cultural teachings	18.05%	50
Television	11.19%	31
Your own personal experience with animals	81.23%	225
Other (please specify)		17
	<b>Answered</b>	<b>277</b>
	<b>Skipped</b>	<b>10</b>

**Other (please specify):**

Respondents	Other (please specify)
1	The way I was brought up
2	Growing up on a dairy farm
3	Own values and ethics
4	Personal philosophy
5	Work
6	Company
7	Not sure
8	Upbringing
9	Media in general and science articles
10	Life
11	Parental views/influence
12	Humanity grounds
13	Parents
14	Own beliefs
15	Parents
16	Family
17	Parents - How you are raised/where you are raised

Q7. Do you know the law classifies animals as property?

Answer Choices	Responses	
<b>Yes</b>	42.31%	121
<b>No</b>	57.69%	165
	<b>Answered</b>	<b>286</b>
	<b>Skipped</b>	<b>1</b>

Q8. Do you think animals should legally be classified as property?

Answer Choices	Responses	
<b>Yes</b>	25.52%	73
<b>No</b>	22.38%	64
<b>Some animals</b>	36.01%	103
<b>Don't know</b>	16.08%	46
	<b>Answered</b>	<b>286</b>
	<b>Skipped</b>	<b>1</b>

Q9: What do you think it means to classify animals as property?

Answer Choices	Responses
<b>Don't know</b>	94
<b>Comment</b>	191

**Comments:**

Respondents	Comment
<b>1</b>	It means that you own the animal and that animals do not have their own rights
<b>2</b>	Something that can be owned, belongs to someone, looked after and cannot be abused.
<b>3</b>	Because really need to be accepted and give a good care, and also stop treating animals in country's where they are regardless.
<b>4</b>	Belonging to humans
<b>5</b>	They are a part of your property
<b>6</b>	Ownership
<b>7</b>	Your personal responsibility
<b>8</b>	I believe my dog is my family
<b>9</b>	- owned by a person  - person has responsibility of the animal thus to care for it/ensure its wellbeing  - give the animal 'rights' and value
<b>10</b>	To protect them, manage their population and habitat

11	Being treated differently in a way that is unethical to us
12	That they belong to you, you are responsible for their welfare
13	You own them, look after them
14	Wrong
15	Live stock on farms, I'm assuming is considered an asset, however, they should be treated with respect and dignity
16	If they are living stock, it needs
17	So others can't just take them away from you
18	Cruel
19	They belong to someone and that person is responsible for them
20	Applies where responsibility for care exists
21	They belong to you so you need to look after them
22	Responsibility for care and protection
23	They are what you are responsible for. You must contain them and care for them.
24	I think that if it is legal property it gives assurances that if there is some type of issue the law will be available to solve it.
25	Property means keeping animals for our household purposes or as an asset.
26	Animals as property - when they are a means of income i.e. farming. But should be protected by some laws as to wellbeing.
27	Makes them product
28	Retention of native species
29	You own them, feed them, but not really affectionate with them. Farm animals in that category.
30	It is a way of getting people to treat them respectfully and look after them
31	Responsible for their wellbeing and people's safety
32	We are inhuman
33	That they belong to the family - in their ownership
34	They belong to someone, can be bought and sold
35	To own, love, protect. As property seem like another appliance in household
36	It means that stye are less important than humans that own them and are to be treated as the human sees fit, like furniture or toys
37	So the Authorities may keep a check on numbers whether it is in the wild or urban..
38	that we own them
39	For protection purposes, responsibility
40	Somebody owns the animal, it is in their possession
41	Dealt with, responsibility
42	Ownership = responsibility, necessity to care
43	Own and take care of them
44	Take care/nurture them
45	Menace - dealt with by law
46	Wont get proper
47	Ownership
48	Animals for food purposes

49	Movable property - so valued then must be insured etc
50	Free choice
51	As if they're an object and belong to someone
52	- Depends on what animal is used for? - farmer = source of income
53	Responsible to them
54	Inanimate object
55	Responsible to them
56	Animals used for profit or food source clothing
57	Part of family should be looked
58	That they are your belongings. Their free will is negated.
59	Property belongs to someone who is responsible to look after and maintain the property (animals)
60	That animals have a defined owner who is responsible for them
61	That they are considered as lifeless commodities
62	They may be treated poorly, inhumanely as sources of income and wealth rather than valued and respected as sentient creatures which deserve respectful treatment
63	They can be owned, traded, sold, and belong to owner
64	To be responsible for them, giving them vet when needed and getting pet insurance
65	They have a home
66	- liable for any damage they cause - ensure safety of animal - ensure animals not neglected etc
67	Bought and paid for them would....(G75)
68	Means you have responsibility for their welfare
69	You possess them (owners)
70	Classify them as something not as an individual beings and for a purpose
71	They become the responsibility of a person(s)
72	To specify who owns the animal
73	They are family or to earn money not property
74	That there is someone responsible for them and their behaviour
75	Not totally sure
76	You are responsible for them
77	It means that humans own and should take great care of the animal in their care
78	As something that is a right, not a privilege, owning an animal is a privilege not a right
79	Owned by another
80	To have ownership
81	Require respect and to be treated humanely
82	Assigns rights to and responsibility for the animals affected to specific individuals that are responsible for their care
83	I think the owners obligation is to look after the animal

84	Responsibility to care for
85	They have rights to be respected and treated humanely
86	Imposes responsibility
87	That the owner has the rights to do with them as they like if the animal is not seen as an equal.
88	Farm animals
89	Owners have responsibility for pets/animals.
90	For breeding purpose or ownership
91	Ownership. But not acknowledging that they are living things.
92	That animals are just things that humans believe they should own and use as they see fit, that they're just 'things'.
93	There are so many variety of animals it is unrealistic to have a generic classification. I assume "property" assumes no freedom or rights.
94	Belong to someone
95	Imposes responsibility
96	That a person owns them and must take responsibility for them.
97	It means they are not recognised as living beings which experience emotions (like pain, happy, fear)
98	One owns the animal outright and can do what they wish to animal
99	It's like a car. Sell it and don't think anymore about it.
100	It's wrong, they're human too. Same organs just a different look to them
101	Someone owns them
102	Place for animals. Can be stolen, protected, subject to dispute of ownership.
103	Open to abuse
104	Yes
105	Possibly that their intelligence and needs are not considered; that instead they are considered only in relation to their useless. They are an integral part of God's creation.
106	Domestic animals need to be property so you can be responsible. Different story for wild animals, everyone's responsibility but nobody's property.
107	Improve their genetics
108	From tax point of view, its a valuation. Business activities e.g. farming
109	Would hopefully make people more responsible for their care
110	You own them
111	It means as a vet I am sometimes forced to put down healthy pups as '0' client want anyone else to have it.
112	It makes people view them as non-entity beings that are perhaps not living and see them as items according to their perception
113	I don't really know but it sounds to me that they have no "rights" and people can treat them the way they want (badly) not considering what animal is and what freedom belongs to it.
114	Ownership by individual, corporation, government and the like
115	Legal responsibility
116	Natures gifts to us
117	You are responsible for them

118	They are objects not as living "things" with human qualities such as ability to feel pain etc
119	Horrible, they are beautiful :-)
120	Farming animals
121	In a commercial sense ie: monies paid traded etc
122	Certified, listed on census
123	It means there is a legal relationship between an animal and a human being which gives the human being control and responsibility over the animal
124	That they are owned by someone
125	Ownership = responsibility
126	That there is someone somewhere who is responsible for the health and wellbeing of said animal, also if the animal causes harm to someone/thing then they are held legally responsible for any damages caused by the animal
127	That we have the right to control them and do/treat them however the owner pleases
128	To care and look after animals humanely
129	Commercialisation of exploitation
130	You're responsible for them
131	It signifies that we a lot animals less rights than (most) humans, presumably because we don't think of them as sentient
132	Will result in better treatment and accountability
133	I think it is a legal definition which assist in the case of laws around owning, harming, trading and containing animals. It makes it easier e.g. to legislate laws regarding dangerous dogs - to name only one example
134	For the purpose of farming, they need to be classified as property
135	Be legally responsible for the animal e.g. cat, dog etc
136	Not really sure but probably that the owner is responsible for his or her property - they need to be responsible owners
137	Makes them one of the family
138	That the animals are yours to look after and be responsible for, to sell, own, give, or butcher for some animals
139	Gives them protection
140	When someone has ownership of the animal.
141	Some human being is taking responsibility for them
142	Own them, have to take care of them, insure them - like a house
143	To assign rights to the owner but possibly allows mistreatment
144	They're ours, nobody else can touch them
145	They have a place within society.
146	Animals belong to you and you should look after them and protect them as you would if something means a lot to you
147	Your own pet only
148	Owned by people who have responsibility for them
149	They have no rights. You can do what you want - not necessarily good things.
150	I think that it adds to our already inflated sense of importance and allows us to commit atrocituous acts of cruelty which should be punishable by law

151	Farm animal is property but a wild animal isn't
152	It means exactly that "property", they are live creatures and like us have feelings
153	To be able to own and treat them in any manner that you deem is your right
154	I feel that property (ownership) suggests its yours to do with what you will in any way you like. This shouldn't apply to animals.
155	They belong to you, you are responsible for them - whether it be positive or negative
156	Possessions, control, domestication
157	Can be owned. Can sell and dispose anytime
158	If you own a pet it could be stolen and therefore considered property. Other people cannot take or abuse your property i.e. pet
159	They belong or are owned by someone
160	Gives them some rights. Responsible for them legally and ethically
161	Where they are part of a money-making enterprise such as farms etc
162	The court could determine its ownership
163	Buying, selling animals - owning them. Most people forget that animal production is solely for human consumption. Raising these animals as property does not mean we as farmers do not care for their welfare and wellbeing. We love our stock and want their lives to be happy ones.
164	An animal belongs to someone, whether that be on their property or a part of the wildlife. They should not be 'stolen' as you wouldn't steal someone's personal belongings. This would also apply to the state's of the country.
165	Liability and responsibility
166	Although they are living beings they belong to the owner and it is the owner's responsibility to look after and take care of own animals.
167	Using them as a commodity
168	That they are inanimate objects, which is obviously untrue
169	It means you own them outright
170	You have ownership over them
171	Inanimate objects or slaves
172	Having a sellable value based on the object itself
173	Means they can be bought/sold/slaughtered at the whirl of the owner
174	By legal terms
175	It means they have no rights
176	<ul style="list-style-type: none"> <li>- Responsibility for care</li> <li>- Provides a capital value (asset)</li> <li>- Provides for business (e.g. farming)</li> </ul>
177	Completely inhuman and inappropriate
178	Property implies ownership and as result the owner can do what he wants with regard to animals. I do not agree.
179	It means that animals belong to humans and lack rights

180	That someone can own them similar to a house, car, etc
181	I think it means that you have a responsibility to treat your animals humanely & if necessary legal action can be taken against you if you don't.
182	I think in terms or situations in which animals need to be protected its is a good thing. But not in situations of abuse.
183	They are your's to take care of and ensure their health and safety
184	Meaningless. They're animals
185	A responsibility due to what they can be meant
186	People don't treat them the way they should, i.e. food instead of living independent beings
187	Appropriate re farming stock
188	They can be bought or sold at the 'owners' discretion - but I hope it doesn't mean that the owner is then able to treat the animal like any other object
189	FOOD
190	BUT it seems to me they are different from a chair or a book - they are sedative creatures, they become attached to their 'owners' - their family and we get attached to them. Just look into their eyes.
191	Their treatment is probably not required to be safe

Q10. Please select your sex

Answer Choices	Responses	
Male	48.60%	139
Female	51.40%	147
	<b>Answered</b>	<b>286</b>

Q11. Please select your age group

Answer Choices	Responses	
18 - 35	44.41%	127
36 - 60	32.17%	92
60+	23.43%	67
	<b>Answered</b>	<b>286</b>
	<b>Skipped</b>	<b>1</b>